

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

BRUNO JOSEPH CUA

Criminal Action No. 21-00107 (RDM)

Honorable Randolph D. Moss

Trial: February 13, 2023

**BRUNO CUA'S SUPPLEMENTAL BRIEF IN SUPPORT OF HIS MOTION
TO DISMISS COUNT THREE OF THE SECOND SUPERSEDING INDICTMENT
OR, IN THE ALTERNATIVE, FOR A PRETRIAL DETERMINATION
REGARDING 18 U.S.C. § 111(a)**

Defendant Bruno Cua, through his counsel, files this supplemental brief in support of his motion to dismiss Count Three of the Second Superseding Indictment, pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure, or, in the alternative, for a pretrial determination that the government must prove beyond a reasonable doubt that Mr. Cua assaulted Officer G.L in order to convict him under 18 U.S.C. § 111(a).

I. Both aggravating factors required for a felony conviction under section 111(a) require that the government prove an assault beyond a reasonable doubt as a required element.

At the January 30, 2023 motions hearing, the Court questioned the parties regarding the two aggravating factors from the felony provision of section 111(a). The provision states, in pertinent part, that “where such acts involve physical contact with the victim of that assault or the intent to commit another felony,” the defendant will be “fined under this title or imprisoned not more than 8 years, or both.” Specifically, the Court questioned whether the phrase “the intent to commit another felony” should be read to not require an assault, but rather as pertaining to any defendant who “assaults, resists, opposes, impedes, intimidates, or interferes with” a federal officer, even if the phrase “involve physical contact with the victim of that assault” requires an

assault. There are at least three reasons found on the face of the statute to conclude that this interpretation is incorrect or, at minimum, to turn to the legislative history to discern Congress's intent.

First, as Mr. Cua argued in his reply brief, ECF No. 268 at 2, 3, 7, 8 & 11, the phrase "such acts" that is modified by both the "physical contact" prong and the "intent to commit another felony" prong, refers to the immediately preceding misdemeanor provision regarding simple assault, i.e., the phrase "acts in violation of this section constitut[ing] only simple assault," and not only the six verbs in subsection (a).

Second, the term "such acts" should be interpreted the same way with respect to each of the two felony aggravating factors. In other words, if the phrase "such acts involve physical contact," requires an "assault"—as it clearly does, given the statute's requirement that the acts involve physical contact "with the victim *of the assault*"—the second aggravating factor "such acts involve ... the intent to commit another felony" should be interpreted the same way. There is no indication in the text that Congress intended to attribute two different meanings to the phrase "such acts," depending on whether they involved physical contact or the intent to commit another felony. If "such acts" is interpreted the same for both physical contact and intent to commit another felony, it must be interpreted to require an assault, based on the phrase "involves physical contact with the victim of that assault" in the first part of the felony provision.

Third, the word "only" before "simple assault" in the misdemeanor provision indicates that the subsequent felony provision requires something *more than* simple assault, not something different from it. In other words, if the assault is only a simple assault, it is a misdemeanor. If it is a non-simple assault, i.e., a simple assault *plus* a requisite aggravating factor, it is a felony. *See* Mot. at 7. If the Court were to adopt an interpretation where a defendant could be convicted of a felony if his actions involved the intent to commit another felony but without at least a simple

assault, that construction would require something *different* from an assault, not something more. It would also create a situation where the statute would provide for a lesser included misdemeanor for the first part of the felony provision, but not the second, an unusual “mix and match” statutory structure the Court should not find, particularly given that there is no indication in the statute or the legislative history that it is what Congress intended.

At the very least, the text and structure are not so clear that the Court should not consider the legislative history of the penalty provisions. That would lead the Court to Senator Kyl’s floor statement, stating that the 2008 amendments to section 111(a) were intended to codify *United States v. Hathaway*, 318 F.3d 1001 (10th Cir. 2003). *See* Mot. at 3. Senator Kyl’s statement is illuminating as to Congress’s intent because it accurately states that the amendment reflects the holding in *Hathaway* and that the purpose of the amendment was to clarify the meaning of “all other cases.” Importantly, the defense is not using Senator Kyl’s statement to change or add to the meaning of the plain text, but rather only to confirm a reasonable textual interpretation. The implication of Senator Kyl’s statement could not be clearer—a conviction under 111(a), whether for a felony or misdemeanor, requires that the government prove an assault beyond a reasonable doubt. None of the circuit decisions cited by the government in support of its position addressed this critical piece of legislative history.

II. Definition of Assault and Bodily Injury

Mr. Cua agrees with the government’s proposed definition of “assault” for purposes of section 111. *See* ECF No. 273, at 1 (Government’s Supplement, quoting 10th Cir. Pattern Jury Instructions, No. 2.09, at 90 (2021)). The Tenth Circuit jury instruction also states: “The acts proscribed by the offense—assault, resist, oppose, impede, intimidate, and interfere with—each require an underlying simple assault.” *Id.*

Mr. Cua also agrees with the government's proposed definition of "bodily injury" and requests that it be used to define injury for purposes of the definition of assault. *See also* U.S. Court of Appeals for the Eleventh Circuit, Pattern Jury Instructions, Criminal Cases, No. O1.1 (defining "forcible assault" under section 111(a) as "an intentional threat or attempt to cause serious *bodily injury* when the ability to do so is apparent and immediate. It includes any intentional display of force that would cause a reasonable person to expect immediate and serious bodily harm or death" (emphasis added)).

Respectfully submitted,

DATED: February 1, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of February, 2023, I filed the foregoing with the Clerk of the United States District Court for the District of Columbia by using the CM/ECF system and served a copy of it by electronic mail on counsel for the United States, Assistant United States Attorneys Kaitlin Klamann, Carolina Nevin, and Kimberly Paschall.

Dated: February 1, 2023

/s/ William E. Zapf
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