

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

UNITED STATES OF AMERICA	:	
	:	
v.	:	CASE NO. 1:21-CR-00679-JEB
	:	
ROBERT WAYNE DENNIS,	:	
	:	
Defendant.	:	

**GOVERNMENT’S RESPONSE IN OPPOSITION TO DEFENDANT’S MOTION TO
DISMISS COUNTS 5, 6, 7, 8, AND 9 AS MULTIPLICITOUS**

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, hereby respectfully submits this opposition to the Robert Wayne Dennis’ Motion to Dismiss Counts 5, 6, 7, 8, and 9 of the Indictment. Dennis raises the argument that these counts are multiplicitous. This argument is without merit and the motion should be denied.

PROCEDURAL HISTORY

On November 17, 2021, the Grand Jury returned an indictment charging the defendant, Robert Wayne Dennis, with various offenses resulting from his conduct at the United States Capitol on January 6, 2021. ECF No. 13. Dennis is charged with the following offenses: civil disorder, in violation of 18 U.S.C. § 231(a)(3) (Count 1); assaulting, resisting, or impeding certain officers, in violation of 18 U.S.C. § 111(a)(1) (Counts 2, 3, and 4); entering and remaining in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(1) (Count 5); disorderly and disruptive conduct in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(2) (Count 6); engaging in physical violence in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(4) (Count 7); disorderly conduct in the capitol grounds or buildings, in violation of 40

U.S.C. § 5104(e)(2)(D) (Count 8); and an act of physical violence in the Capitol ground or buildings, in violation of 5104(e)(2)(F) (Count 9). ECF No. 13.

On October 28, 2022, the defendant filed a motion to dismiss Counts One, Five, Six, Seven, and Eight of the indictment, ECF No. 32. For the reasons stated below, the defendant's motion is without merit and should be denied.

LEGAL STANDARD

A defendant may move to dismiss an indictment or count thereof for failure to state a claim prior to trial. *See* Fed. R. Crim. P. 12(b)(3)(B)(v). However, the Federal Rules of Criminal Procedure state that an indictment is only required to contain “a plain, concise, and definite written statement of the essential facts constituting the offense charged.” Fed. R. Crim. P. 7(c). “An indictment must be viewed as a whole and the allegations must be accepted as true in determining if an offense has been properly alleged.” *United States v. Bowdin*, 770 F. Supp. 2d 142, 146 (D.D.C. 2011). The operative question is whether the allegations, if proven, would be sufficient to permit a jury to find that the crimes charged were committed. *Id.* An indictment must contain every element of the offense charged, if any part or element is missing, the indictment is defective and must be dismissed.” *See United States v. Hillie*, 227 F. Supp. 3d 57, 70 (D.D.C. 2017). Because pretrial dismissal of an indictment “directly encroaches upon the fundamental role of the grand jury, dismissal is granted only in unusual circumstances.” *United States v. Ballestas*, 795 F. 3d 138, 148 (D.C. Cir. 2015) (internal quotation marks omitted). Ultimately, the court must decide “whether the allegations, if proven, would be sufficient to permit a jury to find that the crimes charged were committed.” *United States v. Bowdoin*, 770 F. Supp 2d 142, 146 (D.D.C. 2011).

ARGUMENT

III. The Indictment’s Counts Are Not Multiplicitous.

Dennis briefly asserts that the indictment’s counts are multiplicitous. ECF No. 32 at 1-3. Specifically, Dennis argues that Counts Five, Six, Seven, Eight, and Nine are multiplicitous with one another. *Id.* Dennis is wrong, and obviously so.

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 *United States v. Weathers*, 186 F.3d 948, 951 (D.C. Cir. 1999), and *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). If the 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

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 clearly each require proof of a fact the others do not, so it is not necessary to conduct this further analysis.

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 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); *see id.* (“[T]he test for multiplicity is not whether two counts are based on the same set of facts; rather, it is whether the statutory elements of the two offenses are the same.”).

Here, Dennis’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. Indeed, these are not close questions—which is likely why Dennis spends but a page on the argument and does not even attempt to evaluate or analyze the statutes’ elements. Many of the Counts require proof of multiple facts not required by the other Counts, and all require proof of at least one. Thus, the indictment satisfies *Blockburger*.

First, Count Five charges a violation of Sections 1752(a)(1) of Title 18, which applies to a defendant who “knowingly enters or remains in any restricted building or grounds without lawful authority to do so.” 18 U.S.C. § 1752(a)(1). The elements of that offense are:

- 1) The defendant entered or remained in a restricted building or grounds without lawful authority;
- 2) The defendant did so knowingly;

Count Six charges a violation of Section 1752(a)(2) of Title 18, which applies to a defendant who “knowingly, and with intent to impede or disrupt the orderly conduct of Government business or official functions, engages in disorderly or disruptive conduct in, or within such proximity to, any restricted building or grounds when, or so that, such conduct, in fact,

impedes or disrupts the orderly conduct of Government business or official functions.” 18 U.S.C.

§ 1752(a)(2). The elements of that offense are:

- 1) The defendant engaged in disorderly or disruptive conduct;
- 2) The defendant did so knowingly;
- 3) The conduct was in, or within such proximity to, a restricted building or grounds;
- 4) It was done when, or so that, such conduct in fact impeded or disrupted the orderly conduct of government business or official functions;

Count Seven charges a violation of Sections 1752(a)(4) of Title 18, which applies to a defendant who “knowingly engages in any act of physical violence against any person or property in any restricted building or grounds.” 18 U.S.C. § 1752(a)(4). The elements of that offense are:

- 1) The defendant engaged in an act of physical violence against any person or property;
- 2) The defendant did so knowingly;
- 3) The defendant did so in a restricted building or grounds;

Count Eight charges a violation of Section 5104(e)(2)(D) of Title 40, which applies to a defendant who “willfully and knowingly. . . (D) engage[s] in disorderly and disruptive conduct within the United States Capitol Grounds and 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 or, a committee of Congress or either House of Congress. 40 U.S.C. § 5104(e)(2)(F). The elements of that offense are:

- 1) The defendant engaged in disorderly and disruptive conduct
- 2) The defendant did so willfully and knowingly;
- 3) The defendant did so in any of the Capitol Buildings;
- 4) The defendant did so 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 or, a committee of Congress or either House of Congress.

Count Nine charges a violation of Section 5104(e)(2)(F) of Title 40, which applies to a defendant who “willfully and knowingly. . . (F) engage[s] in an act of physical violence in the

Grounds or any of the Capitol 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;
- 2) The defendant did so willfully and knowingly;
- 3) The defendant did so in the Grounds or any of the Capitol Buildings;

These five counts are not multiplicitous. Count Five requires proof that the defendant was “without lawful authority” to be in any restricted building or grounds (element 1 of Count Five). Counts Six, Seven, Eight, and Nine do not require proof of that fact.

Count Six, meanwhile, requires proof that the defendant engaged in “disorderly or disruptive conduct” (element 1 of Count Six), which Counts Five, Seven, and Nine do not require. Count Six also requires proof that the defendant’s conduct “in fact impede[d] or disrupt[ed] the orderly conduct of government business or official functions” (element 4 of Count Four), which Counts Two, Six, and Eight do not.

Further, Count Seven requires proof that the defendant engaged in “an act of physical violence,” which Counts Five, Six, and Eight do not require.

Count Eight requires proof that the defendant intended to “impede, disrupt and disturb the orderly conduct of a session of Congress and either House of Congress and either House of Congress, and the orderly conduct in that building of a hearing before or any deliberation or, a committee of Congress or either House of Congress,” which Counts Five, Six, Seven, and Nine do not.

Finally, Count Nine requires proof of facts showing that the defendant acted “willfully and knowingly,” a mens rea requirement distinct from Counts Five, Six, and Seven.


Dennis 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”—here, Dennis’s presence and violence at the Capitol Grounds—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). The fact that Dennis’s conduct on January 6, 2021, has led to multiple related charges is unsurprising and ordinary in a criminal case.

CONCLUSION

For the foregoing reasons, the government respectfully requests that the defendant’s motion be denied.

Respectfully submitted,
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