

or obstruct law enforcement and that he engaged in an action that involved some violent force with a police officer on the scene.

II. 18 U.S.C. 231(a)(3) requires a specific intent to interfere with law enforcement.

The issue of what intent is required to violate 231(a)(3) has not been addressed by the District of Columbia Circuit Court of Appeals. Other circuits have squarely found that the offense requires a specific intent to interfere with or obstruct law enforcement. *See National Mobilization Committee to End War in Viet Nam v. Foran*, 411 F.2d 934, 938 (7th Cir. 1969); *U.S. v. Mechanic* 454 F.2d 849, 854 (8th Cir. 1971); *United States v. Casper*, 541 F.2d 1275, 1276 (8th Cir. 1976). Although “[i]t is true that Section 231(a)(3) does not specifically refer to intent,” Congress will not be presumed to have omitted a scienter requirement “where, as here, the crime is grounded on the common law.” *Nat’l Mobilization Committee*, 411 F.2d at 937. In *Mechanic*, the Seventh Circuit overruled a due process challenge to Section 231(a)(3) on the basis that the statute requires intent. 454 F.2d at 854. This is consistent when considering constitutional challenges to the statute, because a constitutional issue as to the breadth of the statute is avoided by construing it to require specific intent. *See Nat’l Mobilization Committee*, 411 F.2d at 937-938.

Courts in this district have reached the same conclusion about mens rea in multiple cases concerning the January 6, 2021 civil disorder. *See United States v. McHugh*, 538 F.Supp.3d 1, 25 (D. D.C. 2022); *United States v. Williams*, 2022 WL 2237301 (D. DC 2022); *United States v. Gossjankowski*, 2023 WL 130817 (D. D.C. 2023); *United States v. Bingert*, 605 F.Supp.3d 111, 128-129 (D. D.C. 2022); *United States v. Fischer*, 2022 WL 782413 (D. D.C. 2022). Consistent with the Seventh and Eighth Circuit and aforementioned cases from this district, Mr. Mlynarek asks that the Court apply a standard of specific intent to obstruct in determining whether he violated Section 231(a)(3).

III. An act to obstruct, impede or interfere requires more than presence at a civil disorder.

The District of Columbia Circuit Court of Appeals has not addressed the issue of what constitutes an “act to obstruct, impede, or interfere” with law enforcement under this statute. It appears that the only Circuit to have interpreted that provision of Section 231(a)(3) is the Eighth Circuit in *U.S. v. Mechanic*, 454 F.2d at 852. The Eighth Circuit noted the statute requires more than mere presence at a civil disorder and therefore applies only to a further act committed during the course of the event. *Id.* at 853. And in similar fashion to the courts that have ruled on the mens rea issue, the Eighth Circuit was mindful of the constitutional issues that arise when an actus reus requirement is interpreted too broadly. *Mechanic* held that Section 231(a)(3) does not apply to speech, but only covers “violent physical acts.” *Id.* at 852. The court reached its conclusion in response to a First Amendment challenge made by the defendants, who were accused of throwing cherry bombs at police officers during a protest that had turned violent. *Id.* at 850-852. Although the court acknowledge that even offensive conduct is entitled to First Amendment protection, it does not extend to rioting or other forms of physical violence. *Id.* at 852.

Some district courts have disagreed with the holding in *Mechanic*, including judges within this district. *See McHugh*, 583 F.Supp.3d at 28-29; *Mostofsky*, 579 F.Supp.3d at 23-24; *United States v. Nordean*, 579 F.Supp.3d 28, 58 (D. D.C. 2021); *United States v. Phomma*, 561 F.Supp.3d 1059, 1068 (D. Oregon 2021); *United States v. Wood*, 2021 WL 3048448 (D. Delaware 2021). There are important reasons, however, that the Court should agree with the Eighth Circuit in *Mechanic* and find that violent conduct is necessary to violate Section 231(a)(3) in this case. First, the case law makes it clear that speech alone is insufficient to constitute a violation of 231(a)(3). *See Phomma*, 561 F.Supp.3d at 1068 (“[t]he words ‘any act’ imply that the statute is directed

towards conduct rather than speech); *McHugh*, 583 F.Supp.3d at 28-29 (same); *Nordean*, 579 F.Supp.3d at 58 (same); *Mostofsky*, 579 F.Supp.3d at 22-23 (same). Because the challenges were raised on First Amendment grounds, it was not necessary for those courts to have reached the issue of whether the act must be violent or not, because with speech all but excluded, the statute does not “make unlawful a substantial amount of constitutionally protected conduct.” *Mostofsky*, 579 F.Supp.3d at 22 (quoting *City of Houston*, 482 U.S. at 459, 107 S.Ct. 2502).

Second, it should also be noted that when Section 231(a)(3) has been charged in relation to January 6, the allegations are overwhelmingly of violent acts. For instance, in *Mostofsky*, the defendant filed a list of over 60 January 6 defendants who were charged with violations of Section 231(a)(3) and that all appear to involve violent conduct, which that court noted. 579 F.Supp.3d at 24 (referring to ECF no. 47-1). Finally, as Judge Jackson noted in *United States v. Williams*, “[t]here are standard jury instructions on obstructing officers that have long since been approved by the Court of Appeals.” 2022 WL 2237301 fn. 3 (citing Instruction No. 6.101, Obstructing Justice, Criminal Jury Instructions for the District of Columbia (16th ed.)). Jury Instruction No. 6.101 describes multiple offenses related to the general theme of obstruction of justice and they all involve some variation of physical harm or threats of harm (violence, threatening letter or communication etc). See Instruction No. 6.101, Obstructing Justice, Criminal Jury Instructions for the District of Columbia (16th ed.). These factors strongly suggest that Mr. Mlynarek would have to have been engaged in some sort of violent contact with law enforcement to be convicted of this offense.

III. Conclusion

The contested portion of this offense requires Mr. Mlynarek to have intended to commit obstruction of law enforcement and to have used physical or violent force to have done so. He

asks that the court evaluate the evidence with those requirements of mens rea and actus reus in reaching a verdict in this case.

Respectfully submitted,

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