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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States of America,)	Criminal Action
)	No. 21-cr-689
Plaintiff,)	
)	SENTENCING HEARING
vs.)	
)	Washington, DC
Thomas Patrick Hamner,)	September 23, 2022
)	Time: 9:30 a.m.
Defendant.)	

TRANSCRIPT OF SENTENCING HEARING
HELD BEFORE
THE HONORABLE JUDGE AMY BERMAN JACKSON
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

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1 THE COURTROOM DEPUTY: Good morning, Your Honor.
2 This morning we have criminal case No. 21-689, the *United*
3 *States of America v. Thomas Patrick Hamner*. The defendant is
4 present and in the courtroom, Your Honor. The probation
5 officer present for these proceedings is Mr. Robert Walters.

6 Will counsel for the government just make sure he has a
7 little green light, reach into his microphone and identify
8 himself for the record.

9 MR. COLLYER: Good morning, Your Honor. Douglas
10 Collyer for the United States.

11 THE COURT: Good morning.

12 THE COURTROOM DEPUTY: Counsel for the defendant.

13 MR. SMITH: Good morning, Judge. Nick Smith for
14 Thomas Hamner.

15 THE COURT: All right. Good morning. And I note
16 Mr. Hamner is present and appears to have some -- possibly some
17 family members present as well. And I'm glad that they're here
18 to support you.

19 We're here this morning for Mr. Hamner's sentencing. He
20 pled guilty -- not pursuant to any kind of plea agreement -- to
21 Count 2, and only Count 2 of the indictment, and he's to be
22 sentenced on that count.

23 Pursuant to the parties' joint status report, any
24 assessment of the impact of this guilty plea on the
25 government's determination as to how to proceed on the

1 remaining counts is going to be made after today's hearing, in
2 accordance with a schedule I'll set before we adjourn. But
3 those counts are not before us today.

4 I want to note, in the event there are any members of
5 the press or the public listening in on the public line, you
6 have an absolute right to attend and report on what transpired
7 during court proceedings, but the recording and dissemination
8 of a recording of these proceedings would be a violation of our
9 court rules.

10 The final presentence report in this case was filed on
11 September 1st. I'm aware that you've filed many comments, but
12 I want to make sure, Mr. Smith, that you both you and Mr.
13 Hamner have had an opportunity to read the presentence report.

14 MR. SMITH: Yes, Your Honor, we have.

15 THE COURT: And I realize there were some issues as
16 to how to credit certain -- in particular, a criminal case and
17 how to apply the guidelines. But with respect to the facts set
18 forth in the plea agreement in the sentencing report, are there
19 any disputes?

20 MR. SMITH: No, Your Honor, not except for the ones
21 that the probation office reflected in the objections.

22 THE COURT: All right. With those noted, then, I'm
23 going to accept the presentence report as undisputed, except
24 for the places where there are objections noted, and as part of
25 my findings of fact at sentencing.

1 And I don't believe there's any legal disputes we have
2 to resolve, other than how the guidelines should be applied; is
3 that correct?

4 MR. SMITH: Correct, Your Honor. Thank you.

5 THE COURT: So I've read the presentence report, but
6 that's not all I've read. I've received additional materials
7 concerning the defendant, including the government's memorandum
8 in aid of sentencing, and attaching an FBI 302 memorializing
9 one officer's experience during the incident that's at the
10 heart of this case.

11 I've read the defendant's memorandum in aid of
12 sentencing, which had a number of attachments, including a very
13 heartfelt letter from the defendant's wife regarding his
14 character and the ongoing impact of his incarceration on their
15 family, their business, and their children. It also documents
16 the defendant's attempts to resolve an outstanding warrant in
17 California before his arrest in this case.

18 I read and received a series of character references
19 that appear to have been generated in 2019 in connection with
20 another purpose, with respect to either work or attendance at a
21 service academy with respect to government contracts. I'm not
22 sure if the authors are aware of their use for the purposes for
23 which they're being supplied now, but I will take into
24 consideration what it is that people who knew you and worked
25 with you in the past had to say then.

1 They noted the defendant's professionalism, his
2 trustworthiness, and his work ethic; called him a man of
3 integrity and ethics at his business, dependable, knowledgeable
4 and hard working, he plainly knows his trade. They were
5 uniformly satisfied with the quality of the finished product
6 and the standards of excellence that he lived up to. They
7 describe him as detail-oriented, confident, punctual, somebody
8 who connected well with other people, and was described as
9 someone who delivers on what he promises. And he's somebody
10 that you'd want on your side if events, as one person put it,
11 went south.

12 There were a few letters from 2021, which were a little
13 bit more relevant, that had been offered, I guess, in support
14 of the defendant's release from pretrial detention. An
15 accountant or someone who'd worked with him in his business
16 remarked on how well Mr. Hamner insists on treating his
17 employees and the importance of his continued role in the
18 company to provide work for those employees and how he supports
19 the families of the employees, as well as his own family.

20 Another person who he met through public forums and his
21 church described him as warm and gregarious, generous with his
22 time in supporting candidates in his community and educating
23 his community.

24 The reason I go through this in so much detail is I want
25 everybody to know I really do read and consider these letters

1 and I appreciate them all.

2 In a criminal case there's a statute that tells me how
3 I'm supposed to decide what the sentence is, it's 18 U.S. Code
4 § 3553. It list a number of factors that I'm going to go
5 through one at a time later. But the advisory sentencing
6 guidelines and what they would recommend as a sentence is one
7 of the factors I have to consider in determining the
8 appropriate sentence here. I'm required to calculate what they
9 would recommend in every case. And the purpose of them is to
10 arrive at a recommended sentencing range based on the offense
11 and then various aggravating and mitigating factors.

12 So I'm going to begin with that calculation. It might
13 sound more like math than law as I go through it, but I want
14 everybody to understand that that's only the initial part of
15 the analysis.

16 The defendant pled guilty to Count 2, which alleges that
17 on or about January 6, at about 1:40 p.m., Mr. Hamner committed
18 and attempted to commit an act to obstruct, impede, and
19 interfere with a law enforcement officer lawfully engaged in
20 the lawful performance of his official duties incident to and
21 during the commission of a civil disorder. And that's a
22 violation of 18 U.S. Code § 231(a)(3) and 2. The maximum
23 sentence for that offense could be up to five years of
24 imprisonment. And the offense level that applies to that
25 particular offense under the guidelines is disputed here.

1 This defendant pled guilty to obstructing, impeding, and
2 interfering with officers, and everyone agrees that you start
3 with § 2A2.4 of the guidelines, which is helpfully entitled
4 "Obstructing or Impeding Officers." The base offense level
5 under that guideline starts you off at level 10. But under
6 that there's a specific offense characteristic that permits an
7 increase of three levels under (b) (1) (A) if the offense
8 involved physical contact or (B) a dangerous weapon was
9 possessed or its use was threatened, then it goes up three more
10 levels. And there are other increases that don't necessarily
11 apply in this situation.

12 I do find -- and I'll set out in more detail in a
13 moment -- that a dangerous weapon was possessed, or at least
14 its use was threatened, and that this would, if that guideline
15 was where we stopped, lead to an offense level of 13. But,
16 § 2A2.4 has a subsection (c) that's a cross reference that
17 leads you to another guideline.

18 And I just say to the members of the public who are
19 listening to this, you can't blame this on me.

20 Yes, Mr. Smith?

21 MR. SMITH: Your Honor, I just want to clarify
22 whether the Court would hear argument on this point before the
23 Court makes its finding on the range, or is the Court inclined
24 to just rely on the papers and --

25 THE COURT: I am, I believe, very thoroughly

1 knowledgeable about your arguments and the guidelines and I
2 don't think I have too many questions. And --

3 MR. SMITH: Would Your Honor mind if I just make just
4 a couple of quick points? Probably less than three minutes.
5 Because just --

6 THE COURT: Well, let me wait until we get to the
7 point where that would be appropriate.

8 MR. SMITH: Okay. Thank you.

9 THE COURT: I understand that you have a lot to say.
10 These are two of the longer sentencing memoranda I've received.
11 And I've spent a lot of time digging into everything you have
12 to say and there may not be anything you need to add.

13 All right. So, where I was, was the cross reference in
14 § 2A2.4(c), which says if the conduct constituted aggravated
15 assault -- well, (c) sends you to another guideline. If the
16 conduct constituted aggravated assault, the guideline is
17 § 2A2.2 instead. And that's a very significant move because
18 that guideline starts at level 14, four levels higher, and then
19 it, too, has the specific characteristics that permit, this
20 time, an increase of four levels for the use of a dangerous
21 weapon and only three for its threatened use. And it permits
22 an adjustment if the victim is an official victim that isn't
23 available under § 2A2.2.

24 The presentence report says, "As it appears the instant
25 offense constituted an aggravated assault, this cross reference

1 applies," but it doesn't detail its reasoning. So what is an
2 aggravated assault under the U.S. Sentencing Guidelines and
3 according to the Commission? The application notes say that an
4 aggravated assault is a felonious assault that involves one of
5 four things: (A) a dangerous weapon with intent to cause
6 bodily injury -- not merely to frighten -- with that weapon;
7 (B) serious bodily injury; (C) strangling, suffocating, or
8 attempting to strangle or suffocate, or; (D) an attempt to
9 commit another felony.

10 So the first question is: Is this an assault? The
11 parties agree on what the definition of an assault is. They
12 both point me to 994 F.3d 1096, at 1099, a Ninth Circuit case
13 that applies the common law definition of a willful attempt to
14 inflict injury on the person of another or to threaten to
15 inflict when coupled with the apparent present ability to do so
16 that causes a reasonable apprehension of immediate bodily
17 harm -- which is very close to what the definition would be if
18 we were sitting in Superior Court in an assault case.

19 The conduct here fits the definition of an assault. And
20 Count 2 is punishable for more than one year, so it is a
21 felonious one. But is it an aggravated one? We don't have
22 aspect (B), the serious bodily injury, and we don't have (C),
23 the strangling or suffocation.

24 So do we have (A), the use of a dangerous weapon with
25 intent to cause bodily injury? How do the guidelines define a

1 dangerous weapon? Again, you have to look at the application
2 notes for the aggravated assault guideline, and it says,
3 "Dangerous weapon" has the meaning given that term in § 1B1.1,
4 application note 1. And that includes any instrument that's
5 not ordinarily used as a weapon -- could be a car, it could be
6 a chair, it could be an ice pick -- if that instrument is
7 involved in the offense with the attempt to commit bodily
8 injury.

9 Application note (1) (E) says a "dangerous weapon" means
10 an instrument capable of inflicting death or serious bodily
11 injury, or an object that is not an instrument capable of it,
12 but closely resembles one, or something the defendant used in a
13 manner that created the impression that the object was an
14 instrument that could cause bodily injury, such as when someone
15 pretends to have a gun.

16 I find that the massive sign being pushed into and over
17 the police line was capable of inflicting serious bodily injury
18 and would qualify as a dangerous weapon, even if it's not
19 something ordinarily utilized as a dangerous weapon. And this
20 is supported by docket 28-1, the FBI 302 containing police
21 eyewitness accounts of the size, weight, and sharp corners of
22 the sign and its supporting metal frame and wheels.

23 But just having a dangerous weapon isn't enough for (A),
24 there has to be evidence of the intent to cause bodily injury.
25 The government says there can be little serious dispute on that

1 issue. And that seems to be the probation office's basis for
2 applying the cross reference. But the government bears the
3 burden by a preponderance and I don't see what the evidence of
4 this defendant's state of mind is. Couldn't one also find that
5 the goal was to push them back, disrupt the line and interfere
6 and obstruct, as opposed to causing bodily injury?

7 I will give you a very brief opportunity, if you want to
8 address this, on behalf of the government.

9 MR. COLLYER: Thank you, Your Honor. I would just --

10 THE COURT: Yes?

11 MR. COLLYER: I would just add that I think the --
12 not only is the manner in which the sign used important, but
13 the context in which it was used important. The sign was
14 pushed into and onto a group from which the defendant was
15 standing against, in the context of what was essentially a
16 medieval battlefield where there was constant hand-to-hand
17 combat for something over an hour. And not isolated incidents.
18 Constant assault. This is one of those examples.

19 So when you consider what took place -- which is clearly
20 depicted on the video -- the manner in which the defendant is,
21 with intensity, pushing that sign -- his knees are bent, his
22 back is bent -- he is pushing that sign into the police. And
23 then take the larger picture into context, which was this was a
24 battlefield. And putting all those together, that clearly
25 shows, at least by a preponderance of the evidence, that the

1 intent here was to injure the police so that they could get
2 through.

3 Now, I understand, of course, with any mens rea element
4 the government can never affirmatively prove what's in
5 somebody's head with direct evidence. But here, the
6 circumstantial evidence, from the manner in which the sign was
7 used, the sign itself, and the context in which it was used
8 that day and what was happening at that time, at that very
9 place, shows that the intent in throwing that sign was to
10 injure the police officers so they could get through the line.

11 THE COURT: All right. At the time of the detention
12 hearing I said, "This ruling is not based on a finding that the
13 defendant threw the sign; that's not depicted in the video.
14 However, the billboard did not 'move toward the police line' --
15 as the defense had put it -- on its own. It was plainly being
16 used." But then I said, "It was plainly being used in an
17 aggressive, offensive manner to disrupt or dislodge the line of
18 officers, and the defendant plainly participated, albeit close
19 to the end of its journey."

20 And while the sign itself largely passed over the heads
21 of the officers, we do have to take into account the fact that
22 it was being held by the huge stand and with huge wheels, which
23 have now been turned vertical and they're not horizontal on the
24 ground. And the FBI 302 provided by the government includes an
25 account of an officer who turned to face the wheel coming

1 straight at his head. But even he said, in docket 28-1, he saw
2 rioters actively pushing the sign into and against the police
3 line. He believed this was done by the rioters in order to
4 breach the police line.

5 So I don't believe the government has proved by a
6 preponderance that this meets the definition of aggravated
7 assault in subsection A, the use of a dangerous weapon with the
8 intent to cause bodily injury by a preponderance of the
9 evidence. And if it did, then we'd have to deal with the
10 question of if that use of the dangerous weapon is what
11 elevates the base offense level to 14, why it would be fair to
12 then add on the extra four points for the use of the same
13 weapon as a special offense characteristic? But I don't think
14 I have to address that because I'm not going with that theory
15 of an aggravated assault.

16 But it's also the government's position that Count 2
17 falls into category (D), an assault that involved an intent to
18 commit another felony. So what's the other felony? The
19 government says Count 1, 18 U.S. Code § 111(a)(1) and (b). And
20 it says that the assault committed in Count 2 involved an
21 intent to commit Count 1, another felony. But the cases the
22 government relies upon all involve something of a different
23 nature, an assault on an officer when you're committing a
24 robbery, when you're trying to get away from a drug offense or
25 some other offense. And those cases seem inapposite to the

1 specific thing I'm being asked to do here.

2 Count 1 charges using the same large metal sign to
3 assault, resist, oppose, impede, intimidate, or interfere with
4 the same officers engaged in their very same official duties.
5 And the government's asking me to find that the defendant
6 committed the assault on the officers with the sign, in Count
7 2, with the intent to commit the felony offense of assaulting,
8 impeding, and interfering with officers based on the exact same
9 facts in Count 1, and that is another, quote/unquote, felony
10 offense from the charge of impeding and interfering with the
11 officers.

12 But I'm concerned that the case law doesn't go that far,
13 even if some sort of elements/*Blockburger* type analysis would
14 let you find the offenses to be different because they have
15 different elements. And the only cases in which that finding
16 has been made in this courthouse so far that the parties have
17 identified are cases in which the parties took the issue off
18 the table in the plea agreement.

19 And the extra problem that we have in this case is we're
20 not using the 231 offense as another felony for the 111
21 offense. We're going the other way. You're saying the intent
22 to commit the 111 offense was the other felony for purposes of
23 Count 2. But, for a violation of 111(a)(1) to even be a
24 felony, if you don't have physical contact with the victim,
25 your acts have to involve the intent to commit another felony.

1 So, the other felony for Count 1 has to be Count 2.

2 So, I don't see how the interference with officers
3 during a civil disorder can be the other felony that's the
4 necessary element to charge a felony violation of § 111, while
5 at the same time § 111 is the other felony that makes the
6 interference with the officers an aggravated assault.

7 The government noted that the cross reference was
8 applied in the *Leffingwell* case. But in that case the
9 defendant pled to a § 111 violation. He did have physical
10 contact with not one, but two victims. And most important, he
11 agreed not to dispute the application of the guideline at the
12 time of the plea. And that was the reason I gave on the record
13 for using the aggravated assault guideline.

14 Similarly, Judge Friedrich, in the *Creek* case, had an
15 agreed-guideline calculation in front of her. She was less
16 troubled by the double counting issue. But there the defendant
17 pled guilty to § 111 and the 231 was the other felony, so you
18 only had to make the cross reference in one direction. Also,
19 her defendant had physically grabbed an officer and forcefully
20 dragged him across the plaza and thrown a strap weighted down
21 with some metal objects in it at him.

22 I will give each party an opportunity to address that
23 very narrow issue. I frankly don't think it's necessary, but
24 if the government would like to say anything further about the
25 issue, I'll be happy to hear it.

1 MR. COLLYER: Very briefly, Your Honor. The
2 government would submit that this case is a palindrome to the
3 *Creek* and *McCaughey* case, which is our convictions of 111 with
4 231 being the other felony.

5 THE COURT: All right. But, you understand, 231 --
6 you didn't have to find that 231 was a felony using 111 to then
7 have -- you don't have -- you're only going one way, not two,
8 and that's what differentiates it for me a little. It's even
9 one more layer of problem here that you don't have there.

10 MR. COLLYER: But you also don't necessarily have to
11 find another felony for 111 to be a felony. It can be the
12 felony through the use of the weapon, which we have here. So
13 both of those things -- or, excuse me, contact, which we have
14 here. So both of those things elevate 111 separately.

15 THE COURT: We don't have contact here. We had
16 contact in *Leffingwell*. We have the use of a weapon, but I
17 think it had to be the other felony was the thing for 111 that
18 makes it more contact.

19 MR. COLLYER: Your Honor, the sign makes contact with
20 the police. Physical contact has been found in the context of
21 an inmate throwing urine into a corrections officer's face.
22 The inmate didn't actually touch the officer, the urine did,
23 and physical contact was found there. That's a Seventh Circuit
24 case. So that's a separate manner in which you can get to the
25 111.

1 So I would submit that the question before the Court is:
2 Is the conduct that constituted a violation of 231, does it
3 also constitute a violation of 111? And the answer is yes.
4 111 is a very inclusive statute. There are six separate verbs
5 that can separately be violations of that statute. And so if
6 the conduct that constitutes the 231 would also constitute a
7 111 -- and in this case it would -- then it is with the intent
8 to commit another felony. And so that's what I would say the
9 issue is here. And the answer to that question is yes, it
10 would constitute.

11 I understand this is an issue of first impression so far
12 in terms of the direction we're going; 231 conviction going to
13 111. But the logic holds true. If one is responsible for an
14 aggravated assault on a violation of 111 with the intent to
15 commit a 231, then one is responsible for an aggravated assault
16 for a violation of 231 with the intent to commit a 111. And
17 that would be my point, Your Honor.

18 THE COURT: All right.

19 MR. COLLYER: Thank you.

20 THE COURT: Mr. Smith, you can give your three-minute
21 summary.

22 MR. SMITH: Thank you, Judge. We, the defense,
23 completely agrees with the Court. The Court's put it in better
24 ways --

25 THE COURT: I haven't ruled yet.

1 MR. SMITH: -- than we have.

2 Well, we agree with the idea as expressed by the Court.
3 But, I'd like to add just a couple of points on the "another
4 felony" issue. There's two problems, and the Court was sort of
5 hinting at this. It's not just that the elements are similar
6 between the 231 and 111 offense, it's the exact same fact
7 conduct. So when the Court was pointing to the cases cited by
8 the government where the other felony was a robbery in a drug
9 deal case, or assault in some other -- you know, a bank
10 robbery, it wasn't just that the elements of those two kinds of
11 offenses are different, it's the different fact conduct.
12 Whereas, I think you just heard Mr. Collyer say that it's the
13 exact same fact conduct.

14 So even if there's some distinction, even if we have
15 physical contact here through the urine case and that makes it
16 a felony, there still remains the problem that this is the
17 exact same fact conduct. And so, as the Court put it, although
18 there might not be a *Blockburger* issue, that doesn't mean that
19 it's another felony to call the exact same fact conduct a
20 different crime when -- another felony when it's the same
21 conduct at issue.

22 So, it's bootstrapping. It's like a Mobius strip or
23 something. This isn't how this is supposed to be used. And
24 so -- oh, the other point I wanted to make, Your Honor, is that
25 Mr. Collyer pointed out some of the element -- the diversity of

1 the elements in the 111(a) offense. But there's a D.C. Circuit
2 case that holds that all of those elements are modified by
3 forcible, the word "forcible." So the use of force has to be
4 used for all of the elements in the 111(a) offense, the
5 intentional use of force.

6 I think that's it, Your Honor.

7 THE COURT: All right. I think I understand your
8 argument.

9 The guidelines don't define another felony for purposes
10 of the cross reference in 2A2.4, although I'm not sure it would
11 help if they did. There is a definition of "another felony" in
12 another guideline, § 2K2.1, which covers the possession of a
13 firearm. That guideline has a special offense characteristic,
14 (b) (6) (B), if the defendant used or possessed any firearm in
15 connection with another felony offense or possessed it with
16 reason to believe it would be used to possess in connection
17 with another felony offense, and there's an increase that goes
18 along with that.

19 And the guideline under § 2K2.1(c) (1) also has a cross
20 reference if the defendant used a firearm in connection with
21 the commission or attempted commission of another offense, and
22 then it says you would use the guideline for that offense.
23 And, so, that guideline has application notes and it defines
24 those terms. And it says, "Another felony offense for purposes
25 of subsection (b) (6) (B) means any federal, state, or local

1 offense -- other than the explosive or firearms possession or
2 trafficking offense -- punishable by imprisonment for a term
3 exceeding one year." And "another offense," for purposes of
4 subsection A, means a federal, state, or local crime other than
5 the explosive or firearms possession offense, regardless of
6 whether a criminal charge was brought.

7 In other words, it defines "another" as another, the way
8 people understand it. It doesn't directly answer the question
9 of whether "another offense" means something, as Mr. Smith
10 said, factually distinct, such as drug trafficking, robbery or
11 assault, or just another offense with slightly different
12 elements arising out of the exact same factual circumstances,
13 the possession of that very weapon.

14 But there's no reason to believe that this is meant to
15 be based on just the hypertechnical alignment of elements.
16 Because when the guideline, at least in the gun context, tells
17 you, well, you'd use the guideline for that offense instead of
18 the firearms offense, it seems clear that it means something
19 other than another gun possession offense. And it seems that
20 the government's approach strips the provision of any meaning.

21 It strikes me that if the Commission is asking: Did you
22 commit the assault with the intent to commit some other
23 offense? it didn't mean with the intent to commit that exact
24 same assault, just charged differently. They could have easily
25 defined "another offense" as any offense with any different

1 elements that's a different offense, but they didn't.

2 It's also important to note that the cross reference
3 says you go to aggravated assault if the assault on the police
4 officer involved the intent to commit another felony, not the
5 same intent needed to satisfy the elements of another felony,
6 not that it was committed during the commission of another
7 felony. This suggests that the guideline is meant to cover
8 just the situation in the cases that you cited, where the
9 assault on the police officer is intended to facilitate or
10 further or advance or succeed in the commission of or evasion
11 of apprehension for a second, different crime.

12 And the reason this is important, I think as I've
13 already said, is if we use the guidelines specifically
14 designated for an assault on officers, § 2A2.4, starting at the
15 base level of 10, add the three levels for the possession and
16 threatened use of a dangerous weapon -- which is indisputable
17 here -- you get to a level 13. You adjust for his acceptance
18 of responsibility and you're at a level 11.

19 But, if you utilize § 2A2.2 for aggravated assault, you
20 start at a base level of 14. You add four levels for the same
21 use of the same dangerous weapon and now you're at level 18.
22 So you're already eight levels higher, but you're not done yet
23 because under § 2A2.2 you get to add six levels for -- under
24 § 3A1.2 for an official victim, if the victim was a government
25 officer and the offense of conviction was motivated by that

1 status. That adds six levels.

2 But, the application notes explain that that enhancement
3 is not available under § 2A2.2 because that guideline
4 specifically incorporates the notion that it's a police officer
5 involved from the start. So they incorporate that notion, but
6 you end up at a lower guideline.

7 So, under aggravated assault you're now up to level 24.
8 You get three levels for acceptance of responsibility, level
9 21. We have a difference of ten levels on the guidelines chart
10 for the exact same set of facts.

11 Then you have the problem that the criminal history
12 category -- which I understand is disputed -- is calculated by
13 the probation office to be Roman numeral V. The defendant says
14 it's IV because his 2002 conviction involving marijuana in
15 California, described in the presentence report in paragraph
16 41, was expunged under the California Health and Safety Code
17 and shouldn't count. The probation office, the government
18 disagree.

19 But I don't think I have to rule on that issue because
20 Count 3 in the 2002 conviction was the possession of explosives
21 and that wasn't expunged. And given the time you'd served when
22 his probation was revoked on that count, as well as on the
23 marijuana count in 2006, the three points was properly
24 assessed, even if you don't include the marijuana at all.

25 So he's at a criminal history category of Roman numeral

1 V. Under § 2A2.2, the recommended advisory sentencing
2 guideline range at level 11, category V, would be 24 to 30
3 months.

4 Under § 2A2.4, the advisory sentencing guideline range
5 for an aggravated assault at category V would be 70 to 87
6 months, which I note already far exceeds the statutory maximum
7 of 60 months anyway.

8 So you've got two guideline calculations for the exact
9 same set of facts and a violation of a statute for which no
10 guideline is even assigned in the manual that produce a
11 46-month -- or almost four-year -- difference on the low end
12 and a 57-month -- so four and three-quarters -- difference on
13 the high end, and the second one starts higher than the
14 statutory maximum you could ever get, in any event.

15 Therefore, given the fact that the showing necessary for
16 the application of the cross reference under subsection A has
17 not been made, given the government's inability to produce
18 evidence to establish the defendant's intent to cause bodily
19 injury by a preponderance of the evidence, given the
20 circularity involved in the government's proposal, that I find
21 that subsection D applies, and that is that the assault, which
22 is the offense of conviction, involved an intent to commit
23 another felony when the other felony is the exact same assault
24 that likely wouldn't be a felony unless it was committed with
25 the intent to commit another felony.

1 And finally, at best, the cross reference is ambiguous.
2 And under such circumstances the Rule of Lenity requires the
3 adoption of the definition that favors the defendant.

4 I find, for purposes of this case only -- and certainly
5 not every criminal case and not every January 6 case -- that
6 the appropriate guideline calculation in this case is the 24 to
7 30 months under § 2A2.2.

8 The analysis is fact dependent. However, I think it's
9 important to point out, Mr. Smith, that it's very troubling
10 that if you use only § 2A4.2, the guideline gives so much less
11 weight to the official role of the victims, and the fact that
12 they were law enforcement officers motivated the attack, which
13 was unquestionably an assault with a dangerous weapon against
14 law enforcement officers performing their duties during the
15 time of a civil disorder.

16 And, therefore, I think it's necessary, no matter which
17 way I rule on the guideline issue, to take both guideline
18 ranges into consideration when applying the statutory factors
19 under 3553(a), particularly (a)(7), which talks about the need
20 to avoid unwarranted sentencing disparities with defendants of
21 similar records who have been found guilty of similar conduct,
22 and when determining what sentence would be sufficient, as well
23 as not greater than necessary.

24 So that's my ruling with respect to the guidelines. So
25 we understand where we are in terms of that. But, then I'm

1 also thinking about the other. And at that point now, would
2 the government like an opportunity to speak regarding the
3 appropriate sentence in this case?

4 MR. COLLYER: Yes. Thank you, Your Honor. Your
5 Honor, the events of January 6th, 2021 left a stain on this
6 nation's history. Each individual participant contributed to
7 the international embarrassment that is the Capitol riot. I
8 know the Court is aware of what took place generally that day,
9 so I will not belabor it. The government's sentencing
10 recommendation is based upon actions this defendant took that
11 day.

12 And just to note for the record, the government agrees
13 with probation's PSI calculation, the final PSI, and still
14 asserts that the final offense level should be 21.

15 I would also just move Exhibits 5, 8, and 9 into the
16 record, which were previously provided to the Court and
17 counsel. The government recommends a sentence of 60 months
18 incarceration which, under the government's assertion, is the
19 guideline sentence by function of 5G1.1(a).

20 The defendant was one of the first to breach the
21 exterior barriers on January 6th. He was on the west lawn,
22 near the Garfield Monument, south of the Peace Circle, when he
23 observed the breach occur at 12:52 p.m. at the Peace Circle.

24 He then jumped the fence line that was in place and
25 personally began pulling the fence down, inviting the thousands

1 of rioters behind him to storm the Capitol that day.

2 Within 30 minutes we can put him on the front lines on
3 the West Plaza. It's important to note that in preparation for
4 the violence, in between the time that he jumps that exterior
5 barrier and tears it down and when he appears on the front
6 lines on the West Plaza, he has replaced his baseball cap with
7 a black helmet.

8 Once on the west front he began to pull away the bike
9 rack barriers protecting police. He is photographed engaged in
10 a tug of war with police over one such barrier. During the
11 *McCaughey* trial, just, I believe, two weeks ago, a sergeant
12 from Metro PD testified about the import of the bike racks that
13 day. And he explained that the bike racks provided protection
14 for the officers, but also acted as a force multiplier because
15 they were able to exert defense over a larger horizontal field
16 by nature of the bike racks which were an unbroken chain of
17 protection.

18 However, once those bike racks started to get stripped
19 away by people like the defendant, the officers were forced to
20 stand shoulder to shoulder, which left their lines subject to
21 easy breaches between the persons of the police officers. And
22 with the constant waves of pressure from the crowd, which
23 vastly outnumbered police, through active assaults and passive
24 resistance, they were able eventually to break the police line
25 in a number of spots. One such assault to help break the

1 police line was the assault for which the defendant stands
2 convicted before the Court.

3 Now, defense has repeatedly submitted that the sign was
4 just crowd surfing over the crowd. But that's belied by the
5 body-worn camera footage. When the defendant first sees the
6 sign coming north across the crowd he exclaims, "Oh, yeah."
7 And then he taps a rioter between him and the police to warn
8 him of the sign's arrival. The sign wasn't otherwise going to
9 impact that rioter. The sign was moving north, parallel to the
10 police line. That other rioter was between the defendant and
11 the police line. The sign would have kept passing north behind
12 him.

13 But, the defendant says to the guy in front of him,
14 between him and the police, "Hey, here's this sign." And it's
15 at the point where it reaches the defendant that the sign stops
16 moving north, it stops moving parallel to the police line, and
17 the defendant is part of the cohort that directs it east into
18 and onto the police line. He did not grab it moments before it
19 was going to pass over anyway. It was moving parallel to the
20 police until he is part of the cohort holding it.

21 As I said before, the body-worn camera depicts the
22 intensity with which he is pushing. His knees are bent, his
23 back is bent, he is pushing into it. The police, at first,
24 desperately trying to push it back before realizing it's not
25 going to work and they just accept the sign being crashed down

1 upon them.

2 I know this Court is aware of the -- and has noted the
3 size and the weight of the sign and the danger it posed to
4 police. And the Court has referenced the Capitol police
5 officer who was out there without a helmet, protecting the
6 Capitol, who narrowly avoided injury by happening to turn
7 around at just the right instant to be able to avoid one of the
8 casters hitting him. And I know the Court has viewed the
9 videos of the assault and I know the Court agrees with the
10 notion that the videos speak for themselves.

11 Moving to the defendant's history and characteristics. This
12 is the defendant's fifth felony conviction and 11th conviction
13 overall. He has asserted that he is apologetic to the police
14 and that he would have assisted injured police officers. But
15 his history of violence and disdain for the police simply --
16 throughout his criminal history belie that.

17 He has, multiple times, been convicted of resisting or
18 obstructing police. He has either fought or fled from police
19 multiple times. He bragged about doing so to the police when
20 he was arrested for this offense; told them he's a runner and a
21 fighter, but that these police are lucky today. Any assertion
22 that he's apologetic to the police or would assist them is
23 belied by his history and his actions.

24 But the police aren't the only victims of his crimes.
25 He's been convicted of felony inflicting corporal injury on his

1 spouse in 2010. Convicted of felony force assault with a
2 deadly weapon with great bodily injury in 2005.

3 And the defendant has put forth the negative effects
4 that his incarceration is having on his family. But there's
5 only one reason Thomas Hamner is where he is today, and that
6 reason is Thomas Hamner. And it is not from a single bad
7 decision, it's not from a single event. It is a repeated,
8 30-year history of this type of conduct that includes violence.
9 January 6 was just the latest example.

10 Given his criminal history and his prior prison and
11 criminal justice sentences, I don't think there actually could
12 be specific deterrence in this case, Your Honor.

13 Defense says that the time he spent in jail thus far is
14 sufficient to deter him from doing this again. But this is at
15 least his third time obstructing law enforcement, it's at least
16 third time assaulting individuals. How many times over the
17 last 30 years has he stood before a court and said, "I won't do
18 it again"?

19 Now, the defense argues that many of those who entered
20 the Capitol that day received probationary sentences. And
21 that's true, but none of those individuals assaulted anyone
22 and, which I would note, that the circuit has noted puts them
23 on a different level of defendant.

24 Defense has presented a number of comparator cases for
25 the Court's sentencing consideration, leaning heavily on the

1 *Leffingwell* case. As the Court is aware, this case is easily
2 distinguishable from *Leffingwell*. Mr. Leffingwell had no prior
3 criminal history, he was a decorated military member, injured
4 in service to this country. He was immediately apologetic to
5 police. This defendant can make no such claims here.

6 The other cases that defense cites either did not
7 involve an assault or, more glaringly, each one of those
8 defendants had no criminal history.

9 As the Court noted, 3553(a) has the Court compare
10 defendants to other defendants with similar records who engaged
11 in similar conduct, not just the offense of conviction. And so
12 the government submits that better comparative cases are the
13 *Howard Richardson* case, where Richardson hit a police officer
14 three times and then participated in the exact same sign
15 assault that the defendant here participated in. He pled
16 guilty to § 111(a)(1) and was sentenced to 46 months. And I
17 would note that he, although had same escalating behavior in
18 recent years, had no prior criminal history.

19 The *Creek* case, which we have discussed and the Court
20 has noted, Creek pushed two officers, hit one of them and
21 kicked the other. He, again, had no prior criminal history.
22 He was sentenced to 27 months.

23 In *Scott Fairlamb*, Fairlamb pled guilty to 111(a)(1) and
24 also a 1512. So I would note that it was the 1512, an
25 obstruction charge, that drove the guideline calculation in

1 that case. But, it's analogous because here we have similar
2 conduct and similarly situated defendants because Scott
3 Fairlamb had a criminal history. Not as egregious as this
4 defendant's, but he had a criminal history, including multiple
5 prior convictions for assault. He was sentenced to 41 months
6 in prison.

7 Your Honor, earlier this year CBS news conducted a poll
8 and found that 62 percent of Americans surveyed believed that
9 there would be violence from the losing side of an election in
10 future years. Only 38 percent of Americans surveyed believed
11 that the losing side would concede peacefully in future
12 presidential elections. In order to prevent January 6, 2021
13 from becoming a quadrennial event in this country, the Court
14 needs to send a message that what happened that day was
15 unacceptable and that there are consequences.

16 For those reasons, the government respectfully requests
17 the Court sentence the defendant to 60 months incarceration, a
18 period of supervised release, the mandatory \$100 special
19 assessment, and \$2,000 in restitution. Thank you.

20 THE COURT: Thank you.

21 Mr. Smith, would you like to speak on the defendant's
22 behalf?

23 MR. SMITH: Yes, Your Honor. Thank you. I'm going
24 to make a few points and then Mr. Hamner is going to allocute.

25 The first point I want to make is, as the Court knows,

1 the guidelines range is presumptively the fair range. And so I
2 think our first position would be for all the reasons that it's
3 the correct range that the Court calculated, it should also
4 apply.

5 Now, the Court noted that --

6 THE COURT: I'm pretty sure that no defense attorney
7 is going to want me quoting back to them in the future the fact
8 that they just said the guidelines were presumptively fair.

9 MR. SMITH: Well, I think, just as Your Honor said,
10 that the facts are limited to this case in your calculations.
11 I would make the same comment.

12 But, so, one point the Court made was that that strikes
13 the Court as a little bit -- that the Court was going to take
14 into account the aggravated assault guideline even if it
15 doesn't formally apply because it seems a little bit
16 inappropriate in the circumstances of January 6 to apply a 24-
17 to 30-month range. But I point out that even Mr. Collyer just
18 noted that some of his comparisons, which were sentenced using
19 the aggravated assault guideline, fell within the 24- to
20 30-month range. Mr. Collyer just cited a case that he compared
21 to Mr. Hamner, and that was a 27-month sentence. I think -- I
22 can't remember which --

23 THE COURT: Was that *Creek*?

24 MR. COLLYER: (Nods head.)

25 THE COURT: Okay. Go an.

1 MR. SMITH: So I think that itself shows that there's
2 nothing wrong with how the Commission decided this type of
3 offense would be sentenced.

4 The other point I want to make is 24 to 30 months, as
5 the Court knows, is nothing to sneeze at. A day in prison is
6 nothing to sneeze at, especially during the pandemic when, like
7 Mr. Hamner experienced, you're in solitary confinement for
8 hundreds of hours at a time when you're serving pretrial
9 confinement and afterwards.

10 The *Leffingwell* case on disparity -- unwarranted
11 disparities, Mr. Collyer is correct, there is more than a few
12 ways in which *Leffingwell*'s background is different than
13 Mr. Hamner's, and yet the offense conduct is very important,
14 too. There is no comparison between punching multiple officers
15 in the head and touching the sign and holding the sign and
16 carrying it and directing it, as Mr. Hamner did. That conduct
17 is criminal, but it is not nearly as aggravated as
18 intentionally punching someone in the head, which can give you
19 a concussion, or worse.

20 Mr. Collyer said that none of the comparisons the
21 defense offered involved assault. That's not the case. One
22 comparison we made was to the *David Blair* case, that's
23 21-CR-186, where, after walking up to a cop and saying, "What's
24 up, Motherfucker? What's up, Bitch?" the defendant assaulted
25 the officer with a lacrosse stick. The sentence in that case,

1 for this charge, 231(a)(3), was five months.

2 THE COURT: That's part of the problem you have here, is
3 that, as you know, every sentencing goes into so much more than
4 just the offense conduct. We don't know what that person's
5 record is, we don't know what they've done since. And, so,
6 it's helpful to a certain extent, but it isn't helpful. You
7 know, for instance, I know a lot more about the differences
8 between *Leffingwell* and this case than either one of the two of
9 you have acknowledged. But -- so that one I have a handle on,
10 whether it's analogous or not. And the others are helpful, but
11 I really want to know what the appropriate sentence is for this
12 offense, for this defendant. I think that's the best place to
13 focus your remarks.

14 I understand that disparities are a factor, but we
15 really have to figure out what to do here. And at the end of
16 the day, too many of the analogies start to be unhelpful
17 because you can find anything -- it's like legislative history,
18 you can find anything you want.

19 MR. SMITH: Well, let's put it this way, Judge: So
20 in the case of *David Blair*, who assaults an officer with a
21 lacrosse stick, he may have had no criminal history, but the
22 criminal history -- which would seem to be the only difference
23 with Mr. Hamner's case here -- is from ten years, it's a decade
24 ago. I understand that it's still formally scored because of
25 these quirks in how probation violations are scored, but if

1 that weren't the case, the criminal history would be three or
2 two.

3 If the Court goes through all of the points that are
4 jacking the range up, it's all the situation where the crime --
5 the penalty for the crime itself falls outside of the range in
6 which it's scored, but then it creeps into the range because
7 there's a probation violation that extends it in.

8 So, if it weren't for that type of scenario -- I guess
9 the Court can consider the argument I'm making as a departure
10 type or variance argument, that the seriousness of the criminal
11 history is overstated, given that it would ordinarily be
12 outside of the count of the range.

13 And, so, we would say, our position on the criminal
14 history, Judge, is he's changed. He left California when he
15 was in with a bad crowd. He moved to Colorado. He's married,
16 he has a family with lots of minor children, and he hasn't
17 committed crimes for ten years. So we say that this is -- the
18 criminal history score here is seriously overrated. And even
19 if it's not, it doesn't mean that someone who assaults a cop
20 with a lacrosse stick would have a five-month sentence and
21 Mr. Hamner's would be above a 30-month -- the 30-month range
22 that the Court has calculated.

23 Then there's Mr. Hamner's children. The Court, I think,
24 has already noted that this situation is already a crisis for
25 his family. One of his minor daughters is experiencing mental

1 health issues and having to see a therapist because of
2 separation from her father. The business has been crushed,
3 that Mr. Hamner was managing with his wife. I heard more about
4 it this morning from his best friend, who is also here. It's a
5 crisis in their family. And the Court might point out that the
6 guidelines say this shouldn't be considered normally. Well,
7 the Court is entitled to disagree with that as a policy matter,
8 and also consider that for variance purposes. And it's
9 serious. I don't understand why the Commission thinks that
10 that's something that shouldn't be considered, because they --
11 I guess the reasoning is that it's true in every case; well,
12 it's not.

13 I don't have children. Mr. Hamner has many children.
14 There's a big difference there. It doesn't mean that someone
15 with children is entitled to commit crimes or that's an excuse,
16 but that's collateral damage, is something the Court should
17 consider. And it's important, for deterrence, when I hear the
18 prosecutor say sitting in hundreds of hours of solitary
19 confinement is not deterrence, it makes me want to ask the
20 prosecutor whether he's ever been to a federal prison, whether
21 he's represented someone who has gone to jail.

22 It is a soul-crushing experience to be in a cell for 23
23 hours a day. There's social science literature backing this
24 up. It's as easy as using Google. It's crushing. That's not
25 an argument to pity Mr. Hamner, but it's certainly incentive

1 not to go back to where he is.

2 Judge, I think on remorse, I'm going to let Mr. Hamner
3 speak for himself.

4 Are there any questions the Court has?

5 THE COURT: No. This is isn't usually where I ask
6 questions. I want to hear what people want me to hear, that's
7 really the purpose of the sentencing. So I don't have
8 questions for you. And I am happy to hear anything that
9 Mr. Hamner wants to say to me. And if you have more to say,
10 I'm going to listen. But it's time for him to speak, he can
11 come to --

12 MR. SMITH: Okay. I'll let him take it away.
13 Thanks.

14 THE COURT: -- the lectern and join --

15 THE DEFENDANT: May I remove my mask?

16 THE COURT: Yes.

17 THE DEFENDANT: Thank you. I would like to start by
18 apologizing to everybody involved, especially to those
19 individuals that may have been negatively impacted as a result
20 of my actions or behavior. I am deeply sorry. The events that
21 took place that day are by far one of the biggest regrets of my
22 lifetime.

23 My initial intent of attending the rally in support of
24 the President quickly became distorted when I made the decision
25 to not leave the rally directly after the speech. I have

1 replayed those moments over and over in my head, wishing that I
2 had made a different choice. No matter how I tell the story, I
3 have to accept the facts of my actions. Will the people I hurt
4 ever be able to forgive me? How selfish I have been? If I had
5 to do it over again, I would have chosen to put my family first
6 and my freedom.

7 You see, in order to understand the background of how I
8 ended up where I did, I first need to go back to the beginning.

9 Eleven years ago I made a choice, a choice that would
10 end up changing the course of the troublesome road I had been
11 traveling down. Although this choice meant that I would fail
12 to complete the classes that I had been sentenced to, required
13 by probation, and ultimately led to a warrant for my arrest.
14 It also freed me from the bondage of my past dictations, and it
15 did get me far away from the negative influence that I just
16 could not seem to escape.

17 Looking back on that decision, I realize that there were
18 probably different choices that I could have made that would
19 have resulted in me completing my probation successfully, but
20 at that time, I honestly felt that leaving California was my
21 only option if I was going to survive. Coming to Colorado was,
22 in fact, the single best decision I have ever made and led me
23 to become the God-fearing man I am today.

24 The biggest blessing of all from that one decision was
25 finding the love of my life, my wife Stephanie. After eight

1 years together we are stronger than ever. Having a blended
2 family with seven children has been an unforgettable journey.
3 And somehow we were still able to build not one, but two very
4 successful businesses. One is a title company specializing in
5 residential, commercial construction. The other is a franchise
6 focused on kitchen and bathroom design and remodeling.

7 My two adult daughters are all grown up and out of the
8 house now, as is Stephanie's oldest son. At home we have my
9 nine-year-old son Blythe; Dillon who is 17; our beautiful
10 13-year-old daughter, Liliana, and our youngest little guy Ben,
11 who has just turned five. I believe that parenthood requires a
12 whole lot of love, not a whole lot of DNA, which is why they
13 only know me as their dad. The love for my stepchildren is the
14 greatest love I have ever known.

15 It was important for me to share those details with you
16 in order for you all to understand the events that occurred
17 right before my arrest. On November 5th, 2021 is a day where
18 mine and my family's world fell apart. We received a call from
19 the middle school that our daughter Liliana had been taken by
20 the school resource officer to the hospital and put on an M1
21 hold. This came as a shock to us since we had already put a
22 504 and an IEP plan in place with her school which required all
23 school staff and counselors to immediately phone home, should
24 Liliana come to the office for any reason or if Lili started to
25 express any unfavorable attitude or negative self talk.

1 Our daughter begged and pleaded with the officers and
2 staff to call mom and dad. She knew it wasn't right that she
3 was being taken off of school grounds without first speaking
4 with the parents. Instead, we learned that not a single person
5 decided they should call us before forcing our daughter to be
6 taken to the hospital against her will.

7 For the next several hours our daughter was missing and
8 could not be located. The school was telling us she was at
9 Memorial Hospital, the hospital was telling us they did not
10 have anyone there by that name. The police were telling us
11 they had taken her to the hospital, so she should be there. It
12 took many hours for them to locate our daughter, and my wife
13 was finally brought back to her room, where she was located.

14 The nightmare continued after the hospital told my wife
15 she could not stay with our daughter and had to leave the
16 hospital. Lili was terrified and all alone. The hospital
17 forcefully kept her for the next three days, eventually
18 releasing her on Monday, November 8th. We were all so thrilled
19 that Lili's back at home, safe with her family once again.
20 Little did I know that once again we would be torn apart from
21 each other just one day later.

22 I was leaving a business meeting with the Salvation
23 Army, one of my clients, when I was met with the 12 to 16
24 officers and agents, with weapons drawn. They yelled at me to
25 put my hands in the air. They told me I had a warrant having

1 to do with the January 6th, 2021 event, and that I was under
2 arrest. To this day I cannot understand why I made the
3 statement about being a runner and a fighter, other than that
4 was me trying to explain who I had used to be, but that I am
5 not that type of person any longer.

6 I most definitely was holding some resentment after the
7 weekend we went through as a family and had some
8 less-than-positive feelings over the handling of my baby girl,
9 although that is certainly no excuse. I owe an apology to
10 those officers and those agents, the Court, to my family, to my
11 nation. And this is not the kind of example I wish to set for
12 my children or anybody, and I could have done better.

13 These circumstances were about to have a lasting
14 impact -- negative impact on my daughter, who not only just
15 suffered the most traumatic weekend of her young life, but now
16 the person she had looked at as a father figure for eight years
17 was not going to be coming home anytime soon. She's being
18 re-traumatized, after already suffering from severe abandonment
19 issues from her absent biological father. Her mental state has
20 now become even more fragile than ever, with several more
21 suicide attempts and hospitalizations to follow while I have
22 been incarcerated.

23 My wife also discovered and informed me that our
24 17-year-old son had been secretly dealing with severe
25 depression for years and used cutting as a means for escape.

1 He apparently decided that we had our hands full with our
2 daughter, that he did not want us to know that he was suffering
3 as well.

4 Only now my wife has been left to deal with all of the
5 day-to-day challenges on her own, trying to raise our young
6 now-five-year-old son who just started kindergarten, while also
7 supporting our older children who struggle with severe
8 depressions, anxiety, OCD, ADHD, and bipolar disorders, as well
9 as having to operate both businesses. No one should be
10 expected to take on such tasks all alone. But she is truly,
11 truly my champion, and I will never be able to repay her for
12 this gift.

13 I pray for their forgiveness, love, and support. It
14 pains me to know how much hurt I have caused them. I have a
15 lot of work to do in order to right the wrongs for the mental
16 anguish I inflicted. I have a spiritual commitment. For the
17 community I can give time and service for the crimes I
18 committed. I can serve the sentence imposed. I do not ask for
19 mercy, what I ask for is opportunity. May I be given an
20 opportunity to do better as a citizen in this society, to be
21 the best father and husband I can be, and prove that I am no
22 longer the person I used to be.

23 Thank you for allowing me to address the Court, Your
24 Honor.

25 THE COURT: Thank you for speaking.

1 What I want to do now is just take a few minutes to
2 organize my thoughts in light of everything I've just heard,
3 and ask you all to stay close to the courtroom. It's only
4 going to be about 10 or 15 minutes. But I'm going to take a
5 break now and return. You all can remain seated. Thank you.

6 (Recess.)

7 THE COURTROOM DEPUTY: Your Honor, recalling criminal
8 case 21-689, *United States of America versus Thomas Patrick*
9 *Hamner*. Mr. Hamner is present in the courtroom. Probation
10 officer is Officer Walters. Counsel for Mr. Hamner is
11 Mr. Smith. Counsel for the government is Mr. Collyer.

12 THE COURT: Mr. Smith and Mr. Hamner, if you would
13 come back to the lectern, please. It's very difficult to talk
14 to somebody who is over there. You're the one who needs to
15 hear what I have to say.

16 As I said, I'm going to go through every single factor
17 in the sentencing statute, and that takes time, but it's
18 because they're all equally important.

19 The first thing I have to consider is the nature and
20 circumstances of the offense. You swore at the plea hearing
21 that you were in fact guilty of taking steps to obstruct,
22 impede, or interfere with law enforcement officers who were
23 engaged in the lawful performance of their official duties
24 during a civil disorder. While we may have struggled to
25 identify which of the artificial categories created by the U.S.

1 Sentencing Commission is best suited to the facts, the facts
2 are clear; you can watch it all unfold on videotape.

3 On January 6th a mob descended on the United States
4 Capitol, which was closed to the public as the Vice President
5 of the United States and members of Congress were performing
6 their constitutionally assigned duty of certifying the results
7 of a democratic election. The building was closed to the
8 public and it was being protected by members of the U.S.
9 Capitol Police and the D.C. Metropolitan Police Department as
10 some members of the angry mob were trying to force their way
11 inside.

12 Apparently this defendant seems to have assigned himself
13 a position as a member of what you could describe as the
14 January 6 offensive line. He suited up in his helmet and he
15 took multiple enthusiastic and entirely unlawful steps, in
16 three multiple locations, to add his physical effort, his
17 physical strength to the effort to breach the barricade and to
18 disrupt or dislodge the line of police so that the rioters
19 behind him could gain entry to the building.

20 Ultimately, as we know, the mob was successful in
21 overpowering and overwhelming the officers. Many people were
22 injured, several died, the building was damaged and defiled,
23 and the counting of the Electoral votes was indeed stopped as
24 the participants had to be hurried off to protect their lives
25 and all of the people who had entered the building without the

1 use of any of the usual security precautions had to be rounded
2 up and shown the door. And, miraculously, they were able to
3 reassume the count after that was done.

4 I'm not exactly sure what the purpose of the history
5 lesson and the argument about how seldom the civil disorder
6 statute has been used in the sentencing memo was supposed to
7 be. The defense made a strategic choice to plead guilty to
8 that count without benefit of an agreement. Maybe that charge
9 hasn't been used a lot before, but maybe that's because we
10 haven't had to face this sort of all-out assault on a
11 government building -- and not just any government building,
12 but the center of our democracy, the U.S. Capitol -- very
13 often.

14 The attack on the seat of government, the attack on the
15 democratic process and the peaceful transfer of power that
16 until that day had been one of the fundamental things that made
17 America America was unprecedented. It was intolerable. And it
18 caused incalculable harm. You might have to dust off an old
19 provision of the criminal code when faced with something you
20 should never have had to address in the first place.

21 And there is a lot more to it than what the defense
22 describes as lending his weight to the corner of a heavy sign.
23 Although I do appreciate the fact that in the sentencing memo
24 the defense has, at last, finally conceded that the defendant
25 personally did something and that he indeed interfered with law

1 enforcement and that it was at least reckless. But the memo
2 continues to gloss over things, with the use of the passive
3 voice, or words suggesting that the sign had some
4 intentionality of its own.

5 I want to be clear: The sign did not, as the memo put
6 it, lumber towards the officers. It was lifted, it was
7 carried, it was pushed, and it was heavy and it was huge. The
8 video exhibits capture, along with the photographs,
9 Mr. Hamner's posture and his effort. He's putting his back and
10 his legs into it. And it is entirely too cute and somewhat
11 inconsistent with the plea of obstructing and impeding and
12 interfering with the officers to minimize it as recklessly
13 crowd surfing a dangerously heavy sign. I do not think so,
14 Mr. Smith.

15 This was not the gleeful passing of an inebriated fan
16 boy over the heads of an adoring crowd at a concert. This was
17 a weapon, a battering ram, a use of force. And suggesting once
18 again that the billboard was being forced over, as opposed to
19 into the line of police, ignores the fact that the sign had a
20 huge base, and for the flat part to pass over the officers --
21 which it did just barely -- the base and wheels had to be
22 headed right at them.

23 And you can see on the video that the defendant does
24 take the time and make the effort to get the attention of
25 another protestor in its path -- berating and taunting the

1 officers with a bullhorn -- to let that guy know it's coming.
2 Plus, you can plainly see that the only reason it went over
3 anyone's head is that there is a line of approximately a dozen
4 officers on the other side grabbing it with both of their arms
5 and pressing it upward to defend themselves.

6 And the participation and the effort to propel the sign
7 towards the line of officers wasn't all the defendant
8 accomplished that day. According to the sentencing memo, he's
9 seen at the Capitol at 2:52 p.m. I think, according to
10 chronologies generated during the various congressional
11 investigations and hearings and published on multiple news
12 outlets, the President wasn't even speaking by that point,
13 hadn't even talked about marching down Pennsylvania Avenue yet.
14 I'm not certain about that.

15 But early on the defendant is already there and ready
16 for action, and he is there as the first rioters break through
17 police line at the Peace Circle. He then hops over the
18 barricades himself and begins tearing down fencing, even as
19 other protestors are urging him not to. This makes it easier
20 for the gathering crowd behind him to maneuver and to get
21 closer to the building.

22 The defendant ends up at the front of the loud and
23 growing crowd at the West Plaza, then wearing the helmet he
24 decided to bring with him to the Capitol. He joins others
25 trying to wrestle the bike racks being used as barricades out

1 of the hands of D.C. police officers. Again interfering with
2 law enforcement officers struggling to do their duties. Those
3 bike racks weren't much, but it's about all they had on January
4 6 and they served the purpose the prosecutor just described.
5 But then, as we know, at about 1:40 p.m., when other members of
6 the crowd started to move the sign that they had discovered
7 towards the officers standing between them and the building,
8 the defendant adds his strength to that effort. And shortly
9 thereafter, at 2 p.m., the Capitol is breached.

10 People talking about January 6th often talk about a mob,
11 but you can't use language that divests the individuals who
12 comprise the mob of their individual responsibility. This
13 defendant's presence added bulk and power to the mob. And he
14 didn't just simply add his presence, as many of those convicted
15 of the misdemeanors did, he added his physical strength and he
16 added action. He took affirmative steps to make sure the
17 rioters could get past the barricades and past the officers
18 that were standing in their way.

19 And by helping to remove the obstacles in the mob's way,
20 he helped it achieve its goal and, let's be frank, his goal to
21 stop the certification of the election. That's what Stop the
22 Steal meant.

23 Defendant's family, defendant's wife in particular, and
24 the defendant implore me to take a note of the impact of any
25 potential sentence on the family. And my heart goes out to

1 both of you. I can truly, deeply empathize with the struggles
2 with sons and daughters going through emotional issues. And I
3 agree with you, Mr. Hamner, they're not your stepchildren,
4 they're your children, and your love for them is demonstrated
5 and it's beautiful and it's real. And it's also true that no
6 parent is ever happier than their unhappiest child, which is an
7 adage that is 100 percent true.

8 But unfortunately, it is this conduct that I just
9 described and the decision to leave Colorado with all of
10 that -- some of that happening even before January 6th -- and
11 not today's sentence that brought about your separation from
12 your children as they continue to struggle with these things.

13 But, as that leads into, I'm also supposed to think
14 about the history and characteristics of the defendant. This
15 offense is not your entire life story and it's not all there is
16 to you. You showed me today how articulate and intelligent you
17 are, and your love for and understanding of your family and
18 your children's issues. Not all fathers get it, I can assure
19 you, and not all of them are as deeply involved.

20 You're also a small business owner and trusted with
21 remodeling of people's homes. You provide employment for other
22 people, who you treat well, and you've been described as
23 trustworthy, fair, and ethical, performing your work with
24 proficiency, skill, and great attention to detail. You are a
25 loving father in your blended family and you are involved and

1 helpful in your community.

2 Your history does also, though, include significant
3 prior involvement with the criminal justice system, some of
4 which was violent. There are five prior felony convictions.
5 Several involve violent assaults on women. And there were
6 ongoing problems with compliance with your conditions of
7 supervision.

8 And the record reflects a current theme of disrespect
9 for law enforcement, fleeing from arrest, resisting arrest, and
10 disrespect for courts in general when you bragged about that in
11 this case.

12 I agree that the overall calculation of the criminal
13 history score under the guidelines tends to overstate his
14 record, and I agree that all of it happened some time ago.
15 But, as Mr. Hamner was taken into custody in Colorado Springs
16 on November 9th, 2021, it was he who yelled out to a woman that
17 the arrest was for the January 6th event, "I was there." And
18 then he tells the officers, "You're lucky I ain't running and
19 making you go through hell right now. Just look at my rap
20 sheet. I'm a runner and I'm a fighter, but ain't that today
21 because I know that I've been doing right."

22 So, maybe he hasn't changed as much as he would like me
23 to believe from the guy who committed those offenses because
24 he's still bragging about them when he gets arrested for this
25 offense. And he says he's remorseful for what he did on

1 January 6 now, but even ten months after the attack on the
2 Capitol, after the full scope of the damage was known and there
3 was plenty of time for a cooler head to prevail, the defendant
4 was not the least bit sorry or chastened. It wasn't really
5 until he was hurt by it and his family had to suffer the idea
6 of being sorry really came to the fore. And I didn't really
7 hear as much about -- I heard about if he could make the choice
8 again, he would choose his family and his freedom. And that's
9 all important, but there was not as robust an apology to the
10 officers, which is what this is all about.

11 I'm required, according to the statute, to impose a
12 sentence that's sufficient but not greater than necessary to
13 accomplish the purposes that are set out in the statute. And
14 there's a lot of them and they often point in different
15 directions. But I'll tell you what the law says, it says I
16 must consider the need for the sentence imposed to reflect the
17 seriousness of the offense, promote respect for the law,
18 provide just punishment for the offense. I'm supposed to
19 afford adequate deterrence to criminal conduct -- and that
20 means yours, but other people's, too. I'm supposed to protect
21 the public from further crimes committed by you, if that's
22 necessary, and to provide you with whatever training or medical
23 care is needed in the most effective way.

24 Looking at all those factors, I do agree that this
25 defendant has already suffered some real punishment. His

1 incarceration to date has placed him far away from his children
2 at a time in their lives when they need him greatly. Maybe
3 that separation didn't cause their struggles, but it certainly
4 hasn't helped them and it may have exacerbated them. His
5 business is struggling he did not have the opportunity to be
6 with his father at the end of his life. He has suffered and
7 his family has suffered.

8 I don't think the government's recommendation of the
9 statutory maximum gives sufficient credit for that, or for the
10 fact that he has accepted his responsibility and pled guilty.
11 You don't usually get the statutory maximum when you plead
12 guilty. But I also have to think about a sentence that will
13 recognize the seriousness of this conduct and deter not only
14 you, but other people from thinking that they just get to take
15 matters in their own hands again. It's not as if the divisions
16 in our country have eased in any way.

17 So I'm not satisfied that a time-served option would
18 serve those statutory purposes. The heated rhetoric that
19 brought the defendant to the District of Columbia has not
20 subsided. The lie that the election was stolen and
21 illegitimate is still being propagated. Right now, government
22 officers involved in the investigation and prosecution of
23 alleged crimes related to January 6 and related to the former
24 President are under attack and subject to threats in
25 unprecedented numbers. And it's not only certain media

1 figures, but very prominent political figures are eagerly and
2 cagily predicting, or even outright calling for violence in the
3 streets if one of the multiple ongoing investigations doesn't
4 go his way.

5 So it needs to be crystal clear that it is not standing
6 up for America to stand up for one man instead of the
7 Constitution. And it is not ever justified to attack law
8 enforcement officers who were just performing their sworn duty
9 to protect the U.S. Capitol from attack and attempting to hold
10 back this effort to undo a democratic election in this country
11 that you say you are patriotic about.

12 What happened on January 6 and the effort to keep that
13 spirit alive a year and a half later is the antithesis of what
14 America stands for. It is the definition of tyranny and it is
15 authoritarianism.

16 I do agree entirely that we have to make sure that
17 January 6 protestors that broke the law aren't treated more
18 harshly than others who break the law. But I also can't set up
19 some separate category and say, oh, it's okay on January 6 for
20 somebody to attack a line of police officers when they're
21 trying to protect a federal building and control a crowd, when
22 we all know perfectly well that it wouldn't be acceptable in
23 the middle of some other protest.

24 The sentencing statute also requires the Court to
25 consider the need to avoid unwarranted sentencing disparities

1 among defendants with similar records who have been found
2 guilty of similar conduct. That means your sentence has to be
3 fair when you compare it to other people's. You can't paint
4 everybody who participated in January 6 with the same brush.
5 Same came to protest what they had been told falsely was a
6 stolen election, but they didn't go inside and they're not
7 charged with anything. Some entered but didn't hurt anybody or
8 break anything or interfere with law enforcement. That's not
9 this case.

10 And defendant fits in the more serious category of
11 people who did interfere with besieged officers struggling to
12 do their job while under attack. But it's also true that
13 within that group there are individuals who engaged in much
14 more egregious conduct, assaulting officers directly with
15 weapons or chemical sprays, and in some cases causing serious
16 injuries. The defendant should not be subject to the sentences
17 warranted in those cases. And I'm not sure the government
18 proposal makes all those fine distinctions.

19 The defense points me to the sentence in *Leffingwell*,
20 says it would be a gross unwarranted disparity if he were
21 sentenced -- if this defendant were sentenced to more than the
22 16 months in that case. But that case does not fit the
23 description of a defendant with similar record who has been
24 found guilty of similar conduct.

25 You seem to have taken time to read the transcript and

1 you couldn't have missed the distinctions, but then you quoted
2 my own transcript back to me -- as if I don't know it very
3 well -- very selectively and pretended that the distinctions
4 weren't there. The gentleman had no prior criminal record
5 whatsoever. There was no weapon involved. He had
6 extraordinary personal circumstances; brain damage due to
7 exposure to IEDs in his years of service in the military.

8 He got inside without assaulting or hurting anyone and
9 stood there largely inactive after that. And when officers
10 started pushing the crowd back, when he was in front, he
11 punched. He punched people wearing full riot gear and vests
12 and helmets. And he apologized that very day to them when he
13 was being processed and didn't even recognize when they had all
14 the equipment off that that's who it was.

15 So the analogy was inappropriate.

16 But, finally, it's important to note that while the
17 guidelines are supposed to serve the function of ensuring
18 parity among similarly situated people, there's circumstances
19 they don't cover. And I completely agree with the defense that
20 it is important to take into consideration the fact of the
21 conditions that this defendant has had to endure during the
22 approximately 11 months that he's spent awaiting trial or today
23 and that they've been particularly harsh. It's true you were
24 locked up through nobody's fault but your own, but the jail
25 experience has been overshadowed by the specter of the virus

1 and the need for more isolation, less contact with counsel,
2 less contact with family, less opportunity to move within the
3 facility, constant worry. And it's similar to the situation
4 that permits a court to find a basis for a departure, even
5 under the *Smith* case when you're talking about immigrants.

6 So in my view, given all of that, just plain credit for
7 time served doesn't necessarily account for the time
8 sufficiently. So in my discretion, when I'm looking at all of
9 the sentencing factors, including the need for the sentence to
10 be sufficient, but not greater than necessary, to provide just
11 punishment and the need to avoid unwarranted sentencing
12 disparities, the sentence I impose will reflect that. In other
13 words, while I might agree that a sentence greater than the one
14 I will impose could be appropriate, it would be greater than
15 necessary in this case.

16 In an exercise of discretion and after consideration of
17 all of the sentencing factors, the sentence to be imposed is as
18 follows:

19 It is the judgment of the Court that you, Thomas Hamner,
20 are hereby sentenced to a period of 30 months incarceration on
21 Count 2, with credit for the time you've already served.

22 I recommend that you be designated to a facility as
23 close to your family as absolutely possible.

24 Do you have a request, Mr. Smith?

25 MR. SMITH: Yes, Your Honor. The facility that

1 you're referring to is FCI Englewood, which is a one-and-a-half
2 hour drive from the home.

3 THE COURT: All right. It was my very strong
4 recommendation that he be designated to that particular
5 facility.

6 MR. SMITH: Thank you, Judge.

7 THE COURT: This is based on a consideration of all
8 the statutory factors, as well as the recommended sentencing
9 guideline range under both §§ 2A2.4 and 2A2.2, and it would be
10 my sentence no matter which calculation I ultimately determined
11 should apply.

12 You're further sentenced to serve a 36-month time of
13 supervised release. I find that you don't have the ability to
14 pay a fine and, therefore, waive the imposition of a fine. You
15 are required, though, to pay a \$100 special assessment because
16 this is a felony. It's immediately payable to the Clerk of the
17 Court for the U.S. District Court of the District of Columbia.
18 If you change your address after you've been released, after
19 any change of the address you have to notify the Clerk of the
20 Court until such time as the obligation is paid in full. While
21 you're incarcerated you can make payments on the assessment
22 through your participation in the Bureau of Prisons Inmate
23 Financial Responsibility Program.

24 As for restitution, the government has pointed over and
25 over again, in all these cases, to the over \$1.5 million worth

1 of damage due to the building in connection with the pleas in
2 this case, and that's probably a vast understatement. And in
3 each case people charged or pled guilty to misdemeanors have
4 been paying \$500 worth of restitution and people charged with
5 felonies, such as Mr. Leffingwell, whose sentence you've asked
6 me to look at, were ordered to pay \$2,000 in restitution. The
7 defendant will be ordered to pay \$2,000 worth of restitution in
8 this case.

9 Within 72 hours of your release from custody you must
10 report in person to the probation office in the district in
11 which you are released. I will transfer supervision to the
12 district in which you reside, but I will not transfer
13 jurisdiction of this case to any other court.

14 While on supervision you may not possess a firearm or
15 other dangerous weapon. You may not use or possess an illegal
16 controlled substance. And you may not commit another federal,
17 state, or local crime. You must abide, also, by the general
18 mandatory conditions of supervision adopted by the U.S.
19 probation office, as well as the standard conditions that are
20 set forth in the judgment and commitment order, as well as the
21 following special conditions:

22 It is a federal statute that requires you to submit to
23 the collection and use of DNA identification information while
24 incarcerated or at the direction of the U.S. probation office.

25 I will sentence you to perform, over the period of your

1 supervised release, 200 hours of community service at a
2 location and at a schedule to be approved by the probation
3 office.

4 Given the significant record that includes violent
5 offenses and offenses committed while intoxicated and the
6 commission of this offense, notwithstanding the years that have
7 gone by since those, it's going to be a condition of your
8 release that you participate in a substance abuse and mental
9 health assessment to determine whether any sort of substance
10 abuse, anger management, or other therapeutic intervention is
11 warranted. And, if so, and if indicated by the assessment, at
12 the direction of the probation office you must participate in
13 any outpatient therapy indicated at their direction and under
14 their supervision. You must abide by the rules and regulations
15 of any program and execute any releases necessary to enable the
16 probation officer to monitor your compliance with the
17 condition.

18 Given the nature and circumstances of the offense and
19 the information related to your criminal history and your poor
20 record of compliance with supervision in the past and your
21 bragging consistent with that record at the time of your
22 arrest, I find, pursuant to *United States versus Malenya*, 736
23 F.3d 554 that this condition is reasonably related to the
24 factors set forth in 18 U.S. Code § 3553, including the need to
25 defer future criminal conduct, to protect the community, and to

1 provide the defendant with any needed treatment in the most
2 effective way possible, and that it involves no greater
3 deprivation of liberty than is reasonably necessary for the
4 purposes identified in this section.

5 On release it is also a condition that you make payments
6 on any outstanding balance on the restitution obligation at a
7 rate to be determined by the probation office, but no less than
8 \$100 a month.

9 Within 60 days after the commencement of your
10 supervision, I'm going to ask the U.S. probation office
11 supervising you to submit a progress report to the Court. Upon
12 receipt of the report I'll determine if we should schedule some
13 sort of video reentry hearing to talk about your either success
14 on the program, in which case I want to be able to talk to you
15 about that, and if there are problems, I want to be able to
16 talk to you about that.

17 Mr. Smith, do you have any objections to the special
18 conditions set forth today and the special conditions that are
19 the standard conditions applied by our probation office?

20 MR. SMITH: No, Your Honor. Thank you.

21 THE COURT: All right. Probation office has to
22 release the presentence investigative report to all appropriate
23 agencies in order to execute the sentence of the Court.
24 Treatment agencies shall return the presentence report to the
25 probation office upon defendant's completion or termination

1 from treatment.

2 Mr. Hamner, you have the right to appeal the sentence
3 imposed by the Court if the period of -- well, actually, those
4 are just usually restrictions imposed in the situation of a
5 plea agreement. There is no plea agreement.

6 You have the right to appeal the sentence imposed by the
7 Court. If you choose to appeal, you must file any appeal
8 within 14 days after the Court enters judgment. If you're
9 unable to afford the cost of appeal, you may request permission
10 from the Court to file an appeal without cost to you.

11 At this point we're not in a situation where there was a
12 plea agreement and other charges are being dismissed; they're
13 pending. And I don't think either side has had an opportunity
14 yet to think about everything we heard today and how that's
15 going to bear on what's going to happen next. So what I would
16 like to get is some sort of a joint status report from the
17 parties, setting forth either your joint or your different
18 positions on further proceedings in the case and when and how
19 those should be undertaken.

20 And so how much time do you think, Mr. Collyer --
21 because imagine you're going to have to confer with others in
22 the U.S. Attorney's Office -- to provide something like that?

23 MR. COLLYER: Your Honor, I would ask -- my plan had
24 been to ask for a status conference in 30 days, to allow
25 effective computation on that. So to the extent of just filing

1 a joint status report, rather than a status conference, I would
2 still ask for the same 30 days.

3 THE COURT: All right. Mr. Smith, does that work for
4 you?

5 MR. SMITH: Well, I can't speak to the government's
6 ability to confer on the issue before then. We would probably
7 ask for something a little bit sooner than 30 days, maybe 15,
8 two weeks, or --

9 THE COURT: Well --

10 MR. SMITH: But, you know --

11 THE COURT: Let me look at my calendar.

12 The defendant has, still, speedy trial rights with
13 respect to those charges.

14 MR. SMITH: We waive any objection to tolling under
15 the Speedy Trial Act.

16 THE COURT: Today is the 23rd. I'm going to ask for
17 the status report on Friday, October 14. That's about three
18 weeks. I'm kind of splitting the difference here. If you are
19 agreed as to what your position is and you want to file it
20 sooner, you can file it sooner. But until I've seen it, I
21 don't know what the next thing I'm setting is, whether I'm
22 setting a motion schedule, whether I'm setting a trial
23 schedule, whether I'm doing nothing. So I would like to get
24 the report and then see what to do from there.

25 And given the defendant's waiver, I find at this point

1 that the time in the speedy trial calculation between today and
2 the 14th is excluded from the speedy trial calculation. And
3 then we'll figure out what happens next when I see what you all
4 think should happen next.

5 All right. Mr. Smith, is there anything further I need
6 to do right now on behalf of Mr. Hamner?

7 MR. SMITH: No, Your Honor. Thank you.

8 THE COURT: All right. Mr. Collyer, anything further
9 on behalf of the government?

10 MR. COLLYER: No, Your Honor.

11 THE COURT: Okay. All right.

12 Mr. Hamner, I really did appreciate your remarks and the
13 sincerity with which they were offered. And I wish you and
14 your wife the best with all of your children.

15 THE DEFENDANT: I apologize for -- making sure I
16 apologize to those officers. That was definitely something
17 that I needed to do.

18 THE COURT: All right. Thank you.

19 THE DEFENDANT: Thank you.

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, JANICE DICKMAN, do hereby certify that the above and foregoing constitutes a true and accurate transcript of my stenographic notes and is a full, true and complete transcript of the proceedings to the best of my ability.

Dated this 16th day of October, 2022

Janice E. Dickman, CRR, CMR, CCR
Official Court Reporter
Room 6523
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