SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION—FELONY BRANCH

THE UNITED STATES OF AMERICA	:	Criminal Nos.	2017CF2001149
	:		2017CF2001160
v.	:		2017CF2001155
	:		2017CF2001206
GABRIEL MIELKE, et al.	:		2017CF2001204
	:		2017CF2001338
	:		2017CF2001272
	:		2017CF2001224
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:	Judge Lynn Leibovitz

ORDER

Before the court is the question whether Count 2 of the superseding indictment properly charges a felony or misdemeanor. For the reasons stated below, the court concludes that there is no felony offense arising from "engaging" in a riot under 22 D.C. Code § 1322, and that the offense charged in Count 2 therefore charges a misdemeanor, not felony.

PROCEDURAL HISTORY

The charges in this case arise from alleged violence during protests in downtown DC on January 20, 2017, and the arrests of over 200 persons on charges of rioting in violation of 22 D.C. Code § 1322. The second superseding indictment was returned on April 27, 2017. Count 2 of the second superseding indictment alleges that all charged defendants violated 22 D.C. Code § 1322 (b), which makes it a misdemeanor willfully to engage in a riot, and 22 D.C. Code § 1322 (d), alleging that the riot resulted in serious bodily harm or property damage in excess of $5,000,

which purported to make Count 2 a felony charge. The court denied defendants' motions to dismiss the superseding indictment by written order on September 14, 2017, but reserved ruling on the question whether there exists a felony charge for "engaging" in a riot under 22 D.C. Code § 1322.

ANALYSIS

D.C. Code § 22–1322 provides:

Rioting or inciting to riot.

(a) A riot in the District of Columbia is a public disturbance involving an assemblage of 5 or more persons which by tumultuous and violent conduct or the threat thereof creates grave danger of damage or injury to property or persons.

(b) Whoever willfully engages in a riot in the District of Columbia shall be punished by imprisonment for not more than 180 days or a fine of not more than the amount set forth in § 22-3571.01, or both.

(c) Whoever willfully incites or urges other persons to engage in a riot shall be punished by imprisonment for not more than 180 days or a fine of not more than the amount set forth in § 22-3571.01, or both.

(d) If in the course and as a result of a riot a person suffers serious bodily harm or there is property damage in excess of $5,000, every person who willfully incited or urged others to engage in the riot shall be punished by imprisonment for not more than 10 years or a fine of not more than the amount set forth in § 22-3571.01, or both.

Defendants argue that, based on the plain reading of the statute, there is no felony offense arising from "engaging" in a riot under 22 D.C. Code § 1322. The government disagrees, claiming that, while the word "engaged" is omitted from section (d) of the statute, based upon a review of the entire rioting statute, its legislative history and the language of section (d), 22 D.C. Code § 1322 permits the government to charge engaging in a riot as a felony, where the requisite property damage or bodily harm is alleged to have resulted.

When interpreting statutory language, courts must first look to the plain language of a statute to determine its meaning, and favor interpretations consistent with the plain language.

Artis v. District of Columbia, 135 A.3d 334, 337 (D.C. 2016)). The primary and general rule of statutory construction is that the intent of the lawmaker is to be found the language that he has used. *Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 753 (D.C. 1983) (*en banc*). The court is to interpret the words used by the legislature according to their ordinary sense and with the meaning commonly attributed to them. *Id.*

In this case, by its plain language, 22 D.C. Code § 1322(c) provides for a misdemeanor offense of "inciting" a riot, and 22 D.C. Code § 1322 (d) sets forth felony penalties for a person who willfully incites or urges a riot, where "[i]f in the course and as a result of a riot a person suffers serious bodily harm or there is property damage in excess of $5,000." By contrast, 22 D.C. Code § 1322 (b) punishes anyone who "willfully engages in a riot in the District of Columbia" by imprisonment for not more than 180 days or a fine of not more than the amount set forth in § 22-3571.01, or both. There is no section setting forth felony penalties for a person who willfully engages in a riot, where "[i]f in the course and as a result of a riot a person suffers serious bodily harm or there is property damage in excess of $5,000." On its face, the statute does not create a felony offense arising from engaging in a riot.

Of course, statutory words are not to be read in isolation; courts also may consult the legislative history of a statute. *Abadie v. District of Columbia Contract Appeals Bd.*, 843 A.2d 738, 742 (D.C. 2004). A court may refuse to adhere strictly to the plain wording of a statute in order to effectuate the legislative purpose, as determined by a reasoning of the legislative history or by an examination of the statute as a whole. *Id.*

The legislative history of the rioting statute on this issue is ambiguous. At the 1967 Congressional Committee hearing to consider the legislation for the prohibition of riots and incitement to riot in the District of Columbia, there were numerous occasions where the

proponents of the legislation contradicted one another as to whether Congress intended to punish "engaging" in a riot as both a misdemeanor and a felony. On one hand, for example, certain testimony regarding the bill indicated an intention to set forth felony and misdemeanor penalties for both engaging in and inciting a riot. Robert Kneipp, Assistant Corporation Counsel for the District of Columbia stated, "[i]t would create a felony. It would make the offense of riots and the offense of incitement to riot a felony as it would be under the common law and it would increase the fine to $10,000 instead of the general penalty of $1,000." *Relating to the Prohibition of Riots and Incitement to Riot in the District of Columbia: Hearing on H.R. 12328, H.R. 12605, H.R. 12721 and H.R. 12557 Before the Subcomm. No. 4 of the Comm. on the D.C. H.R.*, 90th Cong. 26 (1967). And further, the memorandum on the record explained: "[t]he pending legislation provides penalties for those persons convicted for 'willfully' engaging in a riot. A person convicted of such conduct would be subject to imprisonment for not more than one year or a fine of not more than $1,000, or both. In the event that any person, as a result of the riot, suffers "serious" bodily harm, or if there is property damage in excess of $5,000, those who 'willfully' engaged in the riot may be punished by imprisonment for not more than ten years, or fined not more than $10,000, or both." *Id.* at 4.

On the other hand, the legislative history also provides substantial indications of the opposite intent; Fred Vinson, Assistant Attorney General of the United States, explained: "H.R. 12328 specifies that whoever willfully engages in a riot in the District of Columbia shall be punished by imprisonment for not more than one year or fine of $1,000 or both" and that "[t]he proposed statute also offers a realistic penalty structure which is in accord with the seriousness of modern riots.... *Those who incite* this kind of destruction should be dealt with as felons" *Id.* at 16 (emphasis added). Further, the history includes language recognizing that the enactment of a

statute criminalizing rioting would create broader penalty options than were available at common law, but only for inciting a riot: "Furthermore, here we have more stringent penalties in the incitement situation than you would have under common law. We felt that those who incite riots which are serious should be subject to more severe penalties than are provided in the common law." *Id.* at 21.

The legislative history of the rioting statute thus suggests contradictory intent on the question whether "engaging" in a riot was to be punishable as a felony. It therefore does not provide sufficient support for the government's position that an otherwise plainly written statute should be interpreted to provide for an offense it does not expressly set forth. Taking the surrounding provisions into account, the legislature knew how to, and did, set forth felony penalties for "inciting" a riot, and, it must be concluded, intentionally omitted a felony penalty for the alternative charge of "engaging" in a riot.

Accordingly, the court concludes that there is no felony arising from "engaging" in a riot under 22 D.C. Code § 1322. Count 2 therefore charges a misdemeanor, not a felony.[1]

Accordingly, it is this 17th day of **November, 2017**, hereby

SO ORDERED.

Lynn Leibovitz
Associate Judge
(signed in chambers)

cc:

Jennifer Kerkhoff
Assistant United States Attorney

Counsel for all defendants

[1] Count 3 alleges a conspiracy to engage in a riot, citing 22 D.C. Code § 1322(b) only. This is, and always has been, indisputably a misdemeanor charge.