

THE HON. FRANKLIN BURGESS

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

BRIANA WATERS.

Defendant.

CAUSE NO. CR 05-5828 FDB

DEFENSE SENTENCING  
MEMORANDUM

COMES NOW the Defendant, Briana Waters, by and through her attorney, Neil M. Fox, and submits this Sentencing Memorandum.

**I. Introduction**

It is predictable that after a contentious trial in a case involving a clash of cultures, contentious personalities, and allegations of terrorism that there would be calls for vengeance. Having spurned offers to plead guilty to achieve a reduced sentence, and having denied her guilt on the witness stand, Ms. Waters now faces a likely Government recommendation that she be locked up in a prison, surrounded by barbed wire, guarded by armed security forces, for a good part of the next two decades. The Government, of course, has interests to protect – the interest of encouraging people to bargain before trial, the interest of protecting those who opt to become cooperating witnesses, and the interest of holding out to the world the example of someone convicted of what the Government labels to be a “terrorism” offense.

The Court, though, has other interests at stake. The Court’s very power and authority is driven by its ability to mete out mercy, its ability to engage in historic

1 reflection, and its ability as an independent branch of government to impose a sentence  
2 that is based on compassion and justice, rather than the shrillness of the moment.  
3 Years from now, when the fire at the Center for Urban Horticulture will not even be a  
4 mere footnote to history, the question this Court needs to resolve is whether Ms.  
5 Waters should still be incarcerated.

6 2001 was already a long time ago. Much has happened in the world as well as  
7 with Ms. Waters since that day in May seven years ago when the Center of Urban  
8 Horticulture was burned down. Given the time that has already passed, and given Ms.  
9 Waters' life in general, she asks this Court to impose the least amount of time in prison  
10 possible.

## 11 **II. Ms. Waters' Background**

12 As the Court already knows, Ms. Waters grew up in Pennsylvania. Her mother  
13 and father divorced when she was still a child, and her mother struggled to raise her  
14 and her brother pretty much alone. As her aunt, Sara Anne McCuen, recounts, money  
15 was so tight that Ms. Waters got a job at 14 to help out since her father did not pay  
16 child support.<sup>1</sup> She was never the product of privilege, and her achievements were the  
17 result of hard work. Ms. Waters did well in school, impressed her teachers and  
18 received awards and a college scholarship for her achievement. As her high school  
19 English teacher writes:

20 Briana was one of the most motivated, creative and organized  
21 students . . . I have known in my teaching career.

22 Ultimately, Ms. Waters moved to Olympia, Washington, where she attended  
23 and then graduated from The Evergreen State College. The Court heard character  
24 testimony from two of Ms. Waters' professors at the trial, and already knows that as a  
25 project, Ms. Waters directed and produced a documentary film, "Watch," a copy of  
26 which the Court viewed during the trial. This film provides a window into Ms.  
27 Waters' views, activities and focus during the pertinent times of this case, and

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28 <sup>1</sup> Ms. McCuen's letter is among over 200 letters of support that have been filed under separate cover.

1 illustrates her commitment to peaceful, non-violent protest and coalition building as a  
2 mechanism of social change. The film was also more than just a college graduation  
3 project, as the United States Probation Service Presentence Report described it.  
4 Rather, the film documents Ms. Waters' service to the community which was apparent  
5 even at a young age. Its widespread distribution in the early 2000s is itself Ms.  
6 Waters' legacy to society and evidence of her repudiation of the tactics of property  
7 destruction that the Government tried to tag her with during the trial.

8         A family friend, Naomi Skoglund, writes, when she visited Ms. Waters in  
9 Olympia and attended the screening of the film, "[t]here were people who did not  
10 agree with some of the political positions that she put forth in her video, considering  
11 them 'not radical enough,' but she stood by her belief of working with local  
12 communities to find real solutions to the problems facing the environment." In this  
13 regard, friend Eric Chase recounts how in 1999, during an informational rally for the  
14 Steelworkers "while others were brainstorming on various tactics and appropriate  
15 behavior, Ms. Waters asserted that perhaps the more radical elements should not be  
16 speaking of such extreme notions as they were very inappropriate, and proceeded to  
17 play her violin for several hours, calming many of these workers from their emotional  
18 state."

19         After finishing this film, Ms. Waters moved to the Bay Area, where she worked  
20 as a nanny and music teacher. She met John Landgraf, and in 2005, the couple had a  
21 baby, Kalliope. The couple live a modest life – Mr. Landgraf is a carpenter, while Ms.  
22 Waters continues performing music and teaching violin. At this point in her life, Ms.  
23 Waters turned her attentions to helping people in more simple, but no less important,  
24 ways than during the Watch Mountain campaign. Ms. Waters became actively  
25 involved in her community, helping out others.

26         Ms. Waters "uses her music talent in her community to entertain others and  
27 teach others about new areas of music from all different parts of the world," her half-  
28 brother, Philip Kopp, writes. Janine Ryle, an event planner in the Bay Area, writes

1 that Ms. Waters has performed at many fundraising events for non-profit organizations  
2 and “helped to raise funds for numerous people in need.” Pediatric nurse Rebecca  
3 Niemi writes that she treats many children with cancer and “Briana has spent time at  
4 the hospital playing violin for the kids. It was really beautiful to see the smiles on the  
5 faces while she played.” Aliza Naisuler, a project manager with a social services  
6 agency, writes that:

7 Briana has contributed positively and productively to society, often  
8 volunteering her time and skills as a musician to fundraiser concerts for  
9 good causes such as the one I coordinated on March 6, 2005, for the  
benefit of Sudanese Refugees displaced during war in their home towns.

10 Matthew Wright, currently of Victoria, BC, but who used to live in the Bay  
Area, writes that:

11 Briana volunteered her time and musical talents for benefit concerts on  
12 many occasions. In particular, I remember that we performed together  
13 on April 26, 2002 in an ensemble that I organized to raise money for  
14 relief efforts for victims of the devastating earthquake that occurred on  
15 March 25 of that year in the impoverished Baghlan province of  
Afghanistan. Briana immediately volunteered to help with that concert  
when I asked her, and was quite generous with her time and energy in  
preparing for and performing at the event.

16 William Wheeler, the manager of the East Bay Nursery in Berkeley, writes that  
17 his

18 personal life has also been greatly enriched by Briana . . . We both play  
19 traditional Irish music, and she asked me if I wanted to play a charity  
20 music gig with her at the Chaparrel House on St. Patricks Day. The  
21 Chaparrel House is a non-profit senior care facility in Berkeley where  
22 Briana volunteers regularly . . . Briana knew many of the seniors and I  
23 could see our music made a big difference to their day.

24 Juliet Lee, a friend and fellow musician of Ms. Waters, documents how Ms.  
25 Waters would regularly take Kalliope to the Strawberry Creek Lodge, a retirement  
26 home, to volunteer – “Briana played her violin, and Kalliope played with the old folks.  
27 When I asked Kalliope what they did there, she said ‘Make the old people happy.’”

28 Liberty Winn writes:

Briana is a hub, teaching violin at sliding scale to young and old  
alike, playing free concerns and events, always sharing her gift and  
supporting others in enjoying or working at their musical talents. . . .  
Briana has made the children of this community better people.

1 Ms. Waters is also an active member of the Laurel Parents Group in Oakland.  
2 Theresa Bartolero states that Ms. Waters “was one of the first members of the group  
3 and offered to host meetings often.” Lisa Hoffman writes:

4 The Laurel Neighborhood Parents’ Network is an informal  
5 network of parents with young children that was created to help decrease  
6 isolation and provide meaningful connections among parents and  
7 children. In many ways, Briana was one of the ‘founding members’ and  
8 supporters of this network, offering up her home to host gatherings and  
9 helping to organize outings for families.

10 Included in the packet of support letters is a statement signed by thirteen members of  
11 the group, which states:

12 Briana has been very active in our neighborhood parents’ group from  
13 early on in its formation, helping to organize gatherings, doing research  
14 about preschools and education options and sharing that information with  
15 others, talking with us about music and dance for young children and  
16 generally being an active part of our community. She was working on  
17 structuring a type of “talent-exchange” where by parents with certain  
18 talents (such as her talent with the violin) could offer classes to the  
19 children of the group in exchange for classes with another parent sharing  
20 his/her talent (whatever it may be – music/art/cooking, etc.).

21 Some of the people whose lives Ms. Waters has touched include victims of the  
22 fire at the Center for Urban Horticulture itself. Rebecca Chaney, a student of  
23 landscape architecture at the University of Washington, was a King County Master  
24 Gardener volunteer at the time of the fire; she attended class at the CUH and several of  
25 the affected professors were her instructors. Educational material that she used was  
26 damaged by the fire. Yet, despite this loss, Ms. Chaney asks this Court to impose a  
27 minimum sentence, and recounts how Ms. Water has assisted her daughter pursue her  
28 musical career.

These references are but a small part of the over 200 letters of support the Court  
has received from people who have known Ms. Waters at different parts of her life.  
While in many cases people facing sentencing may collect a dozen or so letters of  
support, it is extraordinary to see the number and diversity of letters that have been  
provided. These are not “form” letters generated by a mythical ELF support network.  
Rather, these letters are each unique, written by people who have known Ms. Waters at

1 different stages of her life – as a child, as a college student, as a musician, as a film  
2 producer, as nanny, as a worker, as a neighbor, as a mother, as a friend and as a  
3 relative.

4 Whatever the Government has claimed her role to be in the UW arson, there is  
5 no dispute that Ms. Waters has lived an exemplary life; she has given a lot to her  
6 community, even during the two years she was facing trial; she is truly part of  
7 whatever community she resides in; and her good works and life are cherished by the  
8 hundreds of people who have taken the time to write to the Court and by the thousands  
9 of people whose lives have been positively impacted by the ripples of her kindness.

### 10 **III. *The Offenses of Which Ms. Waters Was Convicted***

11 The grand jury charged Ms. Waters with a series of offenses, and alleged that  
12 Ms. Waters was part of a broad multi-year, and multi-defendant conspiracy. However,  
13 the Government's proof on that count failed; the jury did not convict Ms. Waters of  
14 Count 1 (conspiracy). Similarly, the jury did not convict Ms. Waters of Counts 4 and  
15 6, possession of an unregistered firearm and use of a destructive device during a crime  
16 of violence. The jury convicted Ms. Waters only of the two substantive counts of  
17 arson, Counts 5 and 7, which involved only one act – the fire at the Center of Urban  
18 Horticulture on May 21, 2001 – with two different bases of jurisdiction (institution  
19 receiving federal funds and building affecting interstate commerce).

20 While Ms. Waters understands that there are cases that allow a court to consider  
21 uncharged or even acquitted conduct as a basis for increasing a sentence,<sup>2</sup> nothing  
22 about those cases *require* the court to do so. Although Ms. Waters denies her guilt, she  
23 does recognize that the Court must sentence her in accordance with the jury's verdict.  
24 But, Ms. Waters hopes that she is not just punished because of the jury's verdict, but  
25 that she is also *protected* by the jury's verdict. Ms. Waters should not be punished

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27 <sup>2</sup> See United States v. Mercado, 474 F.3d 654 (9<sup>th</sup> Cir. 2007). The defense understands that this  
28 Court is bound by circuit precedent, although she respectfully submits that Judge Betty Fletcher's dissenting opinion  
in Mercado, 474 F.3d at 657-65 (Fletcher, J., dissenting), more accurately follows the law of the Sixth Amendment's  
jury trial right, as explained by the Supreme Court in Apprendi v. New Jersey, 530 U.S. 466 (2000), and its progeny.

1 based upon crimes that the Government believes the jury *should have* convicted her of  
2 committing. See Apprendi, 530 U.S. at 477 (describing trial by jury as necessary "to  
3 guard against a spirit of oppression and tyranny on the part of rulers" and "as the great  
4 bulwark of [our] civil and political liberties") *quoting* 2 J. Story, *Commentaries on the*  
5 *Constitution of the United States* 540-41 (4th ed. 1873). A sentence based upon  
6 allegations that the jury did not accept would do little to increase popular confidence  
7 for the judicial branch of government, particularly in a case like this one, which has  
8 attracted so much attention and scrutiny.

9 Keeping these principles in mind, it is important to recognize what it was that  
10 the jury convicted Ms. Waters of doing. No one claimed that Ms. Waters herself set  
11 any fire. Rather, the evidence was only that she was an accomplice, and the Court  
12 accordingly gave the jury accomplice liability instructions. Instructions Nos. 23, 24,  
13 and 26. Further, the Government proffered evidence that Ms. Waters was an  
14 accomplice not only based upon Ms. Phillabaum's and Ms. Kolar's claim that Ms.  
15 Waters was a "lookout," but also upon evidence that Ms. Waters procured a rental car,  
16 that she allowed her living space to be used to construct the timing devices, and that  
17 she subscribed to a cell phone that Mr. Rodgers' used in 2001. Given the fact that the  
18 jury failed to convict Ms. Waters of conspiracy, and thus necessarily must have  
19 rejected some of Ms. Kolar's and Ms. Phillabaum's testimony, it cannot be said with  
20 any assurance what was the basis of the jury's verdict on Counts 5 and 7. It is not  
21 known whether the jury believed that Ms. Waters was a lookout, or whether the jury  
22 rejected Ms. Phillabaum's and Ms. Kolar's claims in this regard, and instead based a  
23 conviction on a finding that Ms. Waters, who was social friends with Mr. Rodgers,  
24 may only have procured a rental car for him to use in the arson.

25 The failure of the jury to convict Ms. Waters of Count 1 – the conspiracy charge  
26 – is highly significant. With only a conviction based upon accomplice liability, the  
27 subjective motivations of Ms. Phillabaum, Ms. Kolar, Mr. Rodgers, and whoever else  
28 was involved in actually setting the fire at the UW (whether this be "Capitol Hill Girl,"

1 her “punk” boyfriend, Justin Solondz, “Crazy Dan,” or anyone else) are irrelevant to  
2 the sentencing of Ms. Waters as a matter of law and otherwise.

3 Similarly, because the jury did not convict Ms. Waters of conspiracy and the  
4 evidence at trial was that Ms. Waters did not attend any of the “Book Club” training  
5 groups, it is inappropriate to continue to claim, as the USPS Presentence Report does,  
6 that Ms. Waters “joined the Family” or was otherwise a co-conspirator with Mr.  
7 Meyerhoff, Mr. Rodgers, Ms. Kolar, Ms. Phillabaum, Ms. Gerlach and multiple other  
8 individuals who committed a series of fires in Oregon, Washington, Colorado,  
9 Arizona, and California from 1996 until 2001. The failure of the Government to  
10 convince the jury that Ms. Waters was part of a conspiracy (either a broader conspiracy  
11 or a conspiracy limited to the fire at the Center for Urban Horticulture) should preclude  
12 basing a sentence on things that these other people did or wanted to do or their  
13 motivations for doing them.

14 **IV. *The Court Should Not Consider the Unsubstantiated Allegations***  
15 ***that Ms. Waters Was Involved in the Susanville Action***

16 The Government and the Probation Service have alleged that in addition to the  
17 arson at the University of Washington, Ms. Waters was involved in another arson, in  
18 October 2001, at the Litchfield wild horse facility in Susanville, California. The  
19 defense strongly objects to these allegations.<sup>3</sup>

20 The Government has thrown around these allegations for some time, but when  
21 push comes to shove, it has offered no evidence to attempt to prove them. For  
22 instance, despite Stanislas Meyerhoff’s early claim that a blonde woman who was a  
23 musician was involved in the Susanville arson, the Government did not seek an

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24  
25 <sup>3</sup> The USPS Presentence Report adopts without any proof or independent analysis the Government’s  
26 assertions that Ms. Waters was involved in the Susanville arson, rejecting, without comment, the evidence that the  
27 defense submitted that key players in the Susanville arson, such as Darren Thurston and Jennifer Kolar, have failed  
28 to include Ms. Waters in the ranks of those who committed the action. The defense respectfully disagrees with the  
USPS’ conclusions, based not on the evidence, but on the Government’s unsubstantiated allegations.

It should be noted that Ms. Waters presented the USPS with numerous objections to its Presentence Report. A copy of those objections (minus appendices) is attached in Ex.1, and Ms. Waters reasserts all of them.

1 indictment against Ms. Waters in the Eastern District of California for this arson. Ex.  
2 2.<sup>4</sup> Similarly, even though the Government added a count to the indictment in this  
3 district to address allegations that Mr. Dibee built and transported a destructive device  
4 in this district on the way to the Susanville arson (Count 8), Ms. Waters was never  
5 mentioned in relation to this charge, even in the conspiracy count. The Government  
6 then gave notice that it would seek to prove Ms. Waters' involvement in Susanville at  
7 trial by proffering the testimony of Mr. Stanislas Meyerhoff. However, shortly before  
8 trial, the Government decided not to call Mr. Meyerhoff, and did not offer an iota of  
9 evidence to try to prove that Ms. Waters' was involved in the Susanville arson.

10 The Government has good reason to not try to prove Ms. Waters participated in  
11 the Susanville arson – she was not involved. Attached in Ex 3 are selections from the  
12 testimony at trial of Jennifer Kolar regarding her own involvement in the Susanville  
13 action. She does not mention Ms. Waters at all, and, in various proffer sessions she  
14 told the Government that Ms. Waters was not involved. Ex. 4.

15 Similarly, Darren Thurston, another admitted participant in Susanville, who  
16 fully cooperated with the Government, was very clear that Ms. Waters was not  
17 involved in Susanville. When shown Ms. Waters' photographs, he stated that he did  
18 not recognize her and never met her. He said the same thing about Mr. Solondz. Ex.  
19 4.<sup>5</sup> Mr. Thurston would have recognized both Ms. Waters and Mr. Solondz if they  
20 were present, since Thurston supposedly traveled to California with the people he says  
21 he picked up in Olympia and camped out with them for several days before the action.  
22 However, Mr. Thurston has made it clear that he never met Ms. Waters. Given his  
23 cooperation agreement, there would be no reason for him to lie about this.

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24  
25 <sup>4</sup> The lack of an indictment puts to rest the USPS' claim that the Government's allegations are  
26 "reliable" because the Government presented them to a grand jury which in turn found probable cause in order to  
27 return an indictment. With regard to Susanville, no grand jury ever found probable cause that Ms. Waters was  
involved.

28 <sup>5</sup> Notably, Mr. Solondz's credit card records reveal charge transactions that took place in  
Washington State at a time that he would have been in California if he had been involved in Susanville. Ex. 5.

1 The only evidence that the Government will offer that Ms. Waters was at  
2 Susanville comes from Mr. Meyerhoff, who, the Government now suggests, may not  
3 even be called as a witness at sentencing.

4 If Mr. Meyerhoff is not called as a witness, the Government's claims should be  
5 rejected out of hand. While hearsay may in certain circumstances be admitted in a  
6 sentencing hearing, due process under U.S. Const. amend. 5 limits the admission of  
7 such hearsay to cases where the out-of-court statements are minimally "reliable" and  
8 are corroborated by extrinsic evidence. United States v. Corral, 172 F.3d 714, 715 (9<sup>th</sup>  
9 Cir. 1999). An alleged co-conspirator's out-of-court statements, made during proffer  
10 sessions in an effort to obtain a sentence reduction, generally do not satisfy this test.  
11 United States v. Huckins, 53 F.3d 276, 279 (9th Cir. 1995) ("Miller's statements were  
12 not made under oath, nor at trial where he could be cross-examined. Rather, his  
13 statements were made in the context of plea negotiations with the government, in  
14 which Miller may very well have been hoping to curry favor with law enforcement  
15 officials by implicating his accomplice."). Mr. Meyerhoff's statements, made to  
16 investigating agents in an effort to avoid life in chains, are completely unreliable and  
17 cannot be considered without violating due process of law.

18 As the testimony at trial revealed, Mr. Meyerhoff began by stating that some  
19 blonde woman connected somehow to Olympia was involved at Susanville, but when  
20 he was initially shown Ms. Waters' photograph, he said only "no" (although she  
21 looked like the blonde woman) and when shown a second photograph of Ms. Waters,  
22 he clearly stated, "Familiar, not involved." It was only after Mr. Meyerhoff was  
23 shown a third picture of Ms. Waters that he began to understand that it would be to his  
24 benefit to say "yes, that's the woman," which is exactly what happened. Indeed, Mr.  
25 Meyerhoff himself noticed and told the agents that they were repeatedly showing him  
26 Ms. Waters' photographs.

27 Mr. Meyerhoff's motivation to lie was clear. As cross-examination would  
28 reveal, Mr. Meyerhoff early on after his arrest confided to Lacey Phillabaum that he

1 did not want to spend the rest of his life in prison (or even twenty or thirty years) and  
2 thus he decided to let the prosecutors be his “advocate.” He decided he wanted to  
3 “impress” upon the prosecutors that he was “worthy of consideration” so that he could  
4 get a downward departure.<sup>6</sup>

5 But it is not only the fact that Mr. Meyerhoff consciously threw “his lot in with  
6 the prosecution” that makes his change of heart suspect, but Mr. Meyerhoff’s entire  
7 character makes just about anything he says suspect. Mr. Meyerhoff was one of the  
8 ELF members who possessed weapons caches, and there is compelling evidence that  
9 he was involved in a plan to assassinate a rival, Jonathan Paul. Moreover, Mr.  
10 Meyerhoff recruited at least one child into the ELF (Ian Wallace) and schooled him in  
11 the arts of arson. Every time Mr. Meyerhoff had any police contact before his  
12 December 2005 arrest he lied to them (such as when Mr. Meyerhoff was stealing  
13 license plates from police cars in Minnesota or when set a wild fire accidentally when  
14 he was practicing his arson skills). Mr. Meyerhoff lied on his citizenship application  
15 (which he hypocritically submitted at a time when he was supposedly a “Black Clad  
16 Anarchist”). He even lied to the United States Probation Service officer who was  
17 writing the presentence report when he told the officer that he “first tried marijuana  
18 when he was 16 years old. He said he smoked the drug four or five times.” In fact, it is  
19 clear that he used marijuana on a daily basis for years, and that his drug use was  
20 intimately connected to his relationship with Lacey Phillabaum. Someone who cannot  
21 tell the truth even about this cannot be trusted.

22 Finally, Mr. Meyerhoff has claimed to have given up criminal activity in 2001.  
23 Yet, the evidence is that he had a continuing interest in violent activities for years after  
24 that date. The laptop computer he bought with scholarship money reveals a continuing  
25 interest in automatic weapons and “IED and Criminal Terrorist Devices,” while in  
26

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27 <sup>6</sup> Ms. Waters expects that if the Government calls Mr. Meyerhoff as a witness, the following facts  
28 will come out in cross-examination. If the Government opts not to call him as a witness, Ms. Waters will submit  
under separate cover a packet of materials that will support all of the factual assertions contained herein.

1 2004, at least, Mr. Meyerhoff (or someone working on his behalf) broke into the  
2 control room of a naval installation and took photographs, apparently with the aim of  
3 causing criminal sabotage there (a crime for which he escaped prosecution).

4 In short, the reason why the Government will never call Mr. Meyerhoff to the  
5 stand is apparent – he is a liar and his word cannot be trusted.

6 Accordingly, the Court should ignore the Government’s claims that are based  
7 entirely on Meyerhoff’s false accusation that Ms. Waters was at Susanville, and which  
8 are contradicted by the clear and convincing other evidence that Ms. Waters was not  
9 present.

10 **V. *The Possible Range of Sentencing Options***

11 18 U.S.C. §§ 844(f) & (i) provide that whoever commits those types of arson  
12 “shall be imprisoned for not less than 5 years and not more than 20 years.” The Court,  
13 though, has the power to suspend even the five year prison term and sentence someone  
14 convicted under these sections to probation.

15 18 U.S.C. § 3561(a) provides that a defendant may be sentenced to a term of  
16 probation unless:

- 17 1. The offense is a Class A or Class B felony.
- 18 2. The offense is an offense for which probation has been expressly  
19 precluded.
- 20 3. The defendant is sentenced at the same time to a term of  
21 imprisonment for the same or different offense.

22 18 U.S.C. § 3559(a) classifies Class A and Class B felonies as those with the  
23 maximum sentence of life (or death) or 25 years or more respectively. Here, the  
24 maximum sentence is 20 years, so a sentence of probation for arson under 18 U.S.C. §  
25 844(f) & (i) would not be barred under 18 U.S.C. § 3561(a)(1).

26 The issue then is whether arson is an offense for which probation has been  
27 expressly precluded. Nothing in 18 U.S.C. § 844(f) & (i) prohibits a judge from  
28 suspending that sentence and imposing a term of probation. Notably, other provisions

1 of the United States Code specifically prohibit a judge from suspending a sentence, as  
2 in, for instance, the provisions governing mandatory minimum sentences in drug cases.  
3 See 21 U.S.C. § 841(b) (“Notwithstanding any other provision of law, the court shall  
4 not place on probation or suspend the sentence of any person sentenced under this  
5 subsection.”). Indeed, *another provision of the arson statute itself* contains such  
6 language. See 18 U.S.C. § 844(h) (“Notwithstanding any other provision of law, the  
7 court shall not place on probation or suspend the sentence of any person sentenced  
8 under this subsection, nor shall the term of imprisonment imposed under this  
9 subsection run concurrently with any other term of imprisonment including that  
10 imposed for the felony in which the explosive was used or carried.”).

11 The absence of such language in § 844(f) & (i), where language prohibiting  
12 probation is included in other sections of the same statute, means that a judge does  
13 have the authority to suspend a five year prison sentence and impose probation in the  
14 present case. Clay v. United States, 537 U.S. 522, 528 (2003) (“When Congress  
15 includes particular language in one section of a statute but omits it in another section of  
16 the same Act . . . it is generally presumed that Congress acts intentionally and  
17 purposely in the disparate inclusion or exclusion.”) (internal quotes omitted). Due to  
18 the penal nature of the statutes involved, any ambiguity needs to be resolved in favor  
19 of Ms. Waters, not the Government. Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004).

20 Accordingly, the court has the power to suspend any or all of the five years and  
21 sentence Ms. Waters to probation.

## 22 **VI. The Federal Sentencing Structure Generally**

23 In the wake of United States v. Booker, 543 U.S. 220 (2005), district courts, as  
24 a matter of process, must properly calculate the applicable guidelines range, treat the  
25 guidelines as advisory, and then consider the factors set out in 18 U.S.C. § 3553(a), a  
26 process which the Supreme Court recently summarized:

27 The statute, as modified by Booker, contains an overarching provision  
28 instructing district courts to “impose a sentence sufficient, but not greater  
than necessary” to accomplish the goals of sentencing, including “to

1 reflect the seriousness of the offense," "to promote respect for the law,"  
2 "to provide just punishment for the offense," "to afford adequate  
3 deterrence to criminal conduct," and "to protect the public from further  
4 crimes of the defendant." 18 U.S.C. § 3553(a) (2000 ed. and Supp. V).  
5 The statute further provides that, in determining the appropriate sentence,  
6 the court should consider a number of factors, including "the nature and  
7 circumstances of the offense," "the history and characteristics of the  
8 defendant," "the sentencing range established" by the Guidelines, "any  
9 pertinent policy statement" issued by the Sentencing Commission  
pursuant to its statutory authority, and "the need to avoid unwarranted  
sentence disparities among defendants with similar records who have  
been found guilty of similar conduct." *Ibid.* In sum, while the statute still  
requires a court to give respectful consideration to the Guidelines, see  
*Gall v. United States*, *ante*, 128 S. Ct. 586, 169 L. Ed. 2d 445, 2007 U.S.  
LEXIS 13083 at \*15, \*30, *Booker* "permits the court to tailor the  
sentence in light of other statutory concerns as well," 543 U.S., at 245-  
246, 125 S. Ct. 738, 160 L. Ed. 2d 621.

10 *Kimbrough v. United States*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 558, 570 (2007).

11 Ultimately, after consideration of these factors, a district court can impose any  
12 sentence that is "reasonable," including a sentence that is significantly below the  
13 Guidelines range. *Gall v. United States*, 128 S. Ct. at 597. "The district court may not  
14 presume that the Guidelines range is reasonable. . . . While the Guidelines are to be  
15 respectfully considered, they are one factor among the § 3553(a) factors that are to be  
16 taken into account in arriving at an appropriate sentence." *United States v. Carty*, \_\_\_  
17 F.3d \_\_\_, No. 05-10200 (9<sup>th</sup> Cir., 3/24/08) (en banc). Ultimately, the Court's duty is to  
18 impose a sentence that is "sufficient, but not greater than necessary." *Id.*

19 In a post-*Booker* environment, the term "downward departure" really is of  
20 limited utility. While the Court first must calculate the Guideline range, the Court  
21 must then set a sentence in accordance with the factors in 18 U.S.C. § 3553(a).  
22 Previous concepts of "heartlands" and "downward departures" have little bearing in  
23 this calculus. Factors that previously could not be considered as a grounds for an  
24 adjustment to the offense level or for a "downward departure," now can be considered  
25 18 U.S.C. § 3553(a). For instance, in *United States v. Menyweather*, 447 F.3d 625 (9<sup>th</sup>  
26 Cir. 2006), the Ninth Circuit approved a non-Guidelines' sentence based upon "family  
27 circumstances" and diminished capacity, even if those circumstances were not  
28 sufficient to justify a traditional downward departure under the Guidelines.

1           Moreover, when setting the proper sentence, although the usual evidentiary  
2 standard is “preponderance of the evidence,” if any alleged enhancement would have  
3 an extremely disproportionate effect on the sentence, such factor needs to be proven by  
4 a clear and convincing evidence standard. See United States v. Pike, 473 F.3d 1053,  
5 1057 (9<sup>th</sup> Cir. 2007). See also United States v. Kilby, 443 F.3d 1135, 1140 n.1 (9<sup>th</sup>  
6 Cir. 2006) (noting that where a sentencing factor would have an “extremely  
7 disproportionate effect on the sentence,” the government may have to satisfy a clear  
8 and convincing standard of proof”); United States v. Staten, 466 F.3d 708, 718 (9<sup>th</sup>  
9 Cir. 2006) (holding that the clear and convincing standard still pertains post-Booker for  
10 an enhancement that has an extremely disproportionate effect on the sentence  
11 imposed).

## 12           **VII. *Setting the Proper Sentence***

### 13           **A. Base Offense Level**

14           Using the 2000 version of the *Federal Sentencing Guidelines Manual*, the first  
15 step to determining the sentence is to set the “base offense level.” This is driven by the  
16 value of the building, under § 2K1.4(a)(4). The USPS’ Presentence Report adds in a  
17 16-level increase based upon the costs of constructing a new building. The defense  
18 objects to this increase.

19           First, information about the costs of constructing a *new* building is not relevant  
20 to the issue of the value of the old building. Second, in terms of the value of the old  
21 building, the UW itself has determined that the amount of loss to be only  
22 \$3,312,434.95 (which includes an adjustment for inflation from the 1984 costs of  
23 construction). Attached in Exhibit 6 is a letter from the UW Police Department to  
24 Special Agent Anthony Torres documenting the loss estimate to the University of  
25 Washington. This estimate was prepared specifically for purposes of calculating  
26 restitution. Even *this* figure lacks detailed and specific proof as to how it was  
27 calculated – i.e. the figures in the letter are conclusory only, and lack detail as to  
28 evidence of the assessed value of the property, the costs of construction and the like.

1 Absent such specific information, the defense objects to any increase. However, even  
 2 assuming *arguendo* that this figure is the correct one, under § 2B1.1(b)(1)(P) of the  
 3 2000 Guidelines, the increase should only be 15. Under this theory, the base offense  
 4 level would be “23,” not “24.”<sup>7</sup>

5 **B. Upward Adjustments**

6 **i. The “Terrorism” Enhancement**

7 Because of the multiple legal issues involved, Ms. Waters is filing a separate  
 8 pleading dealing with the “terrorism” enhancement under § 3A1.4. As explained in  
 9 that separate memorandum, this enhancement does not apply to Ms. Waters’ case and  
 10 cannot constitutionally be imposed.

11 **ii. Obstruction**

12 At the suggestion of the Government, the Probation Service is recommending a  
 13 “2” level increase based upon “obstructing or Impeding the Administration of Justice”  
 14 under § 3C1.1. The defense objects.

15 Ms. Waters testified on her own behalf at trial and denied the charges. The fact  
 16 that she was convicted does not mean that she “obstructed” justice or “lied.” The  
 17 conviction was the result of a series of errors at trial and a climate of fear. Given the  
 18 jury’s refusal to find Ms. Waters guilty of the conspiracy count (and other counts),  
 19 multiple jurors at least must have credited Ms. Waters’ testimony,<sup>8</sup> and did not buy all

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20  
 21 <sup>7</sup> While under some circumstances, replacement costs may be a good guide to determining loss  
 22 amount, the pertinent replacement cost should be the costs of replacing the damaged or lost object, not the cost of  
 23 a newer and better object. Here, there is a good estimate, provided by the victim itself, of the value of the damaged  
 property, adjusted for inflation. There is no reason to look at the costs of building a new building, with different  
 features, to determine the value of the old building.

24 Notably, in the Eugene cases, the Government cited to the \$3,312,434.95 figure as the loss amount for the  
 25 UW fire. Ex. 7.

26 <sup>8</sup> At times, the Government has suggested that the jury did not convict Ms. Waters of all counts  
 27 because of sympathy and the fear that she would be sentenced to a 30-year mandatory minimum. This argument,  
 28 however, does not apply to the conspiracy count, because there was no mandatory minimum connected to that count.  
 The jury obviously did not believe all of Ms. Kolar’s and Ms. Phillabaum’s testimony, and must have credited  
 portions of Ms. Waters’ testimony, leading to the conclusion that the verdict was the result of a compromise, and was

(continued...)

1 of the Government's arguments which were often times based upon character  
2 assassination and innuendo.

3 Accordingly, simply because Ms. Waters was convicted of some (but not all)  
4 counts should not lead to the conclusion that she "obstructed" justice or that she  
5 "perjured" herself. See United States v. Abdul-Aziz, 487 F.3d 471, 478-79 (8<sup>th</sup> Cir.  
6 2007) ("A district court cannot, however, impose the departure simply because a  
7 defendant testifies on his own behalf and the jury disbelieves him.") (internal quotes  
8 and cites omitted).

9 **C. Downward Adjustments**

10 **i. Mitigating Role in Offense**

11 Under § 3B1.2, the base offense level should be decreased based upon a  
12 defendant's "mitigating" role in the offense. § 3B1.2(a) provides for a "4" level  
13 decrease if the defendant was a "minimal participant," which the Commentary  
14 describes as those defendants "who are plainly among the least culpable of those  
15 involved in the conduct of a group. Under this provision, the defendant's lack of  
16 knowledge or understanding of the scope and structure of the enterprise and of the  
17 activities of others is indicative of a role as minimal participant." § 3B1.2(b) allows for  
18 a "2" level reduction for "any participant who is less culpable than most other  
19 participants, but whose role could not be described as minimal." Further, "[i]n cases  
20 falling between (a) and (b), decrease by 3 levels." § 3B1.2.

21 In this case, even under Ms. Kolar's and Ms. Phillabaum's versions, Ms. Waters  
22 had a minor role in the case. Ms. Kolar and Ms. Phillabaum were both seasoned  
23 ELF/ALF members, who had attended the training camps, and were involved in other  
24 ELF/ALF actions, including the manufacture and placement of incendiary devices.  
25 The jury's verdict shows only that Ms. Waters was an accomplice, and it is not clear  
26 what the jury concluded her level of involvement really was. Given this minimal level

27 \_\_\_\_\_  
28 <sup>8</sup>(...continued)  
not a "finding" of perjury.

1 and the fact that the jury's verdict may have rested only on the fact that Ms. Waters  
 2 rented a car or let her garage be used, and given the evidence that Ms. Waters did not  
 3 attend the training seminars for the ELF/ALF, did not build or place devices, and did  
 4 not draft communiques, a "4" level reduction is warranted. Alternatively, the Court  
 5 should apply either a "2" or "3" level reduction.<sup>9</sup>

6 **ii. Family Circumstances**

7 The Court knows well that Ms. Waters is the mother of young child who has  
 8 already been torn from her mother. It is true that many other people come before the  
 9 Court who have young children, but that is rather not the point. Ms. Waters truly is a  
 10 devoted mother, whose child is deeply bonded to her, as many of the 200+ letters  
 11 already filed with the Court illustrate. Moreover, the Government's dismissive attitude  
 12 toward the fact that a defendant has a young child merely shows how callous the  
 13 system has become. Ms. Waters is not different from anyone else in this regard, but  
 14 rather the system needs to be more responsive to the suffering of innocent children  
 15 than it is.

16 Additionally, it should be noted that Ms. Waters' father is ill, and does live in  
 17 the Bay Area. While Ms. Waters has not always been extremely close to her father, he  
 18 will, in coming years, need her support.

19 The Ninth Circuit has recognized family circumstances as reason to depart  
 20 downward, and Ms. Waters should qualify for this adjustment. United States v.  
 21 Menyweather, supra. See also United States v. Wachowiak, 412 F. Supp.2d 958, 964

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23  
 24 <sup>9</sup> Ms. Waters respectfully disagrees with the USPS Presentence Report's conclusion that she is not  
 25 entitled to any reduction under this section because she allegedly "understood the scope and structure of the offense  
 26 and the activities of the ALF and ELF as a whole," and because she allegedly rented the car, was a lookout, let others  
 27 use a garage to build the devices, was romantically involved with Justin Solondz, and participated in the Susanville  
 28 arson. Many of these conclusions lack evidentiary foundation or are just not important. For instance, the fact that  
 Ms. Waters was in a romantic relationship with Mr. Solondz has nothing to do with whether Ms. Waters should  
 receive a reduction under § 3B1.2. Similarly, there is no proof that Ms. Waters was at Susanville, and, as noted, the  
 jury was not convinced that Ms. Waters was part of the ALF/ELF conspiracy. Finally, the allegations of the car  
 rental, being a lookout and letting other use a garage is evidence of a minimal role, compared to those who picked  
 the targets, and then built and placed the devices.

1 (E.D. Wisc. 2006), *aff'd* 496 F.3d 744 (7<sup>th</sup> Cir. 2007) (below guidelines sentence  
2 imposed where “the guidelines failed to account for the strong family support  
3 defendant enjoyed, which would aid in his rehabilitation and re-integration into the  
4 community. Because the defendant’s family and friends have not shunned him despite  
5 learning of his crime, he will likely not feel compelled to remain secretive if tempted to  
6 re-offend. Rather, he will seek help and support.”) Ms. Waters’ offense level should  
7 be reduced by “3” points.

8 The USPS Presentence Report places the responsibility for separation from  
9 Kalliope “squarely” on Ms. Waters. That is always the case when a court is asked to  
10 take into account a young child when sentencing a mother. Who bears the  
11 “responsibility” is not the issue. Rather, the issue is whether given the tender years of  
12 Kalliope, and her deep bond to Ms. Waters, whether Kalliope should be taken from her  
13 mother for an extended time at this point in time. The fact that Ms. Waters was  
14 convicted of committing a crime that took place seven years ago has little bearing on  
15 the answer to this question.

16 **iii. Life-Time of Good Works**

17 Ms. Waters should get a reduction based upon a lifetime of “good works.”  
18 There were numerous witnesses at trial who testified about Ms. Waters’ commitment  
19 to peaceful and non-violent environmental action which led to the saving of an old  
20 growth forest near Randle, Washington and the preservation of Randle itself. The film  
21 “Watch” (which the Court viewed during the trial) documents this remarkable effort,  
22 and is an unusual accomplishment much different than the accomplishments of many  
23 people who come before the Court for sentencing. The film was widely distributed  
24 and influenced countless people to show them that the way to change the world  
25 positively was through non-violence and building coalitions between various and  
26  
27  
28

1 sometimes adverse communities. The defense submits that the film reveals an insight  
2 into Ms. Waters' mind as well as her positive influence on the community in 2001.<sup>10</sup>

3 Subsequent to the production and distribution of this film, Ms. Waters became  
4 more interested in music and made positive contributions to her community in the Bay  
5 Area by performing benefit concerts, setting up parenting communities, and playing at  
6 senior citizen homes. Ms. Waters often brought Kalliope with her to her performances  
7 for senior citizens, so that those elders of our community, who often do not have  
8 interactions with anyone, could have their days enriched by contacts with a young child  
9 as well as by the joy and comfort of beautiful music. In this regard, it is important to  
10 note that Ms. Waters is no longer an environmental activist in the same way that she  
11 was in the late 1990s and early 2000s. Rather, her focus has shifted to improving  
12 people's lives on less global basis, but one that is still just as important.

13 Many of the 200+ letters submitted so far are from people who know Ms.  
14 Waters personally who vouch for her "good works." Ms. Waters has touched many,  
15 many lives in the community in incredibly positive ways. Not many defendants come  
16 to court for sentencing with such impressive accomplishments. Accordingly, Ms.  
17 Waters' life should lead to a reduction in the offense level. See e.g. United States v.  
18 Canova, 412 F.3d 331, 343 (2d Cir. 2005); United States v. Taylor, 499 F.3d 94, 99-  
19 100 (1<sup>st</sup> Cir. 2007). Her offense level should be reduced by "3" points.

20 Additionally § 5K2.20 specifically allows for a departure below the guideline  
21 range if a defendant's criminal conduct constituted aberrant behavior. Ms. Waters  
22 qualifies for this departure because the offense did not involve serious bodily injury or  
23 death, did not involve a firearm or a dangerous weapon (the jury did not find Ms.  
24 Waters guilty of the firearm count), and was not a drug trafficking offense. Ms.  
25 Waters also does not have any criminal history points. Given the jury's ambiguous  
26 verdict, it cannot be said that Ms. Waters' involvement in the case involved significant

27 \_\_\_\_\_  
28 <sup>10</sup> Ms. Waters' film stands in contrast to the publications of others (such as Stanislas Meyerhoff)  
which endorsed property destruction as a tactic.

1 planning. Moreover, if Ms. Waters' alleged involvement in the UW arson put her into  
2 an association with those in the ELF/ALF, her purported involvement was of limited  
3 duration, and represented a "marked deviation . . . from an otherwise law-abiding life."  
4 See United States v. Vieke, 348 F.3d 811 (9<sup>th</sup> Cir. 2003) (upholding a four level  
5 downward departure in credit card fraud case where crime was caused by gambling  
6 addiction, and was "totally out of suit with the rest of her life" even though the fraud  
7 went on for years).

8 While "good works" and "aberrant behavior" may well permit separate  
9 downward departures, at the very least, they should be jointly considered to reduce the  
10 offense level by "3" levels.

11 The USPS Presentence Report rejects such a reduction on the theory that Ms.  
12 Waters' film and music activities "fail to reflect a lifetime of good works or counter  
13 the harm caused by the underlying offense." The defense is puzzled by this  
14 conclusion. A reduction for "good works" is not meant to "counter" the harm caused  
15 by an offense. Rather, the reduction credits the good things someone may have done  
16 with her life and treats a person with a lifetime of good works in a positive manner,  
17 shaving levels off a Guideline sentence. In no case where courts have applied such a  
18 reduction for "good works" have the courts ever said that a lifetime of good works  
19 somehow "counters" the harm caused by the offense.

20 Additionally, the USPS Presentence Report minimizes Ms. Waters' life. Ms.  
21 Waters' film, as noted, was not just a college project, but instead documented an entire  
22 campaign designed, peacefully, to save a small town in Washington from being  
23 destroyed by the logging of an old growth forest. Ms. Waters not only was part of that  
24 campaign at a young age, but spent considerable time distributing her film, which  
25 promoted non-violent, peaceful coalition building. Since she moved to Oakland, as  
26 noted, her involvement in the community have been more modest, but no less  
27 important, and cannot just be written off as mere "benefit concerts." She has spent her  
28 life helping others, not only in the music world, but also through her active

1 involvement in the Laurel Parents Group. Ms. Waters' life has been about helping  
2 others and she should have her sentence reduced in recognition of this fact.<sup>11</sup>

3 **iv. Post-Offense Rehabilitation**

4 Even assuming that Ms. Waters did what the jury convicted her of doing, that  
5 was in 2001. In the past seven years, Ms. Waters has had no contacts with the criminal  
6 justice system; she has led a law-abiding and productive life, and a life that literally  
7 hundreds of people vouch for. This post-offense rehabilitation is a basis for mitigating  
8 the sentence. United States v. Thompson, 315 F.3d 1071, 1077-78 (9<sup>th</sup> Cir. 2002)  
9 (Berzon, J., concurring); United States v. Green, 152 F.3d 1202, 1206-07 (9<sup>th</sup> Cir.  
10 1998).

11 At this point, one of the purposes of extended imprisonment – rehabilitation– is  
12 no longer present. If Ms. Waters committed any offense, she has already become  
13 rehabilitated. Accordingly, her offense level should be reduced by “3” points.

14 The USPS disagrees with this reduction because the crime was committed in  
15 2001, and Ms. Waters was identified as a suspect in 2005. Apart from the fact that Ms.

---

16  
17 <sup>11</sup> In Taylor, the First Circuit approved of a downward departure based upon good works under these  
18 circumstances:

19 [T]he district court noted that people from all walks of life wrote to the court to attest to the fact  
20 that Taylor had gone out of his way to help them and the community. Many of Taylor's students  
21 and colleagues also wrote and testified, explaining his importance to the school as a music teacher  
22 and that he had often gone above and beyond his job duties to organize concerts for pupils.  
23 Perhaps the most striking testimony to Taylor's contributions to his school was contained in a letter  
24 from the Boston Public Schools indicating that Taylor would be allowed to continue teaching if  
25 he was not sent to prison, notwithstanding the fact that he had been found guilty of fraud. In light  
26 of the testimony at Taylor's sentencing hearing and the vast number of letters documenting Taylor's  
27 extensive service to his community, we believe that the district court reasonably interpreted the  
28 facts to find that Taylor had engaged in extraordinary good works, and that as such, U.S.S.G. §  
5H1.11 militated in favor of a lower sentence.

499 F.3d at 99-100. Ms. Waters' life's works are no different.

26 As an aside, it should be noted that the defendant in Taylor went to trial on tax fraud charges, and testified  
27 on his own behalf, denying guilt. He received an enhancement for “obstruction” which was based on the fact that  
28 the defendant had counseled others to falsify evidence and lie. Still, the defendant's lifetime of “good works” was  
seen as a valid ground to mitigate the sentence (although the First Circuit reversed based upon the failure of the  
district court to give adequate explanations for its probationary sentence).

1 Waters was not approached by the FBI until February 2006, the defense sees this delay  
2 only as support for the argument that the years between the arson and the filing of  
3 charges supports a reduction for post-offense rehabilitation. The USPS also points to  
4 the fact that Ms. Waters denied committing the offense and allegedly perjured herself  
5 on the stand. Of course, denial does not change the fact that Ms. Waters led an  
6 exemplary life in the years between 2001 and 2006. As for allegedly lying on the  
7 stand, this factor has already been addressed above, and does not properly rebut the  
8 undisputed fact that Ms. Waters was already “rehabilitated” by the time Agent Halla  
9 knocked on her door.

10 **D. Downward Adjustments to Criminal History**

11 Ms. Waters has never been convicted of a crime. She would normally be in  
12 Criminal History Category I. If the Court imposes the “terrorism” enhancement, there  
13 should be a reduction under § 4A1.3 because the final criminal history would overstate  
14 the defendant’s propensity to commit crimes. See United States v. Benkahla, 501 F.  
15 Supp.2d at 758-6. See also United States v. Cuevas-Gomez, 61 F.3d 749 (9<sup>th</sup> Cir.  
16 1995).

17 Indeed, Judge Aiken did exactly this for Suzanne Savoie, one of the Oregon  
18 defendants, where she found the terrorism enhancement, but then reduced the criminal  
19 history to Category II, having found that:

20 a criminal history category of VI substantially overrepresents your  
21 criminal history, given the lack of serious or extensive uncharged  
22 conduct and the lack of activities that would establish a propensity to  
23 engage in criminal behavior, such as continuing involvement with  
coconspirators, involvement with drugs, or illegally purchasing,  
collecting — and collecting firearms, as was the case with other  
defendants.

24 Ex. 8.

25 In this case, there is no hint that Ms. Waters had continuing involvement with  
26 coconspirators, that she was involved with illegal drugs, that she illegally purchased or  
27 collected firearms and the like. Thus, even if an enhancement is imposed because of  
28

1 “terrorism,” Ms. Waters’ criminal history category should be reduced to no higher than  
 2 a Category II.<sup>12</sup>

3 **E. The Guidelines Sentence**

4 Assuming that the Base Offense Level is “23,” the following calculations apply:

5 Base Level 23

6  
 7 Adjustments:

8 -4 §3B1.2, minimal role

9 -3 Family circumstances

10 -3 Good works and Aberrant Behavior

11 -3 Post-Offense Rehabilitation

12 Total Offense Level: 10

13 With a criminal history of Category I, the Guidelines Range is 6-12 months.

14 **F. § 3553 Factors**

15 As noted above, calculating the Guidelines range is but the first step in setting  
 16 the proper sentence. Here, the § 3553(a) factors strongly support the mitigation of the  
 17 sentence significantly below the Guideline range. Ms. Waters’ personal circumstances,  
 18 her history of making positive contributions to society (as evidenced by the 200+  
 19 letters), the length of time since the UW fire took place, and the lack of any real  
 20 purpose that extended incarceration would serve justifies a minimal sentence.

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21  
 22 <sup>12</sup> Additionally, if the Court does impose the terrorism enhancement, the Court should be reduce the  
 23 Criminal History category because of the possibility that in the future the designation of Ms. Waters as a “terrorist”  
 24 will lead to a higher security classification and placement in onerous prison conditions (such as the Communications  
 25 Management Unit at the Federal Correctional Complex in Terre Haute, Indiana). Such restrictive incarceration  
 conditions in themselves should operate to mitigate the sentence. See United States v. Noriega, 40 F. Supp.2d 1378  
 (S.D. Fla. 1999) (reducing sentence because of conditions of confinement).

26 Ms. Waters recognizes that the Oregon defendants have not been placed in such units in the year since their  
 27 sentences were imposed. However, it is not known what will happen years in the future, and it is not so far-fetched  
 28 to assume that someone given an official “terrorism” designation in 2008 may well be incarcerated in severe  
 conditions five or ten years from now. Accordingly, if the Court determines that Ms. Waters is subject to the  
 terrorism enhancement, the prospect of harsh confinement in the future should lead the Court to reduce her Criminal  
 History category at this time.

1 Whatever the Government claimed Ms. Waters did in 2001, it is undisputed that  
2 hundreds of people vouch for the fact that Ms. Waters is *currently* not a danger to  
3 anyone and is a productive member of her community. Removing Ms. Waters from  
4 her community – from the parents group, from teaching violin to children, from  
5 performing for senior citizens – will advance none of the goals in § 3553(a) and  
6 actually will hurt society.

7 Additionally, one of the main goals of § 3553(a) includes “the need to provide  
8 restitution to any victims of the offense.” § 3553(a)(7). Locking Ms. Waters up in a  
9 prison for an extended time will do little to achieve that goal. See United States v.  
10 Menyweather, 447 F.3d at 634 (“We also observe that the district court's goal of  
11 obtaining restitution for the victims of Defendant's offense, 18 U.S.C. § 3553(a)(7), is  
12 better served by a non-incarcerated and employed defendant.”).

13 Finally, one of the main § 3553(a) factors is the need to avoid sentence  
14 disparities. 18 U.S.C. § 3553(a)(6). Here, for instance, it is important to make  
15 reference to the sentences imposed on the other defendants from both this district and  
16 the District of Oregon.<sup>13</sup> The USPS Presentence Report declined to compare  
17 sentences from the Eugene case because such comparisons would create a selection  
18 bias. However, the comparisons to the Eugene case are apt because the conspiracy  
19 charges in Oregon overlap with the conspiracy charge in this district and the  
20 Government itself offered evidence of the Oregon fires as evidence at Ms. Waters’  
21 trial. Accordingly, the sentences imposed in both districts should be examined.

22 For instance, Stanislas Meyerhoff was a main participant in the ELF conspiracy,  
23 and admitted involvement in at least 12 arsons. Although he agreed to cooperate with  
24 law enforcement, he also attended all the “Book Club” meetings, trained others  
25 (including a juvenile, Ian Wallace) how to build incendiary devices, had a leadership  
26 role in various arsons, amassed an arms cache, participated in an attempted

27 \_\_\_\_\_  
28 <sup>13</sup> Some of this information comes from the Government’s own sentencing memorandum in the  
Oregon cases, selections of which are contained in Ex. 7.

1 assassination (of Jonathan Paul), wrote the arson manual for the ELF, continued  
2 associating with his co-conspirators for years after the conspiracy ended (i.e. Lacey  
3 Phillabaum) and planned other criminal activities years after 2001 (i.e. the surveillance  
4 of the naval installation). Mr. Meyerhoff received a sentence of 156 months, or about  
5 13 months per arson.

6 Jake Ferguson was the self-proclaimed “founder” of the ELF. Although he  
7 agreed to cooperate, he participated in almost 15 arsons and has prior convictions,  
8 including convictions for various offenses. He is receiving a sentence of probation.

9 Kevin Tubbs was a core member of the ELF/ALF conspiracy and participated in  
10 at least 11 arsons. He was a recruiter of others, and manufactured and placed the  
11 device in at least one arson. He cooperated with law enforcement, and received a  
12 sentence of 151 months in prison (a little over 13 months per arson).

13 Jennifer Kolar participated in at least four arsons with destructive devices (and  
14 Mr. Ferguson believes that Ms. Kolar was involved in at least one other attempted  
15 arson that Ms. Kolar denied participating in, a planned attack on a restaurant in Eugene  
16 that served veal). She not only built and/or placed the devices, but she trained ELF  
17 members in encryption and secret communication and drafted communiques. She pled  
18 guilty to an 11(c)(1)(C) agreement to a term of 5-7 years. Although she agreed to  
19 cooperate, when she was first contacted by the FBI, Ms. Kolar actively tipped off her  
20 ex-boyfriend, Joe Dibee. In any case, she is receiving a sentence of between 1.25 and  
21 1.7 years per arson (discounting the planned attack on the restaurant).

22 Lacey Phillabaum pled guilty to conspiracy and to one arson with a destructive  
23 device. She attended all the “Book Club” meetings, regularly spoke out at public  
24 forums in favor of property destruction, drafted communiques and continued to be  
25 involved with co-conspirators in the years after 2001. Although she later cooperated,  
26 she obstructed earlier phases of the investigation and encouraged people to resist  
27 testifying before the grand jury. She received an 11(c)(1)(C) plea to a term of 3-5  
28 years.

1 Darren Thurston pled guilty to conspiracy and one arson – at Susanville – and  
2 received a 37 month sentence. Although he agreed to cooperate, still, Mr. Thurston  
3 was an alien who was in the country illegally, he used false identification cards, and he  
4 had possession of a huge buried arms cache (including automatic weapons). Mr.  
5 Thurston also had prior convictions for animal liberation activities and was suspected  
6 in the sending of razor blades through the mail to corporate executives.

7 Jonathan Paul, a long-time animal rights' activist who recruited Jennifer Kolar,  
8 pled guilty to conspiracy and Cavel West arson. He did not agree to testify for the  
9 Government. He received a sentence of 4 years and three months.

10 Daniel McGowan admitted to conspiracy and involvement in two arsons –  
11 Jefferson Poplar Farms and Superior Lumber. He was one of the ideological leaders of  
12 the effort to attack genetically modified crops. He also did not agree to testify for the  
13 Government, and received an 84 month sentence (42 months per arson).

14 Suzanne Savoie similarly admitted to conspiracy and involvement in two arsons  
15 (Jefferson Poplar and Superior Lumber). She was one the main proponents of  
16 targeting genetic research, and participated in the Book Clubs. She cooperated and  
17 received a 51 month sentence (25.5 months per arson).

18 Kendall Tankersly was involved in three arsons and one attempted arson. She  
19 cooperated and received a sentence of 46 months (11-12 months per offense).

20 Nathan Block and Joyanna Zacher pled guilty to conspiracy and participation in  
21 the Romania II and Jefferson Poplar Farms arsons. They did not agree to testify  
22 against others and received 92 months each (or 46 months per arson).

23 Chelsea Gerlach was a core member of the ELF/ALF. Although she  
24 cooperated, she had access to a buried arms cache, dealt drugs, and was assisting an  
25 alien (Mr. Thurston) live secretly in the country. She was involved in six arsons  
26 (including the Vail ski resort and an energy facility). She was also an active member  
27 of the conspiracy. She received a sentence of 9 years (or 1.33 years per arson).

28

1 When one views the above sentences, it is important to note that many of these  
2 defendants share characteristics that are absent in Ms. Waters' case. Many of these  
3 defendants, as noted, were core members of the ELF/ALF; they attended training  
4 sessions; some published "how to" manuals; others wrote communiques; some  
5 recruited others and were in leadership roles. Many continued to have access to hidden  
6 arms caches in the years after the conspiracy ended, while others lived illegal lifestyles  
7 with fake identifications and illegal drugs. Thus, even the reductions for cooperation  
8 (which typically in this district entitles to someone to a reduction to half the mid-point  
9 of the range) and for acceptance of responsibility would balance out against other  
10 factors that are simply not present in Ms. Waters' case. Thus, Ms. Waters should  
11 receive no more than 1-2 years per arson.

12 While a sentence of 1-2 years is proportionate to that of those defendants who  
13 were actually in the ELF/ALF, the Court is compelled to impose a mandatory  
14 minimum sentence of 5 years. This sentence, though, can be suspended and thus the  
15 Court should impose the 5 years, but then suspend a portion – 3.5 years, so that Ms.  
16 Waters spends 1.5 years in custody for one count of being a minor accomplice to an  
17 arson.

#### 18 **G. Conditions of Supervision**

19 As for conditions of the sentence, the defense is perplexed by the USPS'  
20 suggested computer monitoring conditions. Nothing about the arsons at the UW in  
21 2001 had anything to do with computers, and there is no basis to impose such strict  
22 computer monitoring conditions. See United States v. Sales, 476 F.3d 732 (9<sup>th</sup> Cir.  
23 2007); United States v. Barsumyan, 517 F.3d 1154 (9<sup>th</sup> Cir. 2008).

#### 24 **H. BOP Placement**

25 Ms. Waters requests that any confinement be at FCI Dublin, California. Ms.  
26 Waters' family, including her young daughter and her ailing father, would be nearby.  
27 Incarceration in any other facility would operate as an extreme hardship on Ms.  
28 Waters' family, which would not be able to visit her easily.

1                   **I.     Appeal Bond**

2           Ms. Waters also asks (1) this Court to release her pending her self-surrender to  
3 FCI Dublin, and (2) that the Court release Ms. Waters pending appeal under 18 U.S.C.  
4 § 3143 & § 3145. Here, Ms. Waters will not repeat prior arguments except to say that  
5 she respectfully submits that she is not a flight risk, that there are several issues that  
6 will likely be successful on appeal (such as the closure of the courtroom during pretrial  
7 motions and jury selection), that she is not a danger to the community and that there are  
8 exceptional circumstances including the fact that she has a young child. Finally, the  
9 last few months at SeaTac have been traumatic in that a woman on her cellblock  
10 (Roxanna Brown) recently died in custody, after her requests for medical assistance  
11 were ignored. Accordingly, the defense requests that Ms. Waters be released pending  
12 appeal. The release can be subject to any number of conditions, including electronic  
13 home monitoring or a property bond.

14                   **VIII. Conclusion**

15           There is no doubt that the trial in this case was quite contentious. However, at  
16 this point, the issue is how long of a prison sentence Ms. Waters should serve. Given  
17 Ms. Waters' life, her family circumstances, and her integration into a community,  
18 extended incarceration is not warranted. The defense hopes that the Court will impose  
19 the mandatory five years in prison, and then suspend a significant portion of the  
20 sentence.

21           Dated this 27<sup>th</sup> day of May 2008.

22                   Respectfully submitted.

23                   /s/Neil M. Fox  
24                   NEIL M. FOX  
25                   WSBA NO. 15277  
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CERTIFICATE OF SERVICE

I hereby certify that on the 27<sup>th</sup> day of May 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to attorney of record for the Plaintiff and all other parties.

\_\_\_\_\_  
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