UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
	)	Case No. 1:21-cr-689-ABJ
	)	
v.	)	
	)	
THOMAS HAMNER,	)	
	)	
Defendant.	)	
	)	

HAMNER'S MOTION TO DISMISS COUNT ONE

Hamner, by counsel, moves the Court to dismiss Count One of the Indictment for failure to state an offense. Fed. R. Crim. P. 12(b)(3)(B)(v). The Court should grant the motion for the following reasons.

On November 19, 2021, Hamner was charged in a six-count indictment relating to the Capitol riot. ECF 6. The first two charges are at issue here. Count One charged him with forcibly assaulting, resisting, opposing, impeding and interfering with a law enforcement officer using a deadly or dangerous weapon under 18 U.S.C. § 111(a)(1) and (b). Count Two charged Hamner with a civil-disorder offense under 18 U.S.C. § 231(a)(3). Both counts rest on the same offense conduct. A group of rioters lifted a large sign over their heads, moved it through the crowd, and pushed the object over a police line near the Capitol Building. The officers were able to take control of the sign and drop it on the ground without injury to themselves. While Hamner did not participate in moving the sign through the crowd, he did assist the rioters in the moments right before the sign passed over the police line by putting his shoulder under the object and guiding it with his hand.

Without a plea agreement, Hamner pled guilty to the civil-disorder offense in Count Two. The sentencing hearing was held on September 23, 2022. The government argued that Hamner should be sentenced under the aggravated assault guideline in U.S.S.G. §2A2.2 (rather than the interference-with-an-officer guideline at §2A2.4), as his conduct amounted to a "felonious assault that involved . . . an intent to commit another felony." U.S.S.G. §2A2.2 cmt. n. 1. The "other felony" to which the government referred was the § 111 offense charged in Count One, which, again, is based on the same offense conduct.

The Court rejected that argument.[1] 9/23/2022 Tr., pp. 14-16. The Court explained its ruling this way:

> Count 1 charges using the same large metal sign to assault, resist, oppose, impede, intimidate, or interfere with the same officers engaged in their very same official duties. And the government's asking me to find that the defendant committed the assault on the officers with the sign, in Count 2, with the intent to commit the felony offense of assaulting, impeding, and interfering with officers based on the exact same facts in Count 1, and that is another, quote/unquote, felony offense from the charge of impeding and interfering with the officers.
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> But I'm concerned that the case law doesn't go that far, even if some sort of elements/*Blockburger* type analysis would let you find the offenses to be different because they have different elements. And the only cases in which that finding has been made in this courthouse so far that the parties have identified are cases in which the parties took the issue off the table in the plea agreement.
>
> And the extra problem that we have in this case is we're not using the 231 offense as another felony for the 111 offense. We're going the other way. You're saying the intent to commit the 111 offense was the other felony for purposes of Count 2. But, for a violation of 111(a)(1) to even be a felony, if you don't have physical contact with the victim, your acts have to involve the intent to commit another felony.
>
> So, the other felony for Count 1 has to be Count 2. So, I don't see how the interference with officers during a civil disorder can be the other felony that's the necessary element to charge a felony violation of § 111, while at the same time § 111 is the other felony that makes the interference with the officers an aggravated assault.

[1] Separately, the Court found that the government had not established by a preponderance of the evidence that Hamner used the sign—a dangerous weapon in the circumstances—with the intent to cause bodily injury. 9/23/2022 Tr., pp. 12-13.

9/23/2022 Tr., pp. 14-15.

The Court concluded that "there's no reason to believe that this [reference to 'another felony' in §2A2.2] is meant to be based on just the hypertechnical alignment of elements." *Id.*, p. 20. The Court added:

> It strikes me that if the Commission is asking: Did you commit the assault with the intent to commit some other offense? It didn't mean with the intent to commit that exact same assault, just charged differently. They could have easily defined "another offense" as any offense with any different elements that's a different offense, but they didn't.
>
> It's also important to note that the cross reference says you go to aggravated assault if the assault on the police officer involved the intent to commit another felony, not the same intent needed to satisfy the elements of another felony, not that it was committed during the commission of another felony. This suggests that the guideline is meant to cover just the situation in the cases that [the government] cited, where the assault on the police officer is intended to facilitate or further or advance or succeed in the commission of or evasion of apprehension for a second, different crime.

9/23/2022 Tr., p. 21.

In any case, added the Court, the "another felony" phrase "at best . . . is ambiguous. And under such circumstances the Rule of Lenity requires the adoption of the definition that favors the defendant." *Id.*, p. 24. The Court further ruled that even if it had applied §2A2.2, Hamner's sentence would have been the same. *Id.*, p. 57.

Notwithstanding the Court's ruling that Hamner's sentence would not change even if he were convicted on Count One, the government intends to try the defendant on that charge. But the parties do not need to engage in that academic exercise since the Court's Guidelines analysis may be wholly imported into the statutory context. The Court's rationale translates perfectly.

A Section 111 offense becomes a felony where the offense conduct "involve[s] . . . the intent to commit another felony. . ." § 111(a). That is identical to the language used in U.S.S.G. §2A2.2 to define "aggravated assault." Just as with §2A2.2, "there's no reason to believe that

this [reference to 'another felony' in § 111(a)] is meant to be based on just the hypertechnical alignment of elements." 9/23/2022 Tr., p. 20. And it should,

> strike[] [the Court] that if the [Congress] is asking [in § 111(a)]: Did you commit the assault with the intent to commit some other offense? It didn't mean with the intent to commit that exact same assault, just charged differently. They could have easily defined "another offense" as any offense with any different elements that's a different offense, but they didn't.

Id., p. 21.

This should "suggest[] [to the Court] that [§ 111(a)] is meant to cover just the situation in the cases that [the government] cited [at sentencing], where the assault on the police officer is intended to facilitate or further or advance or succeed in the commission of or evasion of apprehension for a second, different crime." 9/23/2022 Tr., p. 21. Thus, even if there is no double jeopardy impediment under the *Blockburger* test here, Section 111(a)'s reference to "another felony" should not be interpreted to refer to "the intent to commit the exact same assault, just charged differently." *Id.*

At all events, the "another felony" phrase in § 111(a) "at best . . . is ambiguous. And under such circumstances the Rule of Lenity requires the adoption of the definition that favors the defendant." 9/23/2022 Tr., p. 24.

For all these reasons, the Court should dismiss Count One for failure to state an offense.

Dated: June 30, 2023

Respectfully submitted,

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Certificate of Service

I hereby certify that on the 30th day of June, 2023, I filed the foregoing motion with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following CM/ECF user(s):

Counsel of record.

And I hereby certify that I have mailed the document by United States mail, first class postage prepaid, to the following non-CM/ECF participant(s), addressed as follows: [none].

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