2UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
v.	:	**CASE NO. 21-cr-00327**
LUKE RUSSELL COFFEE	:	
Defendant	:	

UNITED STATES' OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS COUNTS FOR MULTIPLICITY

Defendant Coffee moves under Federal Rule of Criminal Procedure 12(b)(3)(B)(ii) and the Double Jeopardy Clause of the United States Constitution to dismiss Counts Five-Ten of the Indictment and argues that these Counts are multiplicitous with Counts One-Four. ECF No. 44 (Superseding Indictment); ECF No. 65 (Motion). Coffee misapplies the law, and the Court should deny his motion.

PROCEDURAL BACKGROUND

The Government charged Coffee by Superseding Indictment on December 1, 2021. Coffee filed the motion at issue on January 4, 2023, in anticipation of trial, which had been set for February 27, 2023. Coffee then filed a motion to continue the trial on January 11, 2023, which the Court granted. ECF No. 71. The Court continued the trial to August 21, 2023.

The Government now respectfully responds ahead of the deadline of June 30, 2023. *See* Pretrial Order, ECF No. 74.

ARGUMENT

Coffee argues that Counts Six-Ten in the Indictment are multiplicitous with Counts One-Three and therefore must be dismissed. ECF 65 at 2-3. But, Coffee fails to apply the law correctly,

and this Court should follow the others in the District that have denied this motion in January 6 cases.

I. Applicable Law

A defendant may be convicted of and sentenced under different statutory provisions for multiple offenses arising out of the same single act or course of conduct so long as Congress authorized the imposition of such multiple punishments. *See United States v. McLaughlin*, 164 F.3d 1, 8 (D.C. Cir. 1998) ("If the legislature intends to impose multiple punishment, imposition of such sentences does not violate Double Jeopardy."). "To determine multiplicity vel non, courts generally apply the *Blockburger* test: '[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not,' i.e., whether either is a lesser included offense of the other." *United States v. Mahdi*, 598 F.3d 883, 888 (D.C. Cir. 2010) (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). If two offenses each require proof of a fact the other does not, then the charges are not multiplicitous. *Id.* at 890.[1] The *Blockburger* "test focuses on the statutory elements of the offense, not on the proof offered in a given case." *United States v. McLaughlin*, 164 F.3d 1, 8 (D.C. Cir. 1998). Thus, it is irrelevant whether there is significant overlap in the factual proof of each count at trial, or even whether two counts "are based upon the exact same set of facts and circumstances," as long as

[1] On the other hand, if two offenses fail the *Blockburger* test—because one is a lesser-included offense of the other—that is not the end of the inquiry. In that scenario, the "*Blockburger* test . . . provides only a canon of construction, not a 'conclusive presumption of law,' *id.* at 888 (quoting *Garrett v. United States*, 471 U.S. 773, 779 (1985)), because there "'is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and *punishing also the completed transaction.*'" *Id.* (quoting *Garrett*, 471 U.S. at 779) (emphasis in original). Here, the offenses each require proof of a fact the others do not, so it is not necessary to conduct this further analysis.

each count's elements require proof of a fact that the others do not. *United States v. Manafort*, 313 F. Supp. 3d 311, 314 (D.D.C. 2018).

II. Analysis

Here, Coffee's multiplicity arguments fail because each of the offenses charged in the Indictment "requires proof of a fact which the other does not." *Blockburger*, 284 U.S. at 304. These are not close questions, and—tellingly—Coffee fails to apply or even cite *Blockburger*. Many of the Counts require proof of multiple facts not required by the other Counts, and all require proof of at least one unique fact. Thus, the charges satisfy *Blockburger*.

a. The Superseding Indictment

Count One charges Coffee with Civil Disorder under 18 U.S.C. § 231(a)(3). The elements of that offense are:

1) The defendant knowingly committed an act or attempted to commit an act with the intended purpose of obstructing, impeding, or interfering with one or more law enforcement officers;

2) at the time of the defendant's actual or attempted act, the law enforcement officer or officers were engaged in the lawful performance of their official duties incident to and during a civil disorder; and

3) the civil disorder in any way or degree obstructed, delayed, or adversely affected either commerce or the movement of any article or commodity in commerce or the conduct or performance of any federally protected function.

Counts Two and Three charge Coffee with "Assaulting, Resisting, or Impeding Certain Officers Using a Dangerous Weapon" under 18 U.S.C. § 111(a)(1) and (b). Each count alleges a different law enforcement victim. The elements of the offenses are:

1) The defendant assaulted, resisted, opposed, impeded, intimidated, or interfered with an officer from the United States Capitol Police, Metropolitan Police Department, or other law enforcement agency;

2) the defendant did such acts forcibly;

3) the defendant did such acts voluntarily and intentionally;

4) the person assaulted, resisted, opposed, impeded, intimidated, or interfered with was assisting officers of the United States who were then engaged in the performance of their official duties; and

5) in doing such acts, the defendant intentionally used a deadly or dangerous weapon.

Count Four charges Coffee with "Entering and Remaining in a Restricted Building or Grounds with a Deadly or Dangerous Weapon." 18 U.S.C. § 1752(a)(1) and (b)(1)(A). The elements of that offense are:

1) The defendant entered or remained in a restricted building or grounds without lawful authority to do so;

2) the defendant did so knowingly; and

3) the defendant knowingly used or carried a deadly or dangerous weapon during and in relation to the offense.

Count Five charges Coffee with "Disorderly and Disruptive Conduct in a Restricted Building or Grounds with a Deadly or Dangerous Weapon." 18 U.S.C. § 1752(a)(2) and (b)(1)(A). The elements of that offense are:

1) The defendant engaged in disorderly or disruptive conduct in any restricted building or grounds;

2) the defendant did so knowingly, and with the intent to impede or disrupt the orderly conduct of Government business or official functions;

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; and

4) the defendant knowingly used or carried a deadly or dangerous weapon during and in relation to the offense.

Count Six charges Coffee with "Impeding Ingress and Egress in a Restricted Building or Grounds with a Deadly or Dangerous Weapon." 18 U.S.C. § 1752(a)(3) and (b)(1)(A). The elements of that offense are:

1) The defendant obstructed or impeded ingress or egress to or from any restricted building or grounds;

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 knowingly used or carried a deadly or dangerous weapon during and in relation to the offense.

Count Seven charges Coffee with "Engaging in Physical Violence in a Restricted Building or Grounds with a Deadly or Dangerous Weapon." 18 U.S.C. § 1752(a)(4) and (b)(1)(A). The elements of that offense are:

1) The defendant engaged in an act of physical violence against a person or property in, or in proximity to, a restricted building or grounds;

2) the defendant did so knowingly; and

3) the defendant knowingly used or carried a deadly or dangerous weapon during and in relation to the offense.

Count Eight charges Coffee with "Disorderly Conduct in a Capitol Building." 40 U.S.C. § 5104(e)(2)(D). The elements of that offense are:

1) The defendant engaged in disorderly or disruptive conduct in any of the United States Capitol Buildings or Grounds;

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 knowingly.

Count Nine charges Coffee with "Impeding Passage Through the Capitol Grounds or Buildings." 40 U.S.C. § 5104(e)(2)(E). The elements of that offense are:

1) The defendant obstructed or impeded passage through or within the Capitol Buildings or Grounds; and

2) the defendant acted willfully and knowingly.

Count Ten charges Coffee with "an Act of Physical Violence in the Capitol Grounds or Buildings." 40 U.S.C. § 5104(e)(2)(F). The elements of that offense are:

1) The defendant engaged in an act of physical violence within the Capitol Buildings or Grounds; and

2) the defendant acted willfully and knowingly.

b. The Counts Are Not Multiplicitous.

These counts are not multiplicitous under the *Blockburger* test because each "requires proof of a fact which the other[s] do[] not." 284 U.S. at 304.

Coffee argues that Counts Six-Nine are multiplicitous with Count One and Counts Seven and Ten are multiplicitous with Counts Two and Three. These arguments fail under *Blockburger*.

Each element of Count One requires that the Government prove facts that Counts Six-Nine do not. The first and second elements of Count One both concern law enforcement officers, but no fact pertaining to law enforcement officers is required to prove any element in Counts Six-Nine. Likewise, the second and third elements of Count One require proof of a civil disorder, and no such proof is necessary for any element in Counts Six-Nine. Since Count One "requires proof of a fact which" Counts Six-Nine do not, they are not multiplicitous. *Id.*

Counts Seven and Ten require proof of facts that Counts Two and Three do not. Most obviously, the first element of Count Seven requires that the Government prove that the defendant acted "in, or in proximity to, a restricted building or grounds." Similarly, the first element of Count Ten requires that the defendant acted "within the Capitol Buildings or Grounds." Since Counts

Two and Three do not require any proof related to the defendant's location, they are not multiplicitous with Counts Seven and Ten.[2]

Throughout his motion, Coffee misunderstands that the *Blockburger* multiplicity analysis refers to the elements of the offenses, not whether a single act could violate multiple statutes. The very premise of *Blockburger* and its progeny is that the "same act or transaction" can form the basis of multiple criminal charges so long as each Count requires proof of a fact that the others do not. *Mahdi*, 598 F.3d at 888; *Manafort*, 313 F. Supp. 3d at 314 (counts can be "based upon the exact same set of facts and circumstances," if *Blockburger* is satisfied); *McLaughlin*, 164 F.3d at 8 (the Blockburger "test focuses on the statutory elements of the offense, not on the proof offered in a given case."). That Coffee's conduct on January 6, 2021, led to multiple related charges is fair and unsurprising in a criminal case.

c. None of the Counts are Lesser Included Offenses

Coffee briefly argues that if Counts are not multiplicitous, then they should be considered as lesser included offenses by the jury instead of separately charged Counts. Coffee's argument is unsupported by law.

Under Federal Rule of Criminal Procedure 31(c), a defendant may be entitled to a lesser included offense instruction when the elements of the lesser offense make it "impossible to commit the greater without first having committed the lesser." *Schmuck v. United States*, 489 U.S. 705, 719 (1989). This elemental analysis is objective and "does not depend on inferences that may be drawn from evidence introduced at trial." *Id.* at 720. "An instruction on a lesser-included offense

[2] While Coffee does not argue that any other Counts are multiplicitous, that argument should have failed following the reasoning of other Courts in the District. *See United States v. McHugh*, 2023 WL 2384444, 6-7 (D.C. Dist. 2023) (Bates, J.); *United States v. Baez*, 2023 WL 3846169, 3 (D.C. Dist. 2023) (Friedman, J.) (holding that charges under 18 U.S.C. § 1752(a)(2) and 40 U.S.C. § 5104(e)(2)(D) are not multiplicitous).

is warranted if 1) the elements of the lesser offense are a subset of the elements of the charged offense, and 2) the evidence would permit a jury rationally to find [the defendant] guilty of the lesser offense and acquit him of the greater." *United States v. Rivera-Alonzo*, 584 F.3d 829, 832 (9th Cir. 2009) (citing to *Schmuck*) (quotations and citations removed).

Instead of arguing that the jury should be instructed on an uncharged lesser included offense, which is more common, Coffee urges the Court to present charged Counts as lesser included offenses of each other.[3] First, Coffee vaguely suggests that Count Seven is a lesser included offense of Counts Two, Three, and Ten.[4]

Since Count Seven requires proof that the defendant acted "in, or in proximity to, a restricted building or grounds" while Counts Two, Three, and Ten do not, it is possible to commit Count Seven without having committed Counts Two, Three, or Ten. *See Schmuck*, 489 U.S. at 719. Though Count Ten requires that the defendant acted "within the Capitol Buildings or Grounds," this is a distinct from "a restricted building or grounds." The Court should adopt Judge Bates's reasoning in *McHugh* and conclude that these charges require the government to satisfy different elements and are not lesser included offenses. *See McHugh*, 2023 WL 2384444, 6-7. Judge Bates reasoned:

> [N]one is a lesser included offense of another, as each requires proof of an element distinct from the others . . . . [The Counts charging 18 U.S.C. § 1752(a)(2) and 40 U.S.C. § 5104(e)(2)(D)] differ in a few ways, including that [18 U.S.C. § 1752(a)(2)] applies only to a "restricted building or grounds" and [40 U.S.C. § 5104(e)(2)(D)] applies "in any of the Capitol Buildings." The Capitol is not always a "restricted building or grounds" within the meaning of [18 U.S.C. § 1752(a)(2)] and the term "restricted building or grounds" covers far more than the Capitol building. *See* 18 U.S.C. § 1752(c)(1). (Citations removed).

[3] Thus, the question presented differs from cases in this Circuit that consider instructing on lesser included offenses that were not charged. *See United States v. Sinclair*, 444 F.2d 888 (D.C. Cir. 1971); *United States v. Gibbs*, 904 F.2d 52 (D.C. Cir. 1990).

[4] Coffee neglects to name these Counts, so the Government is forced to infer which Counts he is referencing. ECF 65 at 3.

Second, Coffee posits that Count One is a lesser included offense of Counts Five and Eight. This fails under our same elemental analysis above. *Supra* Section II(b).

CONCLUSION

For the foregoing reasons, the Government respectfully requests that the Court deny Coffee's Motion to Dismiss Counts as Multiplicitous, and to not recharacterize certain counts as lesser-included offenses.

Respectfully submitted,

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