

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA :
 :
 v. : **CASE NO. 21-CR-689 (ABJ)**
 :
 THOMAS PATRICK HAMNER, :
 :
 Defendant. :

GOVERNMENT’S RESPONSE TO COURT’S SEPTEMBER 14, 2022 MINUTE ORDER

The United States of America, by and through its Attorney, the United States Attorney for the District of Columbia, respectfully submits this response to the Court’s September 14, 2022 Minute Order directing the parties to identify any decisions from this District where the application of the cross-reference from U.S.S.G. § 2A2.4(c)(1) to U.S.S.G. § 2A2.2 was disputed, and if so, how the offense level was calculated. The government is not aware of a case arising out of the attack on the Capitol on January 6 that involves a dispute between the parties concerning the application of the cross reference in U.S.S.G. § 2A2.4(c)(1). In *United States v. Creek*, 21-cr-645-DLF, however, Judge Friedrich applied the cross-reference where the Probation Officer concluded that it did not apply.¹

In *Creek*, the defendant attacked two police officers as they attempted to retreat after their defensive line had crumbled. He struck one officer on the face shield of his helmet and then shoved and kicked a second officer. Creek pleaded guilty to a single-count information charging him with Assaulting, Resisting or Impeding Certain Officers, in violation of 18 U.S.C. §

¹ This Court also applied the cross reference in U.S.S.G. § 2A2.4(c)(1) even though the Probation Office had concluded that it did not apply in *United States v. Leffingwell*, 21-cr-5 (ABJ).

111(a)(1), and as part of the plea agreement, the parties agreed that the cross reference in U.S.S.G. § 2A2.4(c)(1) applied, making U.S.S.G. § 2A2.2 the applicable Guideline. As noted above, the Presentence Investigation Report in *Creek* had concluded that the cross reference did not apply.

At sentencing on May 2, 2022, Judge Friedrich applied the cross-reference to U.S.S.G. § 2A2.2 finding the conduct in which Creek engaged constituted aggravated assault under the Guidelines because it was committed with the intent to commit another felony, to wit: Civil Disorder, in violation of 18 U.S.C. § 231(a)(3). See Exhibit A (*Creek* sentencing transcript), at 10. The Court noted, “Section 231 is a different felony than Section 111(a) and has distinct elements. So I think it is appropriate to apply the cross-reference in these circumstances, and this is consistent with the decisions of other judges on this court. See, for example, *U.S. v. Languerand*, 21-353, and *U.S. v. Leffingwell*, 21-5.” *Id.* at 10-11. Consistent with his commitment in the plea agreement, Creek did not object to the application of the cross reference.

Judge Friedrich went on:

“All right. I will note that applying 2A2.2 rather than 2A2.4 or even 2A2.3 results in a substantially higher guideline range in this case. But I do think, looking at not only the cases in this district but other case law cited in the government's brief, I do believe it's appropriate to apply 2A2.2. Even though there is some overlap, I don't think it's double-counting those that the Commission did not intend.” *Id.* at 11.

Just as Creek's conduct on January 6, 2021 amounted to a felonious assault that involved an intent to commit another felony, so too did Hamner's conduct. See Gov. Sentencing Memo. ECF No. 28, at 12-18. Hamner presents the mirrored image of Creek in that Hamner stands convicted of 18 U.S.C. § 231(a)(3) and the conduct for which he pled guilty also constitutes the felony of Assaulting, Resisting or Impeding Certain Officers under 18 U.S.C. § 111(a)(1) and (b). As this Court has already done in *Leffingwell* and Judge Friedrich did in *Creek*, this Court should apply the cross reference in U.S.S.G. § 2A2.4(c)(1) in this case.

Respectfully submitted,

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