UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
	:	**Case No: 21-cr-38 (CRC)**
v.	:	
	:	
RICHARD BARNETT	:	
	:	
Defendant.	:	

DEFENDANT'S MOTION TO DISMISS COUNT ONE – CIVIL DISORDER
18 UNITED STATES CODE SECTION 231(a)(3)

Comes now, Richard Barnett, by and through counsel, and submits this Motion to Dismiss Count One – Civil Disorder, 18 U.S.C. § 231(a)(3). This is the second Motion to Dismiss for the same count; the First Motion was filed before trial (ECF No. 123) and was denied by a written Opinion and Order (ECF No. 130). This second motion arises after the Court issued its Draft Final Jury Instructions before the close of trial.

In the First Motion, the Defendant argued that the Count should be dismissed because the Government has not alleged any facts in the indictment or otherwise, or produced any evidence in discovery that could support a charge of Civil Disorder. The Defendant's First Motion did not argue that Section 231(a)(3) was unconstitutional. Instead, the Defendant recounted the history of Section 231(a)(3) to show how courts have struggled with the poorly written and frequently challenged statute and have rescued the statute from being stricken for unconstitutionality by narrowly interpreting the statute to require an act of violence.

The statute is particularly problematic because a person can be charge for "*any act* to obstruct, impede, or interfere with any fireman or law enforcement officer lawfully engaged in the lawful performance of his official duties incident to and during the

commission of a civil disorder…" From a simple reading of the statute, it follows that literally "any act" that interferes with an officer during a civil disorder can incur liability under the statute. This can't possibly mean "any act," because if it did, the statute's reach could include even constitutionally protected acts such as speaking to a police officer during a civil disorder, filming a police officer during a civil disorder, or even looking at a police officer the wrong way during a civil disorder. A jury, without further instruction, can reasonably consider "speaking," "filming," or "looking" as "acts" included in the statute, and convict based on these acts.

Recognizing this problem, the Eighth Circuit rescued the statute by incorporating an implied element into the statute that the "act" must be a "violent act." This judicial solution was adopted by district courts for fifty years, up to an including cases arising from the season of Black Lives Matter riots that ravaged the Country through the spring and summer of 2020.

But the events on the day of January 6, 2021 have created a new January 6 Jurisprudence that holds the citizens who attended the rally and marched to the Capitol to a new unprecedented standard. One such way, is the new application of Section 1512(c)(2), obstructing an official proceeding, which can be used to charge even defendants like Mr. Barnett who entered the Capitol after the "official proceeding" was "obstructed," and therefore could not possibly have obstructed the proceeding. Another way, is charging defendants like Mr. Barnett of obstructing police officers during the civil disorder, even when they are not accused of acts of violence.

It is undisputed, from before trial and through evidence elicited from the Government's witnesses at trial, that Mr. Barnett is not accused of any violent act on

January 6 or otherwise. Though he was designated a Tier One Terrorist Operator based solely on a picture of him sitting at the desk of a staffer of former speaker Nancy Pelosi that went viral on the internet, not a single witness could point to any violent act, despite reviewing copious video evidence. Mr. Barnett is ultimately being accused of getting into the "personal space" of a police officer during a brief interaction in the Rotunda, and waving his arm for a brief second, which the Government hopes the jury will interpret as Mr. Barnett calling in "reinforcements" to obstruct the officer from "holding the line" at a door in the Rotunda in the Capitol building.

In the First Motion to Dismiss, the Defendant did not argue that the statute was unconstitutional. Rather, the Defendant recounted the history of the statute and how it has been frequently challenged as unconstitutional, and the Eighth Circuit narrowly rescued the statute by inserting the implied element of a violent act. The Defendant argued that absent a violent act, the Count should be dismissed.

The Court rejected the Defendant's argument and the reasoning of the Eighth Circuit, and chose instead to adopt the novel "intuitive" approach to Section 231(a)(3). "This Court agrees with several fellow judges in this district that an ordinary person would have an **intuitive understanding** of what that language proscribes." ECF No. 138 at page 2 (emphasis added).

The Defendant argued in his First Motion that the "intuitive" approach fails because it lacks an objective standard by which a citizen may know if he is committing an "act" that violates the law, and it allows a defendant to be charge and a jury to convict for even constitutionally protected acts such as filming police during a civil disturbances.

The Court did not address the problem of the statute's potential to capture in its dragnet the act of filming police during a civil disorder. The Court simply stated "Barnett identifies edge cases, such as filming an officer, that may prove challenging to evaluate. But marginal factual applications, which exist for many criminal laws, do not make a statute vague." But in failing to address this so-called "edge case" the Court failed to address a central issue in this very case against the Defendant, as he was in fact filming an officer during a civil disorder and there is a very real possibility that the jury will convict him for doing so. Further, this so-called "edge case" is not "edge" at all. It is clearly ubiquitous, especially in the context of January 6 as the 14,000 hours of voluminous video evidence shows, and as some of the Government's witnesses have testified at this trial. This is a serious problem that the Court left unaddressed.

Another problem is the lack of an objective standard in the January 6 jurisprudence "intuitive" standard, which is an "I know it when I see it" standard. The Court addressed this problem by stating that "violation of the statute turns on an objective fact of whether an officer was impeded from conducting his or her duties in response to a civil disorder." ECF No. 138. While the Defendant disagrees with Court's reasoning and decision and intends to appeal if the jury convicts him, at the very least, the Court set forth an objective standard, namely the Defendant can only be convicted if the jury finds that "an officer was impeded from conducting his duties in response to a civil disorder."

But the Defendant was surprised at the last day of trial when the Court issued its Draft Final Jury Instructions which omitted this critical element.

Count One – Civil Disorder and Aiding and Abetting

> Count One of the indictment charges the defendant with committing or attempting to commit an act to obstruct, impede, or interfere with a

Washington D.C. Metropolitan Police Department officer lawfully carrying out his official duties incident to a civil disorder, which is a violation of federal law.

Elements

In order to find the defendant guilty of this offense, you must find the following three elements beyond a reasonable doubt:

- First, the defendant knowingly committed an act or attempted to commit an act with the intended purpose of obstructing, impeding, or interfering with an MPD officer.

- Second, at the time of the defendant's actual or attempted act, the law enforcement officer was engaged in the lawful performance of his official duties incident to and during a civil disorder.

- Third, the civil disorder in any way or degree obstructed, delayed, or adversely affected either commerce or the movement of any article or commodity in commerce or the conduct or performance of any federally protected function.

Final Draft Jury Instructions.

When the Court issued its Draft Final Jury Instructions, the Defendant objected on the record in court that Court seemed to disregard its own Order by not including the objective element that the jury must find that the officer was obstructed. The Court responded by saying that such an interpretation would be inconsistent with a plain reading of the statute, because the statute states unequivocally that the defendant can be charged and convicted for "any act" regardless of whether the act had the effect of obstructing.

The Defendant agrees with the Court's latter understanding of the statute, which is why the Defendant argued that the elements must contain the element of violent conduct. If the statute does not contain the element of a violent act, the statute is unconstitutional. That is the opinion the Eighth Circuit, which is why the Eighth circuit added the violent act element, and why other courts adopted the Eighth Circuit's reasoning. But if the Court

chooses to reject the Eighth Circuit, and now to reject its own Order that requires that the officer was impeded, the Court gives no objective standard to the Defendant or to the Jury.

Without the critical element added by the Court in its Order, the jury can convict Mr. Barnett for filming the police officer during the civil disorder, or even for speaking to the officer, including requesting assistance, which Mr. Barnett was doing. Worse, this will be the first time in the new January 6 Jurisprudence that a defendant is charged with Section 231(a)(3) for non-violent acts, and it will open the door to the Department of Justice to hunt down and prosecute thousands of Americans for simply being present in the vicinity of the Capitol on January 6, 2021.

Before closing arguments to this two-week trial, the Court should reconsider its decision to allow a charge of Section 231(a)(3) for a non-violent act, and should instead adopt the sensible solution of the Eighth Circuit that requires a violent act in order to be charged and convicted. In the alternative, the Court should at the very least include in the Jury Instructions that they must find that the police officer must have been obstructed in performing his duty in order to convict Mr. Barnett for Section 231(a)(3), though if the Court does so, Mr. Barnett reserves his right to appeal.

The Court argues that this is not new January 6 Jurisprudence and points to the case of Abbie Hoffman.

> Interpreting the statute to encompass non-violent acts also makes sense. It is entirely understandable that Congress would penalize non-violent acts that prevent police from responding to a violent riot. A historic prosecution from this district illustrates the point. United States v. Hoffman, 334 F. Supp. 504, 509 (D.D.C. 1971) (noting charge against anti-war activist Abbie Hoffman under section 231(a)(3) for erecting a barricade to obstruct police during the 1971 May Day protests).

ECF No. 138 at 4.

In the lobby on the way to the cafeteria of the Court House on Constitutional Avenue, where this very trial and the trial for hundreds, and soon to be thousands of January 6 defendants is being held, there is a public display featuring several large exhibits that highlight the great achievements of this august Court. One of the exhibits is dedicated the "The First Amendment." The Exhibit states:

> **The Mayday Protestors 1971-1981**
>
> To show their disagreement with the war effort in Vietnam, thousands of protestors filled the streets. Between April 22 and May 6, 1971, the police arrested 14,517 persons typically on charges of disorderly conduct. The government held more than 1,500 of these protestors at the Washington Coliseum. Of those charged, 871 proceeded to full trial on the merits. The Court of Appeals eventually ordered the District Court to enjoin prosecutions not supported by specific evidence – the vast majority of cases. The District Court later ordered that the arrest records of the thousands of protestors be expunged. In 1976, a class action lawsuit was filed on behalf of 1,200 arrested protestors against former Attorney General John Mitchell, former Capitol Police Chief James Powell, the District of Columbia, and others, alleging that the officials violated their First Amendment rights. In 1981, the parties settled.

Exhibit in the lobby of the Court House on the way to the cafeteria.

The Country thought it was past the days when protestors like Abbie Hoffman were arrested, not for their conduct, but for their views. The lowest point of the Richard "Bigo" Barnett trial was when the Government presented through its FBI agent witness Government Exhibits 524 and 525. Exhibit 524 is a picture of a pickup truck with a banner that says, "Trump 2020: No More Bullshit," and Exhibit 525 are retweets of President Trump that say, "See you on January 6th in Washington, D.C. Don't miss it. Information to follow," and "On behalf of two great senators @sendavidperdue & @KLoeffler, I will be going to Georgia on Monday night, January 4th, to have a big wonderful RALLY. So

important for our Country that they win!" That this was the lowest point, speaks volumes considering Mr. Barnett was charged with stealing a single envelope.

Dated: January 19, 2023
Washington, DC

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on this 19th day of January 2023, a copy of the foregoing was served upon all parties as forwarded through the Electronic Case Filing (ECF) System.

/s/ Jonathan Gross, Esq
Jonathan Gross, Esq.