

Judge Leighton

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 BRIANA WATERS,)
)
 Defendant.)

NO. CR05-5828RBL
GOVERNMENT’S SENTENCING
MEMORANDUM

Comes now the United States of America, by and through Jenny A. Durkan, United States Attorney for the Western District of Washington, and Andrew C. Friedman and Thomas M. Woods, Assistant United States Attorneys for said District, and files this Government’s Sentencing Memorandum.

I. INTRODUCTION

Defendant, Briana Waters, is before the Court for sentencing following her guilty pleas to conspiracy, in violation of 18 U.S.C. § 371, possessing an unregistered firearm, in violation of 26 U.S.C. § 5861(d), arson, in violation of 18 U.S.C. § 844(i), and using a destructive device, in violation of 18 U.S.C. § 924(c). Waters is scheduled to be sentenced at 9:00 a.m. on June 22, 2012.

Waters’ convictions are the result of her participation in two arsons committed on behalf of the Earth Liberation Front (ELF) and the Animal Liberation Front (ALF), namely, (1) the May 21, 2001, arson of the University of Washington Center for Urban Horticulture, and (2) the October 15, 2001, arson of the Bureau of Land Management, Litchfield Wild Burrow & Horse Corrals, in Susanville, California. The Center for Urban

1 Horticulture arson, in particular, was a horrific crime. It endangered firefighters who
2 fought to control the towering blaze. It destroyed an entire building devoted to the study
3 of botany, resulting in more than \$6 million in damage. It set back the research and
4 careers of countless professors, researchers, and students, who saw years of work
5 consumed in flames. And it terrorized occupants of the building, many of whom suffered
6 long-lasting emotional damage (in some cases, so severe that it caused them to move
7 elsewhere or change career).

8 Following her initial conviction at trial, and the reversal of that conviction by the
9 Ninth Circuit based upon an evidentiary ruling, Waters agreed to cooperate against the
10 last remaining defendant in the Center for Urban Horticulture arson, Justin Solondz. As a
11 result, the parties entered into an agreement under which they both have agreed to
12 recommend a sentence of 48 months' imprisonment, a recommendation in which the
13 Probation Office also has joined. As explained in greater detail below, this sentence
14 reflects the fact that Waters originally was sentenced to 72 months, and should receive
15 some benefit for cooperating. This sentence also punishes Waters proportionately to the
16 other participants in the conspiracy, taking account of Waters' role in the conspiracy (and,
17 specifically, the fact that Waters participated in two arsons).

18 Any lesser sentence would fail to reflect the fact that Waters' sentence necessarily
19 should be measurably longer than her co-defendant Lacey Phillabaum's 36-month
20 sentence, since (1) Phillabaum participated in only one arson, but Waters participated in
21 two; (2) unlike Phillabaum, who accepted responsibility for her crimes immediately,
22 Waters went to trial, perjured herself at that trial, and presented a defense that she had
23 been framed including by the FBI (which was particularly harmful, given that it likely
24 reinforced many of Waters' supporters' beliefs that authorities, and, in particular, law
25 enforcement, cannot be trusted); and (3) Waters deserves a lesser benefit than Phillabaum
26 based upon the matters, and for the reasons, described in the Government's Filing
27 Concerning Defendant's Sentencing. As a result, the Court should sentence Waters to 48
28 months' imprisonment, as provided by the Plea Agreement.

II. FACTS

1
2 In 2001, Waters was acquainted with William Rodgers, one of the leaders of a
3 group that previously had committed multiple arsons on behalf of ELF and ALF. *See*
4 Plea Agreement ¶ 7. Rodgers told Waters that he was planning to commit an “action”
5 targeted at the office of Professor Toby Bradshaw, a Professor at the University of
6 Washington Center for Urban Horticulture, and asked Waters to participate. *See id.*
7 Waters understood that the motivation for this action was that Professor Bradshaw
8 supposedly was involved in genetic engineering of poplar trees, research that Rodgers and
9 Waters opposed because they believed it harmed the environment. *See id.* In fact,
10 Professor Bradshaw’s research did not involve genetic engineering, but rather involved
11 traditional cross-breeding of trees.

12 Waters agreed to participate, and attended a series of meetings with Rodgers,
13 Jennifer Kolar, Lacey Phillabaum, and Waters’ then-boyfriend, Justin Solondz, during
14 which they made plans to set fire to Professor Bradshaw’s office. *See id.* Waters agreed
15 to obtain a car to be used for transportation to and from the arson, and subsequently
16 persuaded an unwitting relative to rent a car for Waters. *See id.* Waters also permitted
17 others, including Solondz, to manufacture incendiary devices in the garage of a house at
18 which Waters was living. *See id.*

19 On the evening of May 20, 2001, Waters and her co-conspirators drove to the
20 Center for Urban Horticulture with the incendiary devices Solondz had made. *See id.* In
21 the early morning hours of May 21, 2001, Waters hid in some nearby bushes and served
22 as a lookout, while three of the others walked to the Center for Urban Horticulture and
23 used the incendiary devices to start a fire in Professor Bradshaw’s office. *See id.* The
24 devices produced a huge fire that destroyed the entire Center for Urban Horticulture,
25 causing more than \$6 million of damage. *See id.* The towering fire endangered
26 firefighters, destroyed a substantial portion of a library containing rare horticulture books,
27 and destroyed substantial samples of endangered plant species contained in the Center for
28 Urban Horticulture. It also had an enormous impact on professors and students working
in the building, setting their research back years, causing some even to change careers,

1 and causing many to suffer long-lasting emotional impact, including fear of further
2 attacks.

3 Unlike Phillabaum, who saw the results of the arson, and turned away from
4 further such crimes, Waters participated in another arson a few months later.
5 Specifically, in September 2001, Waters participated in a horse release and arson at the
6 Bureau of Land Management, Litchfield Wild Burro & Horse Corrals in Susanville,
7 California. *See id.* Waters and her coconspirators committed this arson because they
8 objected to the BLM's treatment, and in some cases slaughter, of wild horses. The
9 Litchfield Wild Burro & Horse Corrals arson was the last arson committed by Rodgers'
10 ELF/ALF cell. Perhaps as a result, it also marked Waters' last participation in ELF/ALF
11 arsons.

12 **III. PRESENTENCE REPORT**

13 The Government has no objection either to the facts, or the calculation of Waters'
14 sentencing range, set forth in the Presentence Report. The Presentence Report calculates
15 Waters' sentence using the November 2011 Guidelines Manual, since this results in the
16 same offense level as the Sentencing Guidelines in effect at the time of Waters'
17 sentencing. *See* USSG § 1B1.11 (court should apply the Guidelines Manual in effect on
18 the date that offense of conviction was committed where necessary to avoid violating the
19 *ex post facto* clause of the United States Constitution); PSR ¶ 22.

20 **A. The Presentence Report Correctly Applies a Base Offense Level of 24.**

21 As the Presentence Report notes, Waters' offense is governed by Section 2K1.4 of
22 the Sentencing Guidelines. PSR ¶ 25. Section 2K1.4, provides that a defendant has a
23 base offense level of 24, if the defendant's crime caused the destruction of "a state or
24 government facility," or "a place of public use," or if the defendant's crime created "a
25 substantial risk of death or serious bodily injury." *See* USSG § 2K1.4(a)(1)(A), (B).
26 Waters' crime qualifies under all of these tests. The Center for Urban Horticulture, which
27 is part of the University of Washington, is both a state government facility and a place of
28 public use. The Litchfield Wild Burro & Horse Corrals, which belonged to the Bureau of
Land Management, is a federal government facility. And the arson of the Center for

1 Urban Horticulture created a substantial risk of death to responding firefighters. For all
2 of these reasons, the Presentence Report correctly recommends a base offense level of 24.
3 *See* PSR ¶ 25.

4 **B. The Presentence Report Correctly Applies an Adjustment because Waters’
5 Crime is a “Federal Crime of Terrorism.”**

6 The Presentence Report correctly applies an adjustment under Section 3A1.4 of the
7 Sentencing Guidelines because Waters’ crime is a “federal crime of terrorism.” *See* PSR
8 ¶ 27. Although Waters’ crime is substantively different from, say, the attacks of
9 September 11, 2001 -- a fact recognized in the Government’s recommendation of a
10 sentence far below Waters’ guidelines sentencing range -- it is clear that the crime still
11 falls within the definition of a “federal crime of terrorism.” Judge Burgess applied this
12 adjustment in sentencing two of Waters’ co-defendants, Phillabaum and Kolar, as well as
13 Waters herself, at her original sentencing, and this Court has applied the adjustment in
14 sentencing Solondz. *See also United States v. Thurston*, 2007 U.S. Dist. LEXIS 38185
15 (D. Ore. May 21, 2007), *aff’d*, 537 F.3d 1100 (9th Cir. 2008) (applying the adjustment to
16 other members of Rodgers’ ELF/ALF cell who targeted government buildings in States
17 other than Washington); *United States v. Christianson*, 586 F.3d 532, 539 (7th Cir. 2009)
18 (applying adjustment against another member of ELF/ALF).

19 Section 3A1.4 of the Sentencing Guidelines provides that, where a defendant is
20 convicted of “a felony that involved, or was intended to promote, a federal crime of
21 terrorism” the defendant’s offense level should be increased by 12 levels, and the
22 defendant’s criminal history category should be increased to Category VI. USSG
23 § 3A1.4. The commentary to Section 3A1.4 provides that the term “‘federal crime of
24 terrorism’ is defined at 18 U.S.C. § 2332b(g).” *Id.* comment. (n.1). That statute defines a
25 federal crime of terrorism to “mean[] an offense that -- (A) is calculated to influence or
26 affect the conduct of government by intimidation or coercion, or to retaliate against
27 government conduct; and B) is a violation of” any of a number of statutes, including 18
28 U.S.C. § 844(i). 18 U.S.C. § 2332b(g)(5).

1 Waters meets both prongs of this definition. First, Waters has pled guilty to
2 violating 18 U.S.C. § 844(i), which is one of the qualifying predicate statutes. Second,
3 her crime was “calculated to influence or affect the conduct of government by
4 intimidation or coercion, or to retaliate against government conduct.” Kolar testified that
5 the Center for Urban Horticulture was selected as a target because “th[e] group as a whole
6 had agreed on trying to pick a single topic to focus on, that we thought might be
7 winnable, and genetic engineering was decided to be that topic” and because “Toby
8 Bradshaw was a researcher there doing genetic engineering.” Tr. at 1333-34.

9 The communique issued after the arson confirms these facts. That communique
10 (which also claimed responsibility for the simultaneous arson of Jefferson Poplar Farm)
11 read

12 Part 1

13 At 3:15 am on Monday, May 21, the research of Toby
14 Bradshaw was reduced to smoke and ashes. We attacked his
15 office at the University of Washington while at the same time
16 another group set fire to a related target in Clatskanie,
17 Oregon, 150 miles away.

18 Bradshaw, the driving force in G.E. tree research,
19 continues to unleash mutant genes into the environment that is
20 certain to cause irreversible harm to forest ecosystems.

21 After breaking into Bradshaw’s office at the Center for
22 Urban Horticulture, we inspected the building for occupants
23 and set up incendiary devices with a modest amount of
24 accelerant. Although we placed these devices specifically to
25 target his office, a large portion of the building was damaged.
26 This extensive damage was due to a surprisingly slow and
27 poorly coordinated response from the fire department, which
28 was evident by their radio transmissions.

As long as universities continue to pursue this reckless
“science,” they run the risk of suffering severe losses. Our
message remains clear: we are determined to stop genetic
engineering.

From the torching of Catherine I’ve’s office at
Michigan State University to the total incineration of GE
seeds at the D & PL warehouse in Visalia, CA, the Earth
Liberation Front is growing and spreading. As the culture of
domination forces itself into our very genes, wild fires of
outrage will continue to blaze.

ELF

Part 2

1
2 Early Monday morning, May 21, we dealt a blow to
3 one of the many institutions responsible for massive hybrid
4 tree farming in the Northwest. Incendiary devices at Jefferson
5 Poplar in Clatskanie, Oregon, burned an office and a fleet of
6 13 trucks. Unfortunately, due to a design flaw, one targeted
7 structure was left standing. We torched Jefferson Poplar
8 because hybrid poplars are an ecological nightmare
9 threatening native biodiversity in the ecosystem. Our forests
10 are being liquidated and replaced with monocultured tree
11 farms so greedy, earth raping corporations can make more
12 money.

13 Pending legislation in Oregon and Washington further
14 criminalizing direct action in defense of the wild will not stop
15 us and only highlights the fragility of the ecocidal empire.

16 As we wrote in Clatskanie “You cannot control what is
17 wild.”

18 ELF

19 Earth Liberation Front

20 The Center for Urban Horticulture was owned and occupied by the University of
21 Washington, a state university – indeed, the state’s flagship university. Education is a
22 core governmental function. As a result, the Center for Urban Horticulture was part of
23 state government. Professor Bradshaw’s work as a faculty member similarly was part of
24 government. This is even more clearly the case because Professor Bradshaw testified that
25 much of his research was funded by grants from the federal Government. By targeting
26 the Center for Urban Horticulture to attack Professor Bradshaw’s work, Waters and her
27 co-conspirators clearly intended either to influence through intimidation, or to retaliate
28 against, government conduct. And the resulting communique not only acknowledged that
29 Bradshaw and his research were targeted, but contained the defiant claim that even
30 pending legislation would not stop the perpetrators of the Center for Urban Horticulture
31 and Jefferson Poplar Farm arsons.

32 For all of these reasons, Waters and her co-conspirators’ offense was “calculated
33 to influence or affect the conduct of government by intimidation or coercion or to retaliate
34 against government conduct,” 18 U.S.C. § 2332b(g)(5)(A), and the Presentence Report
35 correctly recommends that the Court apply the enhancement.

1 **C. The Presentence Report Correctly Declines to Apply a Downward**
 2 **Adjustment based upon Waters' Role in the Offense.**

3 Waters has objected to the fact that the Presentence Report does not recommend a
 4 downward adjustment based upon Waters' role in the offense. *See* PSR ¶ 28. Section
 5 3B1.2 provides that a defendant should receive a four-level downward adjustment where
 6 the defendant was a minimal participant, or a two-level downward adjustment where a
 7 defendant was a minor participant, in criminal activity. USSG § 3B1.2. To qualify for
 8 even the latter adjustment, a defendant must be "less culpable than most other
 9 participants." *Id.* comment. (n.3).

10 Waters does not meet this test. Waters attended planning meetings, provided a
 11 location for Solondz to build incendiary bombs, arranged for a rental car, served as a
 12 lookout during the arson (including radioing her co-conspirators to warn them of a
 13 passing police car), and drove a getaway car to pick up her co-conspirators. Waters' role
 14 was far larger than that of Phillabaum, who merely attended planning meetings and
 15 helped carry material to the Center for Urban Horticulture. It also was larger than that of
 16 Kolar, who merely attended planning meetings and cut the glass to Professor Bradshaw's
 17 office. Thus, Waters was not "less culpable than most other participants," *id.*, and the
 18 Presentence Report correctly declines to apply a downward adjustment for Waters' role.

19 **D. The Presentence Report Correctly Applies an Adjustment for Obstruction of**
 20 **Justice.**

21 The Presentence Report correctly applies a two-level upward adjustment under
 22 Section 3C1.1 of the Sentencing Guidelines for obstruction of justice. *See* PSR ¶ 29.
 23 Section 3C1.1 provides for a two-level adjustment "[i]f the defendant willfully obstructed
 24 or impeded, or attempted to obstruct or impede, the administration of justice during the
 25 investigation, prosecution, or sentencing of the instant offense." The guideline
 26 commentary expressly provides that this adjustment applies where a defendant commits
 27 perjury. USSG § 3C1.1 comment. (n.4(b)). To impose the adjustment, the Court must
 28 find that (1) Waters gave false testimony at her 2008 trial, (2) concerning a material
 matter, (3) with the willful intent to provide false testimony, rather than as a result of

1 confusion, mistake, or faulty memory. *United States v. Dunnigan*, 507 U.S. 87, 94
2 (1993). All three elements are present here.

3 At trial, Waters repeatedly denied any involvement in the Center for Urban
4 Horticulture arson. For example, she was asked

5 Q. You've heard testimony here from Lacey Phillabaum,
6 from Jennifer Kolar, that you were involved in the
7 arson that they committed at the University of
8 Washington in May 2001. . . .

9 Q. Were you in any way involved in that arson?

10 A. Absolutely not.

11 Tr. at 2371; *see also* Tr. at 2413 (Waters denied committing any crime with William
12 Rodgers); tr. At 2419 (Waters denied committing any crime with Jennifer Kolar).

13 Waters has subsequently admitted in her plea agreement that this testimony was
14 false, *see* Plea Agreement ¶7, and there can be no doubt but that it was both material and
15 willful. As a result, the PSR correctly recommends a two-level increase in Waters'
16 offense level for obstruction of justice.

17 **E. The Presentence Report Correctly Recommends a Downward Adjustment for**
18 **Acceptance of Responsibility.**

19 Finally, the Presentence Report correctly recommends that Waters' offense level
20 be decreased by three levels based upon Waters' acceptance of responsibility, pursuant to
21 Section 3E1.1 of the Sentencing Guidelines. *See* PSR ¶ 35.

22 Based upon the calculations discussed above, the Presentence Report correctly
23 recommends that the Court find that Waters' total offense level is 35, that her criminal
24 history category is VI, and that her Sentencing Guidelines range is 292-365 months. *See*
25 PSR ¶¶ 35, 60.

26 **IV. SENTENCING RECOMMENDATION**

27 As agreed to in the Plea Agreement, the Government recommends that the Court
28 sentence Waters to a term of imprisonment of 48 months (a recommendation in which the
Probation Office also has joined). Although this sentence represents a drastic downward
departure from Waters' Sentencing Guidelines range, the Government entered into a Plea

1 Agreement under which it has agreed jointly to recommend this sentence as a means to
2 balance two competing considerations.

3 First, Judge Burgess sentenced Waters to only six years' imprisonment following
4 her original conviction. The Government believes that that six-year sentence likely
5 created a cap on Waters' sentencing exposure following a retrial. Because the
6 Government believed it required Waters' cooperation in order successfully to prosecute
7 Solondz (who was scheduled to be returned from China in time for Waters' retrial), the
8 Government had to offer Waters something less than six year's imprisonment.

9 Second, the Government was determined to act consistently compared to the two
10 other defendants already sentenced in connection with the Center for Urban Horticulture
11 arson, namely Phillabaum, who was sentenced to 36 months' imprisonment, and Kolar,
12 who was sentenced to 60 months' imprisonment. As explained below, in order to fairly
13 punish Waters, the Government concluded that Waters' sentence necessarily had to be at
14 least 48 months. Any lesser sentence would unfairly benefit Waters relative to
15 Phillabaum, who deserved a materially-lesser sentence than Waters in every respect.

16 The Government believes that a 48-month sentence is consistent with the factors
17 set forth in 18 U.S.C. § 3553(a):

18 **A. The Nature and Circumstances of the Offense**

19 As an initial matter, there can be no dispute that Waters played a substantial role in
20 a serious crime. Waters participated in a series of meetings to plan the arson. Waters
21 allowed her then-boyfriend, Solondz, to use a garage in which she was living to build
22 incendiary bombs for the arson. Waters tricked her cousin into renting a car that Waters
23 and her co-conspirators used to commit the arson. And, Waters served as a lookout
24 during the arson, including radioing to her co-conspirators to warn them of a passing
25 police car.

26 There also is no dispute that the arson was a terrible crime. Based on their
27 erroneous conclusion that Professor Bradshaw was performing genetic engineering of
28 poplar trees, Waters and her co-conspirators burned a large university building devoted to
botanical research and teaching. In doing so, they created a huge fire that easily could

1 have injured or killed either students (who often worked and slept in the building
2 overnight) or responding firefighters (for whom this was the largest -- and one of the most
3 dangerous -- fires they battled during the entire year of 2001).

4 Waters and her co-conspirators caused more than \$6 million of damage to the
5 University of Washington. They caused even greater professional, psychological, and
6 other non-economic harm to the occupants of the Center for Urban Horticulture. To take
7 but three examples:

- 8 -- C.C., a graduate student, submitted a victim impact
9 statement that refers to "the years [her] graduation has
10 been delayed" because of the destruction of her
11 research and her laboratory, and that states that she has
12 "irreversibly lost [] a basic trust of people."
13 -- L.C.-S., a faculty member, submitted a victim impact
14 statement that indicates that the arson resulted in the
15 "destruction of [her] lab research career," and that she
16 was "effectively forced to change jobs because [she]
17 could no longer continue to do what [she] had come to
18 UW and CUH to do." The statement also notes that
19 the arson "terrified [her] children, who were 6 and 11
20 at the time."
21 -- S.R., another professor, submitted a victim impact
22 statement that indicates that she lost a year of work,
23 and easily could have failed to get tenure, as a result of
24 the fire. "Graduate students lost their work and had to
25 postpone job offers and additional educational
26 opportunities." S.R. notes that "[t]his violent act
27 devastated us and . . . we, as individuals, will never
28 fully recover. They took years away from us and
changed how we look at our fellow human[] beings."
S.R. also began having panic attacks immediately after
the fire, and, ultimately, moved because of the fire
because her residence was listed in the phone book.

22 In sum, Waters' crime had a devastating -- and fully foreseeable -- impact on an academic
23 community, none of the members of which did anything to deserve that impact.

24 Moreover, unlike Phillabaum, who withdrew from the conspiracy after the Center
25 for Urban Horticulture arson, Waters participated in another arson later in 2001, namely,
26 the arson of the Litchfield Wild Burro & Horse Corrals. Thus, Waters' criminal conduct
27 cannot credibly be characterized as a one-time mistake -- rather, it was repeated and
28 egregious.

B. Waters' History and Characteristics

1 Although Waters appears to be an admirable person in certain respects (as
2 witnessed by the number of letters submitted on her behalf), the circumstances of this
3 case raise substantial questions about Water's history and characteristics.
4

5 In a letter to the Court, Waters repeatedly seeks to excuse her conduct as that of a
6 naive and immature person 11 years ago. Waters' characterization is not entirely fair.
7 Her criminal conduct did not stop in 2001. Rather, it continued until 2008. Each of the
8 other members of Rodgers' ELF/ALF cell who was arrested (except Rodgers, who
9 committed suicide) pled guilty and either (1) agreed to cooperate or (2) agreed to a
10 limited form of cooperation in which they gave proffers describing their own criminal
11 conduct, but refused to identify or cooperate against others. Waters, by contrast,
12 originally went to trial and obstructed justice by presenting a defense premised upon her
13 own perjury.

14 Moreover, Waters' defense was characterized by repeated groundless accusations
15 of Government misconduct and judicial bias. Thus, Waters repeatedly alleged that
16 Federal Bureau of Investigation Special Agents and Assistant United States Attorneys
17 suppressed evidence, lied, and obstructed justice. Significantly, Judge Burgess repeatedly
18 found "no evidence of government misconduct." *See, e.g.*, Order Affirming Magistrate
19 Judge's Detention Order, at 2 (Mar. 28, 2008). Waters's response, however, was to file a
20 Ninth Circuit brief alleging "consistently biased rulings" by Judge Burgess.

21 Waters' defense also was characterized by vicious attacks on cooperating
22 witnesses. For example, defense counsel outed one of the government's witnesses, Kolar,
23 on the stand, and called another witness, Phillabaum, an "unprincipled slut." Waters
24 necessarily was complicit in this defense strategy, since her uncorroborated testimony that
25 Kolar supposedly had romantically approached Waters, and that Phillabaum supposedly
26 had had an affair with Solondz (facts denied by both Kolar and Phillabaum), provided the
27 only supposed basis for these attacks.

28 Waters' obstruction of justice culminated in her own testimony. Waters perjured
herself during that testimony, both by making general claims of innocence and by denying

1 specific facts that were established both by the testimony of other witnesses and by
2 corroborating documentary evidence. Waters' obstruction of justice and perjury were not
3 only fresh crimes committed by Waters in 2007, they came at great cost to our system of
4 justice. Waters and her counsel appeared to be playing to an audience that is extremely
5 skeptical of government and law enforcement. By falsely claiming to be innocent, and by
6 making what she knows to be groundless claims of misconduct, Waters fueled
7 perceptions of injustice.

8 Waters also contributed to an environment in which others are likelier to commit
9 fresh crimes of violence. One of the arsons committed by Waters' co-conspirators was
10 the March 2001 arson of Joe Romania Chevrolet in Eugene, Oregon. That arson was
11 committed "in support" of two other persons who had committed an ELF arson at Joe
12 Romania Chevrolet in 2000 and who were on trial for that arson in March 2001. The
13 government does not believe that it is a coincidence that a major ELF arson -- in fact, the
14 largest ELF arson in the State of Washington since the Center for Urban Horticulture
15 arson -- took place in Snohomish County, Washington, while the jury was deliberating in
16 Waters' case. By falsely protesting her innocence, and by constantly claiming
17 government and judicial misconduct, Waters fueled an environment in which such crimes
18 continue to occur.

19 Waters' actions in engaging in two separate arsons, months apart, and her
20 willingness to go to any lengths -- including perjury, vicious attacks on witnesses, and
21 unfounded accusations of government misconduct -- all to avoid being held responsible
22 for her own crimes, all raise significant questions about Waters' history and
23 characteristics.

24 **C. The Sentencing Range.**

25 As noted above, Waters' advisory sentencing range under the Sentencing
26 Guidelines is 235-293 months. This range is based in substantial part upon the fact that
27 Waters' crime qualifies as a "federal crime of terrorism." The Government is
28 recommending a sentence that is far below this range, based, in part, upon the recognition
that Waters' crime, while extremely serious, is qualitatively different from crimes of

1 terrorism that are intended to result in injury or death. Nonetheless, Waters' high
2 sentencing range counsels a substantial sentence.

3 **D. The Need to Avoid Unwarranted Sentence Disparities among Defendants.**

4 As noted above, the need to avoid unwarranted sentence disparities among
5 defendants requires a sentence no less than the 48 months that the Government is
6 recommending. Of the five participants in the Center for Urban Horticulture arson, Judge
7 Burgess and this Court already have sentenced three. (The fourth, Rodgers, committed
8 suicide following his arrest.)

9 -- Solondz, the last to be arrested and the defendant who
10 had the most significant role after Rodgers – including
11 making the incendiary devices used to burn the Center
12 for Urban Horticulture – received a sentence of 72
13 months.

14 -- Kolar, who participated in three arsons, and who
15 received a benefit based upon the matters discussed in
16 the Government's Filing Concerning Defendant's
17 Sentencing, received a sentence of 60 months'
18 imprisonment.

19 -- Phillabaum, who participated only in the arson of the
20 Center for Urban Horticulture, and who received a
21 benefit based upon the matters discussed in the
22 Government's Filing Concerning Defendant's
23 Sentencing, received a sentence of 36 months'
24 imprisonment.

25 In order to avoid unwarranted disparity, Waters clearly should receive a sentence
26 materially-longer than Phillabaum. Unlike Phillabaum, who pled guilty promptly, Waters
27 went to trial and presented a defense based upon elaborate perjury. Unlike Phillabaum,
28 who committed only one arson, Waters committed two. And Phillabaum clearly deserved
a greater benefit than Waters based upon the matters discussed in the Government's
Filing Concerning Defendant's Sentencing.

Indeed, one could well argue that Waters should receive a sentence comparable to
Kolar, with Waters' perjury at her initial trial balancing Kolar's participation in a third
arson, and the two receiving approximately equal benefits based upon the matters
discussed in the Government's Filing Concerning Defendant's Sentencing. Given the
Government's need for Waters' cooperation against Solondz, however, the Government

1 concluded that it had no choice but to agree to a joint recommendation of 48 months'
2 imprisonment.

3 Accordingly, the Government asks that the Court impose a 48-month sentence
4 upon Waters. The Government believes such a sentence can adequately be said to
5 balance the various factors set forth in 18 U.S.C. § 3553(a), and that any lower sentence
6 would fail to do so. A 48-month sentence will require Waters, who currently has served
7 the equivalent of approximately three-years-and-one-month in prison, including good
8 time, to return to prison for a period of some months. Based, in significant part, upon that
9 fact, it will serve the goals of deterring others from similar crimes, and will promote
10 respect for the law, reflecting the tremendous harm that the community has suffered as a
11 result of Waters' crime.

12 **V. RECOMMENDATION REGARDING PLACEMENT**

13 Waters has indicated through counsel that she intends to ask the Court to
14 recommend that she be placed in a halfway house to complete her sentence. Such a
15 recommendation would be based upon 18 U.S.C. § 3624(c)(1), which was amended in
16 2008 to provide that the Bureau of Prisons (BOP) "shall, to the extent practicable, ensure
17 that a prisoner serving a term of imprisonment spends a portion of the final months of that
18 term (not to exceed 12 months), under conditions that will afford that prisoner a
19 reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the
20 community. Such conditions may include a community correctional facility." 18 U.S.C.
21 § 3624(c)(1). Waters suggests that the Court should rely upon this provision to
22 recommend that Waters spend the entire approximately-11 months left of her anticipated
23 48-month sentence in a halfway house.

24 This Court should not do this for two reasons. First, BOP's implementing
25 regulations provide that halfway house placements should generally be limited to six
26 months or less. On April 14, 2008, BOP issued a memorandum that provides that
27 "[w]hile the Act makes inmates eligible for a maximum of 12 months pre-release RRC
28 [i.e., residential reentry center] placements, Bureau experience reflects inmates' pre-
release RRC needs can usually be accommodated by a placement of six months or less."

1 *Sacora v. Beaman*, 628 F.2d 1059, 1063 (9th Cir. 2010) (quoting the BOP memorandum).
2 On November 14, 2008, BOP issued a second memorandum that provides that “a RRC
3 placement beyond six months should only occur when there are unusual or extraordinary
4 circumstances justifying such placement, and the Regional Director concurs.” *Id.*
5 (quoting the BOP memorandum). The Ninth Circuit has upheld these memoranda and
6 procedures as reasonable constructions of 18 U.S.C. § 3624(c). *Id.* at 1065-70.

7 Although the ultimate decision of whether Waters should be permitted spend the
8 final 11 months of her sentence in a halfway house ultimately is BOP’s decision, *see* 18
9 U.S.C. § 3621(b); *United States v. Dragna*, 746 F.2d 457 , 458 (9th Cir. 1984), this Court
10 should not recommend such a placement, because Waters falls short of the standard that
11 BOP will apply. Waters’ request is based primarily upon the impact that a return to jail
12 will have on her daughter. Although this situation is certainly tragic, it is neither “unusual
13 [n]or extraordinary.” Unfortunately, all too many defendants, perhaps even the majority,
14 have children who are impacted by their parents’ decisions to engage in crime, and
15 subsequent incarceration. As a result, Waters’ parenthood is not a factor that BOP is
16 likely to weigh significantly in assessing Waters’ request to spend the last 11 months of
17 her sentence in a halfway house, and this Court should defer to BOP’s determination of
18 the appropriate amount of halfway house time to allow Waters at the completion of her
19 sentence for the serious crime of which she stands convicted.

20 Second, and even more important, making the recommendation that Waters seeks
21 will undermine the parties’ recommended sentence. As set forth in Part IV.A, Waters’
22 crime was a serious crime that resulted in significant danger to firefighters and others, in
23 more than \$6 million in property damage, and in serious professional and emotional
24 impacts on the professors and students who worked in the Center for Urban Horticulture.
25 Moreover, it was a high-profile crime that impacted the public, separate and apart from
26 those with direct connections to the Center for Urban Horticulture. As set forth in Part
27 IV.B, Waters compounded her crime by presenting a defense based upon perjury, upon
28 unfounded allegations of government misconduct, and upon outrageous attacks on those

1 of her former co-conspirators decided to accept responsibility, and try and to atone for
2 their crimes as best they could.

3 Waters already has been the beneficiary of a plea bargain under which the parties
4 are making a sentencing recommendation lighter than might have been the case, based
5 upon the need for Waters' cooperation in the prosecution of Solondz. The Court should
6 not contribute to making Waters' punishment even lighter, by recommending that Waters
7 be granted the unusual benefit of being permitted to serve nearly the final year of her
8 sentence in a halfway house. For the Court to do so would essentially give Waters the
9 same sentence that Phillabaum received, something Waters clearly does not deserve.
10 Allowing Waters to avoid returning to prison also would undermine respect for the law,
11 and the deterrent value to others of the Court's sentence. Put otherwise, Waters' crimes
12 and her subsequent behavior were so egregious that they demand Waters being required
13 to return to prison to serve the normal portion of her 48-month sentence.

14 Finally, declining to make the recommendation that Waters seeks is consistent with
15 the Plea Agreement into which the parties understood that they were entering. Prior to
16 executing the Plea Agreement, the Government contacted BOP and was informed that
17 BOP generally does not allow inmates to spend more than the last six months of a
18 sentence in a halfway house. This understanding was incorporated into the Plea
19 Agreement. *See* Plea Agreement ¶ 10 (providing that the Government will recommend a
20 six-month halfway house placement, "pursuant to the provisions of the Bureau of Prisons'
21 program allowing inmates to serve up to the final six months of a sentence in a residential
22 reentry center"). Thus, the Government understood, and believes Waters also understood,
23 that the parties' agreed 48-month recommendation would require her to serve some
24 additional period of imprisonment.

25 For all of these reasons, the Government believes the Court should recommend
26 that Waters be permitted to serve the last six months of her sentence in a halfway house,
27 consistent with BOP's general policy. The Court should, however, decline Waters'
28 invitation to recommend that Waters spend the entire remaining portion of her sentence in
a halfway house, which would be contrary to BOP's general policy, the parties' Plea

1 Agreement, and, most important, considerations of the factors listed in 18 U.S.C.
2 § 3553(a).

3 VI. CONCLUSION

4 For the foregoing reasons, the Court should sentence Waters to 48 months'
5 imprisonment, to be followed by three years' supervised release, should waive a fine
6 based upon Waters' inability to pay, but should order Waters to pay \$6,092,649.85 in
7 restitution and a \$400.00 penalty assessment. The Court should recommend that Waters
8 be incarcerated at FCI-Dublin, and that she be permitted to spend the final six months
9 (but no more) of her sentence at a halfway house.

10 DATED this 18th day of June, 2012.

11 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

s/ Andrew C. Friedman
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