

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA

v.

MELODY STEELE SMITH,

Defendant.

Crim. Action No. 1:21CR77 (RDM)

**MS. MELODY STEELE SMITH'S MOTION FOR
A BILL OF PARTICULARS REGARDING COUNT ONE**

Melody Steele Smith through undersigned counsel, and pursuant to Rules 7(f) and (b) of the Federal Rules of Criminal Procedure (the "Rules"), respectfully requests that the Court order the government to provide her with a bill of particulars related to four counts of the five-count Indictment. Specifically, Ms. Steele Smith seeks a bill of particulars as to: Count One of the Indictment, charging her with obstruction of an official proceeding under 18 U.S.C. § 1512(c)(2); Count Three, charging her with disorderly and disruptive conduct in a restricted building or grounds, in violation of 18 U.S.C. §1752(a)(2); Count Four, charging her with entering and remaining in certain rooms in the Capitol building with an intent to disrupt the orderly conduct of official business, in violation of 40 U.S.C. § 5104(e)(2)(C); and Count Five, charging her with disorderly conduct in a Capitol building, in violation of 40 U.S.C. § 5104(e)(2)(C).

I. Relevant Background

Ms. Steele Smith is accused of entering the Capitol building on January 6, 2021. Discovery provided to date—primarily CCTV video footage from inside the Capitol and photos from Ms. Steele Smith’s phone—shows that Ms. Steele Smith walked into the building through open doors, along with other individuals who also walked in through the doors. She did not climb through a window or over any barriers to get inside. Once inside the building, she proceeded to move calmly about. She did not destroy property, she did not confront law enforcement, she did not assault anyone, and she did not shout or jostle anyone. The videos and photos show that she passed by police officers who do not appear to have any reaction to her being present.

Later, when Ms. Steele Smith was interviewed by law enforcement, she explained that she traveled to DC from her home in Gloucester, Virginia, with friends who had posted on Facebook about the rally. In particular, Ms. Steele Smith went because she wanted to hear the president speak. She was disappointed to miss the president, however, and got separated from her friends. Ms. Steele Smith, who is fifty-nine years old and stands at five feet four inches, described how she was pushed by the crowd into the Capitol building and did not go in “with any bad intention.” She further explained that she just wanted to take pictures and wandered around the building because she did not know how to get out. She also said that she talked to one of the police officers inside the Capitol and that he never told her to leave. Finally, she explained that she never intended to “stop the vote” or “harass” anyone, she just

wanted to take pictures of the Capitol building, which she found to be quite impressive and beautiful.¹

Undersigned counsel have requested a bill of particulars as to four of the five counts of the Indictment. The pertinent indictment counts read as follows²:

Count one: On or about January 6, 2021, within the District of Columbia and elsewhere, Melody Steele-Smith attempted to and did, corruptly obstruct, influence, and impede an official proceeding, that is, a *proceeding before Congress*, by entering and remaining in the United States Capitol without authority *and engaging in disorderly and disruptive conduct*. Obstruction of an Official Proceeding and Aiding and Abetting, in violation of 18 U.S.C. § 1512(c)(2) and 2.

Count two: On or about January 6, 2021, within the District of Columbia, Melody Steele-Smith did knowingly, and with intent to impede and disrupt the orderly conduct of *Government business and official functions*, engage in *disorderly and disruptive conduct* in and within such proximity to, a restricted building and grounds, that is, any posted, cordoned-off, or otherwise restricted area within the United States Capitol and its grounds, where the Vice President and Vice President-elect were temporarily visiting, when and so that such conduct did in fact impede and disrupt the orderly conduct of Government business and official functions. Disorderly and Disruptive Conduct in a Restricted Building or Grounds, in violation of 18 U.S.C. § 1752(a)(2)).

Count Four: On or about January 6, 2021, in the District of Columbia, Melody Steele-Smith, willfully and knowingly, and with the intent to disrupt the orderly conduct of *official business*, entered and remained in a room in any of the Capitol Buildings set aside and designated for the use of either House of Congress and a Member, committee, officer, and employee of Congress, and either House of Congress, and the Library of Congress without authorization to do so. Entering and Remaining in Certain Rooms in the Capitol Building, in violation of 40 U.S.C. § 5104(e)(2)(C).

Count Five: On or about January 6, 2021, in the District of Columbia, Melody Steele-Smith willfully and knowingly engaged in *disorderly and disruptive conduct* in any of the Capitol Buildings with the intent to impede, disrupt, and disturb the *orderly conduct of a session of Congress* and either House of Congress, and the orderly conduct in that building of a hearing before or any deliberation of, a committee of

¹ Ms. Steele Smith's videotaped interview with law enforcement.

² Ms. Steele Smith does not require a bill of particulars as to Count Two, charging her with entering and remaining in a restricted building or grounds, in violation of 18 U.S.C. §1752(a)(1).

Congress or either House of Congress. Disorderly Conduct in a Capitol Building, in violation of 40 U.S.C. § 5104(e)(2)(D).

Indictment, ECF. No. 8 (emphasis added).

Counsel have asked the government to clarify what “proceeding before Congress,” “government business,” or “official business or orderly conduct” it alleges Ms. Steele Smith intended to disrupt and what specific acts the government alleges constituted “disorderly and disruptive conduct.” The government has not responded. As such, Ms. Steele Smith does not know, with sufficient clarity, the exact crimes she must prepare to defend against. Accordingly, counsel move this Court to Order the government provide a bill of particulars as to these counts.

II. Argument

A. An indictment must apprise defendants of the nature of the charges against them.

The Court of Appeals for the District of Columbia Circuit has long held that an indictment insufficiently notifies the defendant of the nature of her charges when it fails to meaningfully describe the defendant’s acts that constitutes the charged offenses. In *United States v. Hillie*, a district court relied on this authority to hold that a child pornography indictment that “did not contain any facts that describe the conduct of Hillie’s that the government believes to constitute criminal behavior” failed to provide notice of the factual bases for the charges, and failed to provide adequate protection of the defendant’s double jeopardy rights. *Hillie*, 227 F. Supp. 3d 57, 71

(D.D.C. 2017). One case the district court relied on to reach this conclusion was *United States v. Hunter*, 47 App. D.C. 406 (D.C. Cir. 1918).³

A description of the charges without particulars about the defendant's specific conduct is insufficient. In *Hunter*, the Court of Appeals for the District of Columbia Circuit considered an indictment charging violation of the unlawful assembly statute that alleged that the defendants had "congregate[d] and assemble[d] on Pennsylvania avenue, N.W., [and] did then and there crowd, obstruct, and incommode the free use of the sidewalk thereof on said avenue." 47 App. D.C. at 408. The court found that the indictment was fatally flawed because it was devoid of any fact "to inform defendants of the nature of the acts which [were] relied upon by the prosecution as constituting alleged obstruction of the sidewalk, or that would enable defendants to make an intelligent defense, much less to advise the court of the sufficiency of the charge in law to support a conviction." *Id.* at 410.

If an indictment's lack of particularity is not fatal, Federal Rule of Criminal Procedure 7(f) provides that the Court may nevertheless direct the filing of a bill of particulars upon the motion of a defendant. Fed. R. Crim. P. 7(f). The purpose of a bill of particulars is to apprise defendants of the nature of the charges against them so as to ensure that they: (1) understand the charges, (2) can prepare a defense, (3) can avoid prejudicial surprise at trial, and (4) can be protected against retrial for

³ As the district court pointed out in *Hillie*, "at the time *Hunter* was decided, the federal appellate court we know today as the 'United States Court of Appeals for the District of Columbia Circuit' was called the 'Court of Appeals of the District of Columbia.'" *Hillie*, 227 F.Supp.3d at 74.

the same offense. *See United States v. Butler*, 822 F. 2d 1191, 1193 (D.C. Cir. 1987) (citing *United States v. Gorel*, 622 F.2d 100, 104 (5th Cir. 1979) (noting a bill of particulars can be necessary to avoid a surprise at trial).

B. A bill of particulars is necessary to inform both Ms. Steele Smith and the Court of the government's theory.

Ms. Steele Smith's Indictment contains many of the same flaws as the indictment in *Hunter*. First, it fails to allege what proceeding she allegedly obstructed. It also fails to notify her of what "official business" or "Government business" she allegedly had the intent to disrupt. Even if the Court concludes that the affidavit and the record provide sufficient notice that Ms. Steele Smith is alleged to have obstructed the counting of electoral votes that took place on January 6, 2020, the government should be required to assert what portion or portions of the day-long congressional proceedings the government believes to qualify as the "official proceeding" at issue.

Second, the Indictment fails to provide notice of how Ms. Steel Smith allegedly acted "corruptly." Finally and most crucially, the Indictment fails to allege what acts of "disorderly and disruptive" conduct that Ms. Steele Smith engaged in. *See Hunter*, 227 F. Supp. 3d at 409 (noting that indictment that failed to "inform the defendants of the nature of the acts" that allegedly constituted "obstruction of the sidewalk" lacked sufficient particularity). "Disorderly and disruptive conduct" is a very broad term, encompassing innumerable specific actions. Without knowing exactly what acts the government intends to prove as falling within those terms, and where and when they took place, and what portion of the day's events were "obstructed, influenced, or

impeded” by which actions, Ms. Steele Smith does not have the required “notice of the *exact* crime which she is alleged to have committed.” *Id.*

C. A bill of particulars is needed to provide clarity as to the government’s theory on Counts One, Three, Four, and Five.

This lack of clarity about the government’s theory is all the more troubling given that government is making novel use of Section 1512 to prosecute offenses unrelated to the administration of justice or destruction of evidence. The application of the obstruction statute to Ms. Steele Smith’s conduct is particularly questionable. As such, as set forth in a separate motion to dismiss Count One, Ms. Steele Smith’s position is that Count One should be dismissed as a matter of law.

Setting aside the propriety of the obstruction statute’s application to Ms. Steele Smith’s case, as Judge Friedrich pointed out recently, the lack of particularity in the government’s obstruction charge also makes it difficult for the district courts to assess the sufficiency of the charges. At an oral argument on another defendant’s Motion to Dismiss the obstruction count in *United States v. Reffitt*, Judge Friedrich *sua sponte* ordered the government to provide a bill of particulars on this ground:

I’m going to request the government to provide a bill of particulars, because it is not really clear to me what your theories are and what you think the facts that you’re going to prove support in terms of obstruction.

Min. Order, *United States v. Reffitt*, 21-CR-32 (D.D.C).⁴

⁴ As the Court is surely aware, Mr. Reffitt was subsequently convicted by a jury of all counts. Of course, this does not undermine Ms. Steele Smith’s claim that her Indictment fails to notify her of the crimes she has to defend against at her trial.

The charges in four out of five of the Indictment's counts lack particularity as Judge Friedrich found in *Reffitt*. As such, Ms. Steele Smith has requested that the government state with particularity the proceeding or official or government business it alleges she intended to obstruct and what acts she took that constituted disorderly and disruptive conduct. The government has declined to respond to counsels' requests for more information. Therefore, as was the case in *Reffitt*, Ms. Steele Smith submits that a bill of particulars would notify her of the crimes against which she must defend and help the Court assess the sufficiency of the charge. *See Hunter*, 47 App. D.C. at 410 (noting that particularity in indictment is important "so that [the court] may decide whether [the allegations] are sufficient in law to support a conviction").

C. The Court should also order the government to produce transcripts of the grand jury proceedings underlying Counts One, Three, Four, and Five.

A. The Court may order disclosure of grand jury material if the defense shows is a particularized need.

"The grand jury is charged with the dual responsibilities of determining whether there is probable cause to believe a crime has been committed and protecting citizens against unfounded criminal prosecutions." *United States v. Stevens*, 771 F. Supp. 2d 556, 566 (D. Md. 2011) (quoting *United States v. Calandra*, 414 U.S. 338, 343 (1974)) (internal quotations and brackets omitted). "In this way, the grand jury serves as the protector of citizens against arbitrary and oppressive government action." *Id.* (quoting *Calandra* 414 U.S. at 343) (internal quotations omitted). If a prosecutor misstates the applicable law to the grand jury, that can yield "grave doubt that the decision to indict was free from substantial influence of the errors," *United States v. Peralta*, 763 F. Supp. 14, 21 (S.D.N.Y. 1991) (quoting *Bank of Nova Scotia*

v. United States, 487 U.S. 250, 256 (1988)) (internal quotations omitted), and provide a basis to dismiss the indictment.

Rule 6(e)(3)(E)(ii) provides that “the court may authorize disclosure . . . of a grand jury matter” “at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury[.]” Fed. Rule Crim. P. 6(e)(3)(E)(ii). In *United States v. Stevens*, a District of Maryland court ordered disclosure of excerpts of grand jury material (after reviewing it *ex parte*) where the defense established cause for concern that prosecutors “may have failed to properly instruct the grand jury regarding the advice of counsel defense and may have failed to present critical exculpatory evidence.” *Stevens*, 771 F. Supp. 2d at 564 (dismissing counts after finding that the government did erroneously instruct the grand jury and finding grave doubt that the decision to indict was free from the substantial influence of the erroneous instruction).

B. There is a particularized need here for such discovery because there is reason to believe the grand jury may not have been properly instructed on the law.

The circumstances here show that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury. The combination of lack of specificity in Counts One, Three, Four, and Five, the failure of the government to respond to repeated requests for more specific information about its theory as to the counts, and discovery to date which appears to show that there is insufficient evidence on elements of several of the counts, together raise the distinct impression that, in indicting Ms. Steele Smith, the grand jury itself may not have

identified what conduct constituted “disorderly or disruptive conduct” or how Ms. Steele Smith acted corruptly.

Put another way, there is definite reason to suspect that Ms. Steele Smith very well may be under indictment for crimes where no evidence was presented to the grand jury that she acted “corruptly” or that she engaged in disorderly or disruptive conduct. Accordingly, there is “particularized need” for disclosure of grand jury materials here. *See United States v. Wilkerson*, 656 F. Supp. 2d 22, 34 (D.D.C. 2009) (“The defendant must “demonstrate[] a ‘particularized need’ or ‘compelling necessity’ for the [material].”) (quoting *Smith v. United States*, 423 U.S. 1303, 1304 (1975)). Her need is great, because only discovery of prosecutors’ instructions, and other relevant statements to the grand jury can establish that a ground “to dismiss the indictment because of a matter that occurred before the grand jury” exists. Fed. R. Crim. P. 6(e)(3)(E)(ii). On the other hand, the public’s general interest in grand jury secrecy is diminished because the indictment has already issued.

CONCLUSION

For the foregoing reasons, Ms. Steele Smith respectfully requests that the Court grant this Motion and order the Government to provide a bill of particulars that specifically details the information requested herein and to order disclosure of grand jury materials, including transcripts and exhibits presented to the grand jury in this case.

Respectfully Submitted,

A. J. KRAMER
FEDERAL PUBLIC DEFENDER

/s/
ELIZABETH A. MULLIN
Assistant Federal Public Defender
625 Indiana Avenue, N.W., Suite 550
Washington, D.C. 20004
(202) 208-7500

/s/
NATHANIEL WENSTRUP
Assistant Federal Public Defender
1650 King Street, Suite 500
Alexandria, Virginia 22314
703-600-0825
703-600-0880 (fax)
Nate_Wenstrup@fd.org