IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	**Case No.: 1:21-cr-195-TFH**
v.	:	
DEBORAH SANDOVAL and SALVADOR SANDOVAL, JR.,	:	
Defendants.	:	

UNITED STATES' RESPONSE TO SALVADOR SANDOVAL JR.'S TRIAL BRIEF

The United States, by and through its attorneys, respectfully submits this response to Salvador Sandoval, Jr's (Salvador) Trial Brief (ECF 96). Salvador's trial brief is deficient in three respects. First, Salvador focuses on his assaults but ignores the five other ways the government can prove a violation 18 U.S.C. § 111(a)(1). Second, grabbing an officer's riot shield is a violation 18 U.S.C. § 111(a)(1). Salvador's contrary contention lacks merit. Third, as a matter of law, the facts do not support a claim of self-defense or defense of others because Salvador acted as the aggressor and intended his violent acts to interfere with the officers' official performance of their duties.

I. Salvador fails to address the five other prohibited acts in 18 U.S.C. § 111(a)(1).

Salvador addresses one prohibited act in § 111(a)(1): assault. But Section 111 plainly identifies six categories of prohibited conduct, covering anyone who "forcibly assaults, resists, opposes, impedes, intimidates, or interferes" with a federal officer engaged in official duties. 18 U.S.C. § 111(a)(1). By using commas between the verbs and the disjunctive "or," Congress made clear its intention that each category of prohibited conduct should be separate and independent of the others. *See Horne v. Flores*, 557 U.S. 433, 454 (2009). And although all six acts require the

defendant to act "forcibly," *see United States v. Arrington*, 309 F.3d 40, 44 (D.C. Cir. 2002), only one is "assault." The other five prohibited acts involve behavior that threatens federal officers or obstructs their official activities but does not necessarily constitute an "assault."

Salvador's trial brief focuses on the word assault, but fails "to … give[] effect" to "every word" in the statute. *United States v. Stands Alone*, 11 F.4th 532, 536 (7th Cir. 2021) (quoting Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 174 (2012)). As noted, the felony clause "refers back to the original list of [six] violative acts against current or former officials." *United States v. Briley*, 770 F.3d 267, 273 (4th Cir. 2014). If assault were an essential element of Section 111(a)'s felony clause, as Salvador contends here, the "remaining five verbs [would be] superfluous." *Stands Alone*, 11 F.4th at 535; *see generally United Mine Workers of Am. 1974 Pension Plan v. Energy W. Mining Co.*, 39 F.4th 730, 738 (D.C. Cir. 2022) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (citation omitted).

The D.C. Circuit's decision in *Arrington*, 309 F.3d 40 (D.C. Cir. 2002), is instructive on Section 111(a)'s sweep. The court explained that "a defendant does not violate the statute unless he *forcibly* assaults or *forcibly* resists or *forcibly* opposes, etc." *Id.* at 44. *Arrington*'s emphasis on Section 111(a)'s disjunctive formulation supports the view that the statute punishes a broad range of conduct beyond assaults.

Salvador committed at least four violations of § 111(a)(1) at the U.S. Capitol on January 6: he grabbed a police officer's arm and pulled another officer's riot shield (count two); he pushed an officer (count three); he shoved another officer (count four); and he grabbed a different officer's shield (count five). These actions constitute forcible assaults, but, also, the forcible resistance, obstruction, opposition, impediment, intimation, or inference of the officers' official performance of their duties in securing the Capitol.

II. Salvador violated 18 U.S.C. § 111(a)(1) when he grabbed an officer's riot shield with the intent to commit other felonies.

Salvador's trial brief argues that, "for two of the four . . . charges under [§ 111(a)(1), . . . the government will not prove actual physical contact between Sandoval and the person of the involved officer; instead, any such contact was with riot shields held by two of the officers." This argument misapplies the law, and will fail at trial. The trial evidence will demonstrate Salvador's guilt under Section 111(a)(1) because: 1) he made physical contact with officers or their riot shields; and 2) he forcibly resisted, opposed, impeded, intimidated, or interfered with the officers with the intent to commit another felony: namely, civil disorder (count one) and obstruction of an official proceeding (count six).

A. Grabbing an officer's riot shied constitutes an assault.

Grabbing an officer's riot shield is an assault. The term assault means any intentional attempt or threat to inflict injury upon someone else, when coupled with an apparent present ability to do so. *See* ASSAULT, Black's Law Dictionary (11th ed. 2019) ("An attempt to commit battery, requiring the specific intent to cause physical injury."). Salvador grabbed several officers' riot shields, pulling them towards an angry mob that was battling them over control of the Capitol. Salvador's actions were intentional and were an attempt or threat to inflict injury upon those officers. His actions were an assault.

In *United States v. Taliaferro*, 211 F.3d 412, 415 (7th Cir. 2000) the Seventh Circuit explained that "contact between the aggressor and the victim need not be direct" to qualify as a battery. Rather, it "can result from the 'indirect application of force ... by some substance or agency placed in motion by' the aggressor." *Id.* (citation omitted); *see also id.* at 415-16 (7th Cir. 2000) (citing cases holding that "spitting on another person has long been held to constitute a battery"). That holding aligns with common-law principles, which recognize that "a battery may

occur through a defendant's direct or indirect contact with the plaintiff." *Nelson v. Carroll*, 735 A.2d 1096, 1100 (Md. 1999); *see id.* at 1101 ("[I]t is enough that the defendant sets a force in motion which ultimately produces the result") (citing Prosser & Keeton, The Law of Torts, § 9, at 40 (5th ed. 1984)); *Mooney v. Carter*, 160 P.2d 390, 392 (Colo. 1945) ("[t]o constitute [a battery] it is enough willfully to set in motion a force which in its ordinary course causes an injury"; defendant who swerved her car to throw a police officer from the running board caused a battery); *see generally* 6A C.J.S. *Assault*, § 12 (2011) (battery can occur through direct or indirect contact so long as the force applied is the proximate cause).

B. Alternatively, Salvador engaged in obstructive conduct with the intent to commit another felony.

Even assuming that some of his conduct does not qualify as "assault," Salvador forcibly resisted, opposed, impeded, intimidated, or interfered with federal officers who were engaged in the performance of their official duties with the intent to commit two felonies, civil disorder (count one) and obstruction of an official proceeding (count six).

The history and design of Section 111 confirm its application to non-assaultive conduct. The statute's predecessor made it an offense to "forcibly resist, oppose, impede, intimidate, or interfere with any" designated federal official "while engaged in the performance of his official duties, or [to] assault him on account of the performance of his official duties." Act of May 18, 1934, ch. 299, § 2, 48 Stat. 781 (18 U.S.C. 254 (1940)). That provision, which contained the same six offense-conduct verbs as the current version, was designed to "insur[e] the integrity of law enforcement pursuits." *United States v. Feola*, 420 U.S. 671, 682 (1975). As the Supreme Court recognized, the provision clearly "outlawed more than assaults." *Id.* at 682 n.17; *see Ladner v. United States*, 358 U.S. 169, 176 (1958) (explaining that the prior statute "ma[de] it unlawful not only to assault federal officers engaged on official duty but also forcibly to resist, oppose, impede,

intimidate or interfere with such officers," noting that "[c]learly one may resist, oppose, or impede the officers or interfere with the performance of their duties without placing them in personal danger").

In *Ladner v. United States*, for example, the Court stated that "the locking of the door of a building to prevent the entry of officers intending to arrest a person within would be an act of hindrance denounced by the statute." 358 U.S. at 176. The Court noted that in 1948, Congress reordered the statute by placing the word "assaults" in front of the five other verbs. Act of June 25, 1948, ch. 645, 62 Stat. 688 ("Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes"); *see Ladner*, 358 U.S. at 176 n.4. That "change in wording," however, "was not intended to be a substantive one." *Ladner*, 358 U.S. at 176 n.4 (discussing Reviser's Notes). And courts therefore properly continued to uphold convictions for non-assaultive conduct under Section 111. *See United States v. Johnson*, 462 F.2d 423, 425, 429 (3d Cir. 1972) (upholding conviction for "willfully resisting, opposing, impeding and interfering with federal officers," despite jury's conclusion that defendant did not commit "assault").

This case is similar to *United States v. Hightower*, 512 F.2d 60 (5th Cir. 1975). In *Hightower*, a federal officer detained the defendant for a hunting offense. *Id.* at 61. As the agent was in his vehicle, the defendant reached in and grabbed the agent by his coat. *Id.* When the agent pushed back, the defendant grabbed the arm of the agent's jacket and gave "a pretty good tug." *Id.* The Fifth Circuit subsequently affirmed the defendant's conviction under 18 U.S.C. § 111, finding "sufficient evidence of the use of force." *Id.* at 61.

The same principle applies here. At 3:27 p.m. (count five), Salvador forcibly grabbed a police officer's riot shield and engaged in a tug-of-war to disarm the officer of the shield. That

conduct—grabbing and tugging at the officer's riot shield—is no different than the act of grabbing an agent's jacket.

Before 1994, Section 111 had a two-tier punishment structure: It punished a defendant who forcibly committed actions described by any of the six verbs with up to three years of imprisonment; but where "any such acts" involved a deadly or dangerous weapon, the maximum sentence was ten years. 62 Stat. 688. In 1994, Congress amended the penalty structure of Section 111 to its current tripartite structure by carving out less-severe forms of the offense into their own category. It introduced the phrase "simple assault" to encompass misdemeanor violations, punishable by no more than a year in prison; "all other cases" would continue to be punishable by up to three years; and offenses involving a dangerous or deadly weapon would remain punishable by up to ten years, as would any act that "inflicts bodily injury." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320101(a), 108 Stat. 2108; *see* Federal Judiciary Protection Act of 2002, Pub. L. No. 107-273, Div. C, Tit. I, § 11008(b), 116 Stat. 1818 (increasing second- and third-tier penalties). In so doing, however, Congress gave no indication that it intended to cut back on the statute's substantive reach by eliminating non-assaultive conduct from the statute's scope.

Congress's subsequent amendment of the statute in 2008 specifically limited the second tier to cases involving physical contact or felonious intent by striking the phrase "in all other cases" from Section 111(a) and inserting "where such acts involve physical contact with the victim of that assault or the intent to commit another felony." Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 208(b), 121 Stat. 2538. In doing so, Congress necessarily understood the language of the first-tier misdemeanor provision to encompass non-assaultive conduct—like resisting arrest—that does not involve physical contact or felonious intent. Otherwise, such

conduct would not be covered by the statute at all, "rip[ping] a big hole in the statutory scheme" and "leav[ing] those officials without protection for the carrying out of federal functions." *Briley*, 770 F.3d at 274; *see United States v. Williams*, 602 F.3d 313, 317 (5th Cir. 2010) ("The recent change in the statutory language … also supports the conclusion that § 111(a)(1) prohibits more than assault, simple or otherwise.").

Thus, for almost a century, Congress has protected federal officials in the performance of their duties by criminalizing six categories of forcibly obstructive conduct. Although over time it has altered the punishment according to the severity of the defendant's behavior—eventually settling on the current three-tier punishment structure[1]—at no point has Congress altered the six basic categories of forcible conduct covered by the statute. Section 111(a) therefore continues to apply to any defendant who forcibly "resists, opposes, impedes, intimidates, or interferes with" a federal officer, whether or not his conduct also constitutes assault. 18 U.S.C. § 111(a); *see Ladner*, 358 U.S. at 176 n.4.

The question whether Salvador's actions constitute "assault" does not accordingly resolve the Section 111(a)(1) charges. The trial evidence will also show, on counts two through five, that Salvador engaged in forcible obstructive conduct with respect to the officer with the intent to commit two felonies, civil disorder (count one) and obstruction of an official proceeding (count six). He is guilty of violating Section 111(a)(1), irrespective of whether this conduct also qualifies as "assault."

[1] Referring to simple assault (a misdemeanor), using physical contact (an 8-year felony), and using a deadly or dangerous weapon or inflicts bodily injury (a 20-year felony). 18 U.S.C. § 111.

III. SALVADOR IS NOT ENTITLED TO SELF-DEFENSE OR DEFENSE OF OTHERS BECAUSE HE WAS THE AGGRESSOR AND HE ASSULTED AN OFFICER WHO WAS PERFORMING THEIR OFFICIAL DUTIES.

On January 6, 2021, Salvador stormed the Capitol, trespassed on the Capitol's restricted grounds, violently engaged multiple officers, and was the aggressor. Yet he claims self-defense or defense-of-others. As violent trespasser, and the aggressor, he cannot cloak himself in those doctrines to escape liability. A defendant charged under Section 111 may assert, as an affirmative defense, a theory of self-defense or defense-of-others, "which justifies the use of a reasonable amount of force against an adversary when a person reasonably believes that he [or another] is in immediate danger of unlawful bodily harm from his adversary and that the use of such force is necessary to avoid this danger." *United States v. Middleton,* 690 F.2d 820, 826 (11th Cir. 1982) (emphasis added).

This defense, however, contains two important limitations. First, Congress enacted Section 111 "to protect both federal officers and federal functions." *United States v. Feola*, 420 U.S. 671, 679 (1975). As a result, "[a]n individual is not justified in using force for the purpose of resisting arrest or other performance of duty by a law enforcement officer within the scope of his official duties." *United States v. Drapeau*, 644 F.3d 646, 653 (8th Cir. 2011); *see also United States v. Branch*, 91 F.3d 699, 714 (5th Cir. 1996) ("[Self-defense] principles must accommodate a citizen's duty to accede to lawful government power and the special protection due federal officials discharging official duties."). Second, even in circumstances where an individual might be justified in using some force to resist a federal officer, that resistance must be reasonable under those circumstances. *See Abrams v. United States*, 237 F.2d 42, 43 (D.C. Cir. 1956) (observing that "the use of 'reasonable force' only would have been open to defendants"); *see also United States v. Wallace,* 368 F.2d 537, 538 (4th Cir. 1966) (explaining that Section 111 permits "reasonable force employed in a justifiable belief that it is exerted in self-defense"); *United States*

v. Perkins, 488 F.2d 652, 655 (1st Cir. 1973) (defendant may be convicted under Section 111 where "he used more force than was necessary to protect the person or property of himself or others").

Moreover, the defendant has the initial burden of production to raise a self-defense or defense-of-others claim. *See United States v. Branch*, 91 F.3d 699, 712 (5th Cir. 1996) (concerning the analytically identical self-defense justification). Only after the defendant meets his burden of production does the Government have the burden to disprove the defense beyond a reasonable doubt. *See id.* The Government is under no duty to affirmatively produce evidence to refute the defense-of-others claim. *See id.* For the defendant to satisfy the initial burden of production, "there must be evidence [in the trial record] sufficient for a reasonable jury to find in [the defendant's] favor." *Mathews v. United States*, 485 U.S. 58, 63 (1988).[2]

Salvador cannot meet that burden for three reasons.

First, Salvador acted for sole purpose of impeding officers as they attempted to perform their official duties at the Capitol on January 6, 2021. Salvador's claim of self-defense contains two important limitations. Congress enacted Section 111 "to protect both federal officers and federal functions." *United States v. Feola*, 420 U.S. 671, 679 (1975). As a result, "[a]n individual is not justified in using force for the purpose of resisting arrest or other performance of duty by a law enforcement officer within the scope of his official duties." *United States v. Drapeau*, 644 F.3d 646, 653 (8th Cir. 2011); *see also United States v. Branch*, 91 F.3d 699, 714 (5th Cir. 1996) ("[Self-defense] principles must accommodate a citizen's duty to accede to lawful government

[2] *See also United States v. Biggs*, 441 F.3d 1069, 1071 (9th Cir. 2006) (To establish a prima facie case of self-defense, the defendant must make an offer of proof of "(1) a reasonable belief that the use of force was necessary to defend himself or another against the immediate use of unlawful force and (2) the use of no more force than was reasonably necessary in the circumstances.")

power and the special protection due federal officials discharging official duties."). And even in circumstances where an individual might be justified in using some force to resist a federal officer, that resistance must be reasonable under those circumstances. *See Abrams v. United States*, 237 F.2d 42, 43 (D.C. Cir. 1956) (observing that "the use of 'reasonable force' only would have been open to defendants"); *see also United States v. Wallace,* 368 F.2d 537, 538 (4th Cir. 1966) (explaining that Section 111 permits "reasonable force employed in a justifiable belief that it is exerted in self-defense"); *United States v. Perkins*, 488 F.2d 652, 655 (1st Cir. 1973) (defendant may be convicted under Section 111 where "he used more force than was necessary to protect the person or property of himself or others").

The officers who were protecting and securing the Capitol on January 6, 2021, were acting in the course of their official duties. At trial, this Court will hear that the officers were pushing rioters from the Capitol to secure it for the Certification of the Electoral College Vote. Between 3:18 p.m. and 3:27 p.m., Salvador grabbed officers riot shields and pushed officers to prevent them from securing the Capitol. At 3:25 p.m., officer Eddie Choi bent over to pick rioters off the ground for their safety. As he was exposed and bent over, Salvador charged him and pushed him. Officer Choi's actions were to assist and help rioters and cannot be categorized as "sadistic and malicious force . . . for the purpose of causing [] harm." *Id.* The only individuals using force to cause harm that day were Salvador's and his fellow rioters.

Second, even if the defendant had the right to resist the officers in some fashion, the proffered video evidence shows that the defendant escalated the encounter into a violent attack on the officers. *See Waters v. Lockett* 896 F.3d 559, 570 (D.C. Cir. 2018) (self-defense not applicable "if [the defendant] and his co-conspirators used excessive force to repel Hargrove's attack"). In particular, the defendant grabbed officers riot shields, pulled on their arms, and

pushed officers to prevent them from securing the Capitol. This quantum of force was unreasonable and, accordingly, disqualifies the defendant from claiming self-defense.

Lastly, the proffered video evidence demonstrates that the defendant was the initial aggressor in this case. At no point before the assault did the officers apply force to the defendant, other than to push the mob out of the Capitol. Indeed, the video evidence shows that the officers made only incidental and non-forceable contact with the defendant while they were executing their official duties. It was the defendant who then initiated a violent physical attack by grabbing the officers, pulling their riot shields, pushing officers. He therefore cannot, as a matter of law, seek acquittal on the Section 111 charge by asserting self-defense.

"A defendant cannot claim self-defense if he was the aggressor or if he provoked the conflict upon himself." *Waters v. Lockett*, 896 F.3d 559, 569 (D.C. Cir. 2018) (internal quotation marks and citation omitted). That principle applies fully to Section 111 prosecutions. *See, e.g.*, *United States v. Mumuni Saleh*, 946 F.3d 97, 110 (2d Cir. 2019) ("Mumuni was the initial aggressor in the altercation with Agent Coughlin; as such, he could not, as a matter of law, have been acting in self-defense"); *United States v. Acosta-Sierra*, 690 F.3d 1111, 1126 (9th Cir. 2012) ("[A]n individual who is the attacker cannot make out a claim of self-defense as a justification for an assault.").

Other circumstances depicted in the video do not bear on the elements of self-defense. Defendant may have objected to law enforcement's presence at the U.S. Capitol, their effort to detain or remove other individuals at the scene, or their directives that he move from his position and leave the area. None of that matters. *See United States v. Urena*, 659 F.3d 903, 907 (9th Cir. 2011) (observing that "harsh words from another, insulting words, demeaning words, or even fighting words" does not provide license to "stab the offending speaker in the neck, bash their

skull with a baseball bat, send a bullet to their heart, or otherwise deploy deadly force in response to the insult"). Because the defendant "was the attacker" in this case, *ibid.*, he cannot advance a self-defense theory.

Salvador also asserts a defense-of-others claim. This too is not supported by the facts or the law.

Salvador's self-defense and defense-of-others claims will fail because the officers were performing their official duties when he assaulted them, he escalated the conflict, and because he was the aggressor. Because Salvador will fail to satisfy his burden of production during trial, he will not be entitled to argue self defense or defense of others in his argument to the Court.

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