No. ________

In The
Supreme Court of the United States

STEVEN DWIGHT HAMMOND,
and DWIGHT LINCOLN HAMMOND, JR.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

LAWRENCE H. MATASAR
LAWRENCE MATASAR, P.C.
621 S.W. Morrison Street,
Suite 1025
Portland, OR 97205
(503) 222-9830
larry@pdxlaw.com
Counsel for Petitioner
Steven Dwight Hammond

KENDRA M. MATTHEWS
Counsel of Record
RANSOM BLACKMAN LLP
1001 S.W. Fifth Avenue,
Suite 1400
Portland, OR 97204
(503) 228-0487
kendra@
ransomblackman.com
Counsel for Petitioner
Dwight Lincoln
Hammond, Jr.

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED FOR REVIEW

Petitioners are cattle ranchers who ranched on 10,000 acres of private land, intermixed with tens of thousands of acres of public land. Both were convicted of arson in connection with a 2001 fire lit to burn invasive species on private land that burned 139 acres of public land. Steven Hammond was also convicted of arson when a "back burn" he lit to protect private land during a giant wildfire burned an acre of public land. The fires caused minimal damage and, arguably, increased the value of the land for grazing. The district court found no one was endangered by the fires.

The district court concluded that Congress did not envision petitioners when, as a part of the Anti-terrorism and Effective Death Penalty Act of 1996, it added a mandatory minimum sentence of five years for damaging property of the United States by means of fire or an explosive in violation of 18 U.S.C. § 844(f)(1). It further concluded that imposition of such a sentence would violate the Eighth Amendment because such a sentence was grossly disproportionate to the offense conduct. App. 17. The Ninth Circuit rejected the idea that a five-year mandatory minimum term could ever be unconstitutional. App. 9.

QUESTIONS PRESENTED FOR REVIEW – Continued

The first question presented is:

Under what circumstances does the Eighth Amendment authorize a district court to impose a sentence less than the statutory mandatory minimum?

Since 1991, the Fourth Circuit has held, based on fairness and finality, that a waiver of appeal by a criminal defendant precludes a government appeal as well. In this case, despite defense counsels' statements to the trial judge right before the waiver that their clients expected the case to be over after sentencing, the Ninth Circuit has expressly rejected the Fourth Circuit's rule.

The second question presented is:

Does a criminal defendant's waiver of appeal rights made in an agreement to resolve a case also prohibit an appeal by the government?

PARTIES TO THE PROCEEDING

Petitioners are Steven Dwight Hammond and Dwight Lincoln Hammond, Jr., son and father, defendants-appellees below.

Respondent is the United States of America, plaintiff-appellant below.

Petitioners file this joint petition for a writ of certiorari before this Court pursuant to Supreme Court Rule 12.4.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
UNITED STATES SUPREME COURT JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
I. Factual Background	3
A. Petitioners' Ranching Operation	3
B. Petitioners' Personal Characteristics	5
II. Convictions	5
III. District Court's Sentences	8
IV. The Ninth Circuit Opinion Vacating Petitioners' Sentences	10
V. Procedural History Relating to Government's Right to Appeal	11

TABLE OF CONTENTS – Continued

Page

REASONS FOR GRANTING THE WRIT 14

I. The Ninth Circuit's Decision Conflicts with this Court's Repeated Assertion that the Eighth Amendment's Proportionality Protections Apply to Sentences Imposing Terms of Years 15

II. This Case Creates a Circuit Split Concerning an Important Matter: the Effect of a Criminal Defendant's Waiver of Appeal on the Government's Ability to Appeal 36

CONCLUSION 39

APPENDIX:

United States v. Hammond, 742 F.3d 880 (9th Cir. 2014) ....App. 1

United States v. Hammond, United States District Court for the District of Oregon Case No. 6:10-cr-60066-HO, Transcript Excerpt: Sentencing Hearing (Oct. 30, 2012) ....App. 12

United States v. Hammond, 742 F.3d 880 (9th Cir. 2014), Order Denying Rehearing and Rehearing En Banc ....App. 23

Fed. R. Crim. P. 11 (Pleas)................................App. 25

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Ewing v. California, 538 U.S. 11 (2003) 11, 16, 18, 19, 20

Graham v. Florida, 560 U.S. 48 (2010) .... *passim*

Harmelin v. Michigan, 501 U.S. 957 (1991) ...... *passim*

Hutto v. Davis, 454 U.S. 370 (1982) 11, 20

Lockyer v. Andrade, 538 U.S. 63 (2003) .... *passim*

McFadden v. United States, 814 F.2d 144 (3d Cir. 1987) 34, 35

Roper v. Simmons, 543 U.S. 551 (2005) 15

Rummel v. Estelle, 445 U.S. 263 (1980) 11, 19, 20

Solem v. Helm, 463 U.S. 277 (1983) 10, 19, 20, 23

United States v. Blick, 408 F.3d 162 (4th Cir. 2005) 37

United States v. Callahan, 659 F. Supp. 80 (E.D. Penn. 1987) 35

United States v. Cleaver, 163 Fed. Appx. 622 (10th Cir. 2005), *cert. den.*, 547 U.S. 1103 (2006) 32, 35

United States v. Crespin, United States District Court for the District of Idaho Case No. 1:08-CR-119-EJL 30, 35

United States v. Davis, 98 F.3d 141 (4th Cir. 1996), *cert. den.*, 520 U.S. 1129 (1997) 33, 35

TABLE OF AUTHORITIES – Continued

Page

United States v. Dowell, 430 F.3d 1100 (10th Cir. 2005), *cert. den.*, 549 U.S. 828 (2006)........31, 35

United States v. Eff, 524 F.3d 712 (5th Cir. 2008), *cert. den.,* 555 U.S. 924 (2008)..............31, 35

United States v. Eichman, 957 F.2d 45 (2d Cir. 1992)...24, 33, 35

United States v. Giggey, 589 F.3d 38 (1st Cir. 2009)...30, 35

United States v. Guevara, 503 U.S. 977 (1992).........37

United States v. Guevara, 941 F.2d 1299 (4th Cir. 1991), *cert. den.*, 503 U.S. 977 (1992).............37

United States v. Hammond, 742 F.3d 880 (9th Cir. 2014)..1

United States v. Hersom, 588 F.3d 60 (1st Cir. 2009)...31

United States v. Hicks, 997 F.2d 594 (9th Cir. 1993)...33, 35

United States v. Love, U.S. District Court for Southern District of California Case No. 3:10-CR-02418-MMM-1....................................29, 35

United States v. Luckie, 2007 WL 1488625 (N.D. Fla. 2007)..31, 35

United States v. Manning, 1987 WL 25923 (E.D.N.Y. 1987)..34, 35

United States v. Mason, 410 Fed. Appx. 881 (6th Cir. 2010)...30, 35

TABLE OF AUTHORITIES – Continued

Page

United States v. Masotto, 73 F.3d 1233 (2d Cir.), *cert. den.*, 519 U.S. 810 (1996) 33, 35

United States v. McDavid, 396 Fed. Appx. 365 (9th Cir. 2010) 30, 35

United States v. McVeigh, 153 F.3d 1166 (10th Cir. 1998), *cert. den.*, 526 U.S. 1007 (1999) 32, 35

United States v. Moussaoui, 591 F.3d 263 (4th Cir. 2010) 30, 35

United States v. Nettles, 476 F.3d 508 (7th Cir. 2007) 31, 35

United States v. Perez-Gonzalez, 445 F.3d 39 (1st Cir. 2006) 31

United States v. Pilaski, 874 F.2d 817 (9th Cir.), *cert. den.,* 493 U.S. 937 (1989) 34, 35

United States v. R.K., Juvenile, 95 Fed. Appx. 232 (9th Cir. 2004) 32

United States v. Sablan, 114 F.3d 913 (9th Cir. 1997), *cert. den.*, 522 U.S. 1075 (1998) 32, 35

United States v. Solis-Jordan, 1999 WL 543199 (N.D. Ill. 1999) 32, 35

United States v. Stewart, 806 F.2d 64 (E.D. Penn. 1986) 34, 35

United States v. Tankersley, 537 F.3d 1100 (9th Cir. 2008), *cert. den.*, 556 U.S. 1282 (2009) 28, 29

United States v. Walker, 179 Fed. Appx. 544 (10th Cir. 2006) 31, 35

TABLE OF AUTHORITIES – Continued

Page

United States v. Walters, 351 F.3d 159 (5th Cir. 2003) 32, 35

United States v. Whitehorn, 710 F. Supp. 803 (D.D.C. 1989) 34, 35

United States v. Winans, 1988 WL 122410 (E.D. Pa. 1988) 34

Weems v. United States, 217 U.S. 349 (1910) 15

FEDERAL CONSTITUTIONAL PROVISIONS

U.S. Const., Amend. VIII ....*passim*

FEDERAL REGULATIONS, RULES AND STATUTES

18 U.S.C. § 241 34

18 U.S.C. § 371 34

18 U.S.C. § 844 9

18 U.S.C. § 844(f) ....*passim*

18 U.S.C. § 844(f)(1) ....*passim*

18 U.S.C. § 844(f)(2) 32

18 U.S.C. § 844(i) 32

18 U.S.C. § 924(c) 32, 33

18 U.S.C. § 2255 12

28 U.S.C. § 1254(1) 1

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 (1996) 9, 24, 26, 29

TABLE OF AUTHORITIES – Continued

Page

Fed. R. Crim. P. 11 2

Pub. L. No. 97-298 (1982) 24

U.S.S.G. § 3A1.4 28

PETITION FOR A WRIT OF CERTIORARI

Petitioners Steven Dwight Hammond and Dwight Lincoln Hammond, Jr. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 742 F.3d 880, and reproduced in the appendix at App. 1. The unpublished order of the court of appeals denying rehearing and rehearing en banc is reproduced at App. 23. The district court's unpublished order imposing sentence upon both petitioners is reproduced at App. 12.

UNITED STATES SUPREME COURT JURISDICTION

A panel of the Ninth Circuit issued its opinion on February 7, 2014. App. 1. Petitioners filed a joint petition for rehearing and rehearing en banc, which was denied on March 19, 2014. App. 23. This petition is timely as it is filed within 90 days of the entry of the order denying the petition for rehearing or rehearing en banc. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, no excessive fines imposed, nor cruel and unusual punishments inflicted."

18 U.S.C. § 844(f)(1) states, in relevant part:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other personal or real property in whole or in part owned or possessed by, or leased to, the United States or any department or agency thereof, or any institution or organization receiving Federal financial assistance, shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title or both.

Federal Rule of Criminal Procedure 11 governs the making of plea agreements; it is reproduced in full in the appendix at App. 25.

STATEMENT OF THE CASE

The district court properly concluded that the imposition of a five-year mandatory minimum term of imprisonment on either petitioner would violate the Eighth Amendment. The Ninth Circuit summarily reversed. This case presents a clean vehicle for this Court to resolve whether and under what circumstances a

sentence to a term of years that is mandated by Congress can ever be deemed unconstitutional.

It also provides the Court with an opportunity to resolve a conflict between the Ninth and Fourth Circuits regarding the reciprocal nature of a criminal defendant's appeal waiver.

I. Factual Background.

A. Petitioners' Ranching Operation.

Petitioners come from a long line of cattle ranchers. ECF-205.[1] Their ranch, Hammond Ranches, Inc. [HRI], is on Steens Mountain in South Eastern Oregon. *Id.* It is a cow-calf operation: each year, it breeds its own cows with its own bulls, tends to the birth of the calves in the spring, moves the herd through numerous private and public pastures over the course of the spring and summer, and sends the majority of the calves to market in the fall. *Id.*

HRI has always operated on a combination of private and public land. *Id.* As of 2006, it owned over 10,000 acres of private pasture and had a Bureau of Land Management [BLM] permit authorizing it to graze cattle on tens of thousands of acres of public land. *Id.* HRI's Grazing Permit authorized it to

[1] "ECF-__" refers to the Electronic Case File document number in the District Court Docket; "ER-__" refers to the government's Excerpts of Record; "SER-__" refers to defendants' Supplemental Excerpts of Record.

pasture about 18 bulls and 374 cow-calf pairs on various allotments on the public land over the course of the year. *Id.* As is common in Eastern Oregon, private land is interspersed with public land and fences separate the two only in a few places. *Id.*

On this type of grazing land, range fires, lit by both the government and ranchers, generally increase the land's value by efficiently removing invasive species such as juniper trees. Fires are often planned years ahead of time for maximum benefit. Fires are also sometimes lit, by both the government and ranchers, to prevent the uncontrolled spreading of wild fires; such fires are referred to as "back burns."[2]

Although HRI employs others at various times of the year, it is essentially a two-man operation – petitioners Dwight and Steven Hammond, father and son now aged 72 and 45. For years, petitioners have devoted their full time and attention on a daily basis to raising hay to feed the herd through the winter, moving it through various pastures in the spring and summer, maintaining improvements on both the private and permit land, and getting calves to market. *Id.*

---

[2] Back burning was described by a government witness at the trial:

> [T]he back burn is a technique that you use both in a prescribed and wild land fire. And . . . 90 percent of the time . . . what you are doing is you are trying to take away the fuels in front of a fire. . . .

ER-607.

B. Petitioners' Personal Characteristics.

The sentencing record was replete with evidence that both petitioners are men of the highest caliber, not only hard-working and fair in their dealings, but generous to others. The prosecutor acknowledged petitioners' high character at sentencing:

> It is true, and it can't be contested, I have spent a lot of time in Burns, [Oregon], that the Hammonds both . . . have done wonderful things for their community and those deeds are recognized in these letters.

ER-7. Similarly, the district court found:

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

ER-21.

II. Convictions.

On June 17, 2010, the government charged the Hammonds in a 19-count indictment with conspiracy, arson and other charges involving numerous range fires occurring in a 24-year period from August 1982 to August 2006. ER-1273. On May 17, 2012, less than 30 days before trial, the government filed a 9-count superseding indictment focusing on four separate fires. SER-137.

Steven Hammond had acknowledged starting two of the fires, and those were the fires upon which

the jury returned guilty verdicts. Both petitioners were convicted of violating 18 U.S.C. § 844(f)(1) in connection with a 2001 range fire known as the Hardie-Hammond Fire. Steven Hammond was also convicted of violating § 844(f)(1) because he started a back burn during the 2006 Krumbo Butte Fire. The jury found that neither fire had caused more than $1,000 in damages. ER-35, 41.

The Ninth Circuit described the 2006 fire as follows:

> In August 2006, a lightning storm kindled several fires near where the Hammonds grew their winter feed. Steven responded by attempting back burns near the boundary of his land. Although a burn ban was in effect, Steven did not seek a waiver. His fires burned about an acre of public land.

App. 3.

As for the 2001 fire, there were several facts petitioners had acknowledged at trial: Petitioners had been warned after a 1999 prescribed burn on their private land had spread to public land that they would face serious consequences should a similar event occur again. *Id*. On September 30, 2001, after the Hammonds and their invited guests finished a day of hunting on their private land, Steven Hammond called the BLM to see if burning was permitted. After being told there was no burn ban in effect, he informed the BLM that the Hammonds would be setting a fire on a section of their private

land. ER-234; ER-306. The Hammonds then set a fire intended to burn off invasive species; the fire spread to approximately 139 acres of adjacent public land on the Hardie-Hammond Allotment. ER-287; ER-243; ER-54-64.

Some of the circumstances of the 2001 fire were disputed at trial. The government's main witness on the 2001 fire was Dwight Hammond's grandson, Dusty Hammond, who asserted that the fire had placed him in physical danger. App. 3. The defense presented substantial evidence contradicting Dusty Hammond's version of the events. *See* SER-11-22. At sentencing, the trial judge rejected Dusty's version of what had happened, based on his age and bias. App. 14.

The trial judge found that the 2001 fire had, at most, temporarily damaged sagebrush and that, while those damages might have technically been greater than $100, "mother nature" had remedied any harm. App. 14. The judge's conclusion was supported by the BLM, which had determined that the 2001 fire improved that portion of the federal land to which the fire spread. ER-305.

Having listened to all of the evidence and testimony at trial, the trial court succinctly summarized the basis for the convictions as follows:

> With regard to the sufficiency of the jury verdicts, they were sufficient. And what happened here, if you analyze this situation, if you listened to the trial as I did and looked

> at the pretrial matters, there was a – there were statements that Mr. Steven Hammond had given that indicated he set some fires [after he had been warned about the consequences if they spread], and the jury accepted that for what it was.

App. 13.

III. District Court's Sentences.

The trial court's advisory guidelines calculations were undisputed on appeal. The advisory range for Dwight Hammond was 0 to 6 months imprisonment, App. 15; the advisory range for Steven Hammond was 8 to 14 months imprisonment, App. 16.

Prior to sentencing, petitioners filed a memorandum seeking less than the five-year mandatory minimum provided for under 18 U.S.C. § 844(f)(1) on the grounds that such sentences would be disproportionate to their criminal conduct and, thus, would violate the Eighth Amendment. ECF-205.

At sentencing, the prosecutor addressed petitioners' Eighth Amendment argument as follows:

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

* * *

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

ER-9-10. The court responded to the prosecutor's comments:

> [T]he argument [the prosecutor] made on proportionality was highly moral. I appreciate that.

ER-18.

The trial court concluded that petitioners' offense conduct was not that contemplated by Congress when it added a five-year mandatory minimum sentence to 18 U.S.C. § 844 under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 (1996). App. 17. Considering the nature of the arson statute, the purpose of the penalty provision added to that statute, the nature of the conduct underlying the petitioners' convictions, their personal characteristics, and the advisory guidelines, the trial court indicated that it would not impose the five-year mandatory minimum sentence because "to do so under the Eighth Amendment would result in a sentence which is grossly disproportionate to the severity of the offenses here." App. 17.

Thereafter, the court imposed sentences in the middle of each petitioner's advisory guidelines range: Dwight Hammond received a sentence of 3 months imprisonment; App. 18. Steven Hammond received a sentence of 12 months and one day. App. 20. Petitioners served their full sentences and are currently on supervised release.

IV. The Ninth Circuit Opinion Vacating Petitioners' Sentences.

The government appealed from the district court's sentences. A panel of the Ninth Circuit rejected the notion that imposition of a five-year term of imprisonment would have been unconstitutional:

> . . . Congress has "broad authority" to determine the appropriate sentence for a crime and may justifiably consider arson, regardless of where it occurs, to be a serious crime. *Solem v. Helm,* 463 U.S. 277, 290 . . . (1983). Even a fire in a remote area has the potential to spread to more populated areas, threaten local property and residents, or endanger the firefighters called to battle the blaze. The September 2001 fire here, which nearly burned a teenager and damaged grazing land, illustrates this very point.
>
> Given the seriousness of arson, a five-year sentence is not grossly disproportionate to the offense. The Supreme Court has upheld far tougher sentences for less serious or, at the very least, comparable offenses. *See Lockyer v. Andrade,* 538 U.S. 63 . . . (2003)

> (upholding a sentence of fifty years to life under California's three-strikes law for stealing nine videotapes); *Ewing v. California,* 538 U.S. 11 . . . (2003) (upholding a sentence of twenty-five years to life under California's three-strikes law for the theft of three golf clubs); *Hutto v. Davis,* 454 U.S. 370 . . . (1982) (per curiam) (upholding a forty-year sentence for possession of nine ounces of marijuana with the intent to distribute); *Rummel v. Estelle,* 445 U.S. 263 . . . (1980) (upholding a life sentence under Texas's recidivist statute for obtaining $120.75 by false pretenses). . . .

App. 9-10.

V. Procedural History Relating to Government's Right to Appeal.

As noted, in 2012, petitioners proceeded to trial on a 9-count superseding indictment focusing on a 2001 fire and a series of 2006 fires. Before that trial, petitioners filed numerous pretrial motions, many of which were denied and, thus, appealable. During trial, petitioners made numerous evidentiary objections. After a two-week trial and several hours of jury deliberations, the jury initially returned a partial verdict. As detailed above, it found petitioners guilty of the only fires they admitted to setting. Petitioners were acquitted on some counts and the jury was unable to reach a verdict on others. ER-1256-66.

After the court received the partial verdict, it directed the jury to continue deliberating. ER-1267. During deliberations, the parties agreed to resolve the case with partial verdicts. ER-1268-70. Their agreement was oral, not written, and the terms were placed on the record in open court:

> Prosecutor: My understanding is that Dwight Hammond – Dwight Lincoln Hammond, Junior, and Steven Hammond have agreed that they would waive their appeal rights and accept the verdicts as they've been returned thus far by the jury.
>
> The government will agree to run any sentences that apply to Steven Hammond, recommend that they run concurrent. And would agree that they should remain released pending the court's sentencing decision.
>
> And the government does have only one recommendation as an additional condition. The court, of course, has discretion to impose. That they need to waive any and all appellate rights and [18 U.S.C. §] 2255 rights, except for, of course, ineffective assistance of counsel, which, quite frankly, in this case I think would be real difficult to prove. I think that's a summary of our understanding.
>
> Counsel for Steven Hammond: Yes, Your Honor. Mr. Steven Hammond has indicated after these discussions with the government that we want this case to be over. The idea is there will be no further proceedings beyond

this court and will be done with at the sentencing. Mr. Steven Hammond has agreed to that. He understands where we are.

Court: All right. Mr. Hammond –

Counsel for Steven Hammond: He wants it to be over. He wants this matter to be finished.

Court: Mr. Hammond, do you agree to that?

Steven Hammond: Yes.

Court: Do you have any other questions of your lawyer before I accept that?

Steven Hammond: I accept that.

Court: Is that a voluntary decision on your part?

Steven Hammond: Yeah.

Court: Thank you. Mr. Blackman?

Counsel for Dwight Hammond: Yes, Your Honor. I've conferred with Dwight Hammond. He is agreeable to waive his appellate rights to bring this matter to a close. And it's our understanding that this would be a resolution of this case with the sentence the court imposes. And the parties would accept the – your judgment as to the sentence that's imposed.

Court: Mr. Dwight Hammond, is that your agreement?

Dwight Hammond: Yes, it is.

Court: Is it a voluntary decision on your part?

Dwight Hammond: Yes, it is.

Court: Do you have any questions of your lawyer before – or me before we accept that?

Dwight Hammond: I guess not.

Court: I accept the waivers.

ER-1268-70. The court then received the jury's partial verdicts. ECF-192, 194.

The government sought imposition of the statutory mandatory minimum of 5 years imprisonment for each petitioner. As noted, at sentencing, the prosecutor acknowledged the primacy of the judicial branch in assessing an Eighth Amendment challenge, and the trial judge explicitly acknowledged the government's deference to the court's view of justice in this case: "The attorneys in this case are all remarkable. The – you do your job. But the argument [the prosecutor] made on proportionality was highly moral. I appreciate that." ER-18. The prosecutor did not respond.

Thereafter, the government appealed from the sentences imposed by the court.

REASONS FOR GRANTING THE WRIT

This Court should grant review to clarify under what circumstances a court can conclude that a

sentence mandated by statute is unconstitutional. Although this Court has said that the Eighth Amendment's protections against disproportionate sentences applies to sentences imposing terms of years, *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003), since 1991, no circuit court has found such a sentence to be unconstitutional. The Ninth Circuit's decision demonstrates that absent clarification by this Court, no circuit court will ever do so. This case presents a clean vehicle for this Court to resolve whether this important Eighth Amendment protection indeed applies to this class of sentences.

This Court should also accept review to resolve a conflict between the Fourth and Ninth Circuits as to the reciprocal nature of a criminal defendant's appeal waiver.

I. The Ninth Circuit's Decision Conflicts with this Court's Repeated Assertion that the Eighth Amendment's Proportionality Protections Apply to Sentences Imposing Terms of Years.

The Eighth Amendment's prohibition of cruel and unusual punishment embodies the "'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.' *Weems v. United States,* 217 U.S. 349, 367 (1910)." *Graham v. Florida*, 560 U.S. 48, 59 (2010); *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (Eighth Amendment "guarantees

individuals the right not to be subjected to excessive sanctions.").

This Court has long held that the Eighth Amendment affords criminal defendants proportionality protection on a case-by-case basis.[3] In such an "as applied" challenge, the Court considers whether the terms of the sentence are constitutional "given all the circumstances in a particular case." *Graham*, 560 U.S. at 59. In non-capital cases, the prohibition on cruel and unusual punishments imposes "a narrow proportionality principle." *Ewing v. California*, 538 U.S. 11, 20 (2003); *Harmelin v. Michigan*, 501 U.S. 957, 997-98 (1991) (Kennedy, J., concurring in part and concurring in judgment). That principle "does not require strict proportionality between crime and sentence," but, rather, "forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin*, 501 U.S. at 997, 1000-1001 (Kennedy, J., concurring in part and concurring in judgment).

Since 1991, when this Court issued its plurality opinion in *Harmelin*, determining when a sentence is "grossly disproportionate" to a crime involves a two-part test: First, a court must compare the gravity of the crime to the severity of the sentence. *Id.* at 1005. Second, and only in " 'the rare case in which [this]

---

[3] The other type of proportionality challenge is a "categorical" challenge, "in which the Court implements the proportionality standard by certain categorical restrictions[.]" *Graham*, 560 U.S. at 59.

threshold comparison . . . leads to an inference of gross disproportionality,' " a court can "compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions." *Graham*, 560 U.S. at 60 (quoting *Harmelin*, 501 U.S. at 1005 (Kennedy, J. concurring in judgment and concurring in part)). If the comparison supports the initial inference that the penalty is grossly disproportionate, the penalty is unconstitutional as applied. *Id.*

This Court has repeatedly maintained that "[a] gross disproportionality principle is applicable to sentences for terms of years." *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003). However, in the 23 years since *Harmelin* was decided, this Court has never found such a penalty unconstitutional; indeed, no sentence has met even the threshold test for disproportionality. Further, petitioners have located no circuit court case in which – applying the test articulated in *Harmelin* – a circuit court has concluded that a term-of-years sentence violated the Eighth Amendment.

This case presents this Court with the opportunity to reevaluate whether there are any circumstances in which a criminal defendant can meet that test. Whether measured by intent, action, damages, character, or the nature of the penalty provision, petitioners' case is unlike any previously considered by this Court. The district court concluded that imposition of the five-year mandatory minimum would violate the Eighth Amendment. And, yet, the

Ninth Circuit concluded that petitioners' case did not even meet the threshold for a finding of gross disproportionality. In so doing, that court relied upon this Court's precedent to conclude that because Congress had established the five-year mandatory minimum term, the court was bound to find it constitutional. App. 10. Its reasoning is consistent with circuit court decisions across the country. *See* App. 10 (citing cases). The Ninth Circuit's decision demonstrates that – absent intervention from this Court – circuit courts will continue to interpret the "narrow proportionality principle" articulated by this Court as one that is, in fact, impossible for a criminal defendant to meet when the sentence challenged is mandated by statute. If the Ninth Circuit's (and other circuit courts') interpretation of this Court's precedent is correct, then it is this Court – not the circuit courts – who must make the point explicit. This case provides an appropriate vehicle for this Court to do so.

An analysis of this Court's precedent, however, demonstrates that the Ninth Circuit is not properly applying them. Most of the "as applied" proportionality challenges this Court has considered have involved challenges to the imposition of a sentence that was driven not by the defendant's underlying offense conduct but, instead, his status as a recidivist. *Ewing*, 538 U.S. at 30-31 (rejecting "as applied" constitutional challenge to a recidivist "three strikes" statute imposing 25 years to life for theft conviction when defendant had four "serious" or "violent" convictions in his past); *Lockyer*, 538 U.S. at 77 (concluding that

state court's conclusion that California's recidivist "three strikes" law does not violate the Eighth Amendment is not contrary to clearly established federal law); *Rummel v. Estelle*, 445 U.S. 263, 285 (1980) (rejecting "as applied" constitutional challenge to recidivist "three strikes" statute imposing life *with* the possibility for parole); *Solem v. Helm*, 463 U.S. 277, 303 (1983) (concluding that applying recidivist statute requiring imposition of sentence of life imprisonment without the possibility for parole on repeat offender convicted of a "passive" crime who had a non-violent, minor criminal history violated the Eighth Amendment).

In evaluating the constitutionality of sentences imposed under such provisions, this Court looked to the rationale of the penalty provision. Recidivist statutes reflect "a deliberate policy choice that individuals who have repeatedly engaged in serious or violent criminal behavior, and whose conduct has not been deterred by more conventional approaches to punishment, must be isolated from society in order to protect the public safety." *Ewing*, 538 U.S. at 24. Because such recidivist statutes rationally advance a legislature's legitimate goal of "dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law," *Rummel*, 445 U.S. at 276, in every case

but *Solem*,[4] this Court held that the sentences imposed could not be said to be grossly disproportionate to the gravity of the conduct targeted by the penalty provision.

Because the evaluation of the penalty provision was driven by the defendant's status as a *recidivist*, the results of these cases (affirming long incarceration terms for recidivists even if their latest offense was relatively minor) provide little insight into how a court might determine whether a particular term-of-year sentence that is not imposed pursuant to a recidivist statute is grossly disproportionate to the offense. Nevertheless, the Ninth Circuit cited *Ewing*, *Lockyer,* and *Rummel* as supporting its decision here because they were cases in which this Court affirmed "far tougher sentences for less serious or, at the very least, comparable offenses." App. 10. Only this Court can clarify that, in so doing, the Ninth Circuit is misunderstanding the import of this precedent.

The only non-recidivist case this Court has decided since 1991 is *Harmelin* itself.[5] A thoughtful

---

[4] In *Solem*, which was decided before *Harmelin*, the offense at issue was minor, the defendant's prior convictions were nonviolent and the punishment at issue was not a term of years but life imprisonment *without* the possibility for parole.

[5] In *Hutto v. Davis*, 454 U.S. 370, 374 (1982) (per curiam), which was decided before *Harmelin*, the defendant sold marijuana and other controlled substances to a police informant. He was subsequently arrested with a small quantity of marijuana and drug paraphernalia and convicted of two counts of possession with intent to distribute marijuana. He was sentenced to a

(Continued on following page)

review, however, demonstrates that the ruling in that case supports – not detracts from – the district court's ruling here. The controlling opinion relating to the "as applied" proportionality analysis in *Harmelin* was Justice Kennedy's plurality opinion. *Harmelin*, 501 U.S. at 997 (Kennedy, J., concurring in judgment and concurring in part). In reaching his decision, Justice Kennedy summarized the principles that have guided this Court in considering "as applied" proportionality challenges to terms-of-years sentences:

(1) Generally courts owe "substantial deference" to "the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes," *id.* at 999;

(2) "[T]he Eighth Amendment does not mandate adoption of any one penological theory" and "competing theories of mandatory and discretionary sentencing have been in varying degrees of ascendancy or decline since the beginning of the Republic," *id.*;

(3) "[M]arked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure," *id.*; and,

---

20-year term of imprisonment on each count, which were imposed consecutively. Observing that the individual sentences were well-within the statutory maximum, this Court concluded the sentence was constitutional. Justice Kennedy considered this case in articulating the test to be applied moving forward in *Harmelin*.

(4) "[P]roportionality review by federal courts should be informed by objective factors to the maximum possible extent[.]" *Id.* at 1000 (internal quotation marks and citations omitted).

Justice Kennedy harmonized those principles to conclude: "The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Id.* at 1001 (citations omitted).

With those principles in mind, Justice Kennedy turned to the particular challenge raised by Harmelin: the defendant had been convicted of possessing 672 grams of cocaine and, because of the quantity of drugs involved, he had been sentenced to a mandatory term of life imprisonment without the possibility of parole. Justice Kennedy observed that "[t]his amount of pure cocaine has a potential yield of between 32,500 and 65,000 doses," and, given the dangers posed by illegal narcotics, defendant's crime "threatened to cause grave harm to society." *Harmelin*, 501 U.S. at 1002 (Kennedy, J. concurring). As to the significance of these facts, Justice Kennedy observed:

> These and other facts and reports detailing the pernicious effects of the drug epidemic in this country do not establish that Michigan's penalty scheme is correct or the most just in any abstract sense. But they do demonstrate that the Michigan Legislature could with reason conclude that the threat posed to the

> individual and society by possession of this large an amount of cocaine – in terms of violence, crime, and social displacement – is momentous enough to warrant the deterrence and retribution of life sentence without parole.

Id. at 1003 (Kennedy, J., concurring). Justice Kennedy's opinion thus concluded that the "severity of petitioner's crime brings his sentence within the constitutional boundaries established by our prior decisions." *Id.* at 1004 (Kennedy, J., concurring).

The circumstances presented by this case (as properly articulated by the district court) stand in stark contrast to those presented in *Harmelin* and the recidivist cases. When evaluating the gravity of the offense, a court may consider the "harm caused or threatened to the victim or society, and the culpability of the offender." *Solem,* 463 U.S. at 292. In evaluating the severity of the penalty, the court looks at the provision itself and the rationale for it. In *Harmelin*, the defendant's malfeasance – dealing a significant quantity of a controlled substance – was precisely that which the legislature targeted with the criminal provision *and* its related penalty provision.

As the district court recognized, that was not the case here. Here, petitioners were convicted of violating 18 U.S.C. § 844(f)(1), which states, in relevant part:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of

> fire or an explosive, any building, vehicle, or other personal or real property in whole or in part owned or possessed by, or leased to the United States . . . shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title or both.

The word "fire" was added to 18 U.S.C. § 844(f)(1) in 1982. Pub. L. No. 97-298 (1982). At that time, Congress had not mandated a minimum sentence for the offense. *Id.*; *see also United States v. Eichman*, 957 F.2d 45 (2d Cir. 1992) (defendants convicted of § 844(f) violation when they burned government-owned flag at recruiting station; 2-years probation, 200-hours community service).

The five-year mandatory minimum sentence provision was added in 1996 as a part of an overall effort to combat terrorists through the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 (AEDPA). The AEDPA has 120 sections, some concerning habeas corpus and victim restitution reform, but its primary focus was a substantive response to acts of terrorism. Title VII of the Act is "Criminal Law Modifications to Counter Terrorism." Its Subtitle A, "Crimes and Penalties," contains nine sections, one of which – Section 708 – adds a five-year mandatory minimum for persons convicted under 18 U.S.C. § 844(f)(1).

Petitioners ranched on 10,000 acres of private land, intermixed with tens of thousands of acres of public land. With the 2001 fire, petitioners notified

the BLM before setting it. In the 2006 fire, Steven Hammond was trying to protect his private property in the middle of a giant, lightening-caused range fire. In both cases, the fire was started on private property to protect private interests and spread onto public land. In 2001, 139 publicly owned acres were burned; in 2006, just one. In both cases, the jury found the damage was less than $1,000; the trial judge found any damage to be minimal; and the record supported a conclusion that the fires actually increased the value of the land for grazing. Having presided over the trial and heard all of the testimony firsthand, the trial judge rejected the notion – proffered by a grandson angry because he had been forced to have a tattoo removed – that either fire had placed anyone in danger.

Entirely consistent with Justice Kennedy's analysis in *Harmelin*, the district court first considered whether the evidence was sufficient to establish guilt under the broad statute:

> With regard to the sufficiency of the jury verdicts, they were sufficient. And what happened here, if you analyze this situation, if you listened to the trial as I did and looked at the pretrial matters, there was a – there were statements that Mr. Steven Hammond had given that indicated he set some fires [after he had been warned about

> the consequences if they spread], and the jury accepted that for what it was.

App. 13.[6]

The court further recognized, however, that the "fire" aspect of § 844(f)(1) is targeting *arsonists*, not ranchers, and, more importantly, petitioners' conduct was not what Congress had envisioned when it enacted the five-year mandatory minimum as a part of the AEDPA:

> And with regard to the Antiterrorism and Effective Death Penalty Act of 1996, this sort of conduct could not have been conduct intended under that statute.
>
> When you say, you know, what if you burn sagebrush in the suburbs of Los Angeles where there are houses up those ravines? Might apply. Out in the wilderness here, I don't think that's what the Congress intended.

App. 17.

In analyzing the proportionality question, the district court also considered the advisory guidelines ranges under the United States Sentencing Guidelines: for petitioner Dwight Hammond, the

---

[6] Again, petitioners had proceeded to trial on a 9-count indictment relating to four fires. SER-137. Steven was convicted in connection with the two fires he had acknowledged starting; his father was convicted of one of them. Both were acquitted by the jury of causing damage in excess of $1,000. ER-35; ER-41.

recommended range was 0 to 6 months incarceration; for petitioner Steven Hammond, it was 8 to 14 months.

Finally, the court took into consideration that petitioners were pillars of the community who had a long history of community engagement and service.

In sum, the district court considered Congressional intent in enacting the arson statute, as well as its intent in enacting the mandatory minimum provision. It gave due deference and respect to the legitimate goals of Congress in enacting each provision. It considered the harm caused by petitioners' conduct and their culpability. As directed by this Court, it considered "all the circumstances in a particular case" before concluding that the imposition of a five-year incarceration term on either petitioner would be grossly disproportionate to the crime and, thus, if applied, would violate the Eighth Amendment. *Graham*, 560 U.S. at 59.

Relying on the *results* in this Court's cases, which have affirmed "far tougher sentences for less serious or, at the very least, comparable offenses," the Ninth Circuit rejected the district court's decision out of hand. App. 10. More troubling, it did so without even considering an intra- and inter-jurisdictional comparison of others sentenced for the same crime. As detailed below, such a comparison, verifies the threshold conclusion that imposition of a five-year mandatory minimum on petitioners would be grossly disproportionate to their conduct.

In the District of Oregon, petitioners located only a single prosecution of several defendants for violations of 18 U.S.C. § 844(f). The defendants were associated with "the activist group known publicly as the Earth Liberation Front ("ELF") and the Animal Liberation Front ("ALF")." *United States v. Tankersley*, 537 F.3d 1100, 1102 (9th Cir. 2008), *cert. den.*, 556 U.S. 1282 (2009). The Ninth Circuit summarized the defendants' conduct as follows:

> Over a five-year period beginning in October 1996 as many as sixteen individuals conspired to damage or destroy private and government property on behalf of ELF and ALF. The conspirators targeted government agencies and private entities they believed were responsible for degrading the environment through timber harvesting, cruelty to animals, and other means. The conspiracy covered multiple crimes in five Western states and resulted in tens of millions of dollars in damage.[ ] . . . After lengthy negotiations, all ten defendants agreed to proceed by way of criminal informations and pled guilty to conspiracy. Nine of the defendants also pled guilty to separate, substantive counts of arson and/or attempted arson.

Tankersley, 537 F.3d at 1103-04 (footnote omitted).

Some of the defendants were subjected to the "terrorism enhancement," U.S.S.G. § 3A1.4, which elevates both the offense level and the offender's criminal history category. Others did not technically qualify for that enhancement, but the district court

imposed a 12-level upward departure to account for the terroristic nature of the overall conspiracy. *Tankersley,* 537 F.3d at 1116. The crimes involved one to nine arsons; the sentences imposed ranged from 37 months to 156 months imprisonment, with nearly all of the sentences imposed falling below the advisory Guidelines range.

Those prosecutions were in the heart of the type of conduct Congress targeted when enacting 18 U.S.C. § 844(f)(1), as well as the mandatory minimum provisions added by the AEDPA. The defendants were domestic terrorists, who intended to destroy property and inflict financial harm. Their advisory guidelines ranges reflected the extremely serious nature of their offenses and established ranges far exceeding the mandatory minimum term. Those prosecutions – both the nature of the offense and the resulting sentences – "validated" the district court's judgment here that the imposition of the mandatory minimum sentence here would have been "grossly disproportionate" to both the crime committed and the offender, and, thus, unconstitutional.

The soundness of the district court's conclusion is affirmed again when a comparison is made to cases in other jurisdictions:

- *United States v. Love*, U.S. District Court for Southern District of California Case No. 3:10-CR-02418-MMM-1 (detonation of three pipe bombs caused significant damage to federal courthouse; ten convictions, including two counts relating to using weapons of mass

destruction, and § 844(f)(1); $325,000 restitution; 55 years total);

- *United States v. Moussaoui*, 591 F.3d 263 (4th Cir. 2010) (9/11 conspirator pled guilty to several conspiracies, including §§ 844(f), (i) conspiracy; life imprisonment);

- *United States v. Mason*, 410 Fed. Appx. 881 (6th Cir. 2010) (domestic "terrorist" burned down university building causing $1.1 million in damages; as part of plea acknowledged $2.5 and $7 million in damages in dozen other acts; multiple convictions; advisory Guidelines range: 360 to 480 months; 262 months on § 844(f)(1) count);

- *United States v. McDavid*, 396 Fed. Appx. 365 (9th Cir. 2010) (domestic "terrorist" conspired to bomb targets, including federal facility for tree genetics, federal dam and fish hatchery and cell phone towers; Guidelines sentence of 235 months);

- *United States v. Crespin*, United States District Court for the District of Idaho Case No. 1:08-CR-119-EJL (defendant set university building on fire, causing $4,010,000 in damages; 80 month sentence);

- *United States v. Giggey*, 589 F.3d 38 (1st Cir. 2009) (as burglary diversion, defendants set fire that destroyed four buildings receiving federal funding; $351,333.33 restitution; Guidelines' range 63 to 78 months; 42 months (reflects cooperation/uncredited state time));

United States v. Hersom, 588 F.3d 60 (1st Cir. 2009) (Giggey co-defendant; 86 months);

- *United States v. Eff*, 524 F.3d 712 (5th Cir. 2008), *cert. den.,* 555 U.S. 924 (2008) (fire-fighter set 23 forest fires, hoping opportunity to fight said fires would result in promotion; aggravated arson, 18 U.S.C. §§ 844(f)(1) and (2); 7 years);
- *United States v. Nettles*, 476 F.3d 508 (7th Cir. 2007) (domestic terrorist plotted to blow up the federal courthouse and to assist Al Queda; multiple convictions; 240 months on § 844(f)(1) count);
- *United States v. Luckie*, 2007 WL 1488625 (N.D. Fla. 2007) (Molotov cocktail used to burn down FEMA-owned trailer defendant thought belonged to foe; multiple convictions; 169 months on § 844(f)(1) count);
- *United States v. Perez-Gonzalez*, 445 F.3d 39 (1st Cir. 2006) (mob stormed military camp in Puerto Rico causing extensive damage; multiple convictions, including § 844(f)(1) count for destroying a Humvee (value $40,000); no sentencing challenge; disposition unknown);
- *United States v. Walker*, 179 Fed. Appx. 544 (10th Cir. 2006) (§ 844(f)(1) conviction for setting ex-girlfriend's home on fire after break-up; home owned by Cheyenne, WY Housing Authority; 151 months);
- *United States v. Dowell*, 430 F.3d 1100, 1109 (10th Cir. 2005), *cert. den.*, 549 U.S. 828 (2006) (domestic "terrorists" conspire to burn

down an IRS building; multiple convictions, including §§ 844(f)(1) and (2) count; 360 months total); *United States v. Cleaver*, 163 Fed. Appx. 622 (10th Cir. 2005), *cert. den.*, 547 U.S. 1103 (2006) (Dowell co-defendant; terrorism counts, as well as suborning perjury and witness tampering; Guidelines range 360-480 months; 400 months total);

- *United States v. R.K., Juvenile*, 95 Fed. Appx. 232 (9th Cir. 2004) (juvenile pled guilty to 18 U.S.C. § 844(f)(1) and (i), and placed on probation in Hawaii);
- *United States v. Walters*, 351 F.3d 159 (5th Cir. 2003) (explosive package sent to Air Force officer, severely injuring her; convictions included §§ 844(f)(1) and (2) count; and multiple 18 U.S.C. § 924(c) convictions; life sentence for § 924(c) violations);
- *United States v. Solis-Jordan*, 1999 WL 543199 (N.D. Ill. 1999) (clandestine political organization plants pipe bombs at recruiting center and beneath government car; car catches fire; multiple convictions, including § 844(f) count; Guidelines range: 51 to 63 months; sentence: 51 months);
- *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998), *cert. den.*, 526 U.S. 1007 (1999) (Oklahoma City bombing; multiple convictions, including §§ 844(f)(1) and (2) count; sentence death);
- *United States v. Sablan*, 114 F.3d 913 (9th Cir. 1997), *cert. den.*, 522 U.S. 1075 (1998)

(as burglary diversion, defendant threw live grenade into parking lot adjacent to post office; multiple people injured, cars and post office damaged; § 844(f) conviction; court increased offense level to 37 and imposed 240 months);

- *United States v. Davis*, 98 F.3d 141 (4th Cir. 1996), *cert. den.*, 520 U.S. 1129 (1997) (defendant's effort to intimidate witness included two acts of arson of witness' Section 8 housing; multiple convictions, including two § 844(f) counts, and use of firearm in crime of violence, 18 U.S.C. § 924(c); 120-month sentence on § 844(f) counts);

- *United States v. Masotto*, 73 F.3d 1233 (2d Cir.), *cert. den.*, 519 U.S. 810 (1996) (Gambino crime family; 14 convictions, relating to RICO, robbery, hijackings, fraud and violence; multiple convictions, including § 844(f) conviction for arson of FBI surveillance post; 248 months total);

- *United States v. Hicks*, 997 F.2d 594 (9th Cir. 1993) (domestic terrorist significantly damaged four IRS buildings in three cities over several years by launching mortar attacks and planting car bombs; multi-jurisdiction case; multiple convictions, including § 844(f) count; sentence reversed and unknown);

- *United States v. Eichman*, 957 F.2d 45 (2d Cir. 1992) (defendants convicted of § 844(f) violation when they burned government-owned flag at recruiting station; 2-years probation, 200-hours community service);

- *United States v. Whitehorn*, 710 F. Supp. 803 (D.D.C. 1989) (defendants charged with conspiracy and four counts of "bombing" D.C. area political locations; disposition unknown);

- *United States v. Pilaski*, 874 F.2d 817 (9th Cir.), *cert. den.,* 493 U.S. 937 (1989) (defendant planted bomb in flower bouquet placed on wife's desk, two people injured; multiple convictions, including § 844(f) count; 180 months total);

- *United States v. Winans*, 1988 WL 122410 (E.D. Pa. 1988) (defendant convicted of conspiracy to damage a government building, 18 U.S.C. § 371, attempted destruction of a government building, § 844(f); 5-years probation);

- *McFadden v. United States*, 814 F.2d 144 (3d Cir. 1987) (defendant mailed explosive device intended to kill addressee, exploded in post office instead; multiple convictions, including § 844(f)(1) count; 120 months total);

- *United States v. Manning*, 1987 WL 25923 (E.D.N.Y. 1987) (defendants convicted of multiple counts for bombing two domestic military sites, including § 844(f) count; 180 months total); and

- *United States v. Stewart*, 806 F.2d 64 (E.D. Penn. 1986) (effort to intimidate black citizens accomplished through arson of one family's home, which was owned by VA; conspiracy to violate civil rights, 18 U.S.C. § 241, 5 years imprisonment; attempted destruction of government property, 18 U.S.C.

§ 844(f), 5-years-probation; *United States v. Callahan*, 659 F. Supp. 80 (E.D. Penn. 1987) (co-defendant; 3 years imprisonment on civil rights violation, to be followed by 5-years probation on arson count).

With a single, stark, exception – "the flag burning" case (*Eichman*) – the cases all fit into the heart of 18 U.S.C. § 844(f) violations. In most, the defendant sought to harm the government (*e.g., Love, Moussaoui, Mason, McDavid, Nettles, Dowell, Solis-Jordan, McVeigh, Masotto, Manning*). In others, people were the targets (*e.g., Moussaoui, Luckie, Walker, Pilaski, Walters, Davis, McFadden, Stewart*). In some, the defendants were simply criminals (*e.g.,* arsonist (*Eff*), burglar (*Giggey, Sablan*)). Many involved bombs (*e.g., Love, Crespin, Nettles, Walters, Solis-Jordan, McVeigh, Hicks, Whitehorn, Pilaski, McFadden, Manning*). Many involved terrorism (*e.g., Love, Moussaoui, Mason, McDavid, Nettles, Dowell, Solis-Jordan, McVeigh, Whitehorn, Hicks*). The financial harm was often immense (*e.g., Love, Mason, Crespin, Giggey*). Most involved multiple convictions and an aggregate sentence. When the Guidelines sentences were identified, the ranges exceeded the mandatory minimum (*Mason*, *McDavid*, *Giggey*, *Cleaver*).

The conduct in those cases stands in stark contrast to petitioners' case. Again, comparison "validate[s] the initial judgment" that imposition of the mandatory minimum here would have resulted in a "grossly disproportionate" sentence and would have been cruel and unusual. *Graham*, 560 U.S. at 60.

Misconstruing this Court's precedent, the Ninth Circuit never even engaged in such a comparison. The Ninth Circuit's decision conflicts with the rationales of the very Supreme Court cases it cites. Only this Court can clarify the meaning of this precedent for the circuit courts. It should take the opportunity to do so in this case.

"The concept of proportionality is central to the Eighth Amendment." *Graham*, 560 U.S. at 59. However, if – faced with these petitioners and these circumstances – the Ninth Circuit is correct that a district court does not have the discretion and authority to conclude that the imposition of the mandatory minimum term would violate the proportionality principles of the Eighth Amendment, then there are *no* circumstances in which a district court could make that ruling. The Ninth Circuit's decision is not only wrong, but in conflict with this Court's repeated assurance that "[a] gross disproportionality principle is applicable to sentences for terms of years." *Lockyer*, 538 U.S. at 72. This Court should take the opportunity presented by this case to clarify this important area of constitutional law.

II. This Case Creates a Circuit Split Concerning an Important Matter: the Effect of a Criminal Defendant's Waiver of Appeal on the Government's Ability to Appeal.

This Court should also grant a petition for a writ of certiorari because in resolving this case, the Ninth

Circuit entered a decision that conflicts with the decision of the Fourth Circuit in *United States v. Guevara*, 941 F.2d 1299, 1300 (4th Cir. 1991), *cert. den.*, 503 U.S. 977 (1992).

In *Guevara*, the Fourth Circuit explained that appeal waivers have been upheld based upon the government's strong concern for finality of judgments, and held:

> The *finality* of judgments and sentences imposed is no more preserved by appeals by the government than by appeals by the defendant, and it strikes us as far too one-sided to construe the plea agreement to permit an appeal by the government for a fancied mistake by the district court, as here, but not to permit an appeal on similar grounds by the defendant, which Wiggins held to be precluded. That being the case, we are of opinion that such a provision against appeals must also be enforced against the government, *which must be held to have implicitly cast its lot with the district court, as the defendant explicitly did*.

Id. at 1299-1300 (emphasis added). The United States' petition for a writ of certiorari in *Guevara* was denied, *United States v. Guevara*, 503 U.S. 977 (1992), and it remains the law in the Fourth Circuit. *See United States v. Blick*, 408 F.3d 162, 168 n. 5 (4th Cir. 2005).

Petitioners argued that, for the reasons articulated in *Guevara*, the Ninth Circuit should conclude

that petitioners' express waiver of appeal here should likewise preclude the government from appealing. The Ninth Circuit disagreed: "We reject that position." App. 7.

This case provides a perfect vehicle in which to resolve this circuit court split because here, at the time petitioners' appeal waivers were entered, both defense lawyers made clear that their clients' understanding of the agreement was that all parties would accept the trial judge's sentence:

> Counsel for Dwight Hammond: Yes, Your Honor. I've conferred with Dwight Hammond. He is agreeable to waive his appellate rights to bring this matter to a close. And it's our understanding that this would be a resolution of this case with the sentence the court imposes. And the parties would accept the – your judgment as to the sentence that's imposed.

ER-1270.

> Counsel for Steven Hammond: Yes, Your Honor. Mr. Steven Hammond has indicated after these discussions with the government that we want this case to be over. The idea is there will be no further proceedings beyond this court and will be done with at the sentencing. Mr. Steven Hammond has agreed to that. He understands where we are.

ER-1269.

Moreover, the government should not be permitted to appeal because at the sentencing hearing it specifically supported the position that it later asked the Ninth Circuit to overturn: that the Constitution authorized the trial court to impose a proportional sentence that it thought effected justice. The prosecutor advised the court:

> The proportionality issue is one, however, that I think our constitution gives to our courts. Congress has told you what they think the mandatory sentence should be. I have done my job as the prosecutor trying the case and presenting the evidence the best way I could, and now it's the judiciary's job to impose a sentence that it thinks just.

ER-10.

Given the importance of fairness when a criminal defendant waives a fundamental right, such as the right to appeal, as well as the equities presented by this case, this Court should take the opportunity this case presents to resolve the conflict between the Fourth Circuit and the Ninth Circuit.

CONCLUSION

For the foregoing reasons, this Court should grant this petition as to both petitioners.

Respectfully submitted this 17th day of June, 2014.

KENDRA M. MATTHEWS
Counsel of Record
RANSOM BLACKMAN LLP
1001 S.W. Fifth Avenue, Suite 1400
Portland, OR 97204
(503) 228-0487
kendra@ransomblackman.com
Counsel for Petitioner
Dwight Lincoln Hammond, Jr.

LAWRENCE H. MATASAR
LAWRENCE MATASAR, P.C.
621 S.W. Morrison Street, Suite 1025
Portland, OR 97205
(503) 222-9830
larry@pdxlaw.com
Counsel for Petitioner
Steven Dwight Hammond

742 F.3d 880
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellant,
v.
Steven Dwight HAMMOND, Defendant-Appellee.

United States of America, Plaintiff-Appellant,
v.
Dwight Lincoln Hammond, Jr., Defendant-Appellee.

Nos. 12-30337, 12-30339. |
Submitted Dec. 3, 2013.* | Filed Feb. 7, 2014.

Attorneys and Law Firms

Kelly A. Zusman, Assistant United States Attorney; S. Amanda Marshall, United States Attorney, District of Oregon, Portland, OR, for Plaintiff-Appellant.

Lawrence H. Matasar, Lawrence Matasar, P.C., Portland, OR, for Defendant-Appellee Steven Dwight Hammond.

Marc D. Blackman and Kendra M. Matthews, Ransom & Blackman, LLP, for Defendant-Appellee Dwight Lincoln Hammond, Jr.

Appeal from the United States District Court for the District of Oregon, *Michael R. Hogan*, District Judge,

---

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R.App. P. 34(a)(2).

Presiding. D.C. Nos. 6:10-cr-60066-HO-1, 6:10-cr-60066-HO-2.

Before: *RICHARD C. TALLMAN* and *CARLOS T. BEA*, Circuit Judges, and *STEPHEN J. MURPHY, III*, District Judge.**

Opinion

OPINION

MURPHY, District Judge:

The government appeals the sentences of Steven and Dwight Hammond, whom a jury convicted of maliciously damaging the real property of the United States by fire, in violation of 18 U.S.C. § 844(f)(1). The convictions carried minimum sentences of five years of imprisonment, but citing Eighth Amendment concerns, the district court sentenced Steven to only twelve months and one day of imprisonment and Dwight to only three months of imprisonment. Because the sentences were illegal and the government did not waive its right to appeal them, we vacate the sentences and remand for resentencing.

I. Background

The Hammonds have long ranched private and public land in Eastern Oregon. Although they lease

** The Honorable *Stephen J. Murphy, III*, United States District Judge

public land for grazing, the Hammonds are not permitted to burn it without prior authorization from the Bureau of Land Management. Government employees reminded Steven of this restriction in 1999 after he started a fire that escaped onto public land.

But in September 2001, the Hammonds again set a fire on their property that spread to nearby public land. Although the Hammonds claimed that the fire was designed to burn off invasive species on their property, a teenage relative of theirs testified that Steven had instructed him to drop lit matches on the ground so as to "light up the whole country on fire." And the teenager did just that. The resulting flames, which were eight to ten feet high, spread quickly and forced the teenager to shelter in a creek. The fire ultimately consumed 139 acres of public land and took the acreage out of production for two growing seasons.

In August 2006, a lightning storm kindled several fires near where the Hammonds grew their winter feed. Steven responded by attempting back burns near the boundary of his land. Although a burn ban was in effect, Steven did not seek a waiver. His fires burned about an acre of public land.

The government ultimately prosecuted the Hammonds on charges related to these and other fires. After trial, the jury deliberated several hours and returned a partial verdict. The jury convicted Steven of two counts and Dwight of one count of maliciously damaging the real property of the United

States by fire, in violation of 18 U.S.C. § 844(f)(1), based on their respective roles in the September 2001 and August 2006 fires. The jury also acquitted the Hammonds of some charges and failed to reach a verdict on others, including conspiracy charges brought against Steven and Dwight. The judge then instructed the jury to continue deliberating.

While the jury deliberated on the remaining charges, the parties reached an oral agreement and presented it to the court.[1] The government told the court that the Hammonds had agreed to "waive their appeal rights" – except with respect to ineffective assistance of counsel claims – "and accept the verdicts as they've been returned thus far by the jury." In return, the government promised to "recommend" that Steven's sentences run concurrently and agreed that the Hammonds "should remain released pending the court's sentencing decision."

The Hammonds agreed with the government's summary of the plea agreement. Their attorneys also added that the Hammonds wanted the "case to be over" and hoped to "bring th[e] matter to a close." According to the defense, the "idea" of the plea agreement was that the case would "be done with at the

---

[1] Although the Hammonds did not enter guilty pleas, the Hammonds agreed not to contest the jury verdicts in exchange for the government moving to dismiss other charges. The resulting posture is the same as that following a plea agreement. We thus will refer to the oral agreement here as a plea agreement and apply to it the law governing plea agreements.

sentencing" and that the "parties would accept . . . the sentence that's imposed." The district court then accepted the plea agreement and dismissed the remaining charges.

At sentencing, the court found that the guidelines range for Steven was 8 to 14 months and for Dwight was 0 to 6 months. Yet their convictions carried five-year minimum terms of imprisonment. *See* 18 U.S.C. § 844(f)(1). The government accordingly recommended five-year sentences of imprisonment and argued – both in its sentencing memorandum and at sentencing – that the court lacked discretion to impose lesser sentences.

The court, however, concluded that the Eighth Amendment required deviation from the statutory minimum. Observing that Congress probably had not intended for the sentence to cover fires in "the wilderness," the court reasoned that five-year sentences would be grossly disproportionate to the severity of the Hammonds' offenses. The court then sentenced Steven to two concurrent terms of twelve months and one day of imprisonment and Dwight to three months of imprisonment.

II. Standard of Review

We review both a waiver of appeal and the legality of a sentence de novo. *See United States v. Bibler,* 495 F.3d 621, 623 (9th Cir.2007) (waiver of appeal); *United States v. Dunn,* 946 F.2d 615, 619 (9th Cir.1991) (legality of a sentence).

III. Discussion

A. Waiver

A threshold issue is whether the government waived its right to appeal the Hammonds' sentences in the plea agreement or otherwise failed to preserve its objection. We find no grounds for dismissing the appeal.

The Hammonds first argue that the government waived its right to appeal in the plea agreement. Because a plea agreement is partly contractual in nature, we interpret it from the perspective of a reasonable defendant. *See United States v. De la Fuente,* 8 F.3d 1333, 1337-38 (9th Cir.1993). But there is no ambiguity here to interpret. A reasonable defendant would expect that the absence of any statements on the government's right to appeal simply means that no waiver was contemplated. *See United States v. Anderson,* 921 F.2d 335, 337-38 (1st Cir.1990).

The Hammonds respond by arguing that the statements of defense counsel show that an all-around waiver of appellate rights was the *sine qua non* of the plea agreement. The record, however, belies that assertion. The statements made by defense counsel just before the judge accepted the plea agreement underscore that all parties sought to resolve the case swiftly, but finality was not the only benefit supporting the plea agreement. Other benefits included favorable recommendations from the government and the dismissal of charges. We thus cannot

reasonably read defense counsels' references to finality as meaning that no party could take an appeal.

Assuming then that the plea agreement is silent on the government's right of appeal, the Hammonds urge us to imply a waiver into the plea agreement. We have never before done so. But relying on *United States v. Guevara,* 941 F.2d 1299 (4th Cir.1991), the Hammonds argue that construing the government's silence as an implied waiver will promote fairness and finality. We reject that position.

The principles governing the formation and interpretation of plea agreements leave no room for implied waivers. Federal Rule of Criminal Procedure 11, not the common law of contracts, governs the making of plea agreements. *See United States v. Escamilla,* 975 F.2d 568, 571 n. 3 (9th Cir.1992); *United States v. Partida-Parra,* 859 F.2d 629, 634 (9th Cir.1988). Although Rule 11 gives courts discretion to accept or reject a plea agreement, it does not authorize courts to remake a plea agreement or imply terms into one. *See United States v. Benchimol,* 471 U.S. 453, 455, 105 S.Ct. 2103, 85 L.Ed.2d 462 (1985) (per curiam) ("Rule 11[ ] . . . speaks in terms of what the parties in fact agree to, and does not suggest that such implied-in-law terms as were read into this agreement by the Court of Appeals have any place under the rule."); *United States v. Stevens,* 548 F.2d 1360, 1362 (9th Cir.1977) (observing that Congress rejected a version of Rule 11 that would have allowed a court to modify a plea agreement in favor of the defendant). We accordingly "enforce the literal terms" of a plea

agreement, construing only ambiguous language in the defendant's favor. *United States v. Franco-Lopez,* 312 F.3d 984, 989 (9th Cir.2002); *see also United States v. Johnson,* 187 F.3d 1129, 1134-35 (9th Cir.1999). These principles preclude us from implying a waiver where none exists.

Moreover, nothing in the nature of plea agreements requires that each promise must be "matched against a mutual and 'similar' promise by the other side." *United States v. Hare,* 269 F.3d 859, 861 (7th Cir.2001). To be sure, the idea behind a plea agreement is that each side waives certain rights to obtain some benefit. *See Partida-Parra,* 859 F.2d at 633. But there are ample reasons that a defendant might enter a plea agreement short of extinguishing the government's right to appeal, including the possibility of a lower sentence and the dismissal of other charges. *Hare,* 269 F.3d at 861; *cf. Brady v. United States,* 397 U.S. 742, 752, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970) (listing possible reasons for entering a plea). For example, the Hammonds negotiated for favorable recommendations from the government and the dismissal of charges. Such benefits are consideration enough to support a plea agreement. *See Hare,* 269 F.3d at 861-62.

Finally, contrary to the Hammonds' assertion, the record leaves no doubt that the government preserved the objection to the sentences that it raises on appeal. Nowhere did the government make a "straightforward" concession. *United States v. Bentson,* 947 F.2d 1353, 1356 (9th Cir.1991). Nor did the government

fail to give the district court an opportunity to address the argument it raises on appeal. *See United States v. Grissom,* 525 F.3d 691, 694-95 (9th Cir.2008). In its sentencing memorandum and at sentencing, the government argued that the trial judge lacked discretion to deviate from the statutory minimum. The government thus preserved its objection, and we may hear its appeal.

B. Sentences

Turning now to the merits, we hold that the district court illegally sentenced the Hammonds to terms of imprisonment less than the statutory minimum. A minimum sentence mandated by statute is not a suggestion that courts have discretion to disregard. *See United States v. Wipf,* 620 F.3d 1168, 1169-70 (9th Cir.2010). The court below was bound to sentence the Hammonds to five-year terms of imprisonment. *See* 18 U.S.C. 844(f)(1). Although the district court attempted to justify lesser sentences on Eighth Amendment grounds, sentencing the Hammonds to five years of imprisonment would not have been unconstitutional.

Rather than categorically challenge five-year sentences for arson, the Hammonds argue that the sentences would be constitutionally disproportionate "under the unique facts and circumstances of this case." We assess this type of Eighth Amendment challenge by "compar[ing] the gravity of the offense to the severity of the sentence." *United States v. Williams,*

636 F.3d 1229, 1232 (9th Cir.2011) (citing *Graham v. Florida,* 560 U.S. 48, 60, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010)). Only in the "rare case in which this threshold comparison leads to an inference of gross disproportionality," do we then "compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions." *Graham,* 560 U.S. at 60, 130 S.Ct. 2011 (internal citations and quotation marks omitted).

Here, we need not progress beyond the first step. Congress has "broad authority" to determine the appropriate sentence for a crime and may justifiably consider arson, regardless of where it occurs, to be a serious crime. *Solem v. Helm,* 463 U.S. 277, 290, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). Even a fire in a remote area has the potential to spread to more populated areas, threaten local property and residents, or endanger the firefighters called to battle the blaze. The September 2001 fire here, which nearly burned a teenager and damaged grazing land, illustrates this very point.

Given the seriousness of arson, a five-year sentence is not grossly disproportionate to the offense. The Supreme Court has upheld far tougher sentences for less serious or, at the very least, comparable offenses. *See Lockyer v. Andrade,* 538 U.S. 63, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003) (upholding a sentence of fifty years to life under California's three-strikes law for stealing nine videotapes); *Ewing v. California,* 538 U.S. 11, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003)

(upholding a sentence of twenty-five years to life under California's three-strikes law for the theft of three golf clubs); *Hutto v. Davis,* 454 U.S. 370, 102 S.Ct. 703, 70 L.Ed.2d 556 (1982) (per curiam) (upholding a forty-year sentence for possession of nine ounces of marijuana with the intent to distribute); *Rummel v. Estelle,* 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980) (upholding a life sentence under Texas's recidivist statute for obtaining $120.75 by false pretenses). And we and other courts have done the same. *See, e.g., United States v. Tolliver,* 730 F.3d 1216, 1230-32 (10th Cir.2013) (upholding a 430-month sentence for using arson in the commission of a felony); *United States v. Major,* 676 F.3d 803, 812 (9th Cir.2012) (upholding a 750-year sentence for offenses under 18 U.S.C. § 924(c)), *cert. denied,* ___ U.S. ___, 133 S.Ct. 280, 184 L.Ed.2d 164 (2012); *United States v. Meiners,* 485 F.3d 1211, 1212-13 (9th Cir.2007) (per curiam) (upholding a fifteen-year sentence for advertising child pornography); *United States v. Uphoff,* 232 F.3d 624, 625-26 (8th Cir.2000) (upholding a five-year sentence for arson of a building).

Because the district court erred by sentencing the Hammonds to terms of imprisonment less than the statutory minimum, we vacate the sentences and remand for resentencing in compliance with the law.

VACATED AND REMANDED.

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

THE HON. MICHAEL R. HOGAN,
JUDGE PRESIDING

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

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

* * *

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

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

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

* * *

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

[21] With regard to suppression costs, the 15,000 and change that the government has in their – I think Page 11 of their memo, the argument is there, but the evidence supporting it is not.

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

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

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

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

In looking at Dusty Hammond's testimony, he was a [22] youngster when these things happened. I am sure he remembered things as best he could. There was, frankly, an incident, apparently it was removal of tattoos, that would have colored any young person's thinking, and if that's what happened, it can't be defended, of course, but that's not what's before the court today.

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

In looking at Dwight Hammond's case, the base offense level here is either – well, it's either – the offense level is either a 6 or a 7, and it depends on whether or not I find there was at least a hundred dollars in damages. Well, the damage was juniper trees and sagebrush, and there might have been a hundred dollars, but it doesn't really matter. It doesn't affect the guidelines, and I am not sure how much sagebrush a hundred dollars worth is. But I think this probably will be – I think mother nature's probably taken care of any injury. I don't think that's the question. There would be – you know, as far as

some of these civil matters, there's a civil proceeding going on in Pendleton. That can take care of that. There's also administrative proceedings. There's going to be a fearsome penalty paid by these two gentlemen for the decisions they made and the actions they took.

At any rate, I find that Dwight Hammond's [23] guideline level is from 0 to 6 months.

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

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

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

Well, whether it's a fish and game matter or whether it just overstates the criminal history, I am

going to find the criminal history category for Steven Hammond to be a III.

And with regard to the sentences, I –

[24] MR. MATASAR: Your Honor, from what you said, it sounded like you would have meant II, if you were considering the overstating.

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

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

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

THE COURT: Okay.

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

* * *

[25] * * *

THE COURT:

* * *

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

Now, with regard to the mandatory minimum, I don't need to repeat that – this, but you all know that – and because you are experienced before me that I

think Mr. Lessley told me a short time ago that he and Mr. Papagni came in about the same time to work both sides of these cases, and I have been a – I have been a pretty faithful observer of the guidelines when they are required to be and their requirements and have been working with sentences for 39 years.

I remember my first sentence for a petty offense, [26] and I knew what I wanted to do. I just didn't know how to say it. And that was a different problem back then.

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

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

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

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

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

MR. PAPAGNI: Not by the government.

MR. MATASAR: No, Your Honor.

[27] MR. BLACKMAN: No, Your Honor. Thank you.

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

THE CLERK: Yes.

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

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

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

The defendant shall disclose all assets and liabilities to probation and not transfer, sell, give away, or

otherwise convey any asset with a fair market value in excess of $500 without approval of probation.

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

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

No fine is ordered.

[28] The defendant shall pay a fee assessment in the amount of $200 due immediately in full.

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

Do you understand, sir?

DEFENDANT DWIGHT HAMMOND: Yes, sir.

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

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

(Conferred with probation.)

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

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

[29] The defendant shall cooperate in the collection of –

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

The defendant shall cooperate in the collection of DNA.

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

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

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

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

No fine is ordered.

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

Mr. Hammond, you have the right to appeal from your sentence under certain circumstances, and a notice of appeal must be filed within 14 days of the entry of [30] judgment. If you are unable to pay the costs of an appeal, you may apply for leave to appeal in forma pauperis, and if you request, the clerk of court will prepare and file a notice of appeal on your behalf.

Do you understand that, sir?

DEFENDANT STEVEN HAMMOND: Yes.

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

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

And I know that for – you know, it's one thing to have the – as one letter said, the cowboy code of

ethics or the Wyoming code and all that, but we are all a part of one country, and it's a great country. And even when there are requirements that seem inappropriate, I'm not saying that all of them were; they weren't, we have to learn to live within them or sometimes the consequences are deep.

* * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States of America Plaintiff-Appellant, v. Steven Hammond, Defendant-Appellee.	No. 12-30337 DC 6:10-cr-60066-HO-1 District of Oregon ORDER Filed Mar. 19, 2014
United States of America, Plaintiff-Appellant, v. Dwight Hammond, Jr., Defendant-Appellee.	No. 12-30337 DC 6:10-cr-60066-HO-2 District of Oregon

Before: TALLMAN and BEA, Circuit Judges, and MURPHY, District Judge.*

The panel has voted to deny the petition for panel rehearing; Judges Tallman and Bea have voted to deny the petition for rehearing en banc, and Judge Murphy so recommends.

---

* The Honorable Stephen Joseph Murphy III, United States District Judge for the Eastern District of Michigan, sitting by designation.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

Federal Rules of Criminal Procedure
Rule 11. Pleas

(a) Entering a Plea.

(1) In General. A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

(2) Conditional Plea. With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

(3) Nolo Contendere Plea. Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.

(4) Failure to Enter a Plea. If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must

inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel – and if necessary have the court appoint counsel – at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a);

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and

(O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

(2) Ensuring That a Plea Is Voluntary. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(c) Plea Agreement Procedure.

(1) In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) Disclosing a Plea Agreement. The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause

allows the parties to disclose the plea agreement in camera.

(3) Judicial Consideration of a Plea Agreement.

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) Accepting a Plea Agreement. If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) Rejecting a Plea Agreement. If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea

agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) Finality of a Guilty or Nolo Contendere Plea. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

(g) Recording the Proceedings. The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

(h) Harmless Error. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.