UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
v.	:	**CASE NO. 21-cr-599 (RBW)**
DONNIE DUANE WREN	:	
Defendant	:	

UNITED STATES' OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS COUNTS 7-9, 13 AND 14 OF THE INDICTMENT

Defendant Wren 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 7, 8, 9, 13 and 14 of the Superseding Indictment. Wren argues these counts are "multiplicitous." ECF 55. He is wrong, and the Court should deny his motion.

BACKGROUND

Defendants Thomas Smith and Donnie Wren, cousins, traveled together to Washington, D.C. to attend former President Trump's rally on January 6, 2021. After the rally, Smith and Wren walked together from the rally to the United States Capitol. They entered Capitol grounds and joined in the riot.

Defendants Wren and Smith were in the Lower West Terrace Tunnel area at around 3:00 p.m. Together, they made their way to the Tunnel entrance. Wren remained at the mouth of the Tunnel while Smith, carrying a flag attached to a flagpole, entered the Tunnel and approached the police line standing guard at the doors leading into the Capitol building. Moments later, Smith jammed the flagpole like a spear trying to stab at one of the glass windowpanes within the first set of Tunnel doors. Video footage shows that, at times, while Smith was inside the tunnel, Wren

looked into the tunnel in an apparent attempt to keep an eye on Smith. Smith remained in the tunnel for approximately five minutes; after he left the tunnel, he and Wren rejoined each other outside the tunnel.

Less than an hour later, at approximately 3:50 p.m., Wren and Smith made their way to the Upper West Terrace, where they stood directly in front of the police line, walking back and forth and waving flags for approximately 10 minutes. A physical conflict began between the police and the crowd of rioters at approximately 4:21 p.m. Wren and Smith participated in this conflict, pushing back against the officers' shields. Wren leaned into one of the officer's shields, using the weight of his body and his hands to push into the shield. Smith, standing right next to Wren, faced away from the officers and leaned backward, using his body weight to push against another shield. The two can be seen together, pushing against the police line, in various videos and photographs.

Following the physical confrontation with the police line, Smith charged into a crowd of rioters to kick an officer's backside, then darted out of the crowd. Moments later, Smith threw a metal stick/pole at the police line. The metal stick/pole hit an officer in the head, causing the officer to stagger backwards. Smith then retreated into the crowd of rioters. Wren was nearby when these events happened, and each time Smith retreated into the crowd, he returned to a position where he was standing near Wren.

Smith and Wren left the Upper West Terrace area at approximately 4:30 p.m. and began their departure from the Capitol grounds. During the days after January 6, 2023, Smith sent Wren links to news articles, via Facebook, in which the two of them were photographed together on Capitol grounds.

As a result of their conduct on January 6, 2021, Defendants Donnie Wren and Thomas Smith were charged with various crimes relating to the attack on the Capitol. ECF 71 (Second Superseding Indictment or "Indictment").

ARGUMENT

I. The Superseding Indictment's Counts Are Not Multiplicitous.

Wren argues that Counts Seven, Eight, Nine, and Thirteen and Fourteen are multiplicitous. ECF 55 at 1-2. Wren 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

[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.*

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 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, Wren'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. 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 charges satisfy *Blockburger*.

First, Count Seven charges a violation of Section 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 to do so; and
2) The defendant did so knowingly.

Count Eight charges a violation of Sections 1752(a)(2), 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

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(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.

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 in, or in proximity to, 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's conduct occurred when, or so that, his conduct in fact impeded or disrupted the orderly conduct of Government business or official functions.

Count Nine 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 in any restricted building or grounds; and
2) The defendant did so knowingly;

Count Thirteen charges a violation of Section 5104(e)(2)(D) of Title 40, which applies to a defendant who "willfully and knowingly . . . 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 any deliberation of, a committee of Congress or either House of Congress." 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
2) The defendant acted willfully and knowingly.

Count Fourteen charges a violation of Section 5104(e)(2)(F) of Title 40, which applies to a defendant who "willfully and knowingly . . . 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 in any of the United States Capitol Buildings or Grounds;[2]
2) The defendant did so willfully and knowingly.

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

Count Eight, meanwhile, requires proof that the defendant engaged in "disorderly or disruptive conduct" (element 1 of Count Eight), which Counts Seven, Nine, and Fourteen do not require. Count Eight 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 3 of Count Eight), which Counts Seven, Nine, Thirteen and Fourteen do not require.

Count Nine requires proof that the defendant engaged in "an act of physical violence," which Counts Seven, Eight, and Thirteen do not require. Additionally, Count Nine requires proof that the act of physical violence was against "any person or property in any restricted building or grounds," (element 1 of Count Nine). Count Fourteen does not require that the act of physical violence occur *in any restricted building or grounds*, but in the Capitol buildings or grounds.

Finally, Counts Thirteen and Fourteen requires proof of facts showing that the defendant acted "willfully and knowingly," a mens rea requirement distinct from Counts Seven, Eight, and Nine.

[2] "Act of physical violence" is defined in Section 5104(a)(1) to mean "any act involving— (A) an assault or other infliction or threat of infliction of death or bodily harm on an individual; or (B) damage to, or destruction of, real or personal property."

Wren argues incorrectly that "many of the charges are lesser-included-offenses of the other charges." ECF 55 at 3. This is plainly wrong. Wren 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, Wren'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). That Wren's conduct on January 6, 2021 has led to multiple related charges is unsurprising and utterly ordinary in a criminal case.

CONCLUSION

For the foregoing reasons, the Government respectfully requests that Wren's Motion to Dismiss Counts Seven, Eight, Nine, Thirteen and Fourteen of the [Superseding] Indictment be denied.

Respectfully submitted,

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