No. 13-1512

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**

REPLY TO UNITED STATES' BRIEF IN OPPOSITION

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REPLY TO UNITED STATES' BRIEF IN OPPOSITION

This case presents an opportunity for this Court to resolve whether a district court can ever conclude that imposition of a statutory mandatory minimum term-of-years sentence would violate the Eighth Amendment.

It also presents this Court with an opportunity to resolve a circuit split on whether a criminal defendant's waiver of appellate rights is reciprocal; that is, whether such a waiver precludes a governmental appeal.

The latter issue is addressed fully in petitioners' petition. This reply addresses points, both factual and legal, related to the first issue.

1. Placed in Proper Context, the Relevant Facts are Not in Dispute and Support this Court Accepting Review.

Much of the government's factual discussion is devoted to trial testimony supporting its version of the Hammonds' conduct. *See* Govt. Opp. 3-6. That version, however, was neither dictated by the jury's verdict, nor adopted by the trial court at sentencing. For the reasons discussed below, the relevant facts before this Court are the ones cited in the Hammonds' petition.

In June 2010, the government returned a 19-count indictment alleging numerous range fires over

two decades. ER-1273. After two years of litigation, in May 2012, the government filed a superseding indictment alleging 9-counts related to four fires. SER-137.

In June 2012, the district court presided over a two-week trial. The government's case consisted primarily of testimony from Bureau of Land Management [BLM] and other government employees; it was strongly contested by the defense via cross-examination and expert testimony. The evidence established that Steven Hammond had admitted setting two fires on his private land, which had spread to government land: the 2001 Hardie-Hammond fire, which was set to deal with problematic invasive species; and the 2006 Krumbo Butte fire, which Steven set, without BLM permission, as a back burn to stop a lightning-caused fire threatening the Hammonds' winter feed.

As detailed below, the jury returned verdicts of guilty only in connection with the fires Steven Hammond expressly admitted they had set:

- 2001 Hardie-Hammond fire: The jury found the Hammonds guilty of violating 18 U.S.C. § 844(f)(1), but acquitted them of causing more than $1,000 in damages.
- 2006 Lower Bridge fire: The jury found the Hammonds not guilty of all charges.
- 2006 Krumbo Butte fire: The jury found Steven Hammond guilty of violating § 844(f)(1) for starting the back burn that burned an acre of public land, but, again, acquitted him

of causing more than $1,000 in damages. (Dwight Hammond was not charged in connection with that fire.)

- 2006 Granddad fire: The jury found Dwight Hammond not guilty of all charges, and reported being unable to reach a verdict on Steven Hammond. The charges, and the conspiracy charge leveled against both, were subsequently dismissed pursuant to the parties' agreement.
- Witness Tampering: The court granted Steven Hammond a judgment of acquittal.

ER-35, 41.

Many of the "facts" asserted by the government relate to acquitted, uncharged, or dismissed fires. *See* Govt. Opp. 4-6. Additionally, the government's factual assertions are primarily based on the testimony of BLM employees, Govt. Opp. 4-6, which was so obviously rejected by the jury that even the prosecutor said at sentencing, "In short, the guilty verdicts here, Judge, relied, I'd have to say, almost entirely on non-BLM employees." ER-7.

As a matter of *law*, the trial court could have considered such evidence at sentencing had it made findings supporting its decision to do so. *See, e.g., United States v. Watts*, 519 U.S. 148, 157 (1997) (per curiam) ("a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence").

As a matter of historical fact, however, the trial court did not consider that evidence relevant. Indeed, at sentencing, the government never suggested that allegations about other fires were relevant to the court's sentencing determination. *See* ECF-204; ER-5-10. The government's references to these uncharged, acquitted, and dismissed matters in its argument to this Court should be ignored.

A. 2001 Hardie-Hammond Fire.

At trial, historical data and testimony established a long-standing plan between the Hammonds and their BLM range conservationist to burn off invasive species on the "School Section" of the Hammonds' property. ER-316-18. Fire is a tool regularly used by the BLM to rehabilitate grazing lands.

Defendants had acknowledged intentionally setting a fire on September 30, 2001 to burn off invasive species on the School Section, which then spread to approximately 139 acres of adjacent public land (the "Hardie-Hammond Allotment"). ER-287, 243.

At trial, the government presented evidence that the fire was set in a manner designed to spread on to the public land, and had endangered members of the Hammonds' party. ER-72-138 (Choate); ER-178-230 (Dusty Hammond). The government extensively cites this evidence in its brief. Govt. Opp. 3-4.

In so doing, the government incorrectly says that a "BLM district manager" testified about being uncomfortable while hunting when he saw the Hammonds' party that day. Govt. Opp. 3. That testimony actually came from Gordon Choate, a private hunting guide who had a great deal of animosity toward the Hammonds. ER-72-137.[1]

The government relies on Dusty Hammond's testimony to claim that the September 30, 2001 fire had placed him in great physical peril. Govt. Opp. 3-4. Dusty, who was 13 in 2001, is Dwight's grandson and Steven's nephew.

At trial, the defense presented substantial evidence contradicting the government's witnesses. ER-1133-45; ER-258-59; SER-11-22. For instance, Scott Gustafson, an insurance agent who was hunting with the Hammonds on September 30, 2001, testified that they set the fire after they finished hunting, and that the interaction with the Choate group earlier in the day was totally unrelated to the fire. ER-1138-39.

Jacon Taylor, whom Dusty Hammond claimed was one of the fire-setters of the Hardie-Hammond fire, flatly contradicted Dusty's testimony. He was not at the September 30, 2001 deer-hunt (as Dusty had claimed), but rather an elk-hunt two weeks earlier.

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[1] BLM District Manager Dyer testified immediately before Choate. *See* ER-50-72 (Dyer); ER-72-136 (Choate). The header on Choate's direct testimony incorrectly reads "Dyer-X," which likely precipitated the government's error.

SER-11-22. Department of Fish and Wildlife hunting license records and photos verified Mr. Taylor's testimony. *See, e.g.,* SER-18; Govt. Ex. 021; Def. Ex. 1401.

The two versions of the 2001 Hardie-Hammond fire are irreconcilable. To sentence defendants, the trial court had to decide which version to accept. Therefore, defendants offered the following analysis in their joint sentencing memorandum:

> 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.

ECF-205 at 5-6.

Because the scope of the court's sentencing authority depended on these findings, defendants asked the court to "make the factual finding that the three specific circumstances noted above are legally sufficient to support the verdict and [are] the only

ones that have sufficient indicia of reliability" to be used at sentencing. *Id.* at 6. At sentencing, defendants echoed the points, and, again, asked the court to make those findings if it was "considering looking with favor at our Eighth Amendment argument." ER-13.

It was in the context of these written arguments and oral requests, that the district court made the findings that have been referenced by both parties:

> 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.
>
> * * *
>
> In looking at Dusty Hammond's testimony, he was a 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.
>
> . . . [T]he damage was juniper trees and sagebrush, and there might have been a hundred dollars [worth of damage], but it

> doesn't really matter. . . . I think mother nature's probably taken care of any injury. . . .
>
> * * *
>
> 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 Congress intended.

App. 13-14, 17.

In this context, the district court plainly adopted the version of the 2001 Hardie-Hammond fire proffered by defendants, which was well within its authority, and rejected the sensationalized story proffered by Dusty Hammond. It concluded no one had been endangered by this fire. The government's reliance on Dusty Hammond's testimony to the contrary is misplaced. Govt. Opp. 3-4.

B. 2006 Krumbo Butte Fire.

The facts of this fire are straight forward. The Ninth Circuit stated:

> 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. The district court found that Steven Hammond had admitted to starting this fire and said the jury "accepted that for what it was." App. 13.

Most of the government's 2006 discussion is about fires for which no one was convicted. Indeed, much of the discussion is about Dwight Hammond, who was either not charged, or acquitted, of any misconduct in 2006. Govt. Opp. 5.

The government stresses a purported threat by Steven Hammond to "frame" BLM worker Joe Glascock. Govt. Opp. 6, 12. Steven Hammond was tried on this allegation (Count 9 – witness tampering) and acquitted by the court, who did not believe the proof was sufficient to submit it to the jury. It did not consider it established for the purposes of sentencing.[2]

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[2] To put the statement to Glascock in context: Humidity was very low on August 22, 2006. It was hot and windy. Conditions were perfect for "spotting," a process by which embers can travel through the air to start new fires far from their origin. Late that evening, Glascock and another BLM employee, without back-up, a water supply, or fire suppression equipment, set a series of back burns along Bridge Creek Road. ER-595-962; ER-1930-40. They walked along the road with drip torches and large cans of drip torch fuel, burning for several hours, only stopping when they ran out of fuel. ER-741. At least one fire they started "jumped and went off upcountry," becoming a "slop over" fire. ER-526, 706.

Appellate courts are obliged to "'give due regard to the opportunity of the district court to judge the credibility of the witnesses,' [and] to 'accept the findings of fact of the district court unless they are clearly erroneous[.]'" *Rita v. United States*, 551 U.S. 338, 361-62 (2007) (Stevens, J., concurring) (quoting 18 U.S.C. § 3742(e)). The government ignores this deferential standard entirely. It wants the case before this Court to be about the broad allegations it brought against the Hammonds; it is not.

Placed in the proper procedural context of this appeal, the facts are as petitioners previously asserted:

The Hammonds are men of "tremendous" character. App. 14 ("With regard to character letters . . . they were tremendous. These are people who have been a salt in their community and liked, and I appreciate that."); *see also* ER-7 (Prosecutor at sentencing, "It is true, and it can't be contested, I have spent a lot of time in Burns, that the Hammonds both . . . have done wonderful things for their community.").

They were convicted of a fire lit to burn invasive species on private land that burned 139 acres of public land; Steven was also convicted for a "back burn" set to protect winter feed that burned one acre of public land. The fires caused minimal damage, if any, and likely increased the land's value. No one was endangered by these fires.

The "arson" aspect of 18 U.S.C. § 844(f)(1) was initially enacted without a mandatory minimum.

Pub. L. No. 97-298 (1982). In 1996, Congress adopted a five-year minimum as a part of an effort to combat terrorists. Pub. L. No. 104-132 (Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)). As the district court observed, "this sort of conduct could not have been conduct intended under that [mandatory minimum] statute." App. 17.

These facts – which given the deference afforded to trial courts in this arena are binding here – make this case an ideal vehicle for this Court to consider whether a mandatory minimum sentence to a term of years can ever be found to violate the Eighth Amendment.

2. This Court Should Accept Review to Resolve Whether the Eighth Amendment Protects Criminal Defendants Sentenced to Term-of-Years Sentences.

This Court has held that a sentence to a term of years can, in an as-applied challenge, be found to violate the Eighth Amendment. *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003). The government points to the 24-year dearth of even a single finding of unconstitutionality by the circuit courts of appeals as a "lack of conflict," which – it contends – warrants against granting review.

The government's argument misses the point. The standard being *articulated* in circuit courts across the country is one crafted by this Court; it is not surprising that the circuits thus cite it. However,

their consistent unwillingness to find even a threshold showing of unconstitutionality since this Court announced the standard demonstrates that those courts are not applying it properly. Indeed, for years, panels in the Fourth Circuit expressly asserted that "proportionality review is not available for any sentence less than life imprisonment without the possibility of parole." *United States v. Ming Hong*, 242 F.3d 528, 532 (4th Cir. 2001); *see also United States v. Lockhart*, 58 F.3d 86, 89 (4th Cir. 1995) (proportionality review "is not appropriate" for a term-of years sentence that is less than life imprisonment). While the Fourth Circuit disavowed these statements in 2014, *United States v. Cobler*, 748 F.3d 570, 575 (4th Cir.), *cert. den.,* 135 S. Ct. 229 (2014), petitioners contend that the circuit's "dicta" accurately captures how this Court's precedent is being applied across the country. Absent this Court's intervention, there are no circumstances in which a circuit court will conclude that a term-of-years sentence violates the Eighth Amendment.

This case illustrates both the point and the problem. Dwight Hammond, now a 73-year-old cattle rancher with no criminal history and a stellar reputation in his community, was convicted of being involved with a single fire ignited to protect his ranch's interests that spread onto public land, causing, at most, minimal damage. App. 14. The fire did not endanger anyone. App. 15. Congress did not contemplate such conduct when, as a part of its antiterrorism efforts, it adopted a five-year mandatory

term. Indeed, the advisory guidelines range for his conduct was 0 to 6 months. App. 14-15. Steven Hammond's additional conviction for setting, without permission, a back burn to stop a lightning-caused fire that threatened the Hammonds' winter feed does not change the analysis.

At sentencing, in a statement the trial court deemed "highly moral," the prosecutor advised the Court that, despite the Congressionally enacted mandatory minimum:

> 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-18. If – faced with these defendants, this prosecutor, and these circumstances – a district court does not have the discretion and authority to conclude that sending either gentleman to prison for five years would violate the proportionality principles of the Eighth Amendment, then there are no circumstances in which it can occur. And this Court's precedent – which expressly provides that a term-of-years sentence can, in appropriate circumstances, be found to violate the Eighth Amendment – is no longer good law. If such an essential constitutional right has been eliminated, it is for this Court, not circuit courts, to so hold. As the situation stands, however, circuit courts,

generally, and the Ninth Circuit in this case, have effectively eliminated a constitutional right this Court has held exists. Review is therefore warranted.

CONCLUSION

For the reasons stated above and in the Hammonds' petition, this Court should issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit as to both petitioners.

Dated this 20th day of February, 2015.

Respectfully submitted,

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