

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)	
)	
)	
)	
v.)	Case No. 1:21-cr-708 (RCL)
)	
LEO CHRISTOPHER KELLY,)	
)	
Defendant.)	
)	

**DEFENDANT KELLY’S MOTION TO
DISMISS COUNTS 2-7 AS MULTIPLICITOUS WITH
INCORPORATED MEMORANDUM OF POINTS AND AUTHORITIES**

COMES NOW Defendant, Leo Christopher Kelly, by and through undersigned counsel, and hereby respectfully moves this Honorable Court for the entry of an Order dismissing Counts 2 through 7 of the Indictment as multiplicitous.

As grounds, the following is stated:

I. Background

1. Mr. Kelly is charged in Counts 2-7 with violations of:

Count 2 – 18 U.S.C. §1752(a)(1) (Knowingly Entering or Remaining in any Restricted Building or Grounds Without Lawful Authority).

Count 3 – 18 U.S.C. §1752(a)(2) (Disorderly and Disruptive Conduct in a Restricted Building or Grounds).

Count 4 – 40 U.S.C. Section 5104(e)(2)(A) (Entering and Remaining on the Floor of Congress).

Count 5 – 40 U.S.C. §5104(e)(2)(C) (Entering and Remaining in Certain Rooms in the Capitol Building).

Count 6 – 40 U.S.C. §5104 (e)(2)(D) (Disorderly Conduct in a Capitol Building).

Count 7 – 40 U.S.C. §5104(e)(2)(G) (Parading, Demonstrating, or Picketing in a Capitol Building).

2. **18 U.S.C. §1752 charges**

The respective elements for the violations of the various subsections of 18 U.S.C. §1752 as alleged in Kelly’s indictment are as follows:

- a. 18 U.S.C. §1752 (a)(1): (1) the defendant entered or remained in a restricted building without lawful authority to do so; and (2) the defendant did so knowingly.¹
- b. 18 U.S.C. §1752 (a)(2): (1) the defendant engaged in disorderly or disruptive conduct in, or in proximity to, any restricted building; (2) the defendant did so knowingly, and with the intent to impede or disrupt the orderly conduct of government business or official functions; and (3) the defendant's conduct occurred when, or so that, his conduct in fact impeded or disrupted the orderly conduct of government business or official functions.²

3. **40 U.S.C. § 5104(e)**

a. 40 U.S.C. § 5104(e)(2)(D): (1) the defendant engaged in disorderly or disruptive conduct in any of the United States Capitol Buildings; (2) the defendant did so with the intent to impede, disrupt, or disturb the orderly conduct of a session of Congress or either House of Congress; and (3) the defendant acted willfully and knowingly³

¹ See *United States v. Rivera*, 2022 WL 2187851, *5 (D.D.C., June 17, 2022) (Kollar-Kotelly, J.)

² *Rivera*, 2022 WL 2187851 at *5.

³ *Rivera*, 2022 WL 2187851 at *5

b. 40 U.S.C. §5104(e)(2)(C) – (1) The defendant, with the intent to disrupt the orderly conduct of official business (2) entered or remained in a room of the Capitol Building set aside or designated for use of either House of Congress and (3) the defendant acted willfully and knowingly.

c. 40 U.S.C. §5104(e)(2)(A) – (1) The defendant entered or remained on the floor of either House of Congress or in any cloakroom or lobby adjacent to that floor without authorization and (2) the defendant acted willfully and knowingly.

d. 40 U.S.C. §5104(e)(2)(G). (1) the defendant paraded, demonstrated, or picketed in any of the United States Capitol Buildings; and (2) the defendant acted willfully and knowingly.

4. The conduct alleged in Counts 2-7 of the Indictment arise out of the same alleged criminal conduct by Mr. Kelly, that is his presence in the Capitol on January 6th, without any indication that Congress intended that conduct to be punishable under multiple subsections of 40 U.S.C. §5104(e) and 18 U.S.C. §1752(a)(1) and (2).

6. Convictions for all these counts would violate the Double Jeopardy Clause of the U.S. Constitution. Moreover, the unnecessary multiplication of counts will prejudice a jury against Mr. Kelly. Multiplicity arises when “an indictment charges the same offense in more than one count.” *United States v. Mahdi*, 598 F.3d 883, 887 (D.C. Cir. 2010), quoting *United States v. Weathers*, 186 F.3d 948, 951 (D.C. Cir. 1999). The Double Jeopardy Clause of the Constitution protects against “multiple punishments for the same offense.” *Weathers*, 186 F.3d at 951, cert. denied, 529 U.S. 1005 (2000); U.S. Const. amend. V, cl. 2. Also, courts have recognized that charging the same offense in multiple counts can “unfairly increas[e] a defendant’s exposure to criminal sanctions” because a jury may conclude that given the number of charges, the defendant must be guilty of something. *United States v. Clarke*, 24 F.3d 257, 261 (D.C. Cir. 1994), quoting *United States v. Harris*, 959 F.2d 246, 250 (D.C. Cir. 1992), abrogated on other grounds, *United*

