

1 BENJAMIN B. WAGNER
United States Attorney
2 AUDREY B. HEMESATH
WILLIAM S. WONG
Assistant U.S. Attorneys
3 501 I Street, Suite 10-100
Sacramento, CA 95814
4 (916) 554-2700

5 IN THE UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF CALIFORNIA
7

8 UNITED STATES,) CASE NO. 2:13-CR-321 JAM
9 Plaintiff,)
10 v.) **SENTENCING MEMORANDUM OF THE**
11 BENJAMIN CUNHA,) **UNITED STATES**
12 Defendant.) Date: January 12, 2016
13) Time: 9:00 a.m.
14) Court: Hon. John A. Mendez

15 **I. INTRODUCTION**

16 The United States and the defendant agreed to a range of 84 to 90 months pursuant to
17 a plea agreement under Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure. The
18 United States seeks a sentence at the top of that range, 90 months, based on the government's
19 assessment that the defendant did not provide substantial assistance to the government. Plea
20 Agreement, ECF No. 46 at 5:23-28. The government requests that the Court accept Mr.
21 Cunha's guilty plea under the terms of the written plea agreement. ECF No. 46.

22 The PSR recommends a sentence at the mandatory minimum of 60 months. PSR ¶
23 81. For the following reasons, the government submits that a 60-month sentence is too low,
24 and the bargained-for 90 months is appropriate in light of the defendant's history as a serial
25 arsonist, the seriousness of the offense, the need to protect the public, and the need to deter
26 criminal conduct.
27
28

1 **II. BACKGROUND**

2 From August 2005 through September 2007, Cal Fire investigated a series of fires in
3 El Dorado and Amador counties. PSR ¶ 4. Two of the fires burned onto federal land.
4 Benjamin Cunha, a local firefighter, admitted to starting the fires. PSR ¶ 18. Cunha
5 indicated that his motivation was to earn overtime and to impress his peers. PSR ¶ 18.
6 Cunha was prosecuted in El Dorado county and pleaded guilty to state charges. PSR ¶ 4.
7 The federal government was not a party to Cunha’s 2008 plea agreement. As part of his state
8 plea agreement, Cunha agreed to cooperate, and he provided local law enforcement with the
9 details of at least 30 fires he admitted to starting in the El Dorado/Amador area.¹ PSR ¶ 4-5.
10 Cunha was sentenced to 365 days of jail, which he was allowed to serve in a program that
11 allowed him to leave the jail each day for work and return for sleep. Cunha was also
12 sentenced to 72 months of probation. PSR ¶ 34. The terms of probation included GPS
13 monitoring during the fire season. He completed his term of probation in the summer of
14 2012. PSR ¶ 34.

15 The next summer, July and August of 2013, authorities investigated two new
16 suspected arson fires in the El Dorado/Amador area. ECF No. 46 at 5:17-20. Law
17 enforcement determined that at least one of the fires was started using a time-delay
18 incendiary device similar to the time-delay incendiary devices Cunha had admitted to using in
19 the 2007-2008 series of El Dorado/Amador county fires. Cunha was a primary suspect in the

20
21
22 ¹ Cunha received transactional immunity from state prosecutors for the information he
23 provided to local law enforcement. PSR ¶ 4. However, the un compelled grant of
24 transactional immunity by the state prosecutors does not bind federal authorities. *United*
25 *States v. Camp*, 72 F.3d 759 (9th Cir. 1995) (statement of defendant under state grant of
26 transactional immunity could be used to increase sentence in federal case); *United States*
27 *v. Anderson*, 79 F.3d 1522, 1525-31 (9th Cir. 1996) (statement defendant who voluntarily
28 cooperated and testified in state proceeding admissible in federal case because testimony
was not compelled by state court under threat of contempt); *United States v. Camp*, 72
F.3d 759 (9th Cir. 1995) (“We decide whether at sentencing a federal court may consider
information revealed by a defendant in exchange for state transactional immunity. We
hold that it may and affirm.”).

1 2013 fires. Rather than continue the investigation of the 2013 fires, and to curb the risk of
2 any additional fires in the meantime, Cunha was charged in the current indictment for the two
3 2007 fires that the government alleged burned onto federal land. ECF No. 1 (Count 1, Mine
4 Fire; Count Two, Palmer Fire). Cunha had admitted to setting both those fires in a 2008
5 videotaped interview with local law enforcement. PSR ¶ 5. As part of the bargain struck in
6 the written plea agreement in this case, this office agrees not to prosecute the two 2013 fires.
7 ECF No. 46 at 5:17-20.

8 Cunha was charged in the federal indictment with two counts of violating 18 U.S.C. §
9 844(f)(1), each imposing a mandatory minimum sentence of 5 years. To avoid a minimum
10 10-year sentence after trial, Cunha bargained for a mid-range sentence of 7.5 years, and the
11 government agreed to dismiss the second count. ECF No. 46 at 5:12-16; 5:23-28. The plea
12 agreement contains the possibility that the government would recommend 84 months if
13 Cunha provided substantial assistance to the government. The government, in its discretion,
14 has determined that Cunha has not provided substantial assistance, and therefore recommends
15 a 90 month sentence per the written plea agreement. ECF No. 46 at 5:28-6:1.

16 **III. A 60-MONTH SENTENCE IS TOO LOW.**

17 The PSR's recommendation of a 60-month sentence, the statutory mandatory
18 minimum, is too low given Cunha's history as a serial arsonist, the need to protect the
19 community, the need to promote respect for the law, and the need to provide just punishment.
20 The PSR calculates the offense level at 23, and criminal history I. PSR ¶ 30, 37. The
21 corresponding sentencing range is 46-57 months. The PSR recommends a 60-month sentence
22 only because of the statutory mandatory minimum. PSR ¶ 61.

23 A sentence at the statutory mandatory minimum of 60 months does not take into
24 account Cunha's history as a serial arsonist. Cunha would receive this same sentence even if
25 this were his first fire. But Cunha has admitted to setting many fires, all in the same small
26 geographic area, using a trademark time delay incendiary device. ECF No. 46 at 13: 6-8.
27 Cunha admitted in the videotaped interview with local law enforcement that he developed
28

1 this time delay device based on his special knowledge acquired as a firefighter, and that his
2 goal was to create fires big enough that significant fire-fighting resources would be required
3 to extinguish the fires. Two of Cunha's stated goals were to impress his fellow firefighters
4 with his skill in fighting the very fires he started, and to accrue overtime pay. PSR ¶ 18. It
5 defies common sense that a serial arsonist, who voluntarily admitted to setting at least 30
6 fires, would score at criminal history zero and receive the same mandatory minimum
7 sentence as a first-time offender.

8 There is a high need to protect the community from Cunha. The type of arson to
9 which Cunha has pleaded guilty—wildland arson—has been recognized by the Ninth Circuit
10 as particularly concerning. *United States v. Warr*, 530 F.3d 1152, 1161 (9th Cir. 2008) (“His
11 conduct occurred during fire season when conditions were optimal to set fires which could
12 easily rage out of control. He started fires during the summer, in high wind, in dried grass.
13 He caused \$7 million in damage, destroyed part of the national forest lands, and placed many
14 peoples' lives in danger.”); *United States v. Hammond*, 742 F.3d 880 (9th Cir. 2014) (“Even a
15 fire in a remote area has the potential to spread to more populated areas, threaten local
16 property and residents, or endanger the firefighters called to battle the blaze.”). In *Warr*, the
17 Ninth Circuit found an above-guideline 120 month sentence to be substantively reasonable.
18 530 F.3d at 1160-61. Also similar to the instant case, the defendant in *Warr* had set 20 fires
19 in state and national forests, was relatively young, and had a history of having been trained as
20 a fire fighter. 530 F.3d at 1155, 1161. All of these factors in combination make Cunha a
21 continued danger to the community, and a sentence of 90 months entirely appropriate.

22 Additionally, the need to promote respect for the law supports a 90-month sentence.
23 Cunha was a trained firefighter who came from a family of firefighters, who knew better.
24 PSR ¶ 43. The idea that setting 30 wildland arson fires might be his gateway into a full-time
25 firefighting position shows a level of hubris that should be extinguished with an appropriately
26 punitive sentence. PSR ¶ 18.

27 Finally, a minimum sentence of 60 months does not provide just punishment. The
28

1 written plea agreement reflects the bargain of the parties: Cunha no longer faces the exposure
2 of a minimum 10 year sentence, in exchange for a mid-range number of 7.5 years. The
3 government does not receive the benefit of the written plea agreement if Cunha is sentenced
4 only to the mandatory minimum on one count. It is within this Court's discretion to accept or
5 reject the sentence bargain, but for the foregoing reasons, the government asserts that the 90-
6 month sentence is fair, necessary, and just. *In re Morgan*, 506 F.3d 705, 711 (9th Cir. 2007)
7 (Rule 11(c)(1)(C) plea agreements).

8 **IV. CONCLUSION**

9 For the reasons stated herein, the United States asks the Court to accept the Rule
10 11(c)(1)(C) plea agreement and sentence defendant Cunha to 90 months.

11
12 DATED: January 5, 2016

Respectfully Submitted,

13 BENJAMIN B. WAGNER
14 United States Attorney

15 By:

16 /s/ Audrey B. Hemesath
17 AUDREY B. HEMESATH
18 WILLIAM S. WONG
19 Assistant U.S. Attorneys
20
21
22
23
24
25
26
27
28