UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, **v.** **THOMAS HAMNER,** **Defendant.**	**Case No.: 21-CR-00689-ABJ**

GOVERNMENT RESPONSE IN OPPOSITION
TO DEFENDANT HAMNER'S MOTION TO DISMISS COUNT ONE

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits its Response in Opposition to Defendant's Motion to Dismiss Count One (Dkt. Entry 52). The Court should deny Defendant Thomas Hamner's motion to dismiss ("Def. Motion"), because Count One of the Indictment sufficiently alleges a violation of 18 U.S.C. §§ 111(a)(1) and (b), and 2.

FACTUAL BACKGROUND

The Government's sentencing memorandum sets out Hamner's conduct on January 6, 2021. *See* Dkt. Entry 28 at p.12-18. In summary, Hamner was amongst the first rioters to enter the restricted perimeter on the West Front and who, for almost an hour from 12:52 pm to at least 1:40 pm on January 6, 2021, harried law enforcement officers and contributed to the chaos by pulling down the defensive barricades and fences surrounding the U.S. Capitol, engaged in a tug of war over bike racks with police officers, and rammed a massive billboard into the police line.

As a result of his actions, Hamner was charged with the following:

Count 1:	Assaulting, Resisting or Impeding Certain Officers Using a Dangerous Weapon, in violation of 18 U.S.C. §§ 111(a)(1) and (b), and 2
Count 2:	Civil Disorder, in violation of 18 U.S.C. §§ 231(a)(3) and 2 (1:40 pm)

Count 3: Civil Disorder, in violation of 18 U.S.C. §§ 231(a)(3) and 2 (1:14 pm)

Count 4: Entering or Remaining in a Restricted Building or Grounds with a Deadly or Dangerous Weapon, in violation of 18 U.S.C. § 1752(a)(1) and (b)(1)(A)

Count 5: Engaging in Physical Violence in a Restricted Building or Grounds with a Deadly or Dangerous Weapon, in violation of 18 U.S.C. § 1752(a)(4) and (b)(1)(A)

On May 17, 2022, Hamner chose to plead guilty to Count 2 with no agreement in place. Ever since the open plea, Hamner has been lobbying to have the Government dismiss the other charges, arguing–incorrectly—that a conviction on civil disorder in Count 2 is analogous to an assault conviction in Count 1. Now, Hamner is trying a new tactic, making the legally and factually unsustainable assertion that the Government is barred from bringing the assault count under Federal Rule of Criminal Procedure 12(b)(3)(B)(v).[1]

LEGAL STANDARD

An indictment is sufficient under the Constitution and Rule 7 of the Federal Rules of Criminal Procedure if it "contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend," *Hamling v. United States*, 418 U.S. 87, 117 (1974), which may be accomplished, as it is here, by "echo[ing] the operative statutory text while also specifying the time and place of the offense." *United States v. Williamson*, 903 F.3d 124, 130 (D.C. Cir. 2018). "[T]he validity of an indictment 'is not a question of whether it could have been more definite and certain.'" *United States v. Verrusio*, 762 F.3d 1, 13 (D.C. Cir. 2014) (quoting *United States v. Debrow*, 346 U.S. 374, 378 (1953)). An indictment need not inform a

[1] Rule 12(b)(3)(B)(v) solely addresses timing; it requires that a defendant file a motion alleging failure to state an offense in the indictment pre-trial. Although Hamner asserts that dismissal is required, nothing prohibits the government from curing any identified defect by filing a superseding indictment.

defendant "as to every means by which the prosecution hopes to prove that the crime was committed." *United States v. Haldeman*, 559 F.2d 31, 124 (D.C. Cir. 1976).

Rule 12 permits a party to raise in a pretrial motion "any defense, objection, or request that the court can determine without a trial on the merits." Fed. R. Crim. P. 12(b)(1). It follows that Rule 12 "does not explicitly authorize the pretrial dismissal of an indictment on sufficiency-of-the-evidence grounds" unless the Government "has made a full proffer of evidence" or the parties have agreed to a "stipulated record," *United States v. Yakou*, 428 F.3d 241, 246-47 (D.C. Cir. 2005) (emphasis added)—neither of which has occurred here.

Indeed, "[i]f contested facts surrounding the commission of the offense would be of *any* assistance in determining the validity of the motion, Rule 12 doesn't authorize its disposition before trial." *United States v. Pope*, 613 F.3d 1255, 1259 (10th Cir. 2010) (Gorsuch, J.). Criminal cases have no mechanism equivalent to the civil rule for summary judgment. *See e.g.*, *United States v. Bailey*, 444 U.S. 394, 413, n.9 (1980) ("[M]otions for summary judgment are creatures of civil, not criminal trials"); *Yakou*, 428 F.3d at 246-47 ("There is no federal criminal procedural mechanism that resembles a motion for summary judgment in the civil context"); *United States v. Oseguera Gonzalez*, No. 20-CR-40 (BAH), 2020 WL 6342948 at *5 (D.D.C. Oct. 29, 2020) (collecting cases explaining that there is no summary judgment procedure in criminal cases or one that permits pretrial determination of the sufficiency of the evidence). Accordingly, dismissal of a charge does not depend on forecasts of how the Government would prove their case. Instead, a criminal defendant may move for dismissal based solely on a legal defect in the indictment, such as a failure to state an offense. *See United States v. Knowles*, 197 F. Supp. 3d 143, 148 (D.D.C. 2016).

Thus, when ruling on a motion to dismiss for failure to state an offense, a district court is limited to reviewing the face of the indictment and more specifically, the language used to charge the crime. *See e.g.*, *United States v. Bingert*, 605 F. Supp. 3d 111, 118 (D.D.C. 2022) (a motion to dismiss challenges the adequacy of an indictment on its face and the relevant inquiry is whether its allegations permit a jury to find that the crimes charged were committed); *United States v. McHugh*, 583 F. Supp. 3d 1, 26-28 (D.D.C. 2022) (a motion to dismiss involves the Court's determination of the legal sufficiency of the indictment, not the sufficiency of the evidence); *United States v. Puma*, No. 21-CR-454 (PLF), 2022 WL 823079 at *4 (D.D.C. Mar. 19, 2022) ("In ruling on a motion to dismiss for failure to state an offense, a district court is limited to reviewing the face of the indictment and, more specifically, the language used to charge the crimes") (quoting *United States v. Sunia*, 643 F.Supp. 2d 51, 60 (D.D.C. 2009)).

Here, there is no failure to state an offense, as the language in the indictment tracks the statutory language. More critically, the Defendant is properly charged with felony assault in violation of 18 USC. Secs. 111(a), 111(b) and 2. His plea to Civil Disorder in violation 18 USC Secs. 231(a)(3) and 2 does not change that fact.

ARGUMENT

The Indictment alleges sufficient facts to put Hamner on notice of the crime with which he is charged. Hamner claims that Count One fails to state a claim pursuant to Rule 12 of the Federal Rules of Criminal Procedure, because it is duplicative of Count Two, while nonetheless acknowledging that "there is no double jeopardy impediment under the *Blockburger* test …." Def. Motion at 4, ECF Dkt. 52.

In essence, Defendant argues that Count 1 should be dismissed, because the Court addressed all of the elements of assault under 18 USC Sec. 111 at the Defendant's sentencing for violating 18 USC Sec. 231. As discussed above, that is not the correct legal analysis. Under

Defendant's logic, a Court's assessment at sentencing would supplant a petit jury's decision as to whether the elements for an offense had been met.

Further, this Court's discussion on calculating the Sentencing Guidelines for 18 USC Sec. 231 does not address all of the ways in which the Government could prove an assault under 18 USC Secs. 111(a), 111(b) and 2. At Hamner's sentencing, this Court considered whether to apply Sec. 2A2.2 (aggravated assaulted) or Sec. 2A2.4 (obstructing or impeding officers). The Sentencing Guidelines define an "aggravated assault" as a felonious assault that involved (A) a dangerous weapon with intent to cause bodily injury (i.e., not merely to frighten) with that weapon; (B) serious bodily injury; (C) strangulation, suffocation or the attempt; and (D) an intent to commit another felony. *See* Sec. 2A2.2, Commentary, Application Notes: 1. At sentencing, the Government argued that (A) and (D) applied. The Court declined to follow the Government's recommendation. The Court found no aggravated assault, because the Government had not shown that Hamner intended to cause bodily injury when he used the dangerous weapon (the sign) or that he had violated 18 USC Sec. 231 with the intent to assault law enforcement officers. As such, the Court calculated the Defendant's Guidelines under Sec. 2A2.4, instead of 2A2.2. Using 2A2.2, the Court applied the Base Offense Level of 10 and added 3 for use of a dangerous weapon under Sec. 2A2.4(b)(1).

Even if one were to "wholly import[]" the Court's reasoning, Def. Motion at 3, it would not address the other ways in which the Government could prove an assault. Specifically, the Government could put on witnesses to prove Count 1 by showing that Hamner:

a. Used a dangerous weapon, under 111(b),[2]

[2] Unlike "aggravated assault" under the sentencing guidelines, which requires a showing that the defendant used a dangerous weapon with the intent to cause bodily injury, a felony assault under 18 U.S.C. § 111(b) merely requires a showing that the defendant used a dangerous weapon.

b. Caused bodily injury, under 111(b),[3]

c. Engaged in physical contact, under 111(a)(1), and/or

d. Had the intent to commit another felony, under 111(a) (1).

Unlike the Court's findings at Hamner's sentencing on the civil disorder count, the Government could show that Hamner "used" the dangerous weapon, with no requirement of proving intent to cause bodily injury; that he "made physical contact;"[4] and/or that he assaulted the officer with the intent to obstruct, rather than the reverse.[5] These are factual questions to flesh out at trial, and do not warrant dismissal at the pleading stage.

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[3] The Government has no evidence at this juncture that Hamner caused bodily injury.

[4] Hamner appears to concede that the sign made physical contact with the officers, but argues that he personally did not make physical contact with the officers and therefore there was no assault. *See, e.g.,* Hamner Sentencing Memorandum, ECF Dkt. No, 27 at p.6, 8. Under that logic, a defendant shooting a victim would not be assault, because the bullet made physical contact with the victim, not the defendant. Likewise, stabbing would not be an assault, because the knife, not the defendant, made physical contact with the victim. That logic is not supported by the law. For example, in *United States v. Frizzi*, the First Circuit affirmed a defendant's conviction under § 111 for spitting in a mail carrier's face. 491 F.2d 1231, 1232 (1st Cir. 1974). The Court held "that spitting in the face" is a "forcible assault, or, more exactly, a battery falling within the statutory description 'forcibly assaults, resists, opposes, impedes, intimidates or interferes.' Although minor, it is an application of force to the body of the victim, a bodily contact intentionally highly offensive." *Id.* And the Eleventh Circuit has held that § 111 "may be violated ... by minimal physical contact . . . or even without the presence of any physical contact[.]" *United States v. Hernandez*, 921 F.2d 1569, 1577 (11th Cir. 1991) (citing cases). In fact, similarly-situated defendants have pled guilty to felony assault under 18 USC Sec. 111(a)(1) in this jurisdiction. *See United States v. Neefe and Smith*, 21CR00567-RCL (Defendants both pled guilty to assaulting officers with the same Trump sign) (111(a)(1)); *United States v. Richardson*, 21CR00721-CKK (Defendant pled guilty to assaulting officers with a flagpole) (111(a)(1)); *United States v. McHugh*, 21cr00453-JDB (parties agreed to stipulated trial on assaulting officers with bear spray) (111(a) and (b)).

[5] While this Court declined at sentencing in this case to find that Hamner obstructed officers with the intent to assault them, the reverse formulation, that he assaulted them with the intent to obstruct has not been decided.Despite the defense's argument, the former ruling does not preclude the latter. 18 U.S.C. § 231(a)(3) has repeatedly served as the underlying felony for assault convictions under

Hamner was properly charged in this case. The Government maintains its position that Hamner cannot *sua sponte* plead guilty to the lesser charge, civil disorder, (with a five-year statutory maximum) and expect the Government to dismiss the assault count (with a 20-year statutory maximum). Trying Hamner on the remaining charges prevents setting the precedent that a defendant can plead guilty to a count of his choice, without any kind of agreement, and expect the Government to dismiss the greater count.

CONCLUSION

For the foregoing reasons, the Government respectfully requests that the Court deny Defendant Hamner's motion to dismiss count one, and preclude time in the interest of justice, so that the Court can decide this matter.

Respectfully submitted,

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18 U.S.C. § 111(a)(1) in cases in this jurisdiction. *See e.g, United States v. Alberts*, 21CR00026-CRC; *United States v. Mehaffie*, 21CR00040-TNM; *United States v. Jensen*, 21CR00060-TJK; *United States v. Williams,* 21CR00618-ABJ.