

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
THE HON. MICHAEL R. HOGAN, JUDGE PRESIDING

UNITED STATES OF AMERICA,)
)
Government,)
)
v.) No. 6:10-cr-60066-HO
)
STEVEN DWIGHT HAMMOND and DWIGHT)
LINCOLN HAMMOND, JR.,)
)
Defendants.)
_____)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
EUGENE, OREGON
TUESDAY, OCTOBER 30, 2012
PAGES 1 - 34

Kristi L. Anderson
Official Federal Reporter
United States Courthouse
405 East Eighth Avenue
Eugene, Oregon 97401
(541) 431-4112
Kristi_Anderson@ord.uscourts.gov

1 APPEARANCES OF COUNSEL:

2

3 FOR THE GOVERNMENT:

4 UNITED STATES ATTORNEY
5 FRANK PAPAGNI, ESQ.
6 405 East Eighth Avenue
7 Eugene, Oregon 97401
8 (541)465-6771
9 frank.papagni@usdoj.gov

7

8 FOR THE DEFENDANT STEVEN DWIGHT HAMMOND:

8

9 LAWRENCE H. MATASAR, ESQ.
10 LAWRENCE MATASAR, PC
11 621 SW Morrison Street
12 Suite 1025
13 Portland, OR 97205
14 (503) 222-9830
15 Fax: (503) 274-8575
16 Email: larry@pdxlaw.com

13

14 FOR THE DEFENDANT DWIGHT LINCOLN HAMMOND, JR.:

14

15 MARC D. BLACKMAN, ESQ.
16 RANSOM BLACKMAN, LLP
17 1001 SW Fifth Avenue
18 Suite 1400
19 Portland, OR 97204
20 (503) 228-0487
21 Fax: (503) 227-5984
22 Email: marc@ransomblackman.com

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

TRANSCRIPT OF PROCEEDINGS

TUESDAY, OCTOBER 30, 2012

THE CLERK: Now is the time for 10-60066, United States of America versus Steven Dwight Hammond and Dwight Lincoln Hammond, Jr., time set for sentencing.

THE COURT: Good morning, gentlemen.

With regard to our schedule, first, I have read all the materials that have been submitted and -- including all of the letters. I just read the last one just now. And what -- there are quite a few issues that we can talk about today. I am going to take your input, your argument on those, and then I am going to take a break in this sentencing. I have a couple of civil motions to hear and a break so that I can organize some thoughts on paper. Much of my reading of this material has been on airplanes the last couple of days, so I want to make sure that I communicate as clearly as I can.

So with that in mind, Mr. Papagni, do you have something more you wish to say that's not in your papers?

MR. PAPAGNI: I suspect the last letter you read was the one from Steven Hammond's wife.

THE COURT: It is.

MR. PAPAGNI: That's the one I just read too. My comments are going to be kind of in the order of the issues so I don't have to spend much time with them.

1 I want the court to know that my cocounsel,
2 Ms. Sgarlata, is not present today because she is very sick
3 with the flu and she's home in bed. Her role, as the court
4 knows, in this prosecution focused on the damages or loss.

5 THE COURT: Yes.

6 MR. PAPAGNI: The paralegal, Ms. Root, is also not
7 present. She is stuck in Virginia because of Hurricane
8 Sandy. I relied upon her quite heavily in this case because
9 she was the only member of the original prosecution team who
10 had been involved in this case from the beginning, and her
11 input to me was pretty important.

12 So you are stuck with me today.

13 What I am going to try to do is go through the
14 issues that were raised by the defense lawyers. I should
15 comment that the defendants have been very ably represented
16 by Mr. Blackman and Mr. Matasar. They certainly have raised
17 every issue they thought appropriate, and they certainly
18 have made me do my job, as I am supposed to.

19 In the past five days, they have raised some
20 issues that I have to respond to. First, after speaking
21 with Ms. Zusman in our office, our appellate chief, it's
22 important to point out in this case the government did not
23 waive its right to appeal as they contend. The Supreme
24 Court in *United States v. Benchimol*, B-E-N-C-H-I-M-O-L, at
25 471 U.S. 453, a 1985 case, which was cited in *United States*

1 v. *Anderson*, 921 F.2d 335, a First Circuit case, 1990, made
2 it clear that the court cannot imply such a waiver in terms
3 of the plea agreement.

4 In fact, the *Anderson* court held that the
5 government could appeal an illegal sentence notwithstanding
6 the fact that it did not expressly reserve its right in a
7 written plea agreement.

8 Moreover, Judge, I have known, in the years I have
9 been an AUSA, that I cannot waive the United States' appeal
10 rights. That right to waive such rights is with the
11 solicitor general, and that's established by law,
12 28 CFR 0.163 and that was recognized in *U.S. v. Hare*,
13 H-A-R-E, 269 F.3d 859 (7th Cir. 2001).

14 So that's all I have to comment on the
15 government's waiver issue.

16 Second, the suppression costs. This court has
17 spent a lot of time dealing with that issue as has pretrial.
18 I think Mr. Davis should be complimented for the work he's
19 done in trying to give the court an outline of what the
20 sentencing guidelines are.

21 In the government's sentencing memo we have
22 concurred with Mr. Davis's, I guess you'd call it original
23 calculations. He has come up with some other ex post facto
24 concerns that the defendants have raised, and I think those
25 can be dealt with by the court.

1 Suffice it to say, the government is comfortable,
2 based upon the testimony of Jeff Rose at trial and the
3 figures he has provided, that what we put forth in our
4 sentencing memo are accurate and reasonable under these
5 circumstances.

6 Mr. Rose is available by phone to testify, but
7 quite frankly, I'd hate to waste the time to do so. I think
8 defense counsel has heard the testimony, and I think the
9 court knows his thoughts on the matter.

10 The third issue is that the defendants have
11 acknowledged that the jury verdicts were factually and
12 legally sufficient, albeit for different reasons.

13 There can be no doubt in this case, and I think
14 the parties and the court knows that some jurors traveled, I
15 think it was up to 180 miles to attend each day of trial
16 that lasted, I think eight, nine days. And there's no doubt
17 they worked hard to return their verdicts, both the guilty
18 ones and the not guilty ones. Indeed, they were hung on
19 some. That fact weighs heavily in the government's mind as
20 to what should be done today.

21 The government maintains, however, the testimony
22 of the defendant's grandson and nephew, Dusty Hammond,
23 coupled with the corroborating testimony and physical facts,
24 coupled with the reasons that the defendants seem to rely
25 upon in their sentencing memo on Page 5 all together

1 supported the jury's verdicts of guilty on Count 2 and
2 likewise on Count 5 when there was testimony from a non-BLM
3 employee Brett Dunten, coupled by Steven Hammond's admission
4 as far as the fire was concerned. In short, the guilty
5 verdicts here, Judge, relied, I'd have to say, almost
6 entirely on non-BLM employees.

7 Mindful in Count 2, there was the testimony of
8 some BLM employees. The court will recall, however, the
9 government did not argue those facts in its closing argument
10 of that testimony.

11 Fourth, the defendants have submitted numerous
12 letters from community members attesting to their high
13 character. I have read all the letters. I have no doubt
14 whatsoever to doubt -- or no doubt of their sincerity of the
15 citizens who wrote them. It is true, and it can't be
16 contested, I have spent a lot of time in Burns, that the
17 Hammonds both -- that you are to sentence both have done
18 wonderful things for their community and those deeds are
19 recognized in these letters. And his wife's letter has to
20 be the most heartfelt, certainly, the one you just read.

21 But my obligation as a prosecutor is to point out
22 not just one side of the equation. And that involves Dusty
23 Hammond. This court has seen the photographs of Dusty
24 Hammond's abuse at the hands of Steven Hammond. Those
25 aren't addressed.

1 This court has also heard the testimony or at
2 least was aware of how Dusty Hammond was involved and almost
3 burned up in the fire in Count 2. Those facts aren't
4 addressed in these letters.

5 The court is aware of the testimony of Gordon
6 Choate, a hunting guide, who perhaps like the hunting guide
7 that Steven Hammond interfered with in 1999, had just as
8 much right to public land as any of the Hammonds did.

9 I have to balance that out in evaluating the
10 Hammonds' conduct in this case. This isn't to distract
11 their good deeds. They have done wonderful things. There's
12 no doubt about it. But they have done things when they have
13 caused problems for citizens using public lands, and they
14 have endangered their own family member that has to be also
15 weighed into the equation.

16 Mr. Steven Hammond has in fact, as the court
17 knows, been convicted of two offenses, one for
18 unsworn falsification. That was a jury verdict in Harney
19 County. And he was also found guilty by a U.S. magistrate
20 for interference with public lands in which the magistrate
21 thought a probation sentence was appropriate. Somewhat
22 unusual, as the court knows, having dealt with CVB cases.

23 But all of these issues now addressed here, Judge,
24 and I am not even going to talk about the 3553(a) issue
25 raised by the defendants, it's pretty clear that that

1 statute doesn't trump the mandatory minimum.

2 The most important issue for this court is what's
3 the appropriate sentence here.

4 I have done this for a few years. Unfortunately,
5 in this case, maybe some would say tragically, that this
6 case has not been resolved before trial. I think the
7 parties, the lawyers, I think, tried hard for that, but it
8 seemed that both sides had their heels dug in. And that's
9 unfortunate, and I think that's tragic.

10 Now the defendants have been found guilty of
11 offenses that Congress has mandated a five-year prison term
12 for. The defendants have asserted such punishment is
13 unconstitutional under the Eighth Amendment cruel and
14 unusual punishment clause. I have found no Supreme Court
15 authority or even appellate court authority that says that a
16 mandatory five-year sentence is a cruel and unusual
17 sentence. I don't think that's a great -- good argument.

18 I have also already addressed the 3553 argument.

19 Perhaps the best argument, Judge, the defendants
20 have in this case is the proportionality of what they did to
21 what their sentence is. Perhaps that's the most troubling
22 for the court. It is for the prosecutor who tried the case.

23 Nevertheless, as I told the defendants shortly
24 after, I think it was midnight, in Pendleton and after you
25 accepted their appellate waivers, I said, quote:

1 "I want to make sure the Hammonds understand
2 that under the statute, the government is
3 obligated to recommend a five-year mandatory
4 minimum term of imprisonment. I think your lawyer
5 has told you that, but I wanted the record to
6 reflect that you gentlemen have been so warned
7 what sentence is going to be -- that I am going to
8 be asking for."

9 I felt obligated to tell them that night because
10 that's what they were facing. The jury returned verdicts of
11 guilty for offenses with those five-year mandatory minimum
12 sentences.

13 That being said, I have done my job as I see it.
14 I think it is lawful. I think it is also ethical what I
15 have recommended to the court.

16 The proportionality issue is one, however, that I
17 think our constitution gives to our courts. Congress has
18 told you what they think the mandatory sentence should be.
19 I have done my job as the prosecutor trying the case and
20 presenting the evidence the best way I could, and now it's
21 the judiciary's job to impose a sentence that it thinks
22 just. We have made our recommendation of five years as the
23 statute says.

24 Those are all the comments that I intend to make.

25 THE COURT: Thank you. For the defense.

1 MR. BLACKMAN: Your Honor, we have provided the
2 court with an awful lot of information in writing, and with
3 respect to Dwight Hammond, I don't really think there's any
4 material disagreement, for example, about the guideline
5 calculation. I think there's a point question in terms of
6 whether there was any loss of more than a hundred dollars in
7 connection with the 2001 fire. I think the court will
8 recall that the testimony from the BLM range con at trial
9 was that the portion of the public land that burned as a
10 result of that fire was improved, not damaged, by the fire,
11 and there were no suppression costs.

12 So I believe that the base offense level that we
13 are recommending of 6 as opposed to 7 for the more than a
14 hundred dollars is correct. But again, it's really not
15 material since I don't think it affects where it places
16 Mr. Hammond under the guidelines.

17 The only other two things I really would like the
18 court to consider, if the court is considering, which we
19 certainly trust that you are, that it would in fact be --
20 and I think proportionality is a part of the Eighth
21 Amendment. If a sentence would be disproportionate to the
22 offense and the offender, at least the extremes as the
23 courts have said, including the Ninth Circuit on at least a
24 couple of occasions, then the proportionality acknowledgment
25 by the government I think demonstrates that imposing a

1 60-month sentence on Dwight Hammond for an offense that
2 under the guidelines would be a maximum six months with
3 the -- probation is basically the recommended sentence as a
4 Zone A offense with a person who is 70 years old and has
5 never been convicted of a crime in his life, who has the
6 kind of respect and appreciation of his community that I
7 don't think anyone is disputing about Mr. Hammond, that that
8 really would shock the conscience, frankly. I just think it
9 shocks the conscience to think that it would be permissible
10 to condemn this man to 60 months in prison when all those
11 things are undisputed and true.

12 If the court is considering, and, again, I think
13 the government's acknowledging that it's the court's
14 responsibility to consider its constitutional obligations
15 under the Eighth Amendment in fashioning a sentence, then
16 with respect to the 2001 fire, as we say in our memorandum,
17 the facts that support that verdict are the admission that
18 occurred at the time. There's no dispute that the Hammonds
19 called in to the BLM dispatch and checked to see if a fire
20 could be set that day.

21 It's not disputed that there had been a fire that
22 got off their land two years earlier and they had received a
23 stern warning from the BLM that if fire set on their private
24 land escaped onto the public land again, there would be
25 legal consequences, so they were warned.

1 The evidence as to where ignitions were set on the
2 private land and adjacent to the fence line with the public
3 land permits, certainly the jury's conclusion, that they
4 intended that fire to cross over into the public land.

5 And those facts are sufficient to support the
6 verdict. And we would urge the court to make those findings
7 as the basis and that it is not sufficiently reliable to
8 conclude that the Dusty Hammond version of that event is
9 more likely than not correct.

10 We have -- I am not going to rehash it all, but
11 his testimony was completely inconsistent with the testimony
12 and the records of the hunting that was done on Section 16
13 in 2001 by Mr. Gustafson, by Mr. Taylor, by the Fish &
14 Wildlife records.

15 So we would urge, if the court is considering
16 looking with favor at our Eighth Amendment argument, that
17 you specifically find those -- that the facts that support
18 that jury verdict are the facts that I have just recited.

19 I don't know if you have any questions that would
20 be of any assistance to you in all the legal stuff we have
21 thrown at you in the last week, but if you have any
22 questions, I would be more than happy to address them.

23 The only other thing I would say, and this is
24 really a practical request, it's if you would in fact find
25 that the nature of this offense was in fact a business

1 regulation offense so that these convictions do not prohibit
2 these men from possessing firearms, which, you know, the
3 only reason they have rifles is because you can't really run
4 a ranch unless you are able to have some opportunity to keep
5 some varmints at bay. So we would ask for that finding as
6 well.

7 Other than that, I think I have said it all more
8 than once in our memoranda. But if you have any questions,
9 I would be happy to address them.

10 THE COURT: Thank you, Mr. Matasar.

11 MR. MATASAR: Your Honor, just a few things about
12 Steven Hammond. As far as the fire suppression costs, we
13 provided a memo late yesterday which explains our position
14 on that. I won't go over that, although I would ask that
15 you make a finding.

16 I agree with what Mr. Blackman said about the
17 basis for the 2001 fire, and so I won't address that but
18 just ask that you make a finding.

19 Steven Hammond has some criminal history issues,
20 which I will just ask the court to make a specific finding.
21 We have argued in the memo about the Fish & Wildlife
22 exception to the -- to one of his convictions.

23 THE COURT: Had you ever heard of a landowner's
24 permit before this case?

25 MR. MATASAR: I had not, but obviously you have.

1 THE COURT: Any of the lawyers ever killed an
2 animal on a landowner's permit?

3 MR. MATASAR: I have not.

4 THE COURT: Your judge has.

5 MR. MATASAR: Yes. And as I found as I was
6 looking into the landowner permit rules, everybody else
7 knows about them before I did. So it's quite common, as you
8 know, Your Honor.

9 THE COURT: It's not common in big cities.

10 MR. MATASAR: Yes. It's not.

11 I would say that -- sorry, Your Honor. I'm
12 resting here. I hurt my back the other day, so that's why I
13 am resting a bit on the table.

14 THE COURT: If you need to be seated, go ahead.

15 MR. MATASAR: No. I think I can stay. There is --
16 There is -- I think maybe I will.

17 Your Honor, I have known Steven Hammond and Dwight
18 Hammond for nearly 20 years, and I think you know them now
19 as well. You know them from the community's letters that
20 you have gotten. People like 84-year old Ellington Peek who
21 runs the video market, from the Farm Bureau, from people who
22 know his kids at school, from people who know him at school.
23 There are people who were at Crane when Steven Hammond was a
24 student. You know, from what you have read, people who know
25 him at church; people who know him from his volunteer work

1 in the community.

2 And I have been here enough times in the last four
3 years, Your Honor, on this case and one other case to know
4 that you read the material that we put in front of you.

5 And Earlyna Hammond was going to read her letter.
6 The reason why I gave it to you late was not because we were
7 lazy but because she had planned to read it, but I think she
8 would have had trouble getting through it, and so we
9 provided it to the court this morning.

10 I would ask Your Honor, as Mr. Blackman did, that
11 you go along with our memo. That you feel -- I believe that
12 under the proportionary principles explained by Mr. Papagni,
13 which are based on the Eighth Amendment, that Mr. Steven
14 Hammond belongs in what the guidelines calls Zone B, which
15 allows for a probationary sentence. We think the difference
16 and one of the reasons why the proportionality principle is
17 important is the difference between a probationary sentence
18 and the mandatory minimum is so great.

19 As far as the other issues raised by Mr. Papagni,
20 the notice of appeal and such, I will rely on our memo, the
21 Fourth Circuit case, the undecided situation in the
22 Ninth Circuit.

23 So other than that, Your Honor, like Mr. Blackman,
24 we are ready to answer questions from you if you have any
25 either now or after you come back, but we ask you to

1 sentence our clients in the -- along the lines we have
2 suggested in our memorandum.

3 THE COURT: I do have this question: We had
4 argument on it, but is -- what indication, if any, do you
5 have more than I have that when this five-year mandatory
6 minimum was put in in the Terrorism Act that this sort of
7 activity is what was anticipated? Is there anything?

8 MR. MATASAR: I can only say, Your Honor, that my
9 understanding, from what I included in the memo, was that,
10 you know, this statute is about through fire or explosives.
11 I think the focus of the statute seemed to be the explosive
12 part, the intentional aspect of it. I indicated all the
13 other sections here, they talk about foreign nationals, they
14 talk about terrorism this and terrorism there. But I see no
15 indication that this -- that this kind of activity was
16 intended in that statute.

17 MR. BLACKMAN: And Your Honor, I think the most
18 significant, if you are looking, really, at the legislation,
19 the most significant indication of that is in the definition
20 of federal crime of terrorism, which explicitly does not
21 include the 844(f)(1).

22 THE COURT: I read that in the memo.

23 MR. BLACKMAN: So I mean, it does strike us as one
24 of those legislative -- I mean, it's a huge bill. Sometimes
25 I think the Congress does things that it's not intended, and

1 the best indication that that's not what they intended is
2 that.

3 THE COURT: All right. We'll come back at
4 12:30 for the actual sentencing, but I do have these
5 comments:

6 The attorneys in this case are all remarkable.
7 The -- you do your job. But the argument Mr. Papagni made
8 on proportionality was highly moral. I appreciate that.

9 And this sort of -- I have been doing this for 39
10 years, and this is my last sentencing. I will impose a
11 sentence that I believe is defensible under the law but also
12 one that is defensible to my conscience.

13 And this is not about me, although there's a
14 couple of indicatings here that I have a -- just a -- a
15 little comment about. I didn't -- I was halfway through
16 this before I realized my entire family is here -- I am just
17 taking a moment to get through some of the emotion -- along
18 with loved ones from the court, and I wouldn't have had this
19 opportunity without each of you. I appreciate it.

20 I love this country. All of us have
21 responsibilities which can't be defined without our --
22 people talk about rights. That's only one side of the coin.
23 Years ago I heard Bishop Fulton Sheen. He gave a wonderful
24 address on that in Washington, D.C.

25 And so we have our role to play in a wonderful

1 legal system, and unlike some of my colleagues who will have
2 people make these sort of comments after they are no longer
3 here, I get to make it today. I am grateful.

4 We'll come back to your case at 12:30.

5 Thank you.

6 MR. BLACKMAN: Thank you.

7 *(Recess.)*

8 THE COURT: Thank you. Be seated.

9 Counsel, anything further?

10 MR. MATASAR: No, Your Honor.

11 THE COURT: And Mr. Dwight Hammond and Mr. Steven
12 Hammond, have you read the presentence reports in the case?

13 MR. MATASAR: There was no formal presentence.

14 THE COURT: All right. Have you talked to your
15 lawyers about all the issues we have been talking about here
16 today?

17 DEFENDANT STEVEN HAMMOND: Yes.

18 DEFENDANT DWIGHT HAMMOND: Yes.

19 THE COURT: All right. If you have a statement
20 that you wish to make, before I impose sentence, now is the
21 time to do that. All right? So if either of you do, you
22 decide who speaks first. I don't really care.

23 DEFENDANT DWIGHT HAMMOND: I really don't have
24 anything other than what my counsel would fill in.

25 THE COURT: All right.

1 DEFENDANT STEVEN HAMMOND: And likewise, I
2 appreciate all the time that's been spent on this.

3 THE COURT: All right. There are a number of
4 issues that need findings, and these could be organized a
5 little better than they are.

6 First, the government has objected to me advancing
7 the sentencing to today, and I understand that.

8 The objection is denied. The last of these events
9 happened in 2006, and I am so familiar with all of the facts
10 here and this situation that it would be not appropriate to
11 burden some other judge with handling the sentencing here.

12 MR. MATASAR: Your Honor, I am going to be seated,
13 if I may.

14 THE COURT: Excuse me?

15 MR. MATASAR: I am going to be seated, if I may.

16 THE COURT: You may, of course.

17 MR. MATASAR: I'm sorry, Your Honor. I just
18 can't --

19 THE COURT: You can all be seated as far as I am
20 concerned. That's all right.

21 MR. MATASAR: Thank you.

22 THE COURT: Now, whether the government waived its
23 right to appeal is frankly not a matter for me. That's a
24 question for the Ninth Circuit, and I am not going to make
25 any findings on that.

1 With regard to suppression costs, the 15,000 and
2 change that the government has in their -- I think Page 11
3 of their memo, the argument is there, but the evidence
4 supporting it is not.

5 And frankly, if this would be another situation
6 and the government had a motion to postpone to be able to
7 submit its materials, it probably would be a good motion.
8 We don't have it here. I am not going to extend this, but
9 nevertheless, I am not going to count that as part of the
10 loss.

11 With regard to the sufficiency of the jury
12 verdicts, they were sufficient. And what happened here, if
13 you analyze this situation, if you listened to the trial as
14 I did and looked at the pretrial matters, there was a --
15 there were statements that Mr. Steven Hammond had given that
16 indicated he set some fires, and the jury accepted that for
17 what it was.

18 There are other evidence that was significant, and
19 none of us know, in the minds of each juror, what is
20 significant. That's part of the jury system. But that was
21 really the key thing that happened here.

22 With regard to character letters and that sort of
23 thing, they were tremendous. These are people who have been
24 a salt in their community and liked, and I appreciate that.

25 In looking at Dusty Hammond's testimony, he was a

1 youngster when these things happened. I am sure he
2 remembered things as best he could. There was, frankly, an
3 incident, apparently it was removal of tattoos, that would
4 have colored any young person's thinking, and if that's what
5 happened, it can't be defended, of course, but that's not
6 what's before the court today.

7 Now, I will take up the matter of the mandatory
8 minimum in a moment.

9 In looking at Dwight Hammond's case, the base
10 offense level here is either -- well, it's either -- the
11 offense level is either a 6 or a 7, and it depends on
12 whether or not I find there was at least a hundred dollars
13 in damages. Well, the damage was juniper trees and
14 sagebrush, and there might have been a hundred dollars, but
15 it doesn't really matter. It doesn't affect the guidelines,
16 and I am not sure how much sagebrush a hundred dollars worth
17 is. But I think this probably will be -- I think mother
18 nature's probably taken care of any injury. I don't think
19 that's the question. There would be -- you know, as far as
20 some of these civil matters, there's a civil proceeding
21 going on in Pendleton. That can take care of that. There's
22 also administrative proceedings. There's going to be a
23 fearsome penalty paid by these two gentlemen for the
24 decisions they made and the actions they took.

25 At any rate, I find that Dwight Hammond's

1 guideline level is from 0 to 6 months.

2 With regard to Steven Hammond, there are some
3 interesting findings there because the guidelines talk about
4 using the guideline in effect at the time of an incident, so
5 in this case, the latter one, the 2006 fire.

6 Well, those would be the 2005 guidelines because
7 that's when the -- those are the ones in effect at the time.
8 And the guidelines are pretty clear that that's to happen.
9 And then on the other hand, the Ninth Circuit made itself
10 one of two circuits in the *Ortland* case that said, well,
11 there's an ex post facto constitutionality problem with
12 that. And therefore, I am going to use the 2000 guidelines,
13 which reflected back to the 2001 fire for that one. Well,
14 if -- that results in a -- I believe a level 10.

15 And then we look at the criminal history category.
16 The landowner preference violation, there's no question for
17 anyone who is an outdoors person that that has to do with
18 the fish and game matter. Nevertheless, the allegation was
19 an unsworn falsification, which is -- can apply to lots of
20 things.

21 Well, whether it's a fish and game matter or
22 whether it just overstates the criminal history, I am going
23 to find the criminal history category for Steven Hammond to
24 be a III.

25 And with regard to the sentences, I --

1 MR. MATASAR: Your Honor, from what you said, it
2 sounded like you would have meant II, if you were
3 considering the overstating.

4 THE COURT: And that's 10 to 16? I may have --

5 MR. MATASAR: Yeah. A level II -- a 10/II would
6 be 8 to 14.

7 PROBATION OFFICER DAVIS: If you drop down to II,
8 that's correct. If it remained at a III, it would be 10 to
9 16.

10 THE COURT: Okay.

11 PROBATION OFFICER DAVIS: So if you drop down to
12 II, it would be 8 to 14.

13 THE REPORTER: You need to turn your mike on.

14 THE COURT: I am dropping down from -- I
15 apologize -- from a IV to a III.

16 MR. MATASAR: I think it's from a III to II. I am
17 not --

18 PROBATION OFFICER DAVIS: Hold on. We are talking
19 apples and oranges. He is talking about the amount of
20 points and you are talking about a category.

21 MR. MATASAR: Oh, yes. So --

22 PROBATION OFFICER DAVIS: So three points puts us
23 in category II.

24 MR. MATASAR: Okay. I'm sorry, Your Honor.

25 THE COURT: And the guideline range there is?

1 PROBATION OFFICER DAVIS: At a level 10, would be
2 8 to 14.

3 THE COURT: Thank you.

4 PROBATION OFFICER DAVIS: You are welcome.

5 THE COURT: I am not going to say that the
6 firearms are a business -- fit under the business
7 requirement exception. I understand the problems in running
8 a ranch out there without a firearm. In fact, I think the
9 other name for a Ruger .223 is a farm gun, and for predators
10 that certainly comes into play, but nevertheless, I am not
11 going to include that. I am not going to make that finding
12 under that exception.

13 So I find that the guideline range for Steven
14 Hammond is a level 10 with a criminal history category of II
15 for 8 to 14 months.

16 Now, with regard to the mandatory minimum, I don't
17 need to repeat that -- this, but you all know that -- and
18 because you are experienced before me that I think
19 Mr. Lessley told me a short time ago that he and Mr. Papagni
20 came in about the same time to work both sides of these
21 cases, and I have been a -- I have been a pretty faithful
22 observer of the guidelines when they are required to be and
23 their requirements and have been working with sentences for
24 39 years.

25 I remember my first sentence for a petty offense,

1 and I knew what I wanted to do. I just didn't know how to
2 say it. And that was a different problem back then.

3 I am not going to apply the mandatory minimum and
4 because, to me, to do so under the Eighth Amendment would
5 result in a sentence which is grossly disproportionate to
6 the severity of the offenses here.

7 And with regard to the Antiterrorism and Effective
8 Death Penalty Act of 1996, this sort of conduct could not
9 have been conduct intended under that statute.

10 When you say, you know, what if you burn sagebrush
11 in the suburbs of Los Angeles where there are houses up
12 those ravines? Might apply. Out in the wilderness here, I
13 don't think that's what the Congress intended. And in
14 addition, it just would not be -- would not meet any idea I
15 have of justice, proportionality. I am not supposed to use
16 the word "fairness" in criminal law. I know that I had a
17 criminal law professor a long time ago yell at me for doing
18 that. And I don't do that. But this -- it would be a
19 sentence which would shock the conscience to me.

20 So I have considered these guidelines and the
21 sentences in this case.

22 Well, first of all, are there other findings,
23 gentlemen, that you require?

24 MR. PAPAGNI: Not by the government.

25 MR. MATASAR: No, Your Honor.

1 MR. BLACKMAN: No, Your Honor. Thank you.

2 THE COURT: With regard to Dwight Hammond, I have
3 given you the guidelines which I am applying, and I have
4 considered the guidelines and the 3553(a) factors, and based
5 on these comments I have made, as to Count 2 -- that's the
6 correct count number, right?

7 THE CLERK: Yes.

8 THE COURT: The defendant is committed to the
9 Bureau of Prisons for confinement for a period of three
10 months.

11 Upon release, the defendant shall serve a
12 three-year term of supervised release subject to the
13 standard conditions and the following special conditions:

14 The defendant shall cooperate in the collection of
15 DNA as directed by probation.

16 The defendant shall disclose all assets and
17 liabilities to probation and not transfer, sell, give away,
18 or otherwise convey any asset with a fair market value in
19 excess of \$500 without approval of probation.

20 The defendant shall not make application for any
21 loan or credit arrangement or lease without approval of
22 probation.

23 And the defendant shall authorize release of -- to
24 probation a financial information by appropriate means.

25 No fine is ordered.

1 The defendant shall pay a fee assessment in the
2 amount of \$200 due immediately in full.

3 Now, Mr. Hammond, you have the right to appeal
4 from this sentence under certain circumstances. Any notice
5 of appeal must be filed within 14 days of entry of judgment,
6 and that will be no later than tomorrow when that judgment
7 is entered. If you are unable to pay the costs of an
8 appeal, you may apply for leave to appeal in forma pauperis,
9 and if you request, the clerk will prepare and file a notice
10 of appeal on your behalf.

11 Do you understand, sir?

12 DEFENDANT DWIGHT HAMMOND: Yes, sir.

13 THE COURT: Now, with regard to Steven Hammond, I
14 have also considered the guidelines as I have commented this
15 morning and considered the 3553(a) factors.

16 And I have one question for probation here before
17 I do this.

18 *(Conferred with probation.)*

19 THE COURT: As to Count 2, the defendant is
20 committed to the Bureau of Prisons for confinement for a
21 period of 12 months and one day.

22 As to Count 5, the defendant is committed to the
23 Bureau of Prisons for confinement for a period of 12 months
24 and one day, said sentence to be served concurrently with
25 the sentence imposed in Count 2.

1 The defendant shall cooperate in the collection
2 of --

3 First of all, the defendant shall serve a
4 three-year term of supervised release subject to the
5 standard conditions and the following special conditions:

6 The defendant shall cooperate in the collection of
7 DNA.

8 The defendant shall disclose all assets and
9 liabilities to probation and not transfer or convey any
10 asset with a fair market value in excess of \$500 without
11 approval of probation.

12 The defendant shall pay full restitution to the
13 victims identified -- I'm sorry. I have eliminated that
14 from the sentence. I'm sorry.

15 The defendant shall not make application for a
16 loan or credit arrangement or enter into a lease agreement
17 without approval of probation.

18 The defendant shall authorize release to probation
19 a financial information by appropriate means.

20 No fine is ordered.

21 The defendant shall pay a fee assessment in the
22 amount of \$200 due immediately in full.

23 Mr. Hammond, you have the right to appeal from
24 your sentence under certain circumstances, and a notice of
25 appeal must be filed within 14 days of the entry of

1 judgment. If you are unable to pay the costs of an appeal,
2 you may apply for leave to appeal in forma pauperis, and if
3 you request, the clerk of court will prepare and file a
4 notice of appeal on your behalf.

5 Do you understand that, sir?

6 DEFENDANT STEVEN HAMMOND: Yes.

7 THE COURT: Now, gentlemen, the decisions you made
8 because you couldn't comply with requests from government
9 agencies, whether they were justified in every instance or
10 not, are going to result in grievous losses to you and your
11 families. And that's how you end up in a place like this.

12 I won't be the judge on any potential supervised
13 release violation. I will be gravely disappointed if you
14 end up before the court again in that regard. People have
15 said a lot of nice things about you. You have a lot to live
16 up to, quite frankly.

17 And I know that for -- you know, it's one thing to
18 have the -- as one letter said, the cowboy code of ethics or
19 the Wyoming code and all that, but we are all a part of one
20 country, and it's a great country. And even when there are
21 requirements that seem inappropriate, I'm not saying that
22 all of them were; they weren't, we have to learn to live
23 within them or sometimes the consequences are deep.

24 Anything further?

25 MR. BLACKMAN: Your Honor, just a couple technical

1 things.

2 Number one, would the court authorize voluntary
3 surrender?

4 THE COURT: Yes. How long do you request?

5 MR. PAPAGNI: I think the sentencing was set for
6 December 11th. I would expect we could set it over until
7 after the first of the year.

8 THE COURT: All right.

9 MR. BLACKMAN: If we could have an early January
10 surrender date.

11 THE COURT: You may.

12 MR. BLACKMAN: And would you please recommend the
13 Sheridan Camp.

14 THE COURT: Yes.

15 MR. BLACKMAN: Then the only other thing, I think
16 you said the fee assessment in Dwight Hammond's case was
17 \$200. I think technically it's 100.

18 THE COURT: It should be 100.

19 MR. BLACKMAN: 100.

20 THE COURT: Yeah. I was using the same form. I
21 only had one of them, and that's what happened. It should
22 be 100.

23 MR. MATASAR: Your Honor, could we confer with the
24 family about perhaps staggering Steven Hammond's turn-in
25 date? Mr. Dwight Hammond, if he surrenders in January, may

1 get out in a few months.

2 THE COURT: Any objection?

3 MR. PAPAGNI: No.

4 THE COURT: All right. Now, I want you to do it
5 today so that I can -- because I am going to have these
6 judgments prepared today.

7 MR. MATASAR: I think that makes sense, Your
8 Honor. We will do it. We will confer now, and before we
9 leave the courthouse, we will get word to your staff.

10 THE COURT: That's fine. All right. Anything
11 further?

12 MR. PAPAGNI: I was going to point out what
13 Mr. Blackman did about the assessment. We caught that one.

14 And of course, the defendants have waived their
15 appeal rights, and I think the court said to the extent they
16 have appeal rights that are limited, that applies, so that's
17 all I have, Judge.

18 THE COURT: They are. You have waived most of
19 your appeal rights.

20 The other thing is I find that both defendants
21 have waived the preparation of a presentence report.

22 All right?

23 MR. BLACKMAN: And Your Honor, we would stipulate
24 that through the trial and all the submissions you had more
25 than sufficient information to proceed to sentencing without

1 a presentence report.

2 MR. MATASAR: Yes, Your Honor.

3 MR. BLACKMAN: We stipulate.

4 MR. MATASAR: For Steven Hammond too.

5 THE COURT: Thank you.

6 MR. MATASAR: Thank you, Your Honor.

7 THE COURT: All right. We are in recess. I would
8 like to see just counsel over at the sidebar for a minute.

9 THE CLERK: Court's in recess.

10 *(The proceedings were concluded this*
11 *30th day of October, 2012.)*

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 I hereby certify that the foregoing is a true and
2 correct transcript of the oral proceedings had in the
3 above-entitled matter, to the best of my skill and ability,
4 dated this 20th day of November, 2012.

5

6 /s/Kristi L. Anderson

7 Kristi L. Anderson, Certified Realtime Reporter

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25