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 REPLY TO THE GOVERNMENT'S OPPOSITION TO HIS MOTION TO DISMISS COUNT ONE

Hamner files this brief reply to the government's Response in Opposition to Defendant Hamner's Motion to Dismiss Count One. ECF 53. The government's argument fails because it takes no account of what Count One actually alleges and fatally omits from its analysis the rule from *Apprendi* and its progeny.

Section 111(a) contains both misdemeanor and felony offenses. The offense is a misdemeanor where "the acts in violation of this section constitute only simple assault . . ." 18 U.S.C. § 111(a). The offense is a felony "where such acts involve [1] physical contact with the victim of that assault or [2] the intent to commit another felony . . ." *Id.* Subsection (b) of Section 111 is an "enhanced penalty" provision; it does not contain an offense distinct from the ones set forth in subsection (a). § 111(b).

Turning to the Indictment, Count One charges an offense under Sections 111(a)(1) and (b) and alleges:

> On or about January 6, 2021, within the District of Columbia, THOMAS PATRICK HAMNER, using a deadly or dangerous weapon, that is, a large metal sign frame, did forcibly assault, resist, oppose, impede, intimidate and interfere with an officer and employee of the United States and of any branch of the United States Government, and any person assisting such an officer and employee, that is, J.C., an officer of the

> Metropolitan Police Department, while such officers and employees were engaged in and on account of the performance of official duties and **where the acts in violation of this section involve the intent to commit another felony**.

Indictment, Count One (emboldening added).

The emboldened language shows that Count One charges a felony offense under § 111(a)(1), because Hamner allegedly committed the criminal acts with "the intent to commit another felony." The government has stated on the record (and to counsel) that the "other felony" to which Count One alludes is the offense charged in Count Two, under 18 U.S.C. § 231(a)(3), to which Hamner pled guilty and was sentenced. Count Two rests on exactly the same offense conduct as Count One, as the government allowed at sentencing. And, at sentencing on Count Two, the Court determined that, in the context of the aggravated assault guideline in U.S.S.G. §2A2.2, the Count One offense could not have been "another felony" Hamner intended to commit because the Commission could not have meant by that phrase "the intent to commit that exact same assault, just charged differently." 9/23/2022 Tr., p. 21. Hamner's motion shows that the interpretive issue is no different when it comes to Section 111(a)'s statutory language.

In response, the government starts with the principle that 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.'" Gov't Resp., p. 2 (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)). The government continues, "Here, there is no failure to state an offense, as the language in the indictment tracks the statutory language." *Id.*, p. 4. "Even if one were to 'wholly import[]' the Court's reasoning [at sentencing], 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); (b) caused

bodily injury, under 111(b); (c) engaged in physical contact, under 111(a)(1); and/or (d) had the intent to commit another felony, under 111(a)(1)." Gov't Resp., pp. 5-6.

The government's argument is flawed in several ways. First, it does not address the substance of Hamner's "another felony" argument. It simply claims that the government has "other ways" to "prove an assault" under § 111(a)(1) that do not rely on the "another felony" provision in that statute. Hamner's argument on that issue should therefore be treated as conceded.

Second, the government has lost the thread of the argument through its misuse of terms. The issue is not whether the government has "other ways" to "prove an *assault*," but whether Count One properly alleges other ways to prove a *felony* offense. Hamner moved the Court to dismiss the *felony charge* in Count One. Section 111(a) is plain that not all assaults covered by the statute are felonies.[1]

Third, the government is mistaken in claiming that it may prove the felony offense in Count One merely by showing that subsection (b) of § 111 is satisfied. As indicated above, subsection (b) is an express "enhanced penalty" provision. It does not contain an independent crime. Its provisions do not purport to alter the preceding baseline requirement that the offense is a felony only "where such acts involve [1] physical contact with the victim of that assault or [2] the intent to commit another felony . . ." § 111(a). The government's construction of subsection (b) would read the misdemeanor/felony distinction out of § 111(a). But the Court

[1] The government itself says the sole reason it wishes to bring Hamner to trial on Count One is the principle that it cannot suffer a defendant to "plead guilty to a count of his choice, without any kind of agreement, and expect the Government to dismiss the *greater* count." Gov't Resp., p. 7 (emphasis added). The government omits that its Count One plea offer to Hamner would have forced him to stipulate to a Guideline (aggravated assault) that the Court found did not apply at sentencing. Had the government not attempted to coerce Hamner to stipulate to an erroneous Guideline provision, the parties would not be in this position.

must "give effect . . . to every clause and word" of the statute. *Begay v. United States*, 553 U.S. 137, 143 (2008).

Fourth is the government's argument that it may prove a felony offense in Count One by showing that Hamner's "assault" involved "physical contact with the victim. . ." § 111(a). This argument founders on the presentment requirement. While it is true that an indictment need not inform the defendant "'as to every means by which the prosecution hopes to prove that the crime was committed,'" Gov't Resp., p. 3 (quoting *United States v. Haldeman*, 559 F.2d 31, 124 (D.C. Cir. 1974)), the indictment must assuredly plead all the elements of the offense. *Hamling*, 418 U.S. at 117. And here, the government ignores that "any facts that increase the prescribed range of penalties to which a criminal defendant is exposed are elements of the crime." *Alleyne v. United States*, 133 S. Ct. 2151, 2160 (2013). After the Supreme Court held in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) that the Sixth Amendment demands that such facts be proven beyond a reasonable doubt to the jury, it later held as a corollary that "fact[s] that increase[] the penalty for a crime beyond the prescribed statutory maximum" must not only be submitted to the petit jury, as required by the Sixth Amendment [] *but must also be alleged in the indictment and presented to the grand jury, as required by the Fifth Amendment*." *United States v. Cotton*, 122 S. Ct. 1781, 1783 (2002) (emphasis added).

Here, Section 111(a)'s physical contact requirement is an *Apprendi* fact because it increases the statutory maximum sentence from one year to 8 years. § 111(a). Yet Count One does not allege that Hamner made physical contact with the victim. It only alleges that he committed a felony Section 111(a) offense by virtue of his alleged intent to commit "another felony." Thus, the government did not satisfy the presentment requirement with respect to

physical contact facts, only with respect to the "another felony" facts, which do not state an offense for the reasons the Court extensively outlined at sentencing.

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

Dated: July 17, 2023

Respectfully submitted,

_/s/ Nicholas D. Smith_____
Nicholas D. Smith, D.C. Bar No. 1029802
1123 Broadway, Suite 909
New York, NY 10010
(917) 902-3869
nds@davidbsmithpllc.com
Counsel to Thomas Hamner

Certificate of Service

I hereby certify that on the 17th day of July, 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].

_/s/ Nicholas D. Smith_____
Nicholas D. Smith, D.C. Bar No. 1029802
1123 Broadway, Suite 909
New York, NY 10010
(917) 902-3869
nds@davidbsmithpllc.com