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Of Attorneys for Defendant Steven Dwight Hammond

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

Eugene Division

UNITED STATES OF AMERICA,	)	**Case No. 6:10-CR-60066-HO**
	)	
Plaintiff,	)	
	)	
v.	)	**DEFENDANTS' JOINT AND SEVERAL SENTENCING MEMORANDUM**
	)	
STEVEN DWIGHT HAMMOND and DWIGHT LINCOLN HAMMOND, JR.,	)	
	)	
Defendants.	)	
	)	

INTRODUCTION

Sentencing of defendants Steven Dwight Hammond and Dwight Lincoln Hammond, Jr. is scheduled for October 30, 2012. Some of the factual and legal issues relevant to the Court's sentencing decisions are common to the defendants. Others are specific to their personal histories and count(s) of conviction.

Defendants submit this Joint and Several Sentencing Memorandum in the interests of efficiency. The first portion addresses the factual and legal issues common to the defendants. The second addresses the factual and legal issues specific to Dwight Lincoln Hammond, Jr. and his counsel's sentencing recommendation. The third addresses the factual and legal issues specific to Steven Dwight Hammond and his counsel's sentencing recommendation.

THE FACTUAL AND LEGAL ISSUES COMMON TO THE DEFENDANTS

1. The Factual Issues Common to the Defendants

A. The Hammond Family Ranching History and Operation

Defendants believe the Court has an understanding of the defendants' ranching history and operation, but summarizes it here for the record.

Defendants come from a long line of ranchers. Members of their family were raising cattle in Oregon at the time of statehood. Their current ranch on Steens Mountain, Hammond Ranches, Inc. [HRI], dates from 1964. 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

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the herd through numerous pastures, both private and public, over the course of the spring and summer, and sends the majority of the calves to market in the fall. As of 2006, HRI's Grazing Permit authorized it to pasture about 18 bulls and 374 cow-calf pairs on various allotments on the public land over the course of the year.

HRI has always operated on a combination of private and public land. As of 2006, it owned over 10,000 acres of private pasture and a BLM permit authorizing it to graze cattle on tens of thousands of acres of public land. As is common in Eastern Oregon, their private land is interspersed with the public land and fences separate the two only in a few places.

Although HRI employs others at various times of the year, it is essentially a two-man operation. The economics of ranching in Harney County - at least on a cash-flow basis - do not permit otherwise. The net income generated by HRI is sufficient to support two families in a reasonable manner, but not to pay others to do the work. For the ranch to be financially viable, defendants have to do the work themselves. So they devote 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.

B. The 2001 Hardie-Hammond Fire

Both defendants were found guilty of the 2001 Hardie-Hammond Fire. Defendants never disputed that on September 30, 2001, they intentionally set a fire on the School Section that spread to and burned approximately 140 acres of adjacent public land on the

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Hardie-Hammond Allotment. Indeed, the undisputed evidence at trial was that Steven Hammond called the BLM at noon on the day of the fire, was told that there was no burn ban in effect, and told the BLM that they would be setting a fire on the School Section.

The specific circumstances surrounding this fire were disputed at trial. The government presented evidence that, despite being warned in 1999 that they would face serious consequences should a fire set on their land spread to public land, the Hammonds intentionally set a fire on private land that was surrounded by public land. It also presented testimony [primarily that of Gordon Choate and Dusty Hammond] that the fire was set in a manner designed to spread on to the public land. Mr. Choate's version was that the fire was set to scare him and the hunters he was guiding off the public land because he had seen members of the Hammond group engage in improper or illegal hunting. Dusty Hammond's version was that after a morning of deer hunting with his father, his uncle Steven, and his cousin Jacon Taylor, he was instructed by Steven Hammond, with Dwight Hammond nearby, to help "light up the whole country on fire," was given a box of matches, and instructed "to walk the fence line and head for Loop Road." Dusty Hammond also testified that the fire grew around him and he "thought he was going to get burned up." The government also presented testimony from HRI's then-range conservationist that he inspected the area after the fire and found points of ignition close to the fence line.

In addition to Steven Hammond's telephone call to BLM dispatch, the defense evidence [presented primarily through the testimony of Scott Gustafson and Jacon Taylor

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and hunting license records from the Oregon Department of Fish and Wildlife] was that the fire was set to burn off non-native species that had invaded the School Section. Mr. Gustafson testified that Steven Hammond's call to the BLM was prompted by Mr. Gustafson's observation of smoke to the south, that the fire was set after they finished hunting, and that it had nothing to do with the Choate group. Jacon Taylor testified that Dusty Hammond's memory was simply inaccurate, that he was not part of the deer-hunting party on September 30, 2001, but rather an elk hunt two week-ends earlier, and that no fires were set while he was there. Mr. Taylor's testimony was corroborated by the Oregon Department of Fish and Wildlife records.

The jury, of course, did not explain its verdict. However, given that the only other count of conviction - Steven Hammond's conviction for the 2006 Krumbo Butte Fire - also involved a contemporaneous acknowledgment by Mr. Hammond that he intentionally set a fire in the vicinity of public land, it is reasonable to conclude that the jury did not accept the testimony of either Gordon Choate or Dusty Hammond, but rather found the defendants guilty on the basis of three things: (1) the warning they received after the 1999 prescribed burn; (2) defendants' acknowledgment that they intentionally set fire on private land adjacent to public land; and (3) the BLM investigator's location of ignition points near the boundary with the public land.

The specific offense characteristics of the 2001 Hardie-Hammond Fire could impact the Court's sentencing authority and Guideline calculation for Steven Hammond.

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Defendants therefore ask the Court to make the factual finding that the three specific circumstances noted above are legally sufficient to support the verdict and the only ones that have sufficient indicia of reliability to be considered in the sentencing determination as to Steven Hammond under U.S.S.G. §6A1.3.

C. The History and Characteristics of the Defendants

As attested to by the many, many letters written by members of their community,[1] both defendants are unquestionably men of the highest caliber, not only hard-working and fair, but generous to others. Each has served on the Frenchglen School Board, Community Club, and Site Counsel. They were instrumental in the founding and financing of the Frenchglen Education Foundation, which provides extracurricular activities to elementary and high school students. They organized and regularly host the annual Science and Career Fairs for seven rural schools. They cook for and contribute to the Harney County 4H and FFA clubs, contribute money and livestock to the youth livestock production auction each year. They invariably buy one or more of the auctioned animals and donate most of the meat to the Harney County Senior Citizens Center. They also donate a steer every year to the Oregon State University Steer-a-Year Program.[2]

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[1] Due to the volume, defense counsel have forwarded only a representative sample of these letters to the Court. The balance are available should the Court want to see them.

[2] The University of Oregon does not have a comparable program.

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As for criminal history, Dwight Hammond is 70 years old and has no criminal convictions. Steven Hammond's record is not unblemished, but his 1999 conviction for interfering with the lawful use of public land and his 2012 conviction for unsworn falsification do not outweigh his many positive contributions to his community. On the contrary, they reflect his deep commitment to it. The former, for example, arose out of his belief that there was something wrong with a system that authorized commercial hunting of wildlife that temporarily wandered on to barren public land from private land lush with forage due to conscientious stewardship. The latter arose out of friendship - a favor to a neighbor who had promised a friend he could hunt on his land, but was unavailable to sign the form because he was with his wife, who was hospitalized in Corvallis due to serious complications from heart surgery. But more important, even if Mr. Hammond's conduct in these cases was completely indefensible, for the reasons discussed below, that would not warrant placing him in Criminal History Category III.

2. The Legal Issues Common to the Defendants

A. The Eighth Amendment prohibition on Cruel and Unusual Punishment Authorizes the Court to Impose a Lesser Sentence than the Mandatory Minimum contained in 18 U.S.C. §844(f)(1)

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...any...personal or real property in whole or in part owned... by...the United States...shall be imprisoned for not less than 5 years and not more than 20 years...

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The Eighth Amendment to the United States Constitution states, in relevant part:

> Excessive bail shall not be required...nor cruel and unusual punishments inflicted.

The Eighth Amendment imposes "a narrow proportionality principle" that "applies to noncapital sentences." *Ewing v. California*, 538 U.S. 11, 20, 123 S. Ct. 1179 (2003). As the District Court for the Northern District of California noted in *Silva v. McDonald*, __ F. Supp. 2d __, 2012 WL 3656240 (C.D. Cal. 2012):

> [I]n non-capital cases, the Eighth Amendment prohibits "extreme" sentences that are "grossly disproportionate" to the severity of the crime. *Harmelin,* 501 U.S. at 1001 (citation and internal quotation marks omitted); *Nunes v. Ramirez–Palmer,* 485 F.3d 432, 439 (9th Cir. 2007) ("gross disproportionality principle" is clearly established federal law under AEDPA for purpose of analyzing whether sentence constitutes cruel and unusual punishment). *Silva v. McDonald*, __ F. Supp. 2d at __, 2012 WL at 3656240, 12.

Congress has the power to establish the punishment for the offenses it creates, but categorical mandatory minimum sentences are nonetheless subject to the Eighth Amendment's prohibition against cruel and unusual punishment. As the Supreme Court recently reiterated in *Miller v. Alabama*, __ U.S. __, 132 S. Ct. 2455 (2012) in the course of invalidating mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes:

> The Eighth Amendment's prohibition of cruel and unusual punishment "guarantees individuals the right not to be subjected to excessive sanctions." *Roper,* 543 U.S., at 560, 125 S. Ct. 1183. That right, we have explained, "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned'" to both the offender and the offense. *Ibid.* (quoting *Weems v. United States,* 217 U.S. 349, 367, 30 S. Ct. 544,

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> 54 L. Ed. 793 (1910)). As we noted the last time we considered life-without-parole sentences imposed on juveniles, "[t]he concept of proportionality is central to the Eighth Amendment." *Graham,* 560 U.S., at ____, 130 S. Ct., at 2021. And we view that concept less through a historical prism than according to "'the evolving standards of decency that mark the progress of a maturing society.'" *Estelle v. Gamble,* 429 U.S. 97, 102, 97 S. Ct. 285, 50 L. Ed.2d 251 (1976) (quoting *Trop v. Dulles,* 356 U.S. 86, 101, 78 S. Ct. 590, 2 L. Ed.2d 630 (1958) (plurality opinion)). *Miller v. Alabama*, __ U.S. at __, 132 S. Ct. at 2463.

Two recent district court decisions discuss the cruel and unusual punishment clause in the context of statutory mandatory minimums. In *United States v. C.R.*, 792 F. Supp 2d 3443 (E.D. N.Y. 2011), the court held that the statutory minimum five-year sentence of imprisonment for distribution of child pornography amounted to cruel and unusual punishment, in violation of Eighth Amendment, for a defendant who was developmentally immature. In *United States v. Marshall*, __ F. Supp. 2d __, 2012 WL 2510845 (N.D. Ohio), the court observed that "the mandatory minimum, as applied to this Defendant, might well be unconstitutional," but declined to decide the issue because "[t]he parties...did not brief those arguments, despite being afforded the opportunity to do so." *United States v. Marshall*, __ F. Supp. 2d at __, 2012 WL 2510845, 7. The court went on to observe, however:

> In *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed.2d 621 (2005), the Supreme Court held that the Sentencing Guidelines are advisory, not mandatory, and that district courts have discretion in fashioning a sentence under Section 3553(a). The later cases of *Rita v. United States,* 551 U.S. 338, 127 S. Ct. 2456, 168 L. Ed.2d 203 (2007), *Gall v. United States,* 552 U.S. 38, 128 S. Ct. 586, 169 L. Ed.2d 445 (2007), and *Kimbrough v. United States,* 552 U.S. 85, 128 S. Ct. 558, 169 L. Ed.2d 481 (2007), as well as numerous Sixth Circuit decisions,

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confirm that district courts have flexibility and discretion to fashion an appropriate sentence based on the individual facts of a given case.

In this case, however, the mandatory minimum sentencing scheme of Section 2252(b) is in direct conflict with this Court's mandate under Section 3553(a) to fashion an appropriate sentence. The Sixth Circuit has not yet evaluated the potential conflict between mandatory minimum sentences and the factors under Section 3553(a) through the lens of *Booker* and its progeny. This conflict is especially problematic in cases such as this one, where this Court finds that the mandatory minimum exceeds a fair and just sentence that is sufficient, but not greater than necessary, to comply with Section 3553(a). As Justice Breyer aptly wrote:

> Mandatory minimum sentences are fundamentally inconsistent with Congress' simultaneous effort to create a fair, honest, and rational sentencing system through the use of Sentencing Guidelines. Unlike Guideline sentences, statutory mandatory minimums generally deny the judge the legal power to depart downward, no matter how unusual the special circumstances that call for leniency. They rarely reflect an effort to achieve sentencing proportionality–a key element of sentencing fairness that demands that the law punish a drug "kingpin" and a "mule" differently. They transfer sentencing power to prosecutors, who can determine sentences through the charges they decide to bring, and who thereby have reintroduced much of the sentencing disparity that Congress created Guidelines to eliminate.

Harris v. United States, 536 U.S. 545, 570-71, 122 S. Ct. 2406, 153 L. Ed.2d 524 (2002) (Breyer, J., concurring in part and in the judgment).

The mandatory minimum as applied in this case handcuffs this Court in considering the relevant factors necessary for imposing a just sentence. The mandatory minimum resists the direction of *Gall*--namely, that sentencing options are "significantly broadened" as dictated by the facts of the case and requiring an "individualized assessment" of the defendant, rejecting mathematical proof for a more flexible exercise in judgment. As a consequence, the mandatory minimum directly conflicts with the goal of unwarranted sentencing disparities. *United States v. Marshall*, ____ F. Supp 2d at __, 2012 WL 2510845, 7-8.

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Unlike the defendant in *Marshall*, defendants in this case explicitly challenge on Eighth Amendment grounds the imposition of mandatory minimum sentences under the facts of this case. This Court is urged to find that under rationale of *Miller v. Alabama* and the analysis in *United States v. C.R.* and *United States v. Marshall*, it would violate the Eighth Amendment's prohibition on cruel and unusual punishment to subject them to the five-year mandatory minimum sentence provided by 18 U.S.C. §844(f)(1).

B. The Mandatory Minimum Sentence Provision of 18 U.S.C. §844(f)(1) Conflicts with the Sentencing Requirements of 18 U.S.C. §3553

18 U.S.C. §3553(a) mandates that:

> The Court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2).

Paragraph 2 of 18 U.S.C. §3553(a) provides:

> The court, in determining the particular sentence to be imposed, shall consider–
>
> (2) the need for the sentence imposed–
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

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Since the United States Supreme Court's decision in *United States v. Booker,* 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed.2d 621 (2005), sentencing judges have been required to fashion sentences based on the factors and criteria set out in 18 U.S.C. §3553(a). The Court's subsequent decisions in *Rita v. United States,* 551 U.S. 338, 127 S. Ct. 2456, 168 L. Ed.2d 203 (2007), *Gall v. United States,* 552 U.S. 38, 128 S. Ct. 586, 169 L. Ed.2d 445 (2007), and *Kimbrough v. United States,* 552 U.S. 85, 128 S. Ct. 558, 169 L. Ed.2d 481 (2007), confirm that to comply with 18 U.S.C. §3553(a), district courts must exercise discretion to fashion an appropriate sentence based on the individual facts of a given case.

The mandatory minimum sentence provision of 18 U.S.C. §844(f)(1) conflicts with the mandate of 18 U.S.C. §3553(a). Since the current construction of 18 U.S.C. §3553(a) dates from 2005 and the terms of 18 U.S.C. §844(f)(1) date from 1996, the former, as the more recent, controls. *Watt v. Alaska*, 451 U.S. 259, 266-67, 101 S. Ct. 1673, 1678 (1981) [recognizing general principle]; *United States v. Kelly*, 676 F.3d 912, 916 (9th Cir. 2012) [same]; *Tug Allie-B, Inc. v. United* States, 273 F.3d 936, 948-49 (11th Cir. 2001) [same]. This is particularly so in light of the legislative history and context surrounding the 1996 amendment to 18 U.S.C. §844(f)(1) discussed below.

This Court should therefore hold that the Mandatory Minimum Sentence Provision of 18 U.S.C. §844(f)(1) need not be applied in determining defendants' sentences.

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C. Congress did not Intend the Mandatory Minimum Sentence Provided by 18 U.S.C. §844(f)(1) to be Imposed on Defendants who Engaged in the Type of Conduct for which Defendants were Convicted

The mandatory minimum sentence provision in 18 U.S.C. §844(f)(1) was one of many sections included in the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132 [the AEDPA]. The AEDPA has 120 sections. Some of its provisions address procedural changes to habeas corpus and victim restitution, but the majority of its substantive provisions address "acts of terrorism;" These substantive provisions almost uniformly used "terrorism" in their titles: "Assistance to Victims of Terrorism;" "Prohibition on International Terrorist Fundraising;" Prohibition on Assistance to Terrorist States;" Removal of Alien Terrorists;" "Exclusion of Members and Representatives of Terrorist Organizations." Those that didn't addressed non-citizens perceived as posing a threat of terrorism or extraordinary weaponry: "Modification to Asylum Procedures;" "Criminal Alien Procedural Improvements;" "Nuclear, Biological, and Chemical Weapons Restriction;" and "Implementation of Plastic Explosive Convention." In short, the AEDPA was plainly focused on acts, organizations, foreign nationals, and foreign countries considering or using violence and intimidation in the pursuit of political aims.

Title VII of the AEDPA, titled "Criminal Law Modifications to Counter Terrorism," amended a laundry list of existing statutes. Subtitle A, titled "Crimes and Penalties," contained nine sections, one of which, Section 708, added a five year mandatory minimum to 18 U.S.C. §844(f)(1).

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The AEDPA's persistent focus on terrorism demonstrates that Congress intended this mandatory minimum penalty provision of 18 U.S.C. §844(f)(1) to apply only when the offense constituted a "federal crime of terrorism." That term is defined in 18 U.S.C. §2332b(g)(5), which provides, in relevant part:

> The term "Federal crime of terrorism" means an offense that–
>
> > (A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and
> >
> > (B) is a violation of–
> >
> > > (i) section 32 (relating to destruction of aircraft or aircraft facilities), 37 (relating to violence at international airports), 81 (relating to arson within special maritime and territorial jurisdiction), 175 or 175b (relating to biological weapons), 175c (relating to variola virus), 229 (relating to chemical weapons), subsection (a), (b), (c), or (d) of section 351 (relating to congressional, cabinet, and Supreme Court assassination and kidnaping), 831 (relating to nuclear materials), 832 (relating to participation in nuclear and weapons of mass destruction threats to the United States) 842(m) or (n) (relating to plastic explosives), **844(f)(2) or (3) (relating to arson and bombing of Government property risking or causing death)**, **844(i) (relating to arson and bombing of property used in interstate commerce)**...[emphasis added].[3]

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[3] *See also* U.S.S.G. §3A1.4, the terrorism guideline. Prior to 2002 [*i.e.* at the time of the 2001 Hardie-Hammond Fire,, this guideline applied to offenses "calculated to influence or affect the conduct of government." In 2002, the Sentencing Commission adopted Application Note 4, which provides, in relevant part:

> By the terms of the directive to the Commission in section 730 of the Antiterrorism and Effective Death Penalty Act of 1996, the adjustment

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Notably absent from this list is 18 U.S.C. §844(f)(1).

In short, Congress did not intend the mandatory minimum punishment provision of 18 U.S.C §844(f)(1) to apply to a rancher who burned invasive species that have spread on to the public land. This Court is urged to so find and refuse to sentence defendants under the mandatory minimum sentence provision of 18 U.S.C. §844(f)(1).

D. This Court Should Find That Defendants' Convictions Are for "Offenses Relating to the Regulation of Business Practices" and Therefore Not Crimes that Disqualify Them from Possessing Firearms

18 U.S.C. §922(g) prohibits "any person...who has been convicted...a crime punishable by imprisonment for a term exceeding one year" from possessing a firearm. 18 U.S.C. §921(20) excludes from the definition of "crime punishable by imprisonment for a term exceeding one year:"

> (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices...

> provided by this guideline applies only to federal crimes of terrorism. However, there may be cases in which (A) the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct but the offense involved, or was intended to promote, an offense other than one of the offenses specifically enumerated in 18 U.S.C. 2332b(g)(5)(B); or (B) the offense involved, or was intended to promote, one of the offenses specifically enumerated in 18 U.S.C. 2332b(g)(5)(B), but the terrorist motive was to intimidate or coerce a civilian population, rather than to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct. In such cases an upward departure would be warranted...

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The evidence presented at trial demonstrated, in the light most favorable to the government, that defendants engaged in the conduct for which they were convicted out of a long-running debate and disagreement between the defendants and the BLM about the use of fire to control invasive species, especially juniper, on Steens Mountain. As BLM employee Lance Okeson testified about his statement to Dwight Hammond during their encounter in the midst of the 2006 Granddad Fire:

> I was trying to get Dwight to talk to me. And so I said, "dammit, Dwight, I know you want to see this mountain burn. I do too, but this is not the way to do it." Tr. at 878.

The evidence in this case establishes, and this Court should find in imposing sentence, that defendants' offenses "pertain[ed] to...the regulation of business" and therefore do not constitute "crime(s) punishable by imprisonment for a term exceeding one year" which would trigger the firearm prohibition of 18 U.S.C. §922.

THE FACTUAL AND LEGAL ISSUES SPECIFIC TO DWIGHT HAMMOND

A. Offense Level Under the Guidelines

Dwight Hammond was convicted only of Count 2, the 2001 Hardie-Hammond Fire. The undisputed evidence at trial was that this fire did no damage to the public land, but rather improved it. Under the 2000 version of the Sentencing Guidelines in effect in September, 2001, the offense level calculation is:

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Applicable Guideline	Description	Level
U.S.S.G. §2K1.4(a)(3)	Base Offense Level for arson committed under circumstances other than described in U.S.S.G. §2K1.4(a)(1) or (2)	2 + offense level under U.S.S.G. §2B1.3
U.S.S.G. §2B1.3	Property Damage or Destruction	4
U.S.S.G. §2B1.1(b)(1)(A)	Loss of $100 or less	0
U.S.S.G. §1B1.1	Specific Offense Characteristics, Adjustments, and Enhancements under Chapters U.S.S.G. Chapters Two and Three	0
U.S.S.G. §1B1.1	Total Offense Level	6

B. Criminal History Category

Dwight Hammond is 70 years old and has no criminal convictions. His Criminal History Category is I.

C. Sentencing Guideline Range

The Guidelines place a defendant with an Offense Level of 6 and Criminal History Category of I in Zone A. The advisory guideline range is 0-6 months. A defendant in Zone A is eligible to receive a sentence of probation unless the offense of conviction is a Class A or B felony. 18 U.S.C. §3561(a)(1); U.S.S.G. §5B1.1(b) [2000 editions]. The maximum sentence authorized by 18 U.S.C. §844(f)(1) is not more than 20 years. It is

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therefore a Class C felony and renders Dwight Hammond eligible to receive a probationary sentence. 18 U.S.C. §3559(a)(3).

D. Sentencing Recommendation

Given "the nature and circumstances of the offense,"[4] "the history and characteristics of the defendant," [18 U.S.C. §3553(a)(1)] and the factors delineated in 18 U.S.C. §3553(a)(2), it cannot seriously be argued that Dwight Hammond should receive a sentence greater than the presumptive guideline range of 0 to 6 months. Indeed, under those provisions, it could not seriously be argued that Mr. Hammond should receive anything but a sentence of probation.

The question for the Court, therefore, is whether this renders the imposition of the mandatory minimum sentence of 18 U.S.C. §844(f)(1) unconstitutional under the Eighth Amendment. The answer to this question lies in the recognition by the Supreme Court that there is a "narrow proportionality principle" that "applies to noncapital sentences." *Ewing v. California*, 538 U.S. 11, 20, 123 S. Ct. 1179 (2003). Given the absence of damage caused by the 2001 Hardie-Hammond Fire, the exemplary life Dwight Hammond has lived for 70 years, and his placement in Zone A by the Sentencing Guidelines, if ever a sentence for

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[4] As noted above at pages 4-6, in light of the jury's over-all verdict, the only offense characteristics that have "sufficient indicia of reliability" to be considered in "the sentencing determination" [U.S.S.G. §6A1.3] with respect to the 2001 Hardie-Hammond Fire are: (1) the warning they received after the 1999 prescribed burn; (2) defendants' acknowledgment to intentionally setting a fire on private land adjacent to public land; and (3) the points of ignition located by BLM investigators near the boundary of the public land. The Court is urged to so find when imposing sentence.

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a non-capital offense would qualify as an "extreme sentence [ ]...'grossly disproportionate' to the crime," [*Norris v. Morgan*, 622 F.3d 1276, 1285-86 (9th Cir. 2010), quoting *Ewing v. California,* 538 U.S. 11, 23, 123 S. Ct. 1179, 155 L. Ed.2d 108 (2003) (plurality opinion) (quoting *Harmelin v. Michigan,* 501 U.S. 957, 1001, 111 S. Ct. 2680, 115 L. Ed.2d 836 (1991) (Kennedy, J., concurring in part and concurring in the judgment)], it would be the imposition of a five-year mandatory minimum sentence on Dwight Hammond.

It is respectfully submitted that the "narrow proportionality principle" applicable to this case mandates that Mr. Hammond receive the sentence prescribed by the Guidelines, not 18 U.S.C. §844(f)(1). The Court is therefore urged to impose a sentence within the range established by the Guidelines - 0-6 months - if not probation.

THE FACTUAL AND LEGAL ISSUES SPECIFIC TO STEVEN HAMMOND

A. Offense Level Under the Guidelines

1. Base Offense Level for 2001 Hardie-Hammond Fire

Under the 2000 version of the Sentencing Guidelines in effect in September, 2001, U.S.S.G. §2K1.4 provided that the offense level for Arson was "2 plus the offense level under U.S.S.G. §2B1.3." Under the 2000 Guidelines, when the property damage was less than $100, the offense level was 4. Also under the 2000 Guidelines, even if an offense reflected "a conscious or reckless risk of death or serious bodily injury," that did not affect the offense level if the person put at risk was a participant in the offense. Hence, under

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the version of the guidelines in effect at the time of the Hardie-Hammond Fire, Steven Hammond's base offense level is 6.

Later versions of the Guidelines added U.S.S.G. §2B1.1(14), which increases the base offense level to 14 when an offense was found to reflect "a conscious or reckless risk of death or serious bodily injury" to any person, including another participant. The Probation Office believes this affects Steven Hammond's offense level for the 2001 Hardie-Hammond Fire because Dusty Hammond, a participant, was placed at risk. For the reasons set forth above, defendants do not believe the jury's verdict supports that conclusion. But even if the Court does not accept that argument, it must decline to apply U.S.S.G. §2B1.1(14) to Steven Hammond for the 2001 Hardie-Hammond Fire because to do so would violate the *ex post facto* rule of the Constitution and the Guidelines.

The Probation Office believes the Court is allowed to apply to an earlier offense the version of the Guidelines in effect at the time of a later offense when the defendant is being sentenced for both the earlier and later offenses in one proceeding. The Probation Office relies on U.S.S.G. §1B1.11 for this position. This provision, however, must be read in conjunction with the *ex post facto* clause of the United States Constitution and U.S.S.G. §1B1.11(b)(1), which provides:

> If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the *ex post facto* clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.

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The requirement that the Court use the Guidelines Manual in effect on the date that the offense of conviction was committed is consistent with the overwhelming majority of the cases. In *Lynce v. Mathis* 519 U.S. 433, 443, 117 S. Ct. 891, 896-97 (1997), the Supreme Court held:

> In *Miller v. Florida*, 482 U.S. 423, 107 S. Ct. 2446, 96 L. Ed.2d 351 (1987), we unanimously concluded that a revision in Florida's sentencing guidelines that went into effect between the date of petitioner's offense and the date of his conviction violated the Ex Post Facto Clause. Our determination that the new guideline was "'more onerous than the prior law,'" *id*., at 431, 107 S. Ct., at 2452 (quoting *Dobbert v. Florid*a, 432 U.S. 282, 294, 97 S. Ct. 2290, 2298-99, 53 L. Ed.2d 344 (1977)), rested entirely on an objective appraisal of the impact of the change on the length of the offender's presumptive sentence. 482 U.S., at 431, 107 S. Ct., at 2452 ("Looking only at the change in primary offense points, the revised guidelines law clearly disadvantages petitioner and similarly situated defendants"). (emphasis added). *Also see Dorsey v. U.S.* 132 S. Ct. 2321, 2332 (U.S. 2012).

This principle is consistently followed in the Ninth Circuit. *See, e.g., Johnson v. Gomez*, 92 F.3d 964 (9th Cir. 1996) [Whenever application of amended version of Sentencing Guidelines would result in harsher sentence than earlier version, application of new guidelines violates *ex post facto* clause; under such circumstances, Court of Appeals requires that defendant be sentenced pursuant to guidelines in effect at time of offense.]; *United States v. Innie*, 7 F3d 840, 849 (9th Cir. 1993) ["Because application of the Guidelines in effect at the time of Innie's sentencing would result in a harsher sentence for Innie, the *Ex Post Facto* Clause prohibits using those Guidelines."] *See also United States v. Warren*, 980 F.2d 1300, 1304 (9th Cir. 1992)."); *U.S. v. Lopez-Solis*, 447 F.3d 1201

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(9th Cir. 2006) [Application of amended sentencing guideline, which included statutory rape in the definition of a "crime of violence," as would warrant 16-level sentencing increase for defendant convicted of illegal reentry, violated *ex post facto* clause, where amended guideline was not in effect at time defendant committed the statutory rape offense, and under version of guideline in effect at time of offense, the crime of statutory rape did not meet the definition of a crime of violence.]

Interestingly, the Sentencing Commission points out that while Congress did not believe the *ex post facto* clause would apply to amended sentencing guidelines, and that the Commission itself concurs in Congress's view, the Commission specifically recognizes that "courts to date generally have held that the *ex post facto* clause does apply to sentencing guideline amendments that subject the defendant to increased punishment." U.S.S.G. §2B1.11, Background commentary to Application Notes to November 1, 2011 Guidelines Manual.

Therefore, this Court should find that Steven Hammond's Base Offense Level for the 2001 Hardie-Hammond Fire is 6, not 16.

2. Grouping for Multiple Convictions

Mr. Hammond agrees with United States Probation Officer Davis that the result of the 2006 conviction on Steven Hammond is a one level increase. This results in an Combined Adjusted Offense Level of 7.

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B. Criminal History Category

Steven Hammond acknowledges that he has two prior convictions: a 1999 conviction in this Court for Interference with the Lawful Use of Public Land [a violation of 43 CFR 4140.1(b)(7)] and a 2012 misdemeanor conviction in the Circuit Court for the State of Oregon, County of Malheur for "Unsworn Falsification" [a violation of ORS 162.085]. Mr. Hammond received sentences of probation in each of these cases. United States Probation Officer John Davis recommends that Mr. Hammond receive 4 criminal history points based on these convictions: 1 each for the convictions themselves and 2 for being on probation from the first at the time of the 2001 Hardie-Hammond Fire.

Steven Hammond does not believe he can be assessed a criminal history point for the 2012 conviction. U.S.S.G. §4A1.2(c)(2) provides:

> sentences for the following prior offenses and offenses similar to them, by whatever name known, are never counted:
>
> Fish and Game violations.

Mr. Hammond's Unsworn Falsification involved the signing of an Oregon Department of Fish and Wildlife "Landowner Preference Registration Form." Mr. Hammond believes that renders the conviction at least "similar to" the Fish and Game violations excluded from criminal history.

Mr. Hammond therefore urges the Court to find that he has only 3 criminal history points and that his Criminal History Category is II, not III.

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Whether or not the Court calculates Mr. Hammond's Criminal History Category as II or III, he urges the Court to find that placing him higher than II would overstate his criminal history, in violation of U.S.S.G. §4A1.2. As the Ninth Circuit reiterated in *United States v. Leal-Felix*, 665 F.3d 1037, 1044 (C.A.9 (9th Cir. 2011):

> Federal sentencing standards, and the Guidelines themselves, require that a defendant's sentence and criminal history not be overstated...*United States v. Cruz–Gramajo,* 570 F.3d 1162, 1170 (9th Cir.) (noting that §4A1.2 ensures "that a defendant's criminal history is not overstated"), *cert. den.,* __ U.S. __, 130 S. Ct. 646, 175 L. Ed.2d 494 (2009). *United States v. Leal-Felix*, 665 F.3d at 1044.

The Court should therefore urged to calculate Mr. Hammond's guideline range on the basis of Criminal History Category II.

C. Sentencing Guideline Range

The Guidelines place a defendant with an Offense Level of 7 and Criminal History Category of II or III in Zone B. The advisory guideline range is for the former is 2-8 months. The Guideline range for the latter is 4-10 months. A defendant in Zone B is also eligible to receive a sentence of probation, provided: (1) a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention is imposed [18 U.S.C. §3561(a)(2); U.S.S.G. §5B1.1(a)(2)]; and (2) the offense of conviction is not a Class A or B felony. U.S.S.G. §5B1.1(b)(1). The maximum sentence authorized by 18 U.S.C. §844(f)(1) is not more than 20 years. It is therefore a Class C felony and renders Steven Hammond eligible to receive a probationary sentence. 18 U.S.C. §3559(a)(3).

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D. Sentencing Recommendation

Steven Hammond relies upon the factual, constitutional, and statutory discussion above, including the analysis in the "Sentencing Recommendation" section for Dwight Hammond, and urges the Court to forego imposition of a mandatory minimum sentence. Imposition of a five-year sentence would conflict with both the Eighth Amendment and 18 U.S.C. §3553(a).

Given "the nature and circumstances of the offense," "the history and characteristics of the defendant," [18 U.S.C. §3553(a)(1)] the factors delineated in 18 U.S.C. §3553(a)(2), and Steven Hammond's presumptive Zone B guideline range of 2-8 months, or even 4-10 months, *supra,* Steven Hammond requests that this Court impose a sentence of probation, with "a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention." 18 U.S.C. §3561(a)(2); U.S.S.G. §5B1.1(a)(2), *supra*.

CONCLUSION

Dwight and Steven Hammond are two very decent men who have been convicted for conduct that meets the technical definition of 18 U.S.C. §844(f)(1). Their punishment, however, can and should reflect the nature and circumstances of the offenses. Their nature and circumstances were simply not what Congress had in mind when it added the mandatory minimum sentence term to that statute. This Court is therefore urged to honor the Constitution's prohibition on cruel and unusual punishments and to exercise its

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discretion under 18 U.S.C. §3553(a) by imposing the sentences they have requested. Such sentences would be sufficient, but not greater than necessary.

Dated this 25th day of October, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing DEFENDANTS' JOINT AND SEVERAL SENTENCING MEMORANDUM on the following attorneys:

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