IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Criminal Division

UNITED STATES	**)**	
	)	**Judge Liebovitz**
v.	**)**	**2017 CF2 1286**
	)	**Next Hearing: March 24, 2017**
JARED FARLEY	**)**	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT JARED FARLEY'S MOTION TO DISMISS THE INDICTMENT

Defendant Jared Farley submits this memorandum of points and authorities in support of his motion to dismiss the indictment.

INTRODUCTION

The indictment is fatally defective and must be dismissed for two independent reasons.

First, the indictment is unconstitutionally vague and lacking in specificity. By merely parroting the language of D.C. Code § 22-1322(d) to charge an undifferentiated mass of 63 people, including Mr. Farley, with "engag[ing], incit[ing] and urg[ing] others to engage in" a riot, the indictment infringes on no fewer than four of Mr. Farley's core constitutional rights. The indictment violates: (i) the Sixth Amendment because it fails to inform Mr. Farley of the specific nature of the accusation against him and thus disables him from preparing his defense; (ii) the Fifth Amendment's grand jury "presentment or indictment" clause because it fails to guarantee that Mr. Farley will be prosecuted based only on the unique allegations the grand jury considered and found; (iii) the Fifth Amendment's double jeopardy clause because it fails to ensure that Mr. Farley cannot be prosecuted again for the same offense; and (iv) the First Amendment because, with the events at issue having occurred during a political demonstration, it precludes the Court from being able to determine whether Mr. Farley is being unlawfully prosecuted for exercising his rights of speech and assembly.

Second, because the indictment charges conduct—*i.e.,* "*engag[ing]*" in a riot— that is not a crime under D.C. Code § 22-1322(d), it fails to state an offense. The Government's inclusion of language that does charge a crime under Section 22-1322(d)—"incit[ing] and urg[ing] others to engage in" a riot—does not save the indictment. Instead, it makes the indictment impermissibly duplicitous, as it is impossible to tell whether the grand jury charged Mr. Farley with conduct that is a crime or, instead, with conduct that is not a crime under Section 22-1322(d).

FACTS

This case arises from a political demonstration that occurred on January 20, 2017, the day of the inauguration of President Donald Trump. On January 21, 2017, the Government filed a complaint charging Mr. Farley with violating D.C. Code § 22-1322(d). It filed identical complaints against more than 200 other demonstrators. On February 3, 2017, right before the Government was going to have to begin establishing individualized probable cause against each of the charged defendants at a series of public preliminary hearings, a grand jury returned the instant indictment.

The indictment charges that "on or about January 20, 2017, in the District of Columbia," an undifferentiated mass of 63 people, including Mr. Farley, "willfully engaged, incited and urged other people to engage in a public disturbance, involving an assemblage of 5 or more persons, that by tumultuous and violent conduct and the threat thereof, resulted in serious bodily harm or property damage in excess of $5,000." That is it; there is nothing else. Thus, the indictment does nothing more than parrot the language of Section 22-1322(d). Notwithstanding the broad, generic terms Section 22-1322(d) employs and the large number of people charged under those terms, the indictment does not allege ***any*** specific facts indicating what Mr. Farley himself purportedly did. It does not identify the specific acts the Government alleges Mr. Farley committed or the specific statements the Government alleges Mr. Farley made in violation of Section 1322(d), the manner

and means by which the Government alleges Mr. Farley committed those specific acts or made those specific statements, the other individuals with whom the Government alleges Mr. Farley committed those specific acts or made those specific statements, the property the Government alleges was damaged by those acts or statements, or the people the Government alleges suffered "serious bodily harm" as a result of those acts or statements. This is so even though Section 22-1322(d)'s key terms, "inciting" and "urging"—and thus the key terms in the indictment—implicate expressive conduct potentially warranting First Amendment protection.

Further, while the indictment charges Mr. Farley with "willfully engag[ing] … in a" riot in violation of Section 22-1322(d), Section 22-1322(d) does not in fact proscribe willfully "engaging" in a riot. Indeed, while the indictment purports to charge Mr. Farley and his 62 co-defendants with a felony offense, willfully "engaging" in a riot is not a felony under any provision of District of Columbia law.

ARGUMENT

I. The Indictment Is Unconstitutionally Vague And Lacking In Specificity

"An indictment may set forth the offense in the words of the criminal statute itself, as long as 'those words of themselves fully, directly, and expressly, without any ambiguity or uncertainty, set forth all the elements necessary to constitute the offence intended to be punished.'" *Hamling v. United States,* 418 U.S. 87, 117 (1974) (quoting *United States v. Carll,* 105 U.S. 611, 612 (1882)). But while the language of the statute may be used in the Government's general description of the offense, it "must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged." *Id.* at 418 U.S. at 117-18 (quoting *United States v. Hess,* 124 U.S. 483, 487 (1888). Put differently, where a statute includes broad, "generic terms, it is not

sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species,--it must descend to particulars." *Russell v. United States*, 369 U.S. 749, 765 (1962) (quoting *United States v. Cruikshank*, 92 U.S. 542, 558 (1875)); *see also United States v. Hillie*, Criminal No. 16-cr-0030 (KBJ), 2017 WL 61930, at *8 (D.D.C. Jan. 5, 2017) ("Courts have found that it is especially important to include such facts and circumstances in cases where, by solely tracking the statutory language, the indictment's terms create ambiguity regarding the defendant's conduct."). Thus, an indictment "not framed to apprise the defendant with reasonable certainty of the nature of the accusation against him … is defective, although it may follow the language of the statute." *Russell*, 369 U.S. at 765 (alteration in original) (citation and internal quotation marks omitted).

The requirement that an indictment "descend to the particulars" protects several core constitutional rights. First, as the Sixth Amendment commands, it ensures that the accused is informed of the nature of the accusations against him so that he may adequately prepare his defense. *See Russell*, 369 U.S. at 761, 763-65; *United States v. Hitt*, 249 F.3d 1010, 1016 (D.C. Cir. 2001); *Hillie*, 2017 WL 61930, at *7. Second, to give teeth to the protections the Fifth Amendment's grand jury clause furnishes against an overbearing sovereign, it ensures that the defendant is prosecuted based only on the unique allegations returned by the grand jury, so that the Government is not permitted to roam free post-indictment, fill in the gaps, and obtain a conviction based on allegations of its own choosing. *See Russell,* 369 U.S. at 769-71; *Stirone v. United States*, 361 U.S. 212, 216-18 (1960); *United States v. Pirro,* 212 F.3d 86, 92 (2d Cir. 2000); *United States v. Cecil,* 608 F.2d 1294, 1296 (9th Cir. 1979); *Hillie*, 2017 WL 61930, at *7, 14, 16. Third, and relatedly, the specificity requirement ensures that the defendant cannot be prosecuted again for the same offense in violation of the Fifth Amendment's double jeopardy clause. *See*

Russell, 369 U.S. at 763-64; *Sanabria v. United States*, 437 U.S. 54, 65-66 (1978); *Hillie*, 2017 WL 61930, at *7.

Where, as here, an indictment charges conduct occurring during a political demonstration, the specificity requirement safeguards yet another fundamental constitutional right: the First Amendment right of speech and assembly. In the context of a political protest, an indictment must be sufficiently specific to allow the trial court to determine whether the government is unlawfully prosecuting an individual for engaging core First Amendment-protected activity. *See United States v. Buddenberg*, No. CR-09-00263 RMW, 2010 WL 2735547, at *6 (N.D. Cal. July 12, 2010) ("In order for an indictment to fulfill its constitutional purposes, it must allege facts that sufficiently inform each defendant of what it is that he or she is alleged to have done that constitutes a crime. This is particularly important where the species of behavior in question spans a wide spectrum from criminal conduct to constitutionally protected political protest."); *United States v. Lattimore*, 127 F. Supp. 405, 407 (D.D.C. 1955) ("[W]hen the charge in an indictment is in the area of the First Amendment, evidencing possible conflict with its guarantees of free thought, belief and expression, and when such indictment is challenged as being vague and indefinite, the Court will uphold it only after subjecting its legal sufficiency to exacting scrutiny."). This is consistent with the Supreme Court's admonition that, although "[t]he First Amendment does not protect violence .... when such occurs in the context of constitutionally protected activity, ... *'precision of regulation' is demanded."*" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)) (emphasis added). "[O]therwise there is a danger that one in sympathy with the legitimate aims of [a political] organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected

purposes which he does not necessarily share." *Id.* at 919 (quoting *Noto v. United States*, 367 U.S. 290, 299 (1961)).

The indictment in this case plainly fails to satisfy the specificity requirement. Merely parroting the language of a statute that employs broad, generic terms like "inciting or urging," it fails to inform Mr. Farley of the specific, individual acts or statements the Government alleges he committed or made. The fact that Mr. Farley is charged with the exact same generic conduct as no fewer than 62 other individuals makes the indictment's lack of specificity even more problematic. How can Mr. Farley possibly prepare his defense when he is alleged to have engaged in the same broadly-identified conduct as 62 (and perhaps 150 more) other people? Based on the paucity of the allegations, he has no idea what the Government is alleging *he* did to violate Section 1322(d), as distinguished from the alleged acts or statements of the 62 others, as well as the scores of others it has charged but not yet indicted. The indictment thus fails to apprise Mr. Farley with "reasonable certainty" of the nature of the accusation against him, in violation of the Sixth Amendment. *See Russell*, 369 U.S. at 765; *Hillie*, 2017 WL 61930, at *8.

Further, because the indictment reveals absolutely nothing about the individual acts Mr. Farley purportedly committed or the individual statements he purportedly made, neither Mr. Farley nor the Court has any way to ensure that Mr. Farley will be prosecuted and tried based strictly on the facts the grand jury considered and found when it indicted him, as the Fifth Amendment guarantees. The extraordinary generality of the charges raises the impermissible possibility that the Government may cast about for, and prosecute Mr. Farley based on, "facts not found by, and perhaps not even presented to, the grand jury which indicted him." *Russell*, 369 U.S. at 770; *see also Buddenberg*, 2010 WL 2735547, at *9. Similarly, the extraordinary generality of the charges presents the constitutionally unacceptable risk that a future court, lacking clear guidance as to the

factual basis of the Government's current prosecution, could entertain the prosecution of Mr. Farley a second time for the very same alleged offense, in violation of the Fifth Amendment's protection against double jeopardy. *See Sanabria*, 437 U.S. at 65-66; *Hillie*, 2017 WL 61930, at *7.

Finally, because this case arises in the context of a political demonstration, generically charging Mr. Farley with "engaging, inciting or urging others to engage in a" riot, without specifying what Mr. Farley actually did or said, violates Mr. Farley's core First Amendment rights. On its face and by its plain terms ("incites" and "urges"), Section 22-1322(d) punishes expressive conduct. Therefore, as applied in a given case, Section 22-1322(d) might well implicate First Amendment protections. For that reason, indictments charging violations of Section 22-1322(d) must "descend to the particulars;" otherwise, there is no assurance that the Government has refrained from prosecuting constitutionally-protected speech. *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (proscribing prosecution for incitement, even incitement to use of force or violence, unless incitement was directed to producing, or likely to produce, "imminent lawless action"); *Claiborne Hardware Co.*, 458 U.S. at 928-29.

In this case, such necessary assurance is demonstrably absent. Because the indictment does nothing more than recite the broad language of Section 22-1322(d), it is impossible for this Court to tell whether the Government is unlawfully prosecuting Mr. Farley for exercising his rights to free speech and assembly. Under the First Amendment, that impossibility is intolerable. *See Claiborne Hardware Co.*, 458 U.S. at 916, 919; *Buddenberg,* 2010 WL 2735547 at *9-10; *Douglas v. Pitcher*, 319 F. Supp. 706, 710-11 (E.D. La. 1970) ("Louisiana Courts will require that First Amendment rights be protected, and will require the State to prove more than mere presence in order to convict these plaintiffs, or any other persons, under [the state anti-riot] statute."); *cf. Cole*

v. Arkansas, 338 U.S. 345 (1949) (upholding convictions under state unlawful assembly statute because it was implicit within the instructions to the jury that "the statute authorized no conviction for a mere presence in an assemblage at which unplanned and unconcerted violence was precipitated by another").

United States v. Buddenberg, No. CR-09-00263 RMW, 2010 WL 2735547 (N.D. Cal. July 12, 2010), is instructive on this point. In *Buddenberg*, a two-count indictment charged a group of individuals with violating the Animal Enterprise Terrorism Act ("AETA") for participating in a series of threatening demonstrations at the homes of university bio-medical researchers whose work involved the use of animals. *Id.* at *1. Count 2, which charged a substantive violation of the AETA, largely parroted the statutory language, "alleg[ing] no facts identifying what each defendant is alleged to have done, to whom, where, or when." *Id.* at *3. Count 1, which charged conspiracy to violate the AETA, similarly parroted the language of the AETA, though it included three overt acts that "offer[ed] a modest amount of factual information but the count [was] still quite generic." *Id.* at *4. The court dismissed the indictment for lack of specificity, finding that it failed to provide constitutionally adequate notice to the defendants, failed to ensure that any conviction would be based on facts found by the grand jury, and failed to permit the court to determine whether the Government was prosecuting the defendants for engaging in protected First Amendment activity. *Id.* at *8-10. The court concluded:

> The indictment is deficient in that it does not contain a statement of facts and circumstances that will inform the defendants of the specific offense conduct with which they are charged. Particularly considering the protest context in which the underlying conduct has occurred and the First Amendment implications raised, it is reasonable to require the government to more specifically identify the precise conduct upon which it seeks to hold each defendant criminally liable. In order for defendants to be fairly informed of what they are alleged to have done in violation of the law, for the court to be able to determine whether the specific conduct charged is protected by the First Amendment, and to ensure that defendants are prosecuted on the basis of facts presented to the grand jury, the indictment must be

> more specific and identify the [acts] that form the proscribed course of conduct, as well as the dates and locations where each of the acts are alleged to have occurred.

Id. at *9 (emphasis added).

Buddenberg is nearly identical to this case. Here, as in *Buddenberg,* the events at issue arose in the context of a political demonstration; the text of the statute being used is broad, punishes expressive conduct, and is susceptible to application that sweeps in First Amendment activity; the indictment names a large group of people *en masse*; and the language in the indictment merely parrots the statutory language, offering no specific information about any defendant's alleged individual acts or statements. Therefore, as in *Buddenberg*, the indictment here is fatally defective. The indictment here may be even more problematic, as the conspiracy count in the indictment in *Buddenberg* at least charged three specific overt acts. The indictment here specifies nothing.

One final, critical point: the Government may not cure the manifest defects in the indictment with a bill of particulars. As the Supreme Court has held, "it is a settled rule that a bill of particulars cannot save an invalid indictment." *Russell*, 369 U.S. at 770; *United States v. Conlon*, 628 F.2d 150, 156 (D.C. Cir. 1980) ("[I]t is settled that a bill of particulars and a fortiori oral argument cannot cure a defective indictment."). That is because a bill of particulars does nothing to ensure that a defendant is prosecuted based only on the facts the grand jury considered and found, as the Fifth Amendment requires. *See Hillie,* 2017 WL 61930, at *16 (collecting cases) ("to permit the omission [of a material fact] to be cured by a bill of particulars would be to allow the grand jury to indict with one crime in mind and to allow the U.S. Attorney to prosecute by producing evidence of a different crime," which would, in essence, "usurp the function of the grand jury … and, in many cases, would violate due process by failing to give the accused fair notice of the charge he must meet.") (quoting *United States v. Thomas*, 444 F.2d 919, 922-23 (D.C. Cir.

1971)). Accordingly, the indictment must be dismissed, even if the Government were to furnish Mr. Farley a bill of particulars.

II. The Indictment Charges Conduct That Is Not A Crime Under D.C. Code § 22-1322(d)

If an indictment alleges conduct that is not a crime under the statute charged, it must be dismissed for failure to state an offense. *See* SCR-Criminal 12(b)(3)(B) (authorizing dismissal for failure to state an offense); *Lamar v. United States*, 240 U.S. 60, 65 (1916) (the objection that an indictment does not charge a crime goes to the merits of the case); *United States v. Akinyoyenu*, Criminal Action No. 15-42 (JEB), 2016 WL 4151040, at *2 (D.D.C. Aug. 4, 2016). Thus, the U.S. District Court for the District of Columbia recently dismissed an indictment charging a violation of the Controlled Substances Act for distribution of Fioricet without a prescription because the statute does not prohibit that conduct. *Id.* at *11.

Here, the Government has charged Mr. Farley with conduct that is not a crime. The statute the Government employs, Section 22-1322(d), provides as follows:

> If in the course and as a result of a riot a person suffers serious bodily harm or there is property damage in excess of $5,000, every person who willfully incited or urged others to engage in the riot shall be punished by imprisonment for not more than 10 years or a fine of not more than the amount set forth in § 22-3571.01, or both.

D.C. Code § 22-1322(d). This statute, by its terms, proscribes "willfully incit[ing] or urg[ing] others to engage in" a riot resulting in serious bodily harm to a person or more than $5,000 of property damage. It does *not* proscribe "willfully *engaging*" in such a riot. But the indictment in this case alleges precisely such conduct. It charges that Mr. Farley and his 62 co-defendants "willfully *engaged*, incited and urged other people to engage in a public disturbance, involving an assemblage of 5 or more persons, that by tumultuous and violent conduct and the threat thereof, resulted in serious bodily harm or property damage in excess of $5,000." (emphasis added).

Therefore, the indictment charges Mr. Farley with conduct—"engaging" in a riot—that Section 22-1322(d) does not proscribe. Indeed, while the indictment purports to charge Mr. Farley with a felony offense, willfully "engaging" in a riot is not a felony under any provision of District of Columbia law.

The Government's inclusion of acts that Section 22-1322(d) does proscribe—*i.e.,* willfully "incit[ing]" and "urg[ing]" a riot—does not save the indictment. To the contrary, it exacerbates the indictment's infirmities because it makes the indictment impermissibly duplicitous. By alleging that Mr. Farley both "engaged" in a riot and "incited and urged others to engage" in a riot in violation of Section 22-1322(d), the indictment collapses into one charge conduct that is not an offense under Section 22-1322(d) and conduct that is an offense under Section 22-1322(d). As a result, it is impossible to know whether the grand jury charged Mr. Farley with conduct that is a crime or conduct that is not a crime. An indictment suffering from such a defect is incurable. *See, e.g., United States v. Savoires*, 430 F.3d 376, 379-81 (6th Cir. 2005) (reversing conviction under 18 U.S.C. § 924(c) where the indictment merged Section 924(c)'s two distinct offenses—"use or carriage" of a firearm "during and in relation to" a drug trafficking crime and "possession" of a firearm "in furtherance of" a drug trafficking crime—into a single count, because the jury could have found the defendant guilty of "possession" of a firearm "during and in relation to" a drug trafficking crime, which is not a crime).

Inasmuch as the indictment charges Mr. Farley with conduct that is not a crime, it is fatally defective and must be dismissed.

CONCLUSION

What happened in this case is no mystery. The police arrested over 200 people *en masse*, and to avoid having to establish the required, individualized probable cause as to each of them at

preliminary hearings—which it knew it could not do—the Government hastily secured an indictment that simply parrots the broad language of Section 22-1322(d) and generically charges scores of individuals (the number sure to be enlarged as additional preliminary hearing dates approach) with "willfully engaging, inciting and urging others to engage in" a riot. The consequence of this indiscriminate, non-individualized, rushed charging process is entirely predictable: a hopelessly vague, impermissibly generalized indictment that defies the most rudimentary constitutional requirements.

Devoid of allegations about what Mr. Farley himself did to violate Section 22-1322(d), the indictment in this case violates Mr. Farley's First, Fifth, and Sixth Amendment rights. To make matters worse, by alleging that Mr. Farley "engaged" in a riot, the indictment charges Mr. Farley with conduct that is not a crime under Section 22-1322(d). For these two independent reasons, the indictment must be dismissed.

Though it need not be said, dismissing the indictment is not a drastic remedy here. To the contrary, it would restore the criminal justice system to its natural, proper order. The Government should not be permitted to charge scores of people with the same generic offense in order to avoid having to establish individualized probable cause against each of them, and then, *after* securing a sweeping, almost indecipherable indictment, figure out which of those individuals engaged in criminal conduct. Rather, the Government should refrain from initiating prosecution unless and until it figures out which individuals actually broke the law. This is especially so in the context of political demonstrations. *See Claiborne Hardware Co.*, 458 U.S. at 916, 919. The Government's approach to this case—indict everyone first, figure out what happened later—is a palpable threat to the exercise of core First Amendment rights. *Id.* at 920 ("In this sensitive field, the State may

not employ means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.") (citations and internal quotations omitted).

Dated: February 21, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2017, a copy of the foregoing Memorandum of Points and Authorities in Support of Defendant Jared Farley's Motion to Dismiss was electronically filed via the CaseFileXpress eFiling service, and notice of the filing will be sent by operation of CaseFileXpress to all parties indicated on the electronic filing receipt

s/_____
Seth Rosenthal