**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**
**CRIMINAL DIVISION—FELONY BRANCH**

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| THE UNITED STATES OF AMERICA | : | Criminal Nos. | 2017 CF2 001247 |
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| v. | : | | 2017 CF2 001257 |
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| GABRIEL MIELKE, et al. | : | | 2017 CF2 001260 |
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: Judge Lynn Leibovitz

**ORDER**

Defendants have moved for dismissal of the indictment.[1] Defendants challenge the validity of Counts 1 and 2 of the indictment on several bases. First, they assert that the charging document is facially insufficient to give notice of the charges. Second, defendants claim that the rioting statute as written is unconstitutionally vague in violation of 5th Amendment Due Process and the First Amendment. Third, they claim, as to Count 2, that there is no felony offense arising from "engaging" in a riot under 22 D.C. Code Section 1322. Fourth, they claim that, as applied to the facts set forth in the indictment charging language, the indictment fails to state a criminal offense because 1) the conduct described is not criminal but rather is protected First Amendment activity; 2) there is a lack of particularity as to the allegations such that the indictment does not state an offense as to some or all defendants and 3) the rioting statute is "inapplicable to disorder arising from political demonstrations." (Jared Farley et al. Motion to

[1]The instant motions seek dismissal of the pending indictment, returned on April 27, 2017. This is the second superseding indictment. Motions to dismiss the superseded indictments have been denied as moot. Count 1 of the April 27, 2017, indictment alleges that all charged defendants violated 22 D.C. Code 1322(d) which makes it a felony willfully to "incite or urge" others to "engage in" a riot that results in serious bodily harm or property damage in excess of $5,000. Count 2 alleges that all charged defendants violated Section 1322 (b), which makes it a misdemeanor willfully to engage in a riot, and Section 1322(d), alleging that the riot resulted in serious bodily harm or property damage in excess of $5,000, which purports to make Count 2 a felony charge. Count 3 charges all charged defendants and "other persons whose identities are both known and unknown to the Grand Jury" with conspiracy to engage in a riot, under 22 D.C. Code 1322(b) only. Counts 4-8 allege that all charged defendants committed felony destruction of property. Count 9 alleges that two named defendants and others known and unknown to the grand jury destroyed property, Count 10 alleges an offense against a single charged defendant that has been resolved by plea agreement. Count 11 charged some but not all defendants with assault on a police officer but has been dismissed by the government. Counts 12-14 allege, only as to a single charged defendant who has since resolved them by plea agreement, three counts of felony assault on a police officer while armed.

Dismiss at p. 13). These challenges also apply to Count 3 in that Count 3 alleges a conspiracy to riot.[2]

As to Count 3, defendants further claim that the conspiracy count fails to allege facts sufficient to establish that defendants knowingly and intentionally entered into an agreement to engage in a riot, and at most alleges only an agreement to protest and march. Defendants seek dismissal of Count 3 also upon a claim that Wharton's Rule prohibits a prosecution both for rioting and conspiracy to riot. Defendants further seek dismissal of Counts 4-8, which charge all defendants with felony destruction of property, on the argument that *Pinkerton* liability does not lie for a felony where the charged conspiracy is to commit a misdemeanor.[3]

Defendants also have, by separate motion, moved for an order compelling the government to disclose the instructions given to the grand jury regarding the rioting and other counts to defendants or, alternatively, *in camera* for inspection by the court. They claim that the government has shown "confusion" regarding the elements of the charged offenses and that, therefore, a risk exists that there were irregularities in the instructions given to the grand jury such that the decision to indict was based upon a misunderstanding of the required *mens rea* and other elements.

The court heard oral argument on both motions on July 27, 2017. Upon consideration of the pleadings in support filed by all defendants, the government's pleadings in opposition to the motions, the oral arguments made at the hearing of the motions, and the entire record of this case, the court will deny both motions.

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[2] In addition, a number of defendants claim that they "should not" have been charged for asserted factual reasons – for example, that they joined the march after others, or were present for a purpose unrelated to protesting and therefore could not have participated with the requisite knowledge and intent or engaged in the conduct ascribed to other defendants. These arguments go to the sufficiency of the evidence and will become relevant at trial, but are not relevant to resolution of the instant motion.

[3] Defendants sought dismissal of Count 11 on the basis that the allegation was derived from a code section stating an iteration of the offense of assault on a police officer that was "defunct" as of January 20, 2017. The government has since conceded and dismissed Count 11.

## A. Motions to Dismiss

### I. Facial Sufficiency of the Indictment

The indictment charges incitement of a riot in Count 1, and engaging in a riot in Count 2. Count 3 alleges conspiracy to engage in a riot. Defendants complain that the language does not sufficiently specify the conduct of each individual defendant, or allege any facts as to certain defendants in the enumerated paragraphs of Counts 1 and 2. They argue that, for this reason, the rioting counts are facially defective. The court concludes that the defendants have shown no insufficiency that would warrant dismissal.

Super. Ct. Crim. R. 7(c) states:

> The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged . . . For each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated. . . . Unless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction.

The sufficiency of an indictment is determined by "(1) whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and (2) whether the record adequately shows that the defendant may plead a former acquittal or conviction in the event any other proceedings are initiated against him later for a similar offense." *Nichols v. United States*, 343 A.2d 336, 340 (D.C. 1975) (*citing Russell v. United States*, 369 U.S. 749 (1962)). If this standard is met, that the indictment could have been made more definite and certain is not material. *Roberts v. United States*, 752 A.2d 583, 587 (D.C. 2000), *cert. denied,* 532 U.S. 1044 (2001) (*citing Hagner v. United States*, 285 U.S. 427, 431, (1932)).

It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as "those words of themselves fully, directly, and expressly, without any

uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished." *United States v. Carll*, 105 U.S. 611, 612 (1882). Although "[u]ndoubtedly the language of the statute may be used in the general description of an offence, . . . 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." *United States v. Hess*, 124 U.S. 483, 487 (1888).

Counts 1 and 2 are "speaking" counts with 42 identical numbered paragraphs each containing specific allegations describing the alleged riot. Paragraph 1 of Counts 1 and 2 names all defendants charged in this case, designating them as a group, "hereinafter, the 'Rioting Defendants,'" and alleging a violation of the statute. Paragraph 1 tracks exactly the language of the subparagraphs of the statute setting forth the offenses of willfully inciting or urging others to engage in a riot, 22 DC Code, Section 1322(d), and willfully engaging in a riot, 22 DC Code Sections 1322(b), respectively.[4] In paragraph 3 of both Counts, the "Rioting Defendants" are alleged as a group to have "used a tactic called the "Black Bloc," which is further described in the paragraph as a tactic involving the members' wearing of black clothing and masks and

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[4] D.C. Code § 22–1322 provides:

**Rioting or inciting to riot.**

(a) A riot in the District of Columbia is a public disturbance involving an assemblage of 5 or more persons which by tumultuous and violent conduct or the threat thereof creates grave danger of damage or injury to property or persons.

(b) Whoever willfully engages in a riot in the District of Columbia shall be punished by imprisonment for not more than 180 days or a fine of not more than the amount set forth in § 22-3571.01, or both.

(c) Whoever willfully incites or urges other persons to engage in a riot shall be punished by imprisonment for not more than 180 days or a fine of not more than the amount set forth in § 22-3571.01, or both.

(d) 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.

moving as a group throughout the streets to prevent identification of those committing acts of violence and prevention of those acts. In subsequent paragraphs, the actions of the "Black Bloc," and the "Rioting Defendants" and the acts which were a "part of" the riot are described in detail, including acts of violence and other acts of participation by the "Rioting Defendants," in other words, all charged defendants. The court concludes that the charging language set forth in these Counts states all of the required elements, including willful commission, of the charged offenses as to all defendants.

Count 3 is also a "speaking" count, tracking the statutory language for conspiracy and engaging in a riot as to all defendants charged in the case, and naming all charged defendants, as well as persons known and unknown to the grand jury, as co-conspirators in a conspiracy to riot. The Count sets forth 38 alleged overt acts alleged to have been committed by conspirators.

The language in Counts 1 and 2 tracks the language of the statute and alleges that each and every charged defendant – each termed a "Rioting Defendant" - has committed the offense. The claim that the language does not allege rioting as to each and every individual defendant is simply incorrect – this is done in paragraphs 1 and 3 alone, and the remaining paragraphs add enormous detail about the concerted actions of the entire group.

Moreover, here the government has announced that it is proceeding on theories of aiding and abetting and conspiracy liability. Thus, each charged defendant who can be shown to be an aider and abettor of those engaging in or inciting the riot is liable as if he were a principal. *See, e.g., Wilson-Bey v. United States,* 903 A.2d 818 (2006)(*en banc*). Conspiracy "justifies conviction of each conspirator for all reasonably foreseeable criminal acts of a co-conspirator . . . without proof of the *mens rea* otherwise required for the subsequent crime." *United States v. Wheeler*, 977 A.2d 973, 985(D.C. 2009) quoting *Wilson-Bey*. *See also Pinkerton v. United*

*States,* 328 U.S. 640 (1946); Redbook Instruction 7.103. Pursuant to these theories, each defendant charged in the indictment may be liable for the acts of others alleged in the indictment, although the indictment does not attribute the acts to the individual.

Conspiracy liability need not be pleaded in the indictment or in a count for which conspiracy liability is sought. *Thomas v. United States*, 748 A.2d 931, 934-36 (D.C. 2000). "Indictments do not recite the government's theory of proof, which is what the *Pinkerton* theory is. *United States v. Edmonds*, 288 U.S. App. D.C. 17, 25, 924 F.2d 261, 269, *cert. denied*, 502 U.S. 838 (1991).

Similarly, in the District of Columbia, the indictment need not include a charge of aiding and abetting for the government to proceed on this theory of liability. *Head v. United States*, 451 A.2d 615, 626 (D.C. 1982). "All persons advising, inciting or conniving at the [criminal] offense, or aiding and abetting the principal offender, shall be charged as principals and not as accessories[.]" D.C. Code § 22-1805; *Fenner v. United States*, 14 CF 331, slip op. at 10 (D.C. 2017). "[T]he elements of aiding and abetting are" that (1) "a crime was committed by someone," (2) "the accused assisted or participated in its commission," and (3) "his participation was with guilty knowledge." *Id.*; *Tann v. United States*, 127 A.3d 400, 439 (D.C. 2015)(quoting *Hawthorne v. United States*, 829 A.2d 948, 952 (D.C. 2003)). "[T]o aid or abet another to commit a crime, it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." *Brooks v. United States*, 599 A.2d 1094, 1099 (D.C. 1991). (internal quotation marks omitted).

As to Count 3, the charging language is sufficient to allege the offense of conspiracy to engage in a riot by all charged defendants. The elements of the offense of conspiracy are 1) an

agreement between 2 or more persons to commit a crime; 2) knowing participation in the agreement with the intent to commit the criminal objective; and 3) commission by a conspirator of an overt act in furtherance of the conspiracy. *See e.g., Castillo-Campos v. United States*, 987 A.2d 476, 482 (D.C. 2010). It is established that the overt acts listed in an indictment may be wholly innocent. *See Yates v. United States,* 354 U.S. 298, 334(1957). Additionally, neither the charging language nor the overt acts need state that the defendants or any one of them met ahead of time or planned to engage in a riot. "An agreement need not be shown to have been explicit. It can instead be inferred from the facts and circumstances of the case." *Iannelli v. United States*, 420 U.S. 770, 777 n.10 (1975). Even where witnesses testify there was no "plan" or that there was no agreement, circumstantial evidence can be sufficient to prove the contrary. Agreement can be "near instant." *Perez v. United States, 968 A.2d 39 (D.C. 2009).* Here, Count 3 tracks the relevant statutory language, alleges that all defendants committed the offense and states the acts constituting the riot in the overt acts.

The charging language of all 3 counts thus satisfies Rule 7 and the demands of *Russell* v. United States, 369 U.S. 749 (1962), relied upon by the defendants, in that the indictment adequately informs each defendant of the charges he or she faces and protects him or her from future prosecution for that offense.

With respect to defendants' claim that, as to Count 2, there is no felony offense arising from "engaging" in a riot under 22 D.C. Code Section 1322, the court will deny the motion to dismiss Count 2, and will defer the substantive determination of this issue to a date prior to the first trial, in order to provide clarity as to the exposure of any defendant upon conviction. Even if the defense is correct, dismissal of Count 2 would not be the remedy in any event, because the

prosecution of the offense stated in Count 2 would go forward on the misdemeanor charge of engaging in a riot. D.C. Code 22-1322(b).

II. The Vagueness and First Amendment Challenges to the Statute

In *United States v. Matthews*, 419 F.2d 1177 (D.C. Cir. 1969) and *United States v. Jeffries*, 45 F.R.D. 110 (D.D.C. 1968), the District of Columbia Circuit and United States District Court for the District of Columbia, respectively, rejected constitutional challenges identical to those made here, to the "willfully engages" provision of the rioting statute, 22 D.C. Code, Section 1322(b). Both cases arose from rioting in the District of Columbia in the aftermath of the assassination of Martin Luther King Jr., and both addressed and rejected Fifth Amendment due process challenges to the rioting statute for vagueness based on claims that the terms of the statute were insufficiently defined to prevent a possible intrusion on First Amendment rights. The language of the statute under which defendants are charged is unchanged. *Jeffries,* 45 F.R.D. at 114-115. *Matthews* is binding upon this court. *Map v. Ryan,* 285 A.2d 310 (1971).

In rejecting the constitutional vagueness challenge to the rioting statute, the court in *Jeffries* stated that the statute is "narrowly drawn and limited so as to define and punish specific conduct." *Id.* at 116, *citing Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940); *see also, e.g., Feiner v. New York,* 340 U.S. 315, 321 (1951).

In *Matthews,* the court made clear that the D.C. rioting statute withstood challenge because, to be subject to a conviction, "[a] person must not only willfully associate himself with an assemblage involving at least five people, but that group must be causing or threatening tumult and violence in such fashion as to create 'grave danger of damage or injury to property or persons,'" 419 F.2d at 1181. Both *Matthews* and *Jeffries* attached and incorporated a jury instruction reflecting this standard and a construction that, the courts held, sufficiently defined

the terms of the statute to withstand First Amendment scrutiny and was intended to limit the conduct that could come within its terms in future prosecutions. *Id.*

The instant motions challenge both the "engaging" and "inciting or urging" sections of the rioting statute. While the *Matthews* and *Jeffries* holdings addressed only the "engaging" section, the construction of these sections by incorporation of the *Matthews* jury instruction addresses the First Amendment claims raised as to both by requiring that a charged defendant act willfully and that he knowingly and intentionally aid or encourage tumultuous and violent conduct that creates a grave danger to property or persons. Indeed, the Redbook Jury Instruction for this offense expressly directs the adaptation of the *Matthews* instruction to a charge of "urging or inciting" a riot where that offense is charged. Redbook Jury Instruction 6.610, *Comment.*[5]

Although "inciting" and "urging" a riot may involve speech in addition to other conduct, the First Amendment does not render the statute unconstitutional for this reason. In *Brandenburg v. Ohio,* 395 U.S. 444 (1969), the Supreme Court held that Ohio's criminal syndicalism statute, under which a Ku Klux Klan member was prosecuted for statements advocating certain action and values of the KKK on television, as applied, punished "mere advocacy," in violation of the First Amendment. *Id.* at 449. The court stated that, "neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action." *Id.* "The constitutional guarantees of free speech . . . do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce

[5] It should be noted that, for reasons that are not clear, the Redbook instruction for the offense of rioting does not recite the *mens rea* required to commit the offense required by *Matthews.* This failure must be kept in mind and corrected in determining proper jury instructions at trial.

such action. *Id.* at 447. Defendants argue that the inciting statute violates the holding and principles of *Brandenburg.* The cases construing that provision do not support defendants' position. *Carr v. District of Columbia,* 587 F.3d 401 (D.C. Cir. 2009)(officers who observed inauguration protesters travel as a group, act cohesively and engage in and cheer on acts of violence by members of the group had probable cause to arrest all those in the group for engaging in and inciting a riot under the identical statute).

The court concludes based upon *Matthews* and *Jeffries,* in addition to the cases applying First Amendment principles to the statute and analogous statutes, that the language of the statute, narrowed in accordance with the *Matthews* instruction, properly limits the conduct prohibited by the "inciting" provision to that unprotected by the First Amendment. *Compare Matthews,* with *Coates v. Cincinnati*, 402 U.S. 611 (1971)(ordinance making it a crime for three or more persons to assemble and conduct themselves in a manner annoying to persons passing by, un-narrowed by any construction by the court, was unconstitutionally vague and for authorizing the punishment of conduct protected by the first amendment). *See also Cantwell v. Connecticut*, 310 U.S. at 308 (breach of the peace includes "not only violent acts but acts and words likely to produce violence in others." ); *United States v. Bridgeman*523 F.2d 1099 (D.C. Cir 1975)(affirming conviction under 22-[1322(d)] for inciting to riot where defendant participated in a prison riot: "the language and legislative history of [22-1322] reflect an interest in preventing not only spontaneous street demonstrations but also in proscribing riot and even incitement to riot. . ."); *Feiner v. New York*, 340 U.S. at 321 (conviction for inciting a breach of the peace for urging people to rise up in arms and fight for equal rights upheld against a claim that it violated rights of free speech under the first and fourteenth amendments. "When a speaker

passes the bounds of argument or persuasion and undertakes incitement to riot, the police are not powerless to prevent a breach of the peace.")

III. The First Amendment and other challenges to the indictment as written

Defendants' First Amendment challenge to the rioting statute as applied to the language of Counts 1 & 2 of the instant indictment also must be rejected. Defendants essentially claim that the indictment fails sufficiently to allege criminal conduct, as opposed to protected conduct, as to each or any charged defendant to withstand a claim that the defendants have been charged for engaging in protected First Amendment activity. In addition, defendants appear to claim that the indictment fails to allege the offenses of engaging in or inciting a riot with sufficient particularity to survive a challenge to facial probable cause. Finally, defendants claim that *Matthews* limited prosecutions under the rioting statute such that the statute is inapplicable to the conduct alleged as to these defendants because they were engaged in a "political demonstration."

As the government rightly argues, these claims are in most respects insufficiency claims as to individual defendants that must be addressed at trial. However, in this case the grand jury has returned a detailed speaking indictment, the allegations of which, within the four corners of the charging document, amply survive a First Amendment challenge as well as scrutiny for Fourth Amendment particularity as to the rioting allegations. *See Matthews & Jeffries, supra; see also Carr v. District of Columbia,* 587 F.3d 401 (D.C. Cir. 2009). In *Carr,* the District of Columbia Circuit reversed the District Court's summary judgment order and rejected a finding that there had been insufficiently particularized probable cause upon which to arrest alleged rioters who participated in a protest march on Inauguration Day in 2005. The opinion addressed both the "engaging" in a riot and "inciting" a riot provisions of D.C. Code Section 22-1322. The D.C. Circuit held that police had sufficiently particularized probable cause to arrest persons

for engaging in and inciting a riot, where the affidavit setting forth the asserted facts included that the police observed the members of the group, among other things, operating as a "cohesive unit," moving or marching together, engaging in violent acts including the throwing of newspaper vending machines into the street and breaking windows of commercial establishments, and cheering such acts by members of the group. *Id.* at 403-04, 407-08. The court concluded that, based on these facts, probable cause existed to arrest every individual within the group. In reaching this conclusion, the court specifically distinguished *Barham v. Ramsey*, 434 F.3d 565 (D.C. Cir. 2006), the "Pershing Park" case, in which police were held to have insufficient knowledge that individual protesters had participated in the alleged criminal actions of the group. The *Carr* court also rejected plaintiff's argument that First Amendment principles prohibited the arrests generally, and also more specifically without a dispersal order. *Id.* at 410 Fn. 6, *citing Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) ("where demonstrations turn violent, they lose their protected quality as expression under the First Amendment."). The *Carr* court further recognized that "the legal issue is probable cause, not ultimate conviction." *Id.* at 408.

Further supporting the sufficiency of the indictment and the rejection of defendants' First Amendment claim as applied to it, is *Rogers v. United States*, 290 A.2d 395 (D.C. 1972). In *Rogers,* defendant, in attempting to gain entry to a concert, for a period of two hours, shouted obscenities outside the doors at police in front of concertgoers whom he tried to get to help him get in and ultimately kicked out glass of the main doors before being arrested. The District of Columbia Court of Appeals held that a combination of both acts and words that was likely to produce violence properly constituted the charged offense of disorderly conduct. Concluding that the statue withstood a First Amendment challenge for vagueness, the court further stated

that, "it is interesting to note that while appellant is not charged with incitement to riot. . . his actions appear to bring him within the scope of that statute....Here we clearly have provocative conduct which undertakes incitement to riot." *Id.* at 397-398. "This case represents a classic example of regulation of conduct through statute and within the scope of the power of the state." *Id* at 398. *See also United States v. Bridgeman,* 523 F.2d 1099 (D.C. Cir. 1975)

Finally, the argument that the rioting statute is inapplicable to "disorder arising from political demonstrations" is similarly contradicted by all relevant authority. *See Carr, supra,* 587 F.3d 401. It is well settled that persons who may intend political protest, but who become violent or who willfully incite violence or other conduct that creates a grave risk of injury to property and persons in the course of the protest, are not shielded from prosecution. *Grayned v. City of Rockford*, 408 U.S. 104.

For all of these reasons, the claims that Counts 1-3 fail to state criminal offenses as to any or all defendants are without merit. The issue of the sufficiency of the evidence to sustain any of these charges against any particular defendant is deferred until the trials of the defendants.

IV. Wharton's Rule.

"Wharton's Rule is an 'exception to the general principle that a conspiracy and the substantive offense that is its immediate end' are discrete crimes for which separate sanctions may be imposed." *Pearsall v. United States*, 812 A.2d 953, 961-62 (D.C. 2002) (citing *Iannelli v. United States*, 420 U.S. 770, 777 (1975)). The rule is grounded in the policy against duplicative punishment for the same offense and is limited to "situations in which the conspiracy to commit a crime produces no additional danger to society[.]" *United States v. Boyle*, 482 F.2d 755, 767 (D.C. Cir. 1973). Formerly construed to be based on double jeopardy principles, the Rule now is construed to be one based in legislative construction. "[A]bsent legislative intent to the

contrary, [Wharton's] Rule supports a presumption that the two [charges] merge when the substantive offense is proved." *Iannelli*, 420 U.S. at 785-86; *see also United States v. Ohlson*, 552 F.2d 1347, 1349 (9th Cir. 1977) ("Wharton's Rule serves as an aid to statutory construction rather than a controlling principle of law and only in the absence of legislative intent to the contrary does the Rule create a judicial presumption of merger"); *see also United States v. Ohlson*, 552 F.2d 1347, 1349 (9th Cir. 1977) ("Wharton's Rule serves as an aid to statutory construction rather than a controlling principle of law and only in the absence of legislative intent to the contrary does the Rule create a judicial presumption of merger").

Moreover, the Supreme Court explained in *Iannelli* that, even when Wharton's Rule would preclude punishment for a conspiracy conviction and a substantive conviction, "[w]e do not consider initial dismissal of the conspiracy charge to be required in such a case." *Iannelli*, 420 U.S. at 786 n. 18. Rather, "the real problem is the avoidance of dual punishment . . . analogous to that presented by the threat of conviction for a greater and a lesser included offense, and should be treated in a similar manner." *Id.*; *see also Pearsall*, 812 A.2d at 962 n. 11 ("initial dismissal of the conspiracy count is not required because the purpose of the rule is avoidance of dual punishment").

Wharton's Rule applies to offenses that share the following characteristics: "[1] the parties to the agreement are the only persons who participate in commission of the substantive offense. . . . [2] the immediate consequences of the crime rest on the parties themselves rather than on society at large . . . and [3] the agreement that attends the substantive offense does not appear likely to pose the distinct kinds of threats to society that the law of conspiracy seeks to avert." *Pearsall v. United States,* 812 A.2d at 953 (*citing Iannelli,* 420 U.S. at 780-784).

Wharton's Rule was classically applied to certain offenses deemed to affect only the actors involved, including adultery, incest, bigamy and dueling. *Iannelli,* 420 U.S. at 782

In *Iannelli*, the United States Supreme Court concluded that Wharton's Rule had no application to the federal gambling statute, 18 U.S.C. § 1955 (b)(1)(ii), which by definition required the involvement of five or more persons. *Iannelli* at 420 U.S. 791. The Court found the significant differences between the characteristics and consequences of the traditional Wharton's Rule offenses and those of the activities proscribed by §1955 to weigh against application of the Rule, stating:

> The conduct proscribed by [18 U.S.C. § 1955] is significantly different from the offenses to which [Wharton's] Rule traditionally has been applied. Unlike the consequences of the classic Wharton's Rule offenses, the harm attendant upon the commission of the substantive offense [of gambling] is not restricted to the parties to the agreement. . . . Moreover, the parties prosecuted for the conspiracy need not be the same persons who are prosecuted for commission of the substantive offense. An endeavor as complex as a large-scale gambling enterprise might involve persons who have played appreciably different roles, and whose level of culpability varies significantly. . . . Nor can it fairly be maintained that agreements to enter into large-scale gambling activities are not likely to generate additional agreements to engage in other criminal endeavors.

*Iannelli* 420 U.S. at 784. After reviewing the legislative history of §1955, the Court concluded that Congress intended to provide the government the traditional option of charging both a conspiracy to violate, and violation of, 18 U.S.C. §1955. *Id.* at 786-91.

Similar reasoning applies to this case, because there is no suggestion in the legislative history of the D.C. rioting statute that the legislature intended to prevent punishment of a defendant for both rioting and conspiracy to riot. Here, the charged offenses do not satisfy the characteristics of offenses covered by Wharton's Rule articulated in *Pearsall* and *Iannelli.* First, the conspiracy count expressly alleges that persons known and unknown to the grand jury were members of the conspiracy, but lists the charged defendants only as having committed the offenses in Counts 1 & 2. It is clear as a practical matter that the planning of the riot could have

been done by persons who never attended the riot, and that those who engaged in and incited the riot in real time could have been persons who were uninvolved in planning it. Second, rioting bears no resemblance to the offenses that traditionally fell under the limitations of Wharton's Rule. Specifically, rioting is inherently a crime that affects society at large. Third, the alleged conspiracy is one that implicates the evil that criminalization of conspiracy was designed to prevent, which is the making of the larger criminal objective attainable –here the creation of grave danger of injury and property damage - by collective and concerted activity. *Iannelli*, 420 U.S.at 778. The offense of rioting does not require either agreement or planning, but is certainly more effectively carried out when an agreement has been formed to engage in a riot with attendant planning and action precedent to the riot itself. Here, therefore, Wharton's Rule does not preclude prosecution in a single trial for both conspiracy to riot and the substantive offense of rioting. *See* 53A Am. Jur. 2d Mobs and Riots § 19 (Aug. 2017) (internal footnotes and citations omitted) ("A conspiracy to riot is separable from the riot itself. It is an indictable offense, and, in proper circumstances, a participant in a riot may be convicted both of riot and of conspiracy to riot. However, one who agrees with others to organize a riot in the future, and commits an overt act pursuant to that agreement, is guilty not of riot but of conspiracy to riot."). *See also, People v. Eaton,* 19 N.Y. 2d 496, 507-08 (N.Y. 1967)(court rejected argument that conspiracy to incite riot necessarily merged with the crime of riot. "A conspiracy to riot is quite separable from the riot itself....The crime of riot ... is not committed until three or more persons, actually assembled, have disturbed or immediately threatened the public peace. A previous agreement or plan is not a necessary element of the crime. One who agrees with others to organize a riot sometime in the future and who commits an overt act pursuant to that agreement is guilty not of riot but of conspiracy to riot.")(internal citations omitted); *Commonwealth v. McSorley*, 174 Pa.

Super. 634, 638 (Pa. Super. Ct. 1953)(conspiracy to riot and participation in a riot were properly treated as two separate crimes such that defendant could be sentenced for both). [6]

The claims that Counts 4-8, which charge felony destruction of property, may not be established as felonies on the basis of *Pinkerton* liability where the offense that is the subject of the agreement is a misdemeanor is unsupported by any authority, as counsel arguing on behalf of a large number of defendants conceded at the hearing. The court concludes that there is no merit to the argument for dismissal on this basis.

B. **Motion to Compel Disclosure of Legal Instructions to the Grand Jury**

Defendants move the court to order disclosure of the instructions given to the grand jury either to the defendants or to the court *in camera.* They argue that the government has betrayed confusion as to the elements of the offenses of engaging in a riot and urging or inciting a riot by returning an earlier indictment that merged both offenses into a single count and by purporting to charge engaging in a riot as a felony in earlier charging documents and in the second superseding indictment; that the government has returned a "defective" indictment lacking in particularized allegations establishing willful commission of the charged offenses by each defendant as to Counts 1, 2 & 3; and that the government charged misdemeanor assault on a police officer in

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[6] *See also, United States v. McNair*, 605 F.3d 1152, 1215–1216 (11th Cir. 2010) (rejecting application of Wharton's Rule to a conspiracy to violate the federal bribery statute); *United States v. Nascimento*, 491 F.3d 25, 48–49 (1st Cir. 2007) (rejecting application of Wharton's Rule to a RICO conspiracy); *United States v. Ruhbayan*, 406 F.3d 292, 300–301 (4th Cir. 2005) (rejecting application of Wharton's Rule to a conspiracy to commit witness tampering and suborning perjury); *United States v. Walker*, 796 F.2d 43, 46-47 (4th Cir. 1986) (conspiracy to commit espionage and espionage convictions withstood Wharton's Rule challenge where legislature's intent was not readily discernible and where substantive offense lacked characteristics of traditional Wharton's Rule offenses); *Zambrana v. United States*, 790 F. Supp. 838, 848-49 (N.D. Ind. 1992) ("Wharton's Rule is inapplicable where the harm from the conspiracy at issue ranges far beyond the immediate event or substantially affects persons who do not participate as necessary actors . . . Where the conspiracy is more dangerous than the substantive offense, the rationale for Wharton's Rule evaporates, and the court will not presume that Congress intended the crimes to merge"); *People v. Johnson*, 57 Cal. 4th 250, 264-66 (Cal 2013) (failing to apply presumption of Wharton's Rule to prosecution for conspiracy to commit active gang participation where criminal street gang is defined as "any ongoing organization, association, or group of three or more persons . . . engaged in a pattern of criminal gang activity")

Count 11 although it recently had been redefined by legislative amendment such that the offense no longer existed as charged. Defendants argue that particularized need for such disclosure has been established, or that, in the alternative, giving of instructions to a grand jury is a ministerial function unprotected, or less protected when balanced against the proffered reasons for disclosure, by grand jury secrecy rules. The government opposes on the basis that the suggestion that the government gave improper instructions to the grand jury is speculative on this record, and that defendants have not made the required showing of particularized need. In addition, the government asserts that there no settled authority for the proposition that a lesser level of justification is required for disclosure of instructions than is required for other grand jury materials.

The Supreme Court has construed Criminal Rule 6(e) "to require a strong showing of particularized need for grand jury materials before any disclosure will be permitted." *Davis v. United States,* 641 A.2d 484, 490 n.17 (D.C. 1994), *citing United States v. Sells Engineering,* 463 U.S. 418 (1983); Super Ct. Crim R. 6(e). This is because "[a] policy of secrecy has been deemed necessary to enable the grand jury to fulfill its dual purposes" of investigating matters to determine whether there is probable cause for criminal indictment and acting as a "bulwark . . . between the ordinary citizen and an overzealous prosecutor." *Davis v. United States,* 641 A.2d at 488. (internal citations omitted). A "particularized need" is established where the parties seeking disclosure "'show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed.'" *United States v. Alexander,* 428 A.2d 42, 53 (D.C. 1981), *quoting Douglas Oil Co. v. Petrol Stops Northwest,* 441 U.S. 211 (1979).

Grand jury secrecy may be invaded "at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." Rule 6(e)(3)(E)(ii). Thus, where "particularized and factually based grounds exist to support the proposition that irregularities in the grand jury proceedings may create a basis for dismissal of the indictment," the court may order production of grand jury materials needed to pursue a motion to dismiss. *See, e.g., United States v. Johnson,* 337 F.2d 180, 197 (4th Cir. 1964); *c.f. United States v. Stevens,* 771 F.Supp. 2d 556, 567 (D. Md. 2011)(where prosecutor's legal instruction to the grand jury regarding the *mens rea* required to commit the offense seriously misstated the applicable law regarding a possible defense, the indictment was subject to dismissal because the misstatement cast "grave doubt that the decision to indict was free from the substantial influence" of the erroneous instruction).

Here, the defendants claim that the government made "mistakes" that indicate that it misstated the law in instructing the grand jury. The claimed mistakes are (1) that its first indictment (later superseded) charged both engaging in a riot and inciting or urging a riot as a single offense, although they are separately stated in different paragraphs of Section 22-1322; (2) that in the second superseding indictment it purported to charge engaging in a riot as a felony, where the defendants claim rioting is defined only as a misdemeanor in 22-1322(b), and there is no section of the rioting statute that provides for a felony offense of rioting; (3) the superseding indictment included count 11 which charged misdemeanor assault on a police officer under a code section recently amended to eliminate the indicted offense; and (4) the indictment is "defective" for failing to state a criminal offense as to each defendant, the claimed basis for dismissal above. The court concludes that defendants have not asserted mistakes or other facts that, even if true, establish that the government mis-instructed the grand jury in any respect.

The second superseding indictment was returned by a grand jury that did not return either preceding indictment. For this reason, whatever "confusion" defendants claim the government betrayed by charging both "engaging in" and "inciting or urging" a riot in a single count in the first superseding indictment had no bearing on the indictment returned on April 27, 2017, which properly charged the two in separate counts. Nor is the fact that the government has charged "engaging" in a riot in Count 2 as a felony by citing both the code section for misdemeanor engaging in a riot, 22-1322 (b), and also 22-1322(d)(felony inciting to riot), a betrayal of confusion. The government did this deliberately, asserting that the offense can be charged as a felony and that the legislature intended this.[7] In any event, the charging language for the felony and the misdemeanor is the same, except that the felony charge specifies that property damage in excess of $5000 and serious bodily harm resulted from the riot. The only means by which the distinction between the misdemeanor and the felony is expressed is in the code sections cited at the end of the charging language. The code sections listed in an indictment are clerical in nature,and do not affect the validity of the charging language. Rule 7(c). In any event, the question whether Count 2 charges a misdemeanor or felony reflects no possibility of erroneous instruction of the grand jury, which neither hears instructions nor makes decisions about penalties, or the code sections cited at the end of the charging language.

With respect to Count 11, which charged misdemeanor assault on a police officer as an offense that, in that particular iteration, recently has been eliminated from the DC Code, the government conceded and that count has been dismissed. The grand jury's indictment of that offense reflects no error in instructions given regarding the rioting charges or any other pending count.

[7] A review of the legislative history betrays some inconsistency on this point such that neither the defendants' nor the government's position is unfounded. The court has deferred resolution of this issue.

Finally, for reasons stated above, the defendants' claims that the rioting and conspiracy counts are "defective" are without merit and therefore do not suggest any failure to properly instruct the grand jury that returned the superseding indictment. Indeed, because the indictment in this case is a detailed "speaking" indictment setting forth 42 paragraphs of facts found by the grand jury in the rioting counts, and because, as the court has concluded, the factual recitations on their face establish probable cause with sufficient particularity as to all charged defendants, there are no "particularized and factually based grounds ... to support the proposition that irregularities" in the instructions given to the grand jury may create a basis for dismissal of the indictment in this case.[8]

There is a presumption of regularity in grand jury proceedings. *Hamling v. United States,* 418 U.S. 87, 139 n.23 (1974); *United States v. Trie,* 23 F. Supp. 2d 55, 61 (D.D.C. 1998). As with other grand jury material, a defendant requesting disclosure of grand jury transcripts must show a particularized need for such information. *Trie,* 23 F. Supp. 2d at 62, *citing Douglas Oil,* 441 U.S. at 222-223. The court concludes that there is insufficient basis to support defendants' claims that the government operated under a "gross misunderstanding of the law that likely infected the grand jury process," (Motion of Daniel Kaufman et al., at p. 6-7) or gave materially incorrect legal instructions regarding the required mental state or any other element of the offenses to the grand jury that returned the second superseding indictment. Further, given the facial validity of the indictment and the detailed factual recitation by the grand jury in bringing the charges, and since none of the claimed "mistakes" or "confusion" can have affected the grand

[8] At oral argument the court asked the government whether it was willing to confirm that it had instructed the grand jury by giving the instruction appended to *Matthews* and *Jeffries, supra.* The government responded that the government generally gives legal instructions to all grand juries asked to return an indictment, and asked for time to consider its reply to the court's specific inquiry. In its Supplemental Opposition, the government has not responded to the question, and argues that the defendants have failed to make the required showing. The court has considered the government's response and for the above reasons concludes that the government will not be required to disclose its instructions to the grand jury in this case.

jury's charging decisions on the record of this case in any way that would have led to dismissal, the defendants have not established a particularized need warranting disclosure of the legal instructions given to the grand jury either to defendants or *in camera* to the court. Even if the defendants' claim that legal instructions were ministerial were supported, there is still no basis to order their disclosure on this record.

For these reasons, the court hereby, this 14 day of **September, 2017**, hereby

**ORDERED** that defendants' motions to dismiss the indictment, or any count of the indictment, are **DENIED**. It further is

**ORDERED** that defendants' motions to compel disclosure of grand jury proceedings are **DENIED.**

**Lynn Leibovitz**
**Associate Judge**
(signed in chambers)

cc:

Jennifer Kerkhoff
Assistant United States Attorney

Counsel for all defendants