FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff - Appellee*, v. PHILIP ALEJANDRO POWERS III, AKA Philip Alejandro Powers III, *Defendant - Appellant*.	No. 23-2218 D.C. No. 3:23-cr-08027-MTL-1 OPINION

Appeal from the United States District Court
for the District of Arizona
Michael T. Liburdi, District Judge, Presiding

Argued and Submitted October 22, 2024
Phoenix, Arizona

Filed February 24, 2025

Before: Milan D. Smith, Jr., Bridget S. Bade, and Danielle J. Forrest, Circuit Judges.

Opinion by Judge Bade

APPENDIX A

SUMMARY*

Criminal Law

The panel affirmed (1) Philip A. Powers III's convictions, following a bench trial before a magistrate judge, on seven misdemeanor counts arising from his setting three fires in national forests (the "Taylor Fire," the "Sycamore Fire," and the "Sycamore 2 Fire"); and (2) an order of restitution.

Powers argued that the magistrate judge erred in refusing to apply the necessity defense to acquit him of the charges. A district judge affirmed the magistrate judge's conclusion that the necessity defense did not apply.

The panel held that because Powers did not show that he was facing imminent harm when he set the Taylor Fire, and because the manner in which he set the fire was objectively unreasonable, his necessity defense as to Counts 2 and 5 fails.

The panel held that because how Powers set the Sycamore Fire and his decision to leave it unattended and unextinguished were objectively unreasonable, he is not entitled to the necessity defense as to Counts 1, 3, and 6.

The panel held that because the undisputed facts do not show that Powers acted reasonably to preserve his life when he started the Sycamore 2 Fire, he is not entitled to the necessity defense as to Counts 4 and 7.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Powers did not otherwise challenge his convictions or the order of restitution.

COUNSEL

Paul V. Stearns (argued), Assistant United States Attorney; Krissa M. Lanham, Appellate Division Chief; Gary M. Restaino, United States Attorney; United States Department of Justice, Office of the United States Attorney, Flagstaff, Arizona; for Plaintiff-Appellee.

Daniel L. Kaplan (argued), Assistant Federal Public Defender; Jon M. Sands, Federal Public Defender, Federal Public Defenders Office, Phoenix, Arizona; Sarah Erlinder, Assistant Federal Public Defender, Federal Public Defenders Office, Flagstaff, Arizona; for Defendant-Appellant.

OPINION

BADE, Circuit Judge

After losing the trail while hiking in northern Arizona, Defendant-Appellant Philip A. Powers III deliberately set three fires in the Prescott and Coconino National Forests. The United States Forest Service (USFS) later named these fires the "Taylor Fire," the "Sycamore Fire," and the "Sycamore 2 Fire." The Sycamore Fire spread uncontrolled over 230 acres of forest, burning timber, shrubs, and grasses, and threatening Flagstaff, Arizona and the nearby watershed. Firefighters contained the fire after approximately nine days,

and the USFS incurred $293,413.71 in recoverable fire suppression costs.

The government charged Powers with seven misdemeanor counts arising from these fires: one count of leaving a fire unattended in violation of 18 U.S.C. § 1856 (Count 1) and six counts of violating USFS regulations (Counts 2 through 7). At a bench trial before a magistrate judge, Powers admitted setting the fires but asserted that he had done so out of necessity. Powers acknowledged that he was aware of the dry conditions and fire restrictions in the forests when he set the fires, but argued that he should nonetheless be acquitted because he was out of food and water, he did not have cell phone service, his physical condition was deteriorating, and his death was imminent. Therefore, he had no choice but to set the fires to "signal" for help. The magistrate judge rejected Powers's necessity defense and found him guilty on all counts, sentenced him to supervised probation, and ordered him to pay restitution to the USFS.

In this appeal, Powers challenges his convictions and the order of restitution.[1] He argues that the magistrate judge erred in refusing to apply the necessity defense to acquit him of the charges. We have jurisdiction under 28 U.S.C. § 1291. *See United States v. Bibbins*, 637 F.3d 1087, 1090 (9th Cir. 2011). Because Powers's actions in setting the fires were objectively unreasonable, and because he was not facing imminent harm when he set the Taylor Fire, he failed to meet the requirements of the necessity defense. Accordingly, we affirm.

[1] Powers has fully served his term of supervised probation.

I.

A.

In May 2018, Powers began an approximately nineteen-mile hike on the Taylor Cabin Loop trail near Sedona, Arizona.[2] The trail begins in the Coconino National Forest and weaves through the high desert of the Sycamore Canyon Wilderness Area. Powers brought mandarin oranges, mangos, granola, and approximately 116 ounces of water. He also brought camping gear, including a machete, a ka-bar knife, and a lighter. He had a GPS feature on his smartphone, but he did not bring a paper map or compass. The weather was "very hot and dry," and Powers knew that there were fire restrictions in the area prohibiting any fire without a permit.

After hiking twelve to fourteen miles of the nineteen-mile loop, Powers reached Taylor Cabin. Shortly after he passed the cabin, and about ten hours into the hike, he lost the trail. He became "very frantic" because he needed to find the connecting trail to go "around the mountain"; otherwise, the only way back to the trailhead was to hike the distance he had already traveled. He had not seen anyone on the trail and was running low on water, with no means of replenishing his supply.

After hiking for about forty minutes in search of the connecting trail, Powers doubled back to Taylor Cabin, arriving near sunset. He tried to use his phone to call for

[2] At first, Powers believed he was on the Cabin Loop trail, an approximately eighteen-mile hike near Flagstaff that is "moderate[ly]" difficult and weaves through a pine forest. In actuality, Powers was on the Taylor Cabin Loop trail, which is "[s]trenuous[ly]" difficult.

help, but he had no signal. He decided to stay at the cabin overnight.

B.

Around 9:00 p.m., Powers decided to set a signal fire. There was a fire pit next to Taylor Cabin, but Powers believed that a fire in the pit would not create enough smoke to be noticed by passing planes. Thus, he ignited a nearby patch of "dead grass mixed in with vegetation" that was "right next to [the] fire pit." This first fire, the Taylor Fire, spread over about a tenth of an acre, burning grass, brush, and small trees, but did not attract any rescuers. When he set the Taylor Fire, Powers had about sixteen ounces of water left, as well as some mangos, two mandarin oranges, and "dehydrated granola," in addition to jelly and coconut oil that he found in the cabin.

By the next morning, the Taylor Fire had died out. Powers finished his remaining water and began the fourteen-mile hike back to the trailhead. The second day of hiking was "rough." The temperature was around 100 degrees Fahrenheit. Powers was exhausted, lacked water, and believed he "was going to die" in the wilderness. His legs were cramping, and he felt like his body was "shutting down." After noticing that he had stopped sweating, Powers "knew [he] was in trouble." He resorted to drinking his own urine.

After hiking about three miles away from Taylor Cabin, Powers decided to set another fire. He "tried to get to a spot where [he] would be easily visible," thinking that a higher "vantage point" would allow the smoke to be "easily seen from the canyon." After searching for "dead brush that would easily ignite," "stay lit," and "cause smoke," Powers ignited a dead tree. He did not build a fire ring, dig a fire pit,

or remove any flammable materials from the area before starting the fire.

Powers stayed with this second fire, the Sycamore Fire, for about an hour, at which point it was "still smoldering" but appeared to be dying out. Thinking that the fire had failed to signal help, Powers decided to continue hiking. He abandoned his backpack but took his car keys and cell phone. He did not extinguish the Sycamore Fire before leaving.

Powers walked a few hundred yards, with frequent breaks, and drank his urine again. He started to feel like he was "hunching over" and his feet were "slipping" as he tried to hike. About thirty minutes after leaving the Sycamore Fire, Powers saw "a low-flying helicopter," which "looped around" and left. The helicopter returned approximately thirty minutes later, and Powers began doing "everything [he] could to get its attention." Because he was dressed in camouflage, he removed his underwear, which were orange, and waved them around on a stick.[3] He also ignited a third signal fire, the Sycamore 2 Fire, which spread to a three-foot circle before dying out. As with the other two fires, Powers did not start the Sycamore 2 Fire in a fire ring or pit, nor did he clear flammable materials from the area.

C.

The helicopter belonged to USFS, which had received reports of a wildfire. Unbeknownst to Powers, the Sycamore Fire had not died out—flying in, firefighters saw a smoke column and twenty to thirty acres of burning landscape. The

[3] Because he was exhausted, Powers could not remove his boots and pants, so he used a knife to cut through his pants and "rip [his underwear] off."

Sycamore Fire ultimately spread to 230 acres before it was contained.

After landing, firefighters spotted Powers lying under a tree. He was able to walk to the helicopter with the assistance of two firefighters. The helicopter crew gave him water and flew him to Sedona where he was put in an ambulance and given intravenous (IV) fluids. While in the ambulance, Powers admitted to setting the fires.

Powers was transported to an emergency medical center, where he was treated by Dr. Jeff Hardin, who diagnosed him with (1) severe dehydration, (2) rhabdomyolysis, (3) acute renal failure, (4) weakness, and (5) heat exhaustion.[4] Dr. Hardin consulted with a nephrologist, who recommended hospital admission and additional fluids. Powers was then transferred to a hospital in Cottonwood for further treatment.

D.

Powers was charged with seven federal misdemeanors: one count of leaving a fire unattended in violation of 18 U.S.C. § 1856, three counts of building a fire in violation of federal restrictions under 36 C.F.R. § 261.52(a), and three counts of causing a fire in a national forest without a permit in violation of 36 C.F.R. § 261.5(c). During a two-day trial, Dr. Hardin testified that Powers probably would have died within 24 hours had he not been rescued; he also described Powers as "pretty ill" but "not on death's door." Powers testified that he set the three fires because he "wanted to live" and, during closing arguments, asserted the necessity defense.

[4] Rhabdomyolysis is a "breakdown of the muscle in the body," which releases "toxins" and can cause various health problems, including kidney damage.

The magistrate judge found Powers guilty of all counts and concluded the necessity defense did not apply for three reasons. First, when Powers set the fires, the harm he faced was not sufficiently "imminent." Second, Powers acted unreasonably by setting the fires in the manner that he did because he had safer alternatives that, although "*per se* illegal," made his chosen conduct objectively unreasonable. Third, Powers created the conditions underlying the necessity because he was reckless and negligent in preparing for the hike. The magistrate judge sentenced Powers to one year of supervised probation, ordered a special assessment of $70.00, and levied stipulated restitution in the amount of $293,413.71 for the recoverable fire suppression costs.

Powers appealed this judgment to the district court, which affirmed the magistrate judge's conclusion that the necessity defense did not apply to excuse Powers's criminal conduct and entered a partial remand on grounds not relevant to this appeal. Powers timely appealed.

II.

We review the magistrate judge's legal conclusions de novo and her factual findings for clear error. *United States v. Doremus*, 888 F.2d 630, 631 (9th Cir. 1989); *see also United States v. Lantis*, 17 F.4th 35, 38 (10th Cir. 2021). Under the clear error standard, factual findings must be upheld so long as they are "plausible in light of the record viewed in its entirety." *June Med. Servs. v. Russo*, 591 U.S. 299, 301 (2020) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573–74 (1985)).

III.

Before determining whether the necessity defense applies to Powers's illegal conduct of setting fires in the

National Forests, we first review and clarify the defense's requirements. "The necessity defense is an affirmative defense that removes criminal liability for violation of a criminal statute." *Raich v. Gonzales*, 500 F.3d 850, 861 (9th Cir. 2007) (citation omitted). It "traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils." *United States v. Bailey*, 444 U.S. 394, 410 (1980). For example, "[a]n escapee who flees from a jail that is in the process of burning to the ground" may be entitled to the defense, *id.* at 415, "for he is not to be hanged because he would not stay to be burnt," *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 487 (1868); *see also United States v. Schoon*, 971 F.2d 193, 196 (9th Cir. 1991) (citing *United States v. Dorrell*, 758 F.2d 427, 432 (9th Cir. 1985)) (explaining that the necessity defense "justifies criminal acts taken to avert a greater harm, maximizing social welfare by allowing a crime to be committed where the social benefits of the crime outweigh the social costs of failing to commit the crime"), *as amended* (Aug. 4, 1992).[5]

"Because the necessity doctrine is utilitarian, however, strict requirements contain its exercise so as to prevent nonbeneficial criminal conduct." *Schoon*, 971 F.2d at 197. To prove necessity, a defendant must show "(1) that he was faced with a choice of evils and chose the lesser evil; (2) that

[5] In *Schoon*, we listed several examples of when the necessity defense may apply to excuse criminal conduct: "prisoners could escape a burning prison," "a person lost in the woods could steal food from a cabin to survive," "an embargo could be violated because adverse weather conditions necessitated sale of the cargo at a foreign port," "a crew could mutiny where their ship was thought to be unseaworthy," and "property could be destroyed to prevent the spread of fire." 971 F.2d at 196 (citations omitted).

he acted to prevent imminent harm; (3) that he reasonably anticipated a causal relation between his conduct and the harm to be avoided; and (4) that there were no other legal alternatives to violating the law." *United States v. Perdomo-Espana*, 522 F.3d 983, 987 (9th Cir. 2008) (quoting *United States v. Arellano-Rivera*, 244 F.3d 1119, 1125–26 (9th Cir. 2001)). All four elements must be proven by a preponderance of the evidence, and each is viewed through an objective framework. *Id.* at 987–88; *see United States v. Cruz*, 554 F.3d 840, 850 (9th Cir. 2009) (noting that a "'defendant must prove the elements of [an] affirmative defense by a preponderance of the evidence,' unless some other standard is set by statute" (quoting *United States v. Beasley*, 346 F.3d 930, 935 (9th Cir. 2003))).

Moreover, to benefit from the necessity defense, a person "must act reasonably."[6] *Perdomo-Espana*, 522 F.3d at 987–88 (applying the necessity defense and explaining that "[e]mbedded in our recognition that a person who seeks to benefit from a justification defense must act reasonably is the principle that justification defenses necessarily must be analyzed objectively"); *see also Bailey*, 444 U.S. at 410–11 (noting that "in the context of prison escape, the escapee is not entitled to claim a defense of . . . necessity unless and until he demonstrates that, given the imminence of the threat, violation of [the law] was his only reasonable alternative"); *United States v. Simpson*, 460 F.2d 515, 518 (9th Cir. 1972)

[6] At argument, Powers (through counsel) agreed that a person must act reasonably to invoke the necessity defense and rejected the position that a defendant could engage in *any* illegal conduct, so long as he did not have legal options. Powers offered the example that the necessity defense would not apply if he had started a signal fire by covering a portion of the forest floor with kerosine because doing so would be unnecessarily dangerous, even if it was likely to signal rescue.

(explaining that the societal benefit underlying justification defenses "is lost . . . when the person seeking to avert the anticipated harm does not act reasonably").[7]

Applying this reasonableness requirement to the third and fourth elements of the necessity defense, we have stated that "the law implies a reasonableness requirement in judging whether legal alternatives exist," *Perdomo-Espana*, 522 F.3d at 987 (quoting *Schoon*, 971 F.2d at 198), and "the defendant must '*reasonably* anticipate a causal relation between his conduct and the harm to be avoided,'" *id.* (alteration omitted) (quoting *Arellano-Rivera*, 244 F.3d at 1126). We now clarify that the reasonableness requirement also applies to the second element: The action a defendant takes to prevent imminent harm must be reasonable. *See Perdomo-Espana*, 522 F.3d at 987–88; *Schoon*, 971 F.2d at 197–98.

We next separately analyze each criminal act that Powers committed to determine whether the necessity defense removes criminal liability for that act.

A.

Powers's convictions for Count 2 (setting a fire in violation of USFS regulations) and Count 5 (unlawfully causing timber, trees, brush, and grass to burn without a permit) arise from the Taylor Fire. The magistrate judge found that Powers was not entitled to the necessity defense as to Counts 2 and 5 because he was not facing imminent harm when he set the Taylor Fire, and because his conduct in setting the fire in brush rather than in the fire pit that was

[7] The necessity defense is a type of justification defense. *See United States v. Barnes*, 895 F.3d 1194, 1205 n.4 (9th Cir. 2018).

only a few feet away was objectively unreasonable.[8] We agree.

1.

"The term 'imminent harm' connotes a real emergency, a crisis involving immediate danger to oneself or to a third party." *Barnes*, 895 F.3d at 1205 (alteration omitted) (citation omitted). For example, in *Perdomo-Espana*, we held that a defendant suffering from diabetes was not facing "imminent harm" because his condition was not "immediately dire." 522 F.3d at 988. Although the defendant asserted that he had dangerously high blood sugar levels, he showed no outward signs of illness when interviewed hours later (despite receiving no medical treatment in the interim); also, a doctor characterized him as a "non-urgent" patient who needed "longer-term care." *Id.* at 985; *see also Schoon*, 971 F.2d at 197 (the necessity defense does not condone crimes committed to "thwart threats" that are "yet to be imminent"); 2 Wayne R. LaFave, *Substantive Criminal Law* § 10.1(d)(5) (3d ed. 2023) ("[U]ntil the time comes when the threatened harm is immediate, there are generally options open to the defendant, to avoid the harm, other than the option of disobeying the literal terms of the law—the rescue ship may appear, the storm may pass; and so the defendant must wait until that

[8] The magistrate judge also found that Powers was not entitled to the necessity defense because he acted recklessly or negligently in preparing for the hike. Neither the Supreme Court nor the Ninth Circuit has addressed whether a defendant's reckless or negligent creation of the dangerous circumstances is relevant to a viable necessity defense. Because Powers's necessity defense fails for other reasons, we do not decide that issue.

hope of survival disappears." (footnotes and citations omitted)).

The undisputed facts demonstrate that Powers was not facing imminent harm when he set the Taylor Fire. At 9:00 p.m. on the first day of his hike, Powers had food, sixteen to twenty ounces of water remaining, and a sheltered place to rest, and his phone still had power. He was not yet ill except for some muscle cramping. Although Dr. Hardin testified that muscle pain may be a symptom of rhabdomyolysis, which in turn can lead to renal failure, he did not opine that Powers was suffering from dehydration, rhabdomyolysis, acute renal failure, or any other condition at the time he set the Taylor Fire.[9] Instead, he testified about Powers's condition and treatment the following day at the medical center in Sedona.[10] In sum, Powers did not present

[9] Dr. Hardin also testified that rhabdomyolysis can be caused by dehydration or muscle exertion, such as from a long hike. In Powers's case, Dr. Hardin could not say if his rhabdomyolysis was caused by dehydration or exertion, but he "would pin it more on the hike."

[10] The magistrate judge found that Powers was "not yet in a life-threatening state" when he set the fires based, in part, on Dr. Hardin's testimony about Powers's condition during the medical examination in Sedona. Powers argues that the magistrate judge clearly erred by assuming that his physical condition when he set the fires was the same as his condition during the medical examination, despite evidence that he drank water and received IV fluids after setting the fires and before the examination. But the magistrate judge did not act irrationally by considering Powers's condition during the medical examination as circumstantial evidence of his condition when he started the fires. *See United States v. Khatami*, 280 F.3d 907, 910 (9th Cir. 2002) ("In reviewing the evidence, we are required to 'respect the exclusive province of the factfinder to . . . draw reasonable inferences from proven facts . . . .'" (alteration omitted) (quoting *United States v. Goode*, 814

testimony or other evidence suggesting that, when he set the Taylor Fire, he was facing a "serious or imminent risk of bodily harm at that time." *Perdomo-Espana*, 522 F.3d at 985; *see also United States v. Cervantes-Flores*, 421 F.3d 825, 829 (9th Cir. 2005) (per curiam) (concluding that defendant's HIV diagnosis did not constitute imminent harm because, although the defendant "may have a more limited life span than others," there was no evidence that the disease created "a threat of death or other serious, immediate harm"), *overruled on other grounds by Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). The magistrate judge did not err by finding that Powers was "not yet in a life-threatening state" when he set the Taylor Fire.

2.

Powers's necessity defense also fails as to the Taylor Fire counts because his actions taken to preserve his life were objectively unreasonable. Powers set the Taylor Fire by igniting a "bunch of dead grass mixed in with vegetation right next to [the] fire pit" near Taylor Cabin, and he did not clear the area or make any effort to limit its spread beforehand. The magistrate judge found that "Powers could have started the Taylor Fire in the fire ring that was only feet away from where he started the fire in the brush" and that "he could have removed flammable material to keep the fire from spreading." Moreover, Powers testified that he hoped the smoke from the Taylor Fire would attract attention, but "he acknowledged that smoke wouldn't be seen at night." Thus, his conduct in starting the Taylor Fire, at night, in the

F.2d 1353, 1355 (9th Cir. 1987)). And Powers does not identify any evidence from which a reasonable factfinder could infer that he was "in a life-threatening state" by 9:00 p.m. on the first day of the hike when he set the Taylor Fire.

brush a few feet away from a fire pit, was objectively unreasonable.

Powers dismisses the magistrate judge's findings that he could have taken reasonable safety precautions when setting the fires as "irrelevant" because starting any fire (even in the fire pit) would have violated the fire regulations. He argues that only legal alternatives can render the necessity defense inapplicable, pointing to the fourth element of the defense: a lack of legal alternatives. *Perdomo-Espana*, 522 F.3d at 987 (citation omitted). But this argument cannot be reconciled with his concessions that the necessity defense does not excuse *any* conduct and instead requires that the person invoking the defense has acted reasonably. As he acknowledged, the necessity defense would not protect "dousing a large swath of the forest with kerosene and setting it aflame" because such conduct would be unreasonable.

This argument also ignores the first and second elements of the defense, which require that he chose the lesser evil and acted reasonably to prevent imminent harm. *Id*. at 987–88. And Powers does not explain how starting the Taylor Fire a few feet from a fire pit, at night, and without taking any measures to prevent it from spreading uncontrollably was objectively reasonable conduct.

Because Powers has not shown that he was facing imminent harm when he set the Taylor Fire, and because the manner in which he set the fire was objectively unreasonable, his necessity defense as to Counts 2 and 5 fails. We therefore affirm his conviction as to those counts.

B.

Powers's convictions on Counts 3 and 6 arise from setting the Sycamore Fire; his conviction on Count 1 arises from leaving the Sycamore Fire unattended without extinguishing it. The magistrate judge found that Powers was not entitled to the necessity defense as to Counts 1, 3, and 6 because he was not facing imminent harm when he set and then abandoned the Sycamore Fire and because his actions were objectively unreasonable. Because Powers set the Sycamore Fire many hours after he set the Taylor Fire, when he no longer had food or water and his physical condition likely deteriorated, we assume without deciding that Powers faced imminent harm when he set and abandoned the Sycamore Fire. But we agree that both how he set the Sycamore Fire and his decision to leave it unattended and unextinguished were objectively unreasonable.

The magistrate judge found that, when Powers set the Sycamore Fire, he had only illegal alternatives—he could not set a signal fire without breaking the law, and he had no legal means of attracting rescue or obtaining water or other supplies to finish the hike. But she also found that "Powers had other objectively reasonable options [with respect to] the manner in which he [chose] to start signal fires," such as clearing brush, creating a fire ring or pit, or extinguishing the Sycamore Fire before leaving it. Thus, the magistrate judge found that Powers acted in an objectively unreasonable manner by failing to take any safety precautions.

Powers again argues the magistrate judge erred by focusing on illegal alternatives, which he contends are "irrelevant to the necessity defense." But even if a defendant has only illegal options, to assert a viable necessity defense,

he must choose among those options reasonably. *See generally Perdomo-Espana*, 522 F.3d at 988 (noting that "a person who seeks to benefit from a justification defense must act reasonably"). For example, a lost hiker is not justified in burning down a cabin to stay warm if he can break into the cabin and warm himself at its fireplace, even though both actions may be *per se* illegal. In other words, the need to act to prevent a greater evil and a lack of legal alternatives does not eliminate the requirement that a defendant seeking to benefit from the necessity defense must choose a course of action that is reasonable under the circumstances. *See id.* at 987–88.

Powers also argues that the alternatives suggested by the magistrate judge are "unrealistic" because he "did not have the energy to build firefighter-quality signal fires when he acted as he did." To begin, the magistrate judge held Powers to a reasonableness standard, not a "firefighter" standard. And the magistrate judge did not clearly err by finding that Powers could have taken some precautionary measures to prevent the fire from spreading uncontrollably. Although Powers was fatigued, he climbed to "the highest vantage point [he] could see" to ignite the Sycamore Fire and continued to hike (with breaks) even after abandoning this fire. From these facts, the magistrate judge could plausibly infer that Powers had the physical ability to take steps to build a safer fire and to extinguish the smoldering tree. *See June Med. Servs.*, 591 U.S. at 301; *Khatami*, 280 F.3d at 910.

In a similar vein, Powers argues that clearing brush or building a fire enclosure would have been unreasonable because, "if the fire failed to attract rescuers," these activities would have sapped his remaining energy and "destroy[ed] any possibility of making further progress down the trail." This argument is speculative and assumes that the exertion

required for all possible safety measures would have meaningfully compromised his ability to continue hiking back to the trailhead. The magistrate judge made no such finding, and the evidentiary record does not establish that this was clear error. Thus, the argument is unavailing. *See June Med. Servs.*, 591 U.S. at 301; *see also Raich*, 500 F.3d at 872 ("The establishment of the factual elements of the [necessity] defense, if submitted, is for the jury (or other trier of fact)." (Beam, J., concurring in part and dissenting in part)).

Powers also argues that "[s]tomping out the Sycamore Fire would have ensured [his] death" because the Sycamore Fire, which spread quickly after Powers left it unextinguished, ultimately attracted rescuers. But Powers testified that he left the Sycamore Fire because he believed "it was not a sufficient fire and it was dying." He did not suggest that he made a conscious choice to leave the Sycamore Fire smoldering based on a reasonable belief that doing so would abate the threatened harm (*i.e.*, by continuing to smoke and therefore signal rescue). *See* LaFave, *supra*, § 10.1(d)(3) (explaining that, to assert a viable necessity defense, the defendant "must believe that his act is necessary to avoid the greater harm"). Thus, this argument is not supported by the record.

Finally, Powers argues that, even assuming he could have taken fire safety precautions without lowering his odds of being rescued by someone who saw smoke from his signal fires, his conduct was objectively reasonable. In his view, the magistrate judge effectively faulted him for not acting in the most "punctilious manner" possible, thereby imposing a more stringent standard than the necessity defense requires. Powers also contends that finding his actions unreasonable because he failed to take safety measures necessarily invites

critique of the effectiveness of any measures taken in future cases, which "would whittle this important [necessity] defense down to nothing." We disagree with the premise of this argument. Failing to take safety measures is different than taking measures that turn out to be ineffective. Reasonableness is a fact-bound inquiry. And our decision today says nothing about whether a defendant who undertakes ineffective preventative measures acts reasonably.

We conclude that Powers's necessity defense fails not because he failed to take the most responsible action *possible* but because he failed to act *reasonably* in seeking rescue. *See Perdomo-Espana*, 522 F.3d at 987–88. That some leeway should be given to an individual responding to a crisis does not mean that anything goes, nor does it establish that Powers's actions in setting and abandoning the Sycamore Fire were objectively reasonable. It is undisputed that he ignited a dead tree without making any effort to contain the fire's ability to spread in a hot, dry forest with no nearby water sources, and then left the still-smoldering fire unattended. The magistrate judge found that Powers reasonably had the ability to set the fire in a safer manner, and this finding is not clearly erroneous. By choosing not to take any precautions and to set the Sycamore Fire in an unnecessarily careless manner (and then abandon it, unextinguished), Powers acted unreasonably.

Because Powers failed to act reasonably with respect to the Sycamore Fire, he is not entitled to the necessity defense as to Counts 1, 3, and 6. We therefore affirm his conviction as to those counts.

C.

Likewise, Powers is not entitled to the necessity defense as to Counts 4 and 7, which arise from the Sycamore 2 Fire, because he acted in an objectively unreasonable manner.[11]

As with the Taylor Fire and the Sycamore Fire, the magistrate judge found that Powers acted in an objectively unreasonable manner by setting the Sycamore 2 Fire without taking any safety precautions. Powers argues the suggested precautions—clearing the surrounding area or creating a fire ring or pit—are unrealistic, but the magistrate judge did not clearly err by finding that Powers was capable of such alternatives. When Powers set the Sycamore 2 Fire, he could still hike (albeit only in small bursts) and was able to remove his underwear and wave it on a stick (albeit with difficulty).

Beyond challenging the magistrate judge's factual findings, Powers does not explain why his conduct with respect to the Sycamore 2 Fire was reasonable, and the evidence presented at trial about the fire's circumstances was sparse. This lack of information weighs against Powers because he has the burden to establish the elements of the necessity defense by a preponderance of the evidence. *See Cruz*, 554 F.3d at 850; *United States v. Dominguez-Mestas*, 929 F.2d 1379, 1384 (9th Cir. 1991) (per curiam).

Moreover, the undisputed facts demonstrate that Powers did not set the Sycamore 2 Fire in a reasonable manner. Before igniting it, he saw "smoke coming out over a ridge," although it is not clear whether he understood its source was the Sycamore Fire, which was only a few hundred yards away and spread quickly after he left it. He then saw the

[11] As with the Sycamore Fire, we assume, without deciding, that Powers faced imminent harm when he set the Sycamore 2 Fire.

helicopter for a second time and "immediately" started the Sycamore 2 Fire by lighting some nearby brush. Although there were "materials" in the area from which "a rock ring could have been built," and despite knowing that something nearby was burning, Powers again made no effort to limit this third fire's ability to spread in the hot, dry forest.[12] Instead, the photographs admitted at trial show that the Sycamore 2 Fire was started in the middle of a larger patch of dry brush.

In sum, the undisputed facts do not show that Powers acted reasonably to preserve his life when he started the Sycamore 2 Fire. Thus, he is not entitled to the necessity defense as to Counts 4 and 7, and we affirm his convictions as to those counts.

IV.

Because the magistrate judge's view of the evidence was plausible and we find no error in the conclusion that the necessity defense did not excuse Powers's criminal conduct, and because Powers does not otherwise challenge his convictions or the order of restitution, we affirm.

AFFIRMED.

[12] The Sycamore 2 Fire spread to a three-foot circle, burning some "grass and brush," before dying out; Powers testified that it self-extinguished before he left on the helicopter.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America, Plaintiff, v. Philip Alejandro Powers, III, Defendant.	No. CR-23-08027-001-PCT-MTL **ORDER**

Defendant Phillip Alejandro Powers, III, appeals an order and judgment by the Magistrate Judge ("MJ") requiring him to pay $293,413.71 to the United States government for starting three separate fires—which spread to 230 acres in size—when he went off trail from a hike in northern Arizona. Powers argues that starting these fires is protected by the necessity defense because they were necessary to save his life, and that the MJ erred when she found it did not apply to his case. For the reasons listed below, the Court will affirm in part and remand in part so that the MJ may modify two provisions in the judgment as further explained below.

I. BACKGROUND

A. Powers Plans a Hike

Powers was 37 years old, and had been an Arizona resident for 30 years, when he went on a hike in northern Arizona on May 27 and May 28, 2018. (Doc. 27-3 at 12–13.) Powers thought he was going to take a 17.8-mile hike called the "Taylor Cabin Loop," in a remote part of the Coconino and Prescott National Forests near Sedona, Arizona. (*Id.*)

He had some hiking experience but testified that he had not been on a lengthy hike for several years, and that he had never hiked the Taylor Cabin Loop. *(Id*.) Powers researched the Taylor Cabin Loop hike from a book called "A Falcon Guide, Hiking Arizona, A Guide to the State's Greatest Hiking Adventures." (*Id.*) That book describes the Taylor Cabin Loop as a strenuous 18.8-mile hike that would take about twelve hours or two days to hike, and that there is usually water in Sycamore Creek during the spring, but the water dries up later in the year. (*Id.* at n.2.) Another hike, called the "Cabin Loop," is about 50 miles away from the Taylor Cabin Loop hike and is considered moderately difficult that takes about two days to complete. (*Id.*) The MJ noted that "Powers seemed confused about which hike he actually attempted" and he "provided information about the wrong hike to [Retired United States Forest Service ("USFS") Law Enforcement Officer Michael O'Neil]." (Doc. 27-2 at 41.)

Powers began his hike sometime between 6:00 and 7:00 in the morning of the 27th. (Doc. 27-4 at 61.) He packed 100 ounces of water in a bladder on his backpack and also had approximately 16 ounces in a separate bottle. (Doc 27-4 at 20, 57.) Altogether, Powers had about 116 fluid ounces of water for the entire hike. (*Id.* at 57.) For reference, one gallon of water contains 128 fluid ounces.

Powers knew the importance of carrying sufficient water and emergency gear while hiking. (*Id.* at 48.) He was familiar with Arizona fire restrictions, and Powers knew the area of his hike was subject to fire restrictions at the time. (*Id.* at 45–46, 123–28.) When Powers arrived at the trailhead, it was hot and dry. (*Id.* at 57.) There were no water sources in the immediate area. (*Id.* at 61.) At trial, Powers testified that he knew he would not find water once he arrived at the trailhead. (*Id.* at 73.) Powers had no water purification tablets or devices with him. (Doc. 27-4 at 89–90.) He also left his water filter in his vehicle at the trailhead. (*Id.*) Ultimately, Powers failed to find a water source on the hike. (Doc 27-4 at 70.) Powers also failed to take a signaling device with him on the hike. (*Id.* at 91.) He also failed to take a medical or first-aid kit. (*Id.*) Powers, however, brought a vape pen with him. (*Id*. at 91–92; Doc. 27-5 at 43.) He also had both a machete and a Ka-Bar knife with

him, either of which could have been used to dig or make a fire ring or pit. (Doc. 27-3 at 198.)

Powers made it to the Taylor Cabin in the Coconino National Forest. (Doc. 27-4 at 64.) Powers intended to hike the Taylor Cabin Loop and end back at the trailhead parking lot. (*Id.* at 16.) But he lost the trail several miles past the Taylor Cabin. (*Id*. at 65–66.) Powers thought he had about four miles to finish the loop and end back at the parking lot. (*Id.* at 66.) Powers, however, got lost. *(Id*. at 66–70.)

Powers' only global positioning system ("GPS") was the one featured on his smart phone. (*Id.* at 67.) But it did not work for lack of a cellular phone signal. (*Id.* at 68–70, 90.) Powers did not have a separate paper map or a compass. (*Id.* at 90.)

B. Powers Returns to Taylor Cabin

After getting lost on the Taylor Cabin Loop, Powers returned to the Taylor Cabin for the night. (Doc. 27-4 at 26.) He had planned for a day hike, not an overnight hike. (*Id.* at 55.) His cellphone could not get a signal and eventually ran out of battery. (Doc. 27-3 at 148; Doc. 27-4 at 26–27, 95.) Powers had a small amount of food with him and found some food that was stored at the Taylor Cabin. (*Id.* at 27, 57–58.) He saved about 16 to 20 ounces of water for the morning. (Doc. 27-4 at 70–71.) He also sought to return to the trailhead that he had taken the previous day, and no longer attempted to complete the Taylor Cabin Loop. (Doc. 27-4 at 33, 83.) Because Powers got lost and had to return to the Taylor Cabin, his anticipated 17.8-mile hike became much longer, possibly more than 20 miles. (Doc. 27-3 at 14.) Powers acknowledged that he did not have enough water for the entirety of the return hike. (Doc. 27-4 at 96–97.) At trial, Powers claimed that he was properly prepared—if the trail had not been so difficult to find past the Taylor Cabin. (Doc. 27-4 at 96.)

C. Powers Ignites Three Separate Fires

Between the evening of May 27 and the morning of May 28, 2018, Powers purposefully, voluntarily, and admittedly set three separate fires in the National Forest. (Doc. 27-4 at 31, 40, 73, 82–83, 87, 95.) Powers testified that he started them as signal fires seeking help. (Doc. 27-4 at 32, 40, 43.)

The first fire was later named the "Taylor Fire," and was started around the Taylor Cabin in the Coconino National Forest. (Doc. 27-3 at 135–36; Doc. 27-4 at 133.) Powers started the Taylor Fire at around 9:00 p.m. on May 27. (Doc. 27-3 at 178–79, 189; Doc. 27-4 at 31.) Although there was a fire pit very close to the Taylor Cabin, only a few feet from where he started the Taylor Fire, he decided not to use it. (Doc. 27-3 at 91–92, Doc. 27-4 at 33, 77; Doc. 27-5 at 34–36.) He also failed to clear any brush or flammable material away before starting the fire. (Doc. 27-3 at 152–52; Doc. 27-4 at 77–79.) The Taylor Fire burned approximately .10 acres (including grass, brush, small trees, and timber) before going out on its own—not by Powers' doing. (Doc. 27-3 at 91–92; Doc. 27-4 at 74.)

Powers tried to start the hike back to the trailhead parking lot early in the morning on May 28, 2018, while it was still dark, due to the anticipated heat of the day. (Doc. 27-4 at 26, 78–81.) He ate a small breakfast before he started the return hike. (*Id.* at 71.) A few miles into the hike back, Powers explained that his legs began to cramp, he could only hike short distances before having to stop, and had to rest in the shade to try and "collect energy." (Doc. 27-4 at 34, 78.)

That morning, Powers ignited his second fire, later named the "Sycamore Fire," in the Prescott National Forest near the boundary of the Coconino National Forest. (Doc. 27-3 at 136–37; Doc. 27-4 at 82–83, 133.) Powers stayed around the Sycamore Fire for about an hour hoping that the smoke would attract help—he also thought the fire was going out. (*Id.* at 35–36, 85.) Powers admitted that the Sycamore Fire was still smoldering when he walked away from it. (*Id.*; Doc. 32 at Exhibit 8, 35:42 36:01 ("It wasn't that big when I left it. I thought it was going out.").) Like the Taylor Fire, Powers did not start the Sycamore Fire in a fire ring or pit; he instead ignited it in the "snag" of a dead tree. (Doc. 27-3 at 152–53; Doc. 27-4 at 84.) And again, Powers did not clear any brush or flammable material away before starting the fire. (Doc. 27-3 at 152; Doc. 27-4 at 84.) The Sycamore Fire eventually spread and burned beyond Powers' control, destroying approximately 230 acres of the National Forest in the District of Arizona and burning grass, brush, and timber in a National Forest. (Doc. 27-3 at 153, 162, 171; Doc. 27-4 at 134–50; Doc. 27-5 at 1–28.)

The third fire, also set that morning, was later named the "Sycamore 2 Fire." (Doc. 27-3 at 134, 155; Doc. 27-4 at 38, 47, 87, 133.) Powers started it after seeing an aircraft overhead, as he was concerned that the aircraft might not see him due to his camouflage clothing. (Doc. 27-4 at 38–39, 87–88.) Again, Powers did not ignite the Sycamore 2 Fire in a fire ring or pit, nor did he clear any brush or flammable material away before starting the fire. (*Id.* at 87.) It burned a small area of grass and brush in the National Forest. (Doc. 27-3 at 172; Doc. 27-5 at 29–33.)

At the time of the fires described above, both the Coconino and Prescott National Forests were under Stage 2 fire restrictions. (Doc. 27-3 at 71–72, 137–38; Doc. 27-4 at 45, 123–28.) Stage 2 fire restrictions prohibit individuals from building, maintaining, attending, or using a fire without a permit. (Doc. 27-3 at 138; Doc. 27-4 at 123–28.) Powers knew the forests were dry and in fire restrictions before he started his hike and did not have a permit to start any of the three fires. (Doc. 27-3 at 138; Doc. 27-4 at 45, 57, 61, 73.)

D. Powers is Rescued

Shortly after Powers started the Sycamore Fire, the USFS in the Red Rock Ranger District of the Coconino National Forest received reports of smoke and a fire. (Doc. 27-3 at 78, 138–40.) A USFS helicopter was sent to the area. (*Id.* at 78.) Mr. Badger, who is a fire management officer and was aboard the helicopter, saw Powers under a tree and assisted him into the helicopter, and he was then flown to the Sedona, Arizona airport, where an ambulance was waiting. (*Id.* at 78, 80–82, 140–41.) Mr. Badger stayed on the scene of the Sycamore Fire for about five days. (*Id.* at 96–97, 101.) He and others hiked to the Taylor Cabin to inspect and assess the Taylor Fire. (*Id.* at 85–86.) Mr. Badger found that the Taylor Fire—the first fire Powers set—scorched nearly .10 acres before it burned out. (*Id.* at 91.)

With respect to Powers' second fire—the Sycamore Fire—it took nearly nine days to contain. (Doc. 27-6 at 50.) Because the Sycamore Fire was ignited in a remote area, the USFS fought the fire with both air assets (like helicopters) and firefighters on the ground. (*Id.*) The Sycamore Fire was also a potential threat to the Flagstaff area and the nearby

watershed, and the USFS had to expend considerable resources to contain it from spreading further. (Doc. 27-3 at 84–85, 100–01, 158–59.) The parties stipulated that the USFS sustained $293,413.71 in recoverable fire suppression costs for the Sycamore Fire. (Doc. 27-6 at 50–51.)

E. Powers' Medical Treatment

Powers' medical records for treatment he received after being evacuated from the area of the fire show that he was dehydrated. (Doc. 27-6 at 54–75.) Powers was treated by, among others, Dr. Jeff Davison Hardin. (Doc. 27-3 at 205, 224; Doc. 27-6 at 54–75.) Dr. Hardin testified that Powers was moderately dehydrated and suffering from heat exhaustion (but not heat stroke), early onset renal failure (for which he did not need dialysis and was recovering), and rhabdomyolysis. (Doc. 27-3 at 215, 220–21, 224–25, 227–28.) Dr. Hardin, however, could not be certain that the rhabdomyolysis was caused by dehydration. (*Id.* at 226.) He explained that it could have been caused by the exertion during the strenuous hike. (*Id.*) With respect to Powers' dehydration, Dr. Hardin testified that while Powers' case was moderate, if left untreated for another 24 to 48 hours, it would have been life threatening. (*Id.* at 215, 230–31.)

F. Powers' Charges

On October 6, 2021, the United States filed a seven-count Complaint against Powers. (Doc. 27-7 at 11–30.) Powers was charged with one count of leaving a fire unattended and unextinguished in a National Forest in violation of 18 U.S.C. § 1856, three counts of unlawfully building a fire in a National Forest during fire restrictions in violation of 36 C.F.R. § 261.52(a), and three counts of unlawfully causing timber, trees, brush, and grass to burn in a National Forest without a permit in violation of 36 C.F.R. § 261.5(c). (*Id.* at 11–12.) Each charge is a Class B misdemeanor. Powers rejected various plea offers, and the matter was set for a bench trial. (*Id.* at 8–9, 35–37.)

G. Powers' Bench Trial

Magistrate Judge Bibles tried Powers' case on November 2 and 3, 2022. (Doc. 27-2 at 37.) At the close of the United States' case, Powers moved for a judgment of acquittal

as to Count 1 of the Complaint arguing that he did not have criminal intent for the 18 U.S.C. § 1856 charge based on *United States v. Launder*, 743 F.2d 686 (9th Cir. 1984). (Doc. 27-3 at 2–6, 291–93.) The MJ denied that motion. (Doc. 27-4 at 5.) During closing arguments, counsel for Powers raised a necessity defense for the first time. (Doc. 27-2 at 59–60; Doc. 27-4 at 112–17.) Powers was found guilty of all seven charges. (Doc. 27-2 at 2–5.) He was sentenced to one year of supervised probation, concurrent, on each of the seven counts of the Complaint. (*Id.*) Powers was also ordered to pay restitution in the amount of $293,413.71. (*Id.*) On February 17, 2023, he timely appealed to this Court. (Doc. 27-7 at 31–32.)

II. STANDARD OF REVIEW

18 U.S.C. § 3402 provides this Court with jurisdiction over the instant appeal. It states: "In all cases of conviction by a United States magistrate judge an appeal of right shall lie from the judgment of the magistrate judge to a judge of the district court of the district in which the offense was committed."

Federal Rule of Criminal Procedure 58(g)(2)(D) outlines the scope of appeal for petty offenses and other misdemeanors, which "is the same as in an appeal to the court of appeals from a judgment entered by a district judge"—specifically, "[t]he defendant is not entitled to a trial de novo by a district judge." And "[a]cting as an appellate court, this Court has the power to 'affirm, modify, vacate, set aside or reverse' the magistrate judge's order and 'may remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be ha[d] as may be just under the circumstances.'" *United States v. Ramirez*, No. CR F 08-0239 LJO, 2008 WL 5397497, at *2 (E.D. Cal. Dec. 24, 2008) (citing 28 U.S.C. § 2106).

This Court on appeal reviews questions of law *de novo* and findings of fact for clear error. *United States v. Oberdorfer*, No. 3:12-CR-00578-BR, 2014 WL 1343427, at *6 (D. Or. Apr. 3, 2014) (citing *United States v. Ziskin*, 360 F.3d 934, 943 (9th Cir. 2003); *United States v. Perdomo-Espana*, 522 F.3d 983, 986 (9th Cir. 2008)). Mixed questions of law and fact are subject to *de novo* review; however, the factual findings that underlie the

application of the law are reviewed for clear error. *United States v. Prieto-Villa*, 910 F.2d 601, 604 (9th Cir. 1990).

III. DISCUSSION

The issue presented here is whether the MJ erred when she denied Powers' necessity defense, and found him guilty of leaving fires unattended and unextinguished, violating fire restrictions, and causing timber to burn without a permit. (Doc. 27-2 at 2.) Powers argues he had to act unlawfully to prevent his own death and that the MJ erred when she concluded that the necessity defense was inapplicable. (Doc. 27 at 15.) Powers appeals (1) the MJ's application of the facts to the elements of the necessity defense and (2) the MJ's analysis of his "recklessness" when evaluating his necessity defense.

A. The Necessity Defense

The necessity defense is an affirmative defense that does not negate any of the elements of a crime but instead serves as a justification or excuse. *United States v. Sandoval-Gonzalez*, 642 F.3d 717, 723 (9th Cir. 2011). "Necessity is essentially a justification for the prohibited conduct: the 'harm caused by the justified behavior remains a legally recognized harm that is to be avoided whenever possible.'" *Raich v. Gonzales*, 500 F.3d 850, 861 (9th Cir. 2007) (quoting Paul H. Robinson, Criminal Law Defenses § 24(a) (1984 & Supp. 2006–2007)). "A common law necessity defense thus singles out conduct that is '[o]therwise criminal, which under the circumstances is socially acceptable and which deserves neither criminal liability nor even censure.'" *Id.* (citing LaFave, Substantive Criminal Law § 9.1(a)(3) (2d ed. 2003 & Supp. 2005)).

"The defense of necessity is available when a person is faced with a choice of two evils and must then decide whether to commit a crime or an alternative act that constitutes a greater evil." *United States v. Contento-Pachon*, 723 F.2d 691, 695 (9th Cir. 1984) (citing *United States v. Richardson*, 588 F.2d 1235, 1239 (9th Cir.1978)). Powers has attempted to justify his violation of 18 U.S.C. § 1856 and 36 C.F.R. §§ 261.5(c) and 261.52(a) by showing that the alternative, his death, was a greater evil. "Traditionally, in order for the necessity defense to apply, the coercion must have had its source in the physical forces of

nature." *Id.*

The Ninth Circuit model jury instruction for necessity states that "A defendant acts out of necessity only if at the time of the crime charged:"

> First, the defendant was faced with a choice of evils and chose the lesser evil;
> Second, the defendant acted to prevent imminent harm;
> Third, the defendant reasonably anticipated his conduct would prevent such harm; and
> Fourth, there were no other legal alternatives to violating the law.

Jury Instructions 5.8 (9th Cir. 2018). If "each of these things" is found "by a preponderance of the evidence" the defendant must be found not guilty. *Id.* "It is not enough . . . that the defendant had a subjective but unreasonable belief as to each of these elements. Instead, the defendant's belief must be reasonable, as judged from an objective point of view." *Perdomo-Espana*, 522 F.3d 983 at 988-89 (affirming the district court where it denied defendant's requested necessity jury instruction).

B. The MJ Did Not Err When She Found that the Necessity Defense Does Not Apply to Powers' Case.

Powers argues that the MJ incorrectly found that Powers' death was not imminent. (Doc. 27 at 19–20.) This Court, respecting that the "magistrate judge's decision . . . is entitled to great deference," disagrees with Powers and finds that the MJ did not err when she precluded his necessity defense. *United States v. Abonce-Barrera*, 257 F.3d 959, 969 (9th Cir. 2001).

Dr. Hardin testified that when Powers arrived at the Sedona Emergency Department on May 28, 2018, he was diagnosed with "weakness, heat exhaustion, acute renal failure, rhabdomyolysis, and severe dehydration." (Doc. 27-3 at 206.) Dr. Hardin clarified that Powers suffered from heat exhaustion, which is not as severe as heat stroke. (*Id.* at 220–21.) He emphasized that "heat exhaustion could be anything from a mild headache to just feeling fatigued to feeling overheated and you need to rest from [] dehydration can be part of it." (*Id.* at 221.) Regarding Powers' rhabdomyolysis diagnosis, Dr. Hardin explained

that his case was "moderate . . . a little bit more towards mild than severe." (*Id.* at 225.) Dr. Hardin also explained that Powers' "renal failure" was "mild." (*Id.* at 227.) Dr. Hardin also testified that he was "not sure what the [dehydration] situation was with Mr. Powers." (*Id.* at 228.) On re-direct, Dr. Hardin testified that Powers:

> [P]robably would have died in that weather another 24 hours. You know, he came in midday. I'm not sure what time he was rescued. But in that heat—you know, we assume the heat was pretty high where he was at. And without any food or water. Possible if he stayed in the shade he could have survived another day, or even two, but unlikely. You know, it probably would have been fatal.

(*Id.* at 231.) The MJ, evaluating all of Dr. Hardin's testimony, found that "while these ailments could cause significant discomfort, Mr. Powers was not yet in a life-threatening state, which necessitated the actions of starting a series of fires" and that his "harm was not imminent." (Doc. 27-2 at 61–62.)

When evaluating all of Dr. Hardin's testimony and reviewing the MJ's analysis that Powers had a subjective and unreasonable belief that breaking the law would prevent imminent harm, this Court finds that the MJ did not clearly err. Dr. Hardin's testimony explained Powers' diagnoses were "moderate" and "mild," and also speculated on what could have happened, but without certainty.

Powers also argues that the MJ erred when she found there were other alternatives that he could have taken rather than starting a series of unrestrained fires. The Court again disagrees with Powers.

If "there was a reasonable, legal alternative to violating the law," the necessity defense fails. *United States v. Dorrell*, 758 F.2d 427, 431 (9th Cir. 1985) (citing *United States v. Bailey*, 444 U.S. 394, 410 (1980)). Here, Powers had such alternatives. Powers could have cleared one or more areas to start a signal fire. *See Launder*, 743 F.2d at 688 (Defendant "cleared an area on a rock ledge approximately five to ten feet across and, using small twigs, leaves and grass as fuel, lit a signal fire"). Powers could have also built a fire ring or dug a fire pit. With respect to the Sycamore Fire—the fire that destroyed 230

acres—Powers could have ensured that the fire was out before leaving it unattended in violation of 18 U.S.C. § 1856.

Powers also could have potentially avoided setting any fires overall had he properly prepared for the hike with a signaling device, compass or proper GPS device, and more water and food. *See United States v. Bibbins*, 637 F.3d 1087, 1094 (9th Cir. 2011) (agreeing with the district court's rejection of Defendant's necessity defense because he could have avoided the greater "evil" with legal alternatives like "[vocalizing the] need for medical help" or proposing "an alternative way to comply with the rangers' instructions.").

C. Necessity and Justification

Powers argues the MJ erred when she found the necessity defense inapplicable because (1) she evaluated whether Powers "created the conditions the conditions underlying the supposed necessity" and (2) found he was "reckless and negligent in his preparation for a hike of this magnitude from the outset." (Doc. 27 at 24–29.)

The Supreme Court explained that "the defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils." *United States v. Bailey*, 444 U.S. 394, 410, (1980). Powers argues, in his reply brief that "the Ninth Circuit plainly does not interpret this language as withdrawing the defense from anyone whose recklessness led to the circumstances creating the necessity—as reflected in the opinions cited above." (Doc. 37 at 13–14.) The opinions that Powers cites to, however, do not squarely address this issue. In those opinions, the court either did not discuss the necessity defense at all or was not presented with the precise issue here. *See United States v. Liu*, 731 F.3d 982 (9th Cir. 2013); *see also United States v. Schoon*, 971 F.2d 193 (9th Cir. 1991), *as amended* (Aug. 4, 1992); *United States v. Barnes*, 895 F.3d 1194 (9th Cir. 2018). Here, the MJ denied applying the necessity defense because (1) she found that Powers did not prove, by a preponderance of the evidence that he faced imminent harm or had no viable alternatives and (2) that Powers "created the conditions underlying the supposed necessity." (Doc. 27-2 at 61–64.)

Powers also argues that the MJ erred because she looked beyond the "elements of the necessity defense set forth in the Ninth Circuit's [Necessity] model instruction." (Doc. 27 at 24.) And that she impermissibly looked to justification instruction, referencing a defendant "not recklessly plac[ing] himself in a situation where he would be forced to engage in criminal conduct." (*Id.* at 25 (quoting Model Criminal Jury Instruction 5.9, Justification (9th Cir. 2022).) Powers argues that "had the Ninth Circuit intended for the defendant's lack of responsibility to be an element of the necessity defense, the court would have included it in its Necessity instruction as well." (*Id.* at 25.) But model jury instructions are not statutes. In fact, the Ninth Circuit itself in its Introduction to the Model Criminal Jury Instructions:

> As the title states, these instructions are only models. They are not mandatory, and they have been neither adopted nor approved by the Ninth Circuit . . . They also must be carefully reviewed, with additional legal research and analysis performed when needed, before being used in any specific case, and they should be tailored or modified when appropriate.

Model Criminal Jury Instructions, Introduction (9th Cir. 2021). In his reply brief, Powers correctly clarifies that the instruction "accurately" reflects the elements laid out in Ninth Circuit case law. *See. Schoon*, 971 F.2d at 195. But Powers' attempt to narrowly look at some parts of Ninth Circuit precedent but ignore other binding precedent is unavailing. For example, Powers relies on *Barnes*, 895 F.3d at 1205 n.4, for the proposition that where the "defendant has 'distinctly raised a defense of necessity,' rather than of justification, the court must determine whether the defendant 'met the requirements to present a necessity defense, not a justification defense.'" (Doc. 27 at 25.) But in *Barnes*, the Ninth Circuit clarified that treating "necessity and justification as separate and distinct defenses" arose "in felon-in-possession cases," which is inapplicable here because this is not a felon-in-possession case. *Barnes*, 895 F.3d at 1205, n.4. The court also explained that, "[g]enerally speaking, necessity—typically presented as a situation where the actor claims he chose 'the lesser of two evils'—is a type of justification defense." *Id.* Furthermore, when the court reviewed Barnes' "evidence to determine whether he has sufficiently made out a case for

necessity" it "conclude[d] that he has not, under either the test for necessity or for justification." *Id.* Powers' argument that no justification analysis may seep into a necessity analysis is also meritless given that the Ninth Circuit has evaluated the justification defense when the preclusion of a necessity defense was at issue. In *Perdomo-Espana*, 522 F.3d 983, for example, at issue was whether the necessity defense operates on an objective or subjective framework. In reaching the conclusion that the necessity defense required an objective framework, the court examined the justification defense. It explained:

> In *United States v. Simpson*, 460 F.2d 515 (9th Cir. 1972), moreover, while discussing justification defenses more broadly, we said:
>
> > The theoretical basis of the justification defenses is the proposition that, in many instances, society benefits when one acts to prevent another from intentionally or negligently causing injury to people or property. That benefit is lost, however, and the theory fails when the person seeking to avert the anticipated harm does not act reasonably.
>
> *Id.* at 517-18. Embedded in our recognition that a person who seeks to benefit from a *justification defense must act reasonably is the principle that justification defenses necessarily must be analyzed objectively*.

Id. at 987–88 (emphasis added).

Applying a *de novo* review here, the Court concludes that because *United States v. Bailey*, 444 U.S. 394, 410 (1980), is binding precedent, it must look to whether Powers is "covered" by the "defense of necessity, or choice of evils," because there were "physical forces beyond [his] control" justifying the "illegal conduct" for "the lesser of two evils" or whether he placed himself in such physical forces. *Id.* at 987.

Although the Court sympathizes with Powers—he, and he alone—placed himself in the physical forces that led him to violating the law. He decided to go on a hike by himself

in northern Arizona in late May when the weather is unforgiving. He did not adequately plan or prepare for his hike. He failed to bring enough water, food, or the appropriate equipment such as a signaling device or an appropriate GPS. Had Powers, an experienced hiker, adequately planned and prepared for his hike, he would not have found himself in such circumstances. The Court therefore concludes that Powers' necessity defense fails because his irresponsibility created those physical forces and were not beyond his control. *Bailey*, 444 U.S. at 410.

The MJ did not clearly err when she found that "Powers was reckless and negligent in his preparation for a hike of this magnitude from the outset." (Doc. 27-2 at 62.) Powers, an Arizona resident and self-proclaimed experienced outdoorsman, was ill-prepared for a relatively long and strenuous hike in a wilderness area under Stage 2 fire restrictions and daytime temperatures over 100 degrees Fahrenheit. (*Id.* at 63.) First, Powers failed to pack enough water and only brought with him 116 ounces. (*Id.*) During trial, Dr. Hardin was asked to opine on "how much water or fluid would a person need to be doing an 18-mile hike in the forest in Sedona in a 90-plus degree or even 100-degree heat?" He responded with, "Yikes. I don't know. If they were smart, they would—they would get up at 4:00, when it's cool, and be done by 8:00, which is what I do in the Grand Canyon . . . I would speculate if you're over 100 degrees Fahrenheit and you're hiking in the high desert, then you—probably several gallons to survive that." (Doc. 27-3 at 223–24.)

Dr. Hardin also testified that a regular person sitting in the shade in 100-degree heat in Sedona, Arizona, would likely need at least a gallon, or 128 fluid ounces, of water per day to stay properly hydrated. (*Id.* at 223.) And even that amount, was perhaps not enough. (*Id.*) Dr. Hardin's testimony showed that 116 ounces of water was clearly insufficient for Powers' hike. (*See Id.* at 222–24.) Other witnesses, like Mr. Badger, testified that he brought 200 ounces when he responded to the Sycamore fire, which included a short hike to the Taylor Cabin. (*Id.* at 85–87.) Mr. O'Neil also opined that Powers brought an insufficient amount of water. (*Id.* at 244.)

Powers also recklessly relied on his cellphone for navigation, communication, and

as a light source. Cell service in the Sycamore Canyon Wilderness Area—like any remote area—is unreliable. Powers failed to pack any paper maps, guidebooks, a compass, or GPS. Any of one of these materials could have properly guided him or kept him on the trail. Powers also failed to pack enough food, any sort of emergency tool or kit, or signaling device, which is similarly reckless, particularly when hiking alone in a remote area.

D. Requested Modifications

Powers also asks this Court to direct the MJ to "correct two errors in the judgment." (Doc. 27 at 29.) The two errors, which the United States does not oppose, are (1) to remove the reference about waiving his right to appeal in accordance with his "plea agreement" and (2) either delete or replace the "major purchases" provision in the judgment. (Doc. 27 at 29–30; Doc. 34 at 27.) The Court will remand, in part, so that the MJ may modify the judgment to address these errors, and will affirm the judgment in all other respects.

IV. CONCLUSION

Accordingly,

IT IS ORDERED affirming in part, and remanding in part, the Magistrate Judge's Judgment. (*U.S. v. Philip Alejandro Powers*, 3:21-mj-04310-CDB (D. Ariz. Feb. 14, 2023) at Doc. 38.)

IT IS FURTHER ORDERED that the Court will remand the Magistrate Judge's Judgment so that she may modify the judgment to (1) remove the "plea agreement" provision and (2) replace the second special condition that currently states: "You are prohibited from making major purchases, incurring new financial obligations, or entering into any financial contracts without the prior approval of the probation officer[,]" with "You are prohibited from making major purchases, incurring new financial obligations, or entering into any financial contracts over $500.00 without the prior approval of the probation officer."

IT IS FURTHER ORDERED that the Magistrate Judge's Judgment shall be affirmed in all other respects.

IT IS FINALLY ORDERED affirming the Magistrate Judge's Order that Philip

Alejandro Powers, III, pay Restitution to the United States government in the amount of $293,413.71. (*U.S. v. Philip Alejandro Powers*, 3:21-mj-04310-CDB (D. Ariz. Feb. 14, 2023) at Doc. 36.)

Dated this 11th day of September, 2023.

Michael T. Liburdi

Michael T. Liburdi
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff,

v.

Philip Alejandro Powers,

Defendant.

Case No. MJ-21-04310-001-PCT-CDB

ORDER

This case, tried to the Court on November 2-3, 2022, is notable in that few facts are in dispute, rather the crux of the matter is in the legal import of those facts. The charges stem from three separate fires started by the defendant during a hike in a wilderness area near the Sedona, Arizona area on May 27-28, 2018. (Criminal Compl., ECF No. 1.) In short, it is alleged that defendant went on what he intended to be a 17-plus-mile hike, that he got lost, ran out of water and started three fires. Those fires were named by the United States Forest Service ("USFS") as the "Taylor Fire," the "Sycamore Fire," and the "Sycamore 2 Fire." One of these fires, the Sycamore Fire, burned out of control to 230 acres endangering Flagstaff, Arizona, and the watershed. While the defendant acknowledges that he started the fires, at trial he argued the defense of necessity. The United States position is that given the fire restrictions in place at the time, the danger posed by fires in this area and the defendant's actions and lack of adequate preparation for the conditions that he is guilty of the charges filed. In essence, when a person fails to prepare for obvious dangerous conditions and then suffers the inevitable result, they cannot then avail themselves of the defense of necessity for the emergency that they created.

On October 6, 2021, Plaintiff, the United States of America (the "United States") filed a seven-count Complaint against Defendant Philip Alejandro Powers (the "defendant" or "Powers"). *Id*. The defendant was charged with one count of leaving a fire unattended and unextinguished in a National Forest in violation of 18 U.S.C. § 1856, three counts of unlawfully building a fire in a National Forest during fire restrictions in violation of 36 C.F.R. § 261.52(a), and three counts of unlawfully causing timber, trees, brush, and grass to burn in a National Forest without a permit in violation of 36 C.F.R. § 261.5(c). *Id*.[1] Each of these charges is a Class B misdemeanor punishable by a term of imprisonment of up to six months and up to a $5,000.00 fine. The offenses are probation eligible, with up to five years of probation.

The parties submitted two written stipulations of facts which were admitted into evidence. (The Parties' Stipulations for Trial and/or Hr'g's, ECF No. 21.; The Parties' Stipulations for Trial and/or Hr'g's, ECF No. 24.; Order on the Parties' Stipulations, ECF No. 25.) The stipulations are as follows:

- The Coconino National Forest, in the District of Arizona, was in Stage 2 fire restrictions on May 28, 2018 and May 29, 2018, and before and after those dates as set forth in Forest Order No. 04-18-07-F.[2] The stipulation included a copy of Forest Order No. 04-18-07-F. The parties stipulated that Forest Order No. 04-18-07-F was posted on the Coconino National Forest website, https://www.fs.usda.gov/coconino, and at various United States Forest Service offices and locations in the Coconino National Forest in the District of Arizona. (Stipulations, ECF No. 21.; *see also* Pl. Ex. 1.)
- The Prescott National Forest, in the District of Arizona, was in Stage 2 fire restrictions on May 28, 2018 and May 29, 2018, and before and after those

[1] Prior to the start of trial, the United States moved to amend its Criminal Complaint to simply state that Counts 1 through 7 occurred in a National Forest. (Compl., ECF No. 1.) The defendant did not object to the amendment, and it was allowed.

[2] The court notes that Forest Order No. 04-18-07-F for Coconino National Forest went into effect on May 4, 2018. (Pl. Ex. 1.)

dates as set forth in Forest Order No. 09-247.[3] The stipulation included a copy of Forest Order No. 09-247. The parties stipulated that Forest Order No. 09-247 was posted on the Prescott National Forest website, https://www.fs.usda.gov/prescott, and at various United States Forest Service offices and locations in the Prescott National Forest in the District of Arizona. (Stipulations, ECF No. 21.; *see also* Pl. Ex. 2.)

- The "Sycamore Fire" was ignited on or about May 28, 2018, in the Sycamore Canyon Wilderness Area in and about the Prescott and/or the Coconino National Forests in the District of Arizona. The Sycamore Fire was in a remote part of the National Forest and it spread to an area that was about 230 acres in size. The fire burned timber, shrubs, and grasses, and was contained on or about June 6, 2018. The parties stipulated that fire suppression by the USFS was primarily conducted with air resources (e.g., aircraft) along with USFS firefighters (i.e., hot shot crews) who were flown into the area. (Stipulations, ECF No. 24.)
- The USFS's recoverable fire suppression costs (i.e., restitution) related to this case and specifically the Sycamore Fire are $293,413.71. *Id.*
- The foundation, admissibility, and entry into evidence of the defendant's medical records from Northern Arizona Healthcare from his treatment on May 28, 2018, and May 29, 2018. The statements made therein, as well as the diagnoses, laboratory records, assessments, plans, physical exams, complaints, reasons for consultation, patient history, symptoms, impressions, discharge dispositions, and/or discharge condition are admissible into evidence for the truth of the matter asserted therein. *Id.*
- To permit the testimony of Jeff Davison Hardin, MD, via telephone. The parties stipulated that Dr. Hardin was one of the treating physicians for the

[3] The court notes that Forest Order No. 09-247 for Prescott National Forest went into effect on May 22, 2018. (Pl. Ex. 2.)

defendant at the Verde Valley Medical Center in Cottonwood, Arizona, for the defendant's treatment at the emergency room on May 28, 2018. *Id.*

At the start of trial, the parties further stipulated to the foundation, authenticity, and admission into evidence of the following additional exhibits: Plaintiff's exhibits 3 through 9, 11 through 18, and 23; and Defendant's exhibit 100. (Criminal Ex. List, ECF No. 29; Criminal Ex. List, ECF No. 30.)

The United States called two witnesses were called at trial, Retired USFS Law Enforcement Officer (LEO) Michael O'Neil ("O'Neil") and USFS Firefighter Lawrence Badger ("FF Badger"). (Criminal Witness List, ECF No. 31.) O'Neil investigated the fires, and FF Badger was one of the firefighters who flew into the wilderness area by helicopter to suppress the fires. Two witnesses were called at trial by the defense, Jeff Davison Hardin, MD ("Dr. Hardin"), the defendant's treating physician at the hospital in Sedona, Arizona, and the defendant himself. (Criminal Witness List, ECF No. 28.)

Having considered all of the evidence introduced at trial and the arguments of counsel with the applicable law, the Court makes the following findings of fact and conclusions of law.

I. Findings of Fact

1. To the extent not addressed below, the stipulations are adopted and incorporated herein as findings of fact. (The Parties' Stipulations for Trial and/or Hr'g's, ECF No. 21.; The Parties' Stipulations for Trial and/or Hr'g's, ECF No. 24.; Order on the Parties' Stipulations, ECF No. 25.)

2. Phillip Alejandro Powers III ("Powers") is an adult male who was 37 years old at the time of the violations described in the Complaint. At the time, he had been an Arizona resident for over 30 years.

3. Powers was hiking to prepare for a hunting trip later in the year when he went on what he thought was a 17.8-mile hike in the Coconino and Prescott National Forests near Sedona, Arizona. The hike went into the Sycamore Canyon Wilderness Area, which is a remote part of the National Forest. The hike that Powers went on was the "Taylor

Cabin Loop", an 18.8 mile distance. Powers researched his hike in a book called "A Falcon Guide, Hiking Arizona, A Guide to the State's Greatest Hiking Adventures." (Pl. Ex. 23.) The "Taylor Cabin Loop" was described in this book as a 18.8-mile "strenuous" hike that would take about 12 hours or two days to hike. (Pl. Ex. 23.) Additionally, the book warns that there is usually water in Sycamore Creek during the spring, but that it is dry later in the year. (Pl. Ex. 23.)

4. Powers confused the "Taylor Cabin Loop" with another hike in that book, the "Cabin Loop." When interviewed on June 2, 2018, Powers provided information about the wrong hike to O'Neil. (Pl. Ex. 14.) Even at trial, Powers seemed confused about which hike he actually attempted. He further testified at trial that he was still confused about what hike he had sent to O'Neil stating, "I was unaware that the book had two different trails for the same hike… it sounded like the same hike as they are both going to Taylor Cabin, so I am kind of confused about what I sent him".[4]

5. The information provided to O'Neil by Powers was about a hike referred to as the "Cabin Loop", which, according to O'Neil, was approximately 50 miles away from the "Taylor Cabin Loop." That hike was described in the book Powers used as a 17.8-mile loop, of "moderate" difficulty and a hiking time of about two days. (Pl. Ex. 14.)

6. Powers had some hiking, hunting, and camping experience; however, he testified that he had not been on a hike of this distance for approximately 3 to 4 years.

7. Powers had never hiked in the Sycamore Canyon Wilderness Area prior to May 27, 2018, and he had not previously been on this specific hike. However, Powers testified that he had been on many hikes in the Sedona, Arizona, area.

8. Powers knew the importance of carrying sufficient water on hikes in Arizona and understood the dangers of becoming dehydrated.

9. Powers knew the dangers of wildfire in Arizona.

[4] The court notes that the "Taylor Cabin Loop" hike and the "Cabin Loop" hike are two entirely different hikes, in vastly different terrain, to different cabins. The "Cabin Loop" hike is north of the Mogollon Rim in a Ponderosa pine forest. Conversely, the "Taylor Cabin Loop" hike, which Mr. Powers attempted, is located in the high desert, consisting of piñon-juniper woodlands.

10. Both the Coconino and Prescott National Forests were under Stage 2 fire restrictions. [5]

11. Stage 2 fire restrictions prohibited individuals from building, maintaining, attending, or using a fire without a permit. (Pl. Ex. 1.; Pl. Ex. 2.)

12. Powers knew that the Prescott and Coconino National Forests were in Stage 2 fire restrictions at the time of his hike on May 27, 2018 to May 28, 2018.

13. Powers did not obtain a permit to have a fire at the time of his hike on May 27, 2018 to May 28, 2018.

14. Powers was a long-time Arizona resident who described himself as experienced in the outdoors.

15. Powers arrived at the parking lot for the Dogie Trailhead, in the Coconino National Forest, on May 26, 2018. Powers parked and camped overnight, so he could start the hike early in the morning to avoid some of the heat.

16. When Powers arrived at the trailhead, it was hot and dry. No water sources were viewed in the immediate area. Powers testified that it was unlikely he would find water on the hike.

17. When interviewed on body camera as to this point in May and June 2018, Powers indicated that he believed he would find water on the trail notwithstanding the very dry and hot conditions. (*E.g.*, Pl. Ex. 7 at 7:54 to 8:22.; Pl. Ex. 8 at 7:45 to 8:50.; *see also* Pl. Ex. 17.)

18. Powers began his hike on the morning of May 27, 2018, around 6:00 to 6:30 a.m. He was attempting to complete the Taylor Cabin Loop in one day.

[5] The parties stipulated that the National Forests were under Stage 2 Fire Restrictions: Coconino National Forest, in the District of Arizona, was in Stage 2 Fire Restrictions on May 28-29, 2018, pursuant to Forest Order No. 04-18-07-F. (Pl. Ex. 1.) Prescott National Forest, in the District of Arizona, was in Stage 2 Fire Restrictions on May 28-29, 2018, pursuant to Forest Order No. 09-247. (Pl. Ex. 2.)

19. Powers carried 100 ounces of water in a bladder in his backpack and had an approximate 16-ounce bottle of water. Thus, Powers had approximately 116 fluid ounces of water for the entire hike.

20. Powers also had "Cutie" Oranges, mango, and freeze-dried granola.

21. Along with water and food, Power's backpack contained camping gear including two fuel canisters, a sleeping bag, a hammock, hammock straps, a machete, and a Ka-bar knife.[6] (Pl. Ex. 15.) Powers also testified that he had his cellphone, a 4G hotspot (which doubled as a charger for his cellphone), and a small battery charger.

22. Powers successfully hiked to the Taylor Cabin, which is on the Coconino National Forest in the District of Arizona. The trail was well-marked and easy to follow.

23. Powers did not find a water source.

24. Powers lost the trail several miles past the Taylor Cabin. The terrain and trail was rough and overgrown. At the time, Powers believed he had about four miles to finish the Taylor Cabin Loop and end back at the parking lot where he started.

25. Powers had a global positioning system ("GPS") feature on an application on his smart phone. While it displayed a map of the area – he described it being a topographic map – it was not actively providing him information on his route because he was not getting a cellular phone signal. Powers did not have any alternative navigation options, like a paper map or compass.

26. After getting lost on the afternoon of May 27, 2018, Powers returned to the Taylor Cabin for the night. He originally planned a day hike (not an overnight hike). Powers still had some food remaining, and he found additional food at the Taylor Cabin. Powers saved about 16 to 20 ounces of water for the morning. Powers intended to backtrack on the trail he had hiked in on to return to his vehicle.

27. Because Powers lost the trail and returned to the Taylor Cabin, his anticipated 17.8-mile hike became longer, possibly more than 20 miles. As such, he admitted that he

[6] At trial, O'Neil testified that a Ka-bar knife is a military fighting tool, that could also be used for trenching.

did not have enough water for the return hike. (According to "A Falcon Guide," the hike Powers actually went on was 18.8 miles. (Pl. Ex. 23.))

28. Power's cell phone was low on battery at this point of the day on May 27, 2018. He turned it on approximately every hour to check for a signal and attempted to send voicemails to friends to alert them of his situation.[7] He also used his WiFi hotspot device to search for a signal. He planned to use the hotspot to charge his phone if he found a signal.

29. While at the cabin, Powers signed a trail log, indicating he was low on water, and hoping to find Geronimo or Dobey Springs. (Pl. Ex. 17.) Geronimo and Dobey Springs are in the general vicinity of Taylor Cabin.

30. Powers did not sleep well at the Taylor Cabin due to leg cramps. This is when he began to worry that he was physically unable to return to his vehicle.

31. Powers heard a rattlesnake in the cabin. Fearing that the rattlesnake was going to strike him, he killed the snake. He then threw the dead snake into the firepit near the cabin. Powers set up a hammock outside.

32. Concerned about his ability to get back, Powers purposefully, voluntarily, and admittedly started a fire that night, testifying that he hoped the smoke would attract attention, although he acknowledged that smoke wouldn't be seen at night. This fire was named the "Taylor Fire," which was in the area of the Taylor Cabin in the Coconino National Forest.

33. The Taylor Fire was not started in a fire ring or pit, and it burned approximately 1/10th of an acre (including grass, brush, small trees, and timber). Powers did not clear any brush or flammable material away before starting the fire.

34. Powers started the Taylor Fire on the evening of May 27, 2018, at about 9:00 p.m. At the time, Powers still had some water left, about 16 to 20 ounces. He also had food and shelter.

[7] He later learned his voicemails were only delivered once he was out of the wilderness area.

35. There was a fire ring or pit in very close proximity to the Taylor Cabin, and it was only a few feet from where Powers started the Taylor Fire.

36. The Taylor Fire went out on its own.

37. Powers laid in the hammock near the fire site. He slept little due to his legs cramping.

38. Powers started the hike back to the trailhead parking lot early in the morning on May 28, 2018, while it was still dark, due to the anticipated heat of the day. Powers ate a small breakfast before he left on the hike. A few miles into the hike back, Powers' testified that his legs started to cramp, that his body began to "shut down," and that he could only hike short distances before he had to stop and rest in the shade.

39. Powers' cellphone could not get a signal – he unsuccessfully tried contacting 9-1-1 and a friend via phone. His phone eventually ran out of battery charge.[8]

40. Powers ran out of water and drank some of his own urine out of desperation.

41. Powers was approximately 3 to 4 miles back on the trailhead when he believed he could no longer hike any further.

42. Powers knowingly and intentionally lit a second fire in a dead tree ("snag"). He chose the snag because there was dead vegetation around it and he hoped it would create smoke and attract attention. The second fire that Powers set was named the "Sycamore Fire," which was in the Prescott National Forest near the boundary of the Coconino National Forest. Powers started this fire on the morning of May 28, 2018.

43. The Sycamore Fire was not started in a fire ring. Powers did not clear brush or flammable material away before starting this fire.

[8] Powers testified that he had a Verizon mobile 4G hotspot – a device used to share the network with other devices to access the Internet – with him. Powers testified the hotspot had a backup battery but that his cellphone still ran out of power during the hike. Other than the hotspot device and small battery charger, Powers did not have a way to charge his phone such as a solar charger.

44. Powers stayed in the area of the Sycamore Fire for about an hour hoping that the smoke would bring help and he thought the fire was going out. However, Powers did not make sure that the fire was out, prior to leaving the area.

45. Powers took his cellphone, 4G hotspot device, battery charger, and keys with him. He abandoned his pack near the snag and continued down the trailhead.

46. Powers knew that the fire was not out when he walked away. In one of Powers' interviews with O'Neil that was recorded on a body camera, Powers said, "It wasn't that big when I left it. I thought it was going out." (Pl. Ex. 8, 35:42-36:01.)

47. Powers knowingly, willingly, voluntarily, intentionally, and recklessly left the Sycamore Fire unattended and without extinguishing it. Powers knowingly, willingly, voluntarily, intentionally, and recklessly permitted the Sycamore Fire to burn and spread beyond his control, in that he left the area of the Sycamore Fire when the fire was not completely extinguished in an area that was extremely dry.

48. The Sycamore Fire eventually spread beyond Powers' control and burned approximately 230 acres of the National Forest in the District of Arizona. The Sycamore Fire burned grass, brush, and timber in a National Forest.

49. Powers eventually saw a small plane. About 30 minutes later he saw a helicopter that had circled and left. Approximately, 30 minutes later the helicopter returned.

50. In an attempt to be seen, Powers cut off his orange boxer brief underwear and waved them around on a walking stick. Powers started a third fire with his lighter, concerned that the helicopter did not see him.[9]

51. The third fire that Powers set was named the "Sycamore 2 Fire," which was in the Prescott National Forest near the boundary of the Coconino National Forest. Powers started this fire on the morning of May 28, 2018.

52. The Sycamore 2 Fire was not started in a fire ring. Powers did not clear brush or flammable material away before starting the fire. It burned an area of grass, brush, and timber in a National Forest.

[9] Powers was wearing all camouflage attire.

53. The Sycamore 2 Fire ultimately burned a three-foot circle.

54. After Powers started the Sycamore Fire, reports of smoke and/or a fire were made to the USFS in the Red Rock Ranger District of the Coconino National Forest on the morning of May 28, 2018.

55. A USFS Helitak team in a helicopter was sent to the area of the Sycamore Fire. FF Badger was one of the firefighters on that crew. FF Badger saw a male subject under a tree, who was later identified as Powers.

56. Powers was assisted into the helicopter where the crew gave Powers some water which he was able to drink in small sips. Although there is no USFS protocol for passengers on the helicopter, the crew chose to fly Powers out.

57. Powers was flown to the Sedona, Arizona, airport, where he was met by an ambulance. Powers was assisted in walking with two people to the ambulance.

58. In the ambulance, now-retired USFS Law Enforcement Officer Michael O'Neil first met Powers. O'Neil asked Powers about the fires, Powers responded, "It was me." Powers told O'Neil about the hike, including killing the rattlesnake and drinking his urine, and he took full responsibility for igniting the fires. He told O'Neil he did not want to light them, and that lighting them was a last resort. (Pl. Ex. 6.)

59. Emergency Medical Technicians started Powers on an IV with fluids and transported him to Sedona Emergency Department, a satellite campus of the Verde Valley Medical Center.

60. Dr. Jeff Hardin treated Mr. Powers at the Sedona Emergency Department on May 28, 2018. Dr. Hardin is board certified in emergency medicine and has practiced medicine for more than 24 years and he is familiar with the medical issues created by heat and exertion in the Sedona area.

61. Dr. Hardin diagnosed Powers with weakness, heat exhaustion, acute renal failure, rhabdomyolysis, and dehydration. These conditions can be severe and cause permanent damage. Acute Renal Failure can cause kidney damage requiring lifelong dialysis. Acute Renal Failure can have many causes. Rhabdomyolysis can cause permanent

kidney and/or heart damage. Rhabdomyolysis can be caused by dehydration, but more often it is caused by overexertion.

62. Dr. Hardin concluded that Powers was moderately dehydrated, suffering from heat exhaustion (but not the more serious heat stroke), early onset renal failure, and Rhabdomyolysis. When asked about the severity of the early onset renal failure, Dr. Hardin described it as a mild case and testified that Powers did not require dialysis. Further, Dr. Hardin could not be certain that the Rhabdomyolysis was caused by dehydration as it could have been caused by the exertion during the strenuous hike.

63. Dr. Hardin did not have concerns about Powers' mental state at the time and would not expect Powers' conditions to affect his mental state.

64. Dr. Hardin testified that while Powers' was moderately dehydrated, left untreated (e.g., another 24 hours) it would have been life threatening. Powers was experiencing significant adversity with regards to his health at the time he started the Sycamore and Sycamore 2 Fires.

65. As articulated more fully below, this adversity could have been avoided and did not relieve him of the responsibility of acting in a reasonable manner under the circumstances.

66. O'Neil interviewed Powers a second time in the Sedona Emergency Room. Powers immediately asked about the fires, told O'Neil he had ignited them, described what happened on the hike including the rattlesnake and drinking his urine, and answered all of O'Neil's questions.

67. Powers was treated in the Emergency Department with an IV and fentanyl for pain. Dr. Hardin consulted with a nephrologist and both physicians recommended Powers be admitted to the hospital. Despite the treatment Powers had received, Dr. Hardin did not believe it was safe for Powers to leave the Emergency Department.

68. Powers remained in the hospital for one night. The following day he felt somewhat better. He elected to leave the hospital that day.

69. FF Badger stayed on the scene and/or area of the Sycamore Fire. He, along with others, hiked to the Taylor Cabin to inspect and assess the Taylor Fire. He found that the Taylor Fire was about 1/10th of an acre and had burned out.

70. The Sycamore Fire was contained on or about June 6, 2018. Containment does not mean that the fire was out. Instead, it means that the forward progression of the fire had been stopped.

71. Because of the remote area of the fire, the resources used to fight the fire were air assets (e.g., helicopters) and firefighters on the ground. (The Parties' Stipulations for Trial and/or Hr'g's, ECF No. 24.)

72. Due to the location of the Sycamore Fire, it was a threat to Flagstaff, Arizona, as well as the nearby watershed.

73. The recoverable fire suppression costs (i.e., restitution) incurred by the USFS for the Sycamore Fire are $293,413.71. *Id.*

74. Powers acknowledged that he had no water purification system (e.g., filters or tablets) for hike.[10]

75. Dr. Hardin testified that a regular person sitting in the shade in 100-degree heat in Sedona, Arizona, would likely need at least a gallon (128 fluid ounces) of water per day to stay properly hydrated, and that would be on the low side. Further, that a person on an approximately 18-mile or so hike would need at least two to three gallons of water to stay properly hydrated.

76. Given the conditions that existed in the Sycamore Canyon Wilderness Area on May 27, 2018, 116 ounces of water was profoundly insufficient for a hike of this difficulty in the temperatures and dry conditions of the time.

77. Powers relied on his smart phone for light, navigation and communication. Cell phone service in the Sycamore Canyon Wilderness Area was sporadic, at best.

[10] Powers testified that he had left a water filter in his vehicle at the trailhead, and on body camera video he can be heard saying he left his LifeStraw™ at home.

78. Powers did not have a paper map, guidebook, GPS device, compass, communication or signaling device (even a mirror), first aid or medical kit or any alternative light sources.

79. Powers did not bring sufficient food for a hike of this duration in these conditions.

80. Powers was ill-equipped for a hike of this length and difficulty.

81. The Court finds that Powers was reckless in his preparations for this hike.

82. The Court finds that Powers created the condition that caused him to start the emergency signal fires.

83. The Court further finds that the defendant had other options other than starting wildfires. For example, Powers could have started the Taylor Fire in the fire ring that was only feet away from where he started the fire in the brush. Powers also could have made a fire ring or pit when he started all three fires, and he could have removed flammable material to keep the fire from spreading.

84. Powers did not have a permit to start any of the three fires. Thus, his starting of the fires was *per se* illegal.

85. Powers knowingly, willingly, voluntarily, intentionally, and recklessly started the Taylor Fire, the Sycamore Fire, and the Sycamore 2 Fire, when prohibited by Forest Service Order. *Supra*, note 3.

86. Powers knowingly, willingly, voluntarily, intentionally, and recklessly left the Sycamore Fire, allowing it to burn unattended and spread beyond Power's control.

87. By starting the Taylor Fire, Sycamore Fire, and Sycamore 2 Fire, Powers knowingly, willingly, voluntarily, intentionally, and recklessly caused timber, trees, slash, brush, or grass to burn, when prohibited by Forest Service Order. *Id*.

88. The fires described above all occurred in the Prescott and/or Coconino National Forests, in the District of Arizona, which are forests owned by the United States and under the jurisdiction of the United States Forest Service (which is part of the United States government).

89. Any finding of fact deemed a conclusion of law is so adopted.

II. Conclusions of Law

The defendant readily admitted starting three signal fires in a National Forest in the Sycamore Canyon Wilderness Area of the Coconino and Prescott National Forests in the District of Arizona. The United States posits that Powers had the requisite criminal intent when he started the fires and, in the case of the Sycamore Fire, when he left the area and permitted the fire to burn unattended and spread beyond his control. The United States further argued that Powers was reckless in his preparation for this hike in a wilderness area during Stage 2 fire restrictions, and this recklessness created the condition where Powers believed he needed to start one or more signal fires. Powers argued that he should be found not guilty on Count 1 because he lacked criminal intent. (Mem. of P. & A. in Supp. of Def.['s] Mot. for J. of Acquittal as to Count 1, ECF No. 34.) He further argued that he should be found not guilty on all counts based on a necessity defense. In support of his argument, he testified that he started the fires to save his life after getting lost on a hike in the wilderness area.

A. Count 1 of the Complaint, a Violation Under 18 U.S.C. § 1856.

Under Count 1 of the Complaint, the defendant was charged with one count of leaving a fire unattended and unextinguished in a National Forest in violation of 18 U.S.C. § 1856. (Compl., ECF No. 1.)[11] The elements of this count are as follows:

1. That on or about May 27, 2018 to May 28, 2018, in a National Forest,

[11] Section 1856 states: "Whoever, having kindled or caused to be kindled, a fire in or near any forest, timber, or other inflammable material upon any lands owned, controlled or leased by, or under the partial, concurrent, or exclusive jurisdiction of the United States, including lands under contract for purchase or for the acquisition of which condemnation proceedings have been instituted, and including any Indian reservation or lands belonging to or occupied by any tribe or group of Indians under the authority of the United States, or any Indian allotment while the title to the same is held in trust by the United States, or while the same shall remain inalienable by the allottee without the consent of the United States, leaves said fire without totally extinguishing the same, or permits or suffers said fire to burn or spread beyond his control, or leaves or suffers said fire to burn unattended, shall be fined under this title or imprisoned not more than six months, or both." 18 U.S.C. § 1856.

> 2. upon lands owned, controlled, or under the partial jurisdiction of the United States,
> 3. the defendant having kindled or caused to be kindled, a fire in or near a forest, timber, or other inflammable material,
> 4. did leave said fire without totally extinguishing the same, or permitted or suffered said fire to burn or spread beyond his control, or left or suffered said fire to burn unattended.

18 U.S.C. § 1856. The fire in Count 1 refers to the Sycamore Fire. (Compl., ECF No. 1.)

The Complaint tracks the language of the statute, although the United States charged in the conjunctive rather than in the disjunctive used in Section 1856. (*Compare* Compl., ECF No. 1., *with*, 18 U.S.C. § 1856.)[12] Under the plain language of the statute, to prevail the United States must prove that the defendant: (1) left the Sycamore Fire without totally extinguishing it, (2) permitted the Sycamore Fire to burn or spread beyond the defendant's control, (3) suffered the Sycamore Fire to burn or spread beyond the defendant's control, (4) left the Sycamore Fire to burn unattended, or (5) suffered said fire to burn unattended. *See* 18 U.S.C. § 1856.

The Court finds that Powers started the Sycamore Fire on May 28, 2018, in the Prescott National Forest, which is land owned and under the control of the United States (i.e., the United States Forest Service). The court also finds that Powers purposefully, intentionally, willingly, and voluntarily started the Sycamore Fire in a dead tree snag that contained other dead material around it. He strategically picked the tree and surrounding dead material as he believed it would ignite easily and generate a significant amount of smoke. He also did not make efforts to clear the area to keep the fire contained. As much

[12] It is well settled that the United States may charge in the conjunctive but prove in the disjunctive when the statute so supports. *E.g.*, *United States v. Abascal*, 564 F.2d 821, 832 (9th Cir. 1977) ("The government may charge in the conjunctive form that which the statutes denounce disjunctively, and evidence supporting any one of the charges will support a guilty verdict."); *United States v. Arias*, 253 F.3d 453, 457-58 (9th Cir. 2001)("When, as here, the statute speaks disjunctively, the conjunctive is not required even if the offense is charged conjunctively in the indictment.").

of this evidence was not in dispute, the court finds that the United States proved the first three elements beyond a reasonable doubt in Count 1 of the Complaint.

As to the fourth element, the court finds that the United States proved beyond a reasonable doubt that Powers did not totally extinguish the Sycamore Fire, that he left it because he thought it was going out, and that the fire was permitted to burn beyond the defendant's control.[13] At trial, Powers admitted that the Sycamore Fire was not completely out when he walked away from it. In one of his interviews with O'Neil in 2018 that was recorded on a body camera, Powers said, "It wasn't that big when I left it. I thought it was going out." (Pl. Ex. 8, 35:42-36:01.) Powers also testified that he knew the importance of putting out a fire, that he knew it was hot and dry when he started the hike, that he knew of the substantial fire risks in Arizona, and that he knew of the fire restrictions at the time of hike. Thus, the court finds that Powers voluntarily and willingly (1) left the Sycamore Fire without totally extinguishing it, (2) he permitted the fire to burn (and/or spread) beyond his control, and (3) he left the fire to burn unattended.[14]

The last element of Count 1 hinges on Power's intent. While intent is not expressly required under this section, the Ninth Circuit has held that Section 1856 requires a finding of "criminal intent." *United States v. Launder*, 743 F.2d 686, 689 (9th Cir. 1984).[15]

In *Launder*, the defendant, Robert W. Launder ("Launder"), went camping with his friends at Mount Lemmon in the Coronado National Forest near Tucson, Arizona. *Id.* at 688. The next day, Launder decided to hike around the campground area by himself, and

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[13] The parties stipulated that approximately 230 acres of timber, shrubs, and grasses burned in the Prescott and/or Coconino National Forests as a result of the Sycamore Fire. (The Parties' Stipulations for Trial and/or Hr'g's 1 ¶ 1, ECF No. 24.) Thus, the fire was unquestionably beyond the defendant's control.

[14] The United States only has to prevail on one of these theories to support the fourth element of the charge, but the evidence supports the defendant's guilt on at least three separate theories. *See* 18 U.S.C. § 1856.

[15] It is important to recognize that the *Launder* case did not deal with a situation where (1) the defendant left the fire without totally extinguishing it and (2) where the defendant left the fire to burn unattended. 743 F.2d at 688. Indeed, the Ninth Circuit did not analyze the specific situation and allegations that are at issue in the instant case.

he left his campsite intending to hike for one or two hours. *Id.* Launder took no food, water, or camping gear with him. *Id.* Soon thereafter, Launder found himself in an unfamiliar and rough area, and he lost track of time and distance. *Id.* At about 6:00 p.m., Launder realized that he could not find his way back to either his campsite or Tucson. *Id.* In an attempt to attract attention, Launder decided to light a signal fire. *Id.* Launder started a signal fire, but did so only after clearing an area on a rock ledge approximately five to ten feet across. *Id.*

Soon after Launder lit the signal fire, a gust of wind spread the fire and ignited four smaller fires in the area around him. *Id.* Launder attempted to put the fires out but was unable to do so and the fire escaped his control. *Id.* The fire spread and became a wildfire that came rapidly toward him. *Id.* To avoid injury, Launder ran from the fire. *Id.*

About 20 minutes later, Launder saw a helicopter in the area of the fire. *Id.* Launder tried unsuccessfully to attract the attention of the helicopter. *Id.* When this failed, Launder cleared another area and ignited a second fire. *Id.* Launder was sighted by the helicopter crew, and they landed nearby to rescue him. *Id.* Upon rescue, Launder freely admitted to the helicopter crew, and later to the fire suppression specialist from the USFS, that he had set the first fire as a signal fire when he got lost. *Id.* The Ninth Circuit noted that Launder "vigorously tried to combat" the first signal fire, and "even helped the authorities put out the second signal fire." *Id.* at 690.

At the time Launder lit his fires, the risk of fire danger in the Coronado National Forest was significant. *Id.* at 688. While notices of the fire conditions had been posted on the highway at the base of Mount Lemmon, the USFS had not prohibited campers from lighting fires. *Id.*

Launder's charges under 18 U.S.C. § 1856, only related to the first fire he set which ultimately spread out of control. *Id*. Launder argued at the outset of trial that the evidence would show that he had no criminal intent in leaving the first fire as he did everything possible to extinguish it. *Id.* The United States argued that 18 U.S.C. § 1856 was a regulatory offense that does not require a showing of criminal intent. *Id.* The district court

agreed with the United States that the offense set forth in 18 U.S.C. § 1856 is a regulatory offense that does not, under *Morissette v. United States*, 342 U.S. 246 (1952), require a showing of criminal intent. *Launder*, 743 F.2d at 688. Launder was convicted under 18 U.S.C. § 1856 and sentenced to three years' probation. *Id.* at 688.

Launder appealed and the Ninth Circuit reversed. *Id.* The court stated, "The language of 18 U.S.C. § 1856 in no way suggests that Congress intended to impose strict criminal liability." *Id.* at 689. In pertinent part, the *Launder* court further stated:

> In including the terms "permits" and "suffers" in section 1856 Congress evidenced its intention that a defendant not be found culpable under the statute unless the government has shown a willingness on his part to allow the fire to burn beyond control, *or at the least that he failed to make all reasonable efforts to extinguish the fire*. Moreover, we think the use of the terms "permits" and "suffers" illustrates the general intent of Congress with respect to the entire statute and that Congress intended that a showing of criminal intent be required regardless of which clause of the statute is invoked in a particular case.

743 F.2d at 689-90 (emphasis added).

Ultimately, the court found that the United States did not claim Launder possessed the requisite criminal intent. After lighting the signal fire, Launder vigorously tried to combat it and only left once it had spread beyond his control. He immediately confessed his actions to the rescue team and United States Forest Service. Lastly, he "even helped the authorities put out the second signal fire. *Id.* at 690. "Such activities do not lend themselves to the view that Launder engaged in the willful act of leaving a fire without extinguishing it or 'permitted or suffered a fire to burn or spread beyond his control.'" *Launder*, 743 F.2d at 691 (internal brackets omitted).

The court finds that *Launder* is distinguishable from the facts of the instant case. 743 F.2d at 688-90. When Launder realized he became lost, he cleared a rock ledge approximately five to ten feet across and used small twigs, leaves, and grass as fuel to light

a signal fire. *Id*. at 688. This act demonstrates a precautionary measure in ensuring that the signal fire would not spread. Nonetheless, a gust of wind spread his signal fire and started four smaller fires in the area, which Launder attempted to extinguish. *Id*. Launder then only ran away from the fire when it began spreading quickly and coming rapidly towards him, to avoid injury to his person. *Id*.

In the current case, the court finds that Powers found himself in a situation that he created. Further, he did not take precautionary measures when igniting the Sycamore Fire. To the contrary, he did the opposite. Powers intentionally lit a dead tree snag knowing that there was significant dry matter surrounding the snag to create a larger fire. While igniting the fire only supports one element of 18 U.S.C. § 1856, this analysis bolsters Power's intent of creating a larger fire, which ultimately spread beyond his control.

Further, the court finds that Powers did not make any affirmative efforts to extinguish, or at minimum, contain the Sycamore Fire. Powers did not clear the area where he started the Sycamore Fire. The defendant, who had both a machete and a ka-bar knife, also could have built a fire pit or ring.[16] Powers also had access to an existing fire ring at the Taylor Cabin, where he still had shelter, and could have started a signal fire during daylight hours. Yet, nothing in his testimony suggested that he made such efforts.

Lastly, Powers willingly and knowingly walked away from the Sycamore Fire while it was still burning because he thought it was going out. (*E.g.*, Pl. Ex. 8, 35:42-36:01.) He did not attempt to put the fire out prior to his departure. In *Launder*, the Ninth Circuit distinguishes the term "leaves" in the statute, stating "[it] connotes a voluntary leaving by the defendant and does not embrace an involuntary departure compelled by events over which the defendant has no control." 743 F.2d at 690, note 2. While Launder left the fire, once it was beyond his control and rapidly spreading towards him, Powers voluntarily decided to continue further down the trail, leaving the fire unattended and allowing it to

[16] During O'Neil's testimony, he explained that a Ka-Bar knife can be used for trenching purposes. *See supra*, note 5.

spread. Therefore, Powers departure from the Sycamore fire was voluntarily and within his own control.

Accordingly, the Court finds that the defendant had the requisite criminal intent pertaining to the Sycamore Fire. The Court finds that the defendant had the requisite intent of knowingly, willingly, voluntarily, intentionally, and recklessly (1) leaving the Sycamore Fire without totally extinguishing it, (2) permitting the fire to burn (and/or spread) beyond his control, and (3) leaving the fire to burn unattended.

As such, the Court finds the defendant guilty of Count 1 of the Complaint.

B. Counts 2-4 of the Complaint, Violations under 36 C.F.R. § 261.52(a)

Under Counts 2, 3, and 4 of the Complaint, the defendant was charged with unlawfully building, maintaining, and attending a fire in a National Forest when prohibited to do so by order in violation of 36 C.F.R. § 261.52(a). (Compl., ECF No. 1.) In that regard, the defendant was charged with one count each for the Taylor, Sycamore, and Sycamore 2 fires. *Id*.

Section 261.52(a) has no intent required under the plain language of the regulation. Under 36 C.F.R. § 261.1(c), intent is not an element of any offense under part 261 unless otherwise specified. Thus, merely starting the fires – due to the fire restrictions – was *per se* illegal. *See Launder*, 743 F.2d at 691 ("We readily acknowledge that protecting forests from fires which every year ravish invaluable acres of forest lands in the United States is a legitimate concern. However, the United States Forest Service has the authority to prohibit, by order, all fires in a given area whenever circumstances warrant such action. 36 C.F.R. § 261.52 (1983).").

The defendant stipulated that both the Coconino National Forest and the Prescott National Forest were in Stage 2 fire restrictions on May 28, 2018 and May 29, 2018. (The Parties' Stipulations for Trial and/or Hr'g's, ECF No. 21.; *see also* Pl. Ex. 1.; Pl. Ex. 2.) The evidence supports that the fire restrictions were posted at various locations in the forest and online, and the defendant testified that he was aware of the restrictions (although his

knowledge is not required). The Stage 2 fire restrictions prohibited the building, maintaining, attending, or using a fire under 36 C.F.R. § 261.52(a). *Id*.

a. Taylor Fire

The court finds that on the evening of May 27, 2018, at about 9:00 p.m., Powers lit the Taylor Fire near the Taylor Cabin. The fire was not started in a fire ring or pit, and it burned approximately 1/10th of an acre. Powers further testified to starting this fire with a lighter.

b. Sycamore Fire

The court finds that on the morning of May 28, 2018, Powers lit a second fire in a dead tree ("snag"). The Court further finds that Powers did not clear any brush or flammable material away before starting the fire. This fire burned approximately 230 acres of the National Forest. Powers further testified to starting this fire with a lighter and leaving it unattended, when he assumed it was going out.

c. Sycamore 2 Fire

The court finds that on the morning of May 28, 2018, Powers started the Sycamore 2 Fire. This fire was not started in a fire ring and ultimately burned a three-foot circle. Powers testified to starting this fire with a lighter.

In summation, Powers admitted to starting all three fires in a National Forest with a lighter, and the evidence is undisputed that he had no permit to do so. Here, both forests were in Stage 2 fire restrictions. (Pl. Ex. 1.; Pl. Ex. 2.) Starting the fires was *per se* illegal under Title 36 of the Code of Federal Regulations. (*See* Compl. Counts 2-7, ECF No. 1.) As such, the Court finds that the defendant built, maintained, and attended a fire when prohibited to do so by order. As such, the Court finds the defendant guilty of Counts 2, 3, and 4 of the Complaint.

C. Counts 5-7 of the Complaint, Violations under 36 C.F.R. § 261.5(c)

Under Counts 5, 6, and 7 of the Complaint, Powers was charged with unlawfully causing timber, trees, brush, and grass to burn in a National Forest without a permit in

violation of 36 C.F.R. 261.5(c). (Compl., ECF No. 1.) In that regard, Powers was charged with one count for each of the Taylor, Sycamore, and Sycamore 2 fires. *Id.*

Under the plain language of Section 261.5(c), there is no intent requirement.[17] Again, under 36 C.F.R. § 261.1(c), intent is not an element of any offense under part 261 of the regulations unless otherwise specified. *See also United States v. Polaris Sales, Inc.*, 2020 WL 4430375, at *3 (C.D. Cal. July 31, 2020)("As a preliminary matter, Yanez claims that subsections (c), (d), and (e) require intentional conduct. However, 36 C.F.R. section 261.1(c) unequivocally states that 'unless an offense set out in this part specifies that intent is required, intent is not an element of any offense under this part.' Intent is not expressly required in section 261.5; thus, Yanez's first argument is unavailing.")(internal citation and brackets omitted).

The court concluded that Powers started all three of these fires with a lighter in a National Forest, and that he did not have a permit to start the fires. *Supra*, 22 at 12-13. The court further finds these fires caused grass, brush, and timber to burn. (*E.g.*, Pl. Ex. 11.; Pl. Ex. 12.; Pl. Ex. 13.; *see also* The Parties' Stipulations for Trial and/or Hr'g's ¶ 1, ECF No. 24.) Accordingly, the Court finds that the defendant unlawfully caused timber, trees, brush, and grass to burn without being authorized to do so by a permit. As such, the Court finds the defendant guilty of Counts 5, 6, and 7 of the Complaint.

D. The Defendant's Necessity Defense

In closing argument, Power's raised, for the first time, the defense of necessity to all of the charges in the Complaint. "The necessity defense is an affirmative defense that protects the defendant from criminal liability for violation of a criminal statute." *Raich v. Gonzales*, 500 F.3d 850, 861 (9th Cir. 2007). The necessity defense is one that does not negate any of the elements of a crime but instead serves as a justification or excuse. *See United States v. Sandoval-Gonzalez*, 642 F.3d 717, 723 (9th Cir. 2011)(explaining that necessity is a "classic affirmative defense" that does not "negative any of the elements of

[17] Section 261.5(c) states: "The following are prohibited: … (c) Causing timber, trees, slash, brush or grass to burn except as authorized by permit." 36 C.F.R. 261.5(c).

the crime."). Essentially, the necessity defense functions as a justification for the prohibited conduct due to the circumstances under which the defendant committed the violation. *Raich*, 500. F.3d at 861.

a. Failure to Prove Necessity Defense by Preponderance of the Evidence

The defendant must prove necessity by a preponderance of the evidence. Manual of Model Criminal Jury Instr. 6.6 (9th Cir. Jury Instr. Committee 2010, Last updated Mar. 2018) The Ninth Circuit's jury instructions for necessity states that "a defendant acts out of necessity only if at the time of the crime charged:"

> First, the defendant was faced with a choice of evils and chose the lesser evil;
>
> Second, the defendant acted to prevent imminent harm;
>
> Third, the defendant reasonably anticipated his conduct would prevent such harm;
>
> Fourth, there were no other legal alternatives to violating the law.

Id. If each of these things is found by a preponderance of the evidence the defendant must be found not guilty. *Id.* "It is not enough … that the defendant had a subjective but unreasonable belief as to each of these elements. Instead, the defendant's belief must be reasonable, as judged from an objective point of view." *United States v. Perdomo-Espana*, 522 F.3d 983, 988 (9th Cir. 2008).

The court finds that the defendant's necessity defense fails. First, Powers harm was not imminent. Second, his actions in setting all the fires, in the manner that he set them, was objectively unreasonable given the circumstances.

In *Perdomo-Espana*, the Ninth Circuit found that a defendant's medical condition of diabetes, necessitating emergency care, was not considered imminent harm for purposes of a necessity defense. *Id* at 988. At trial, the Defendant testified that he illegally entered the United States fearing for his life and seeking medical attention for his diabetes. *Id* at

985. He further testified that he previously had a stroke precipitated by his high blood sugar and had been treated with insulin injections. *Id*. On the day he attempted to cross into the United States, he stated his blood sugar was 480 – the same level it had been during his previous stroke. *Id*. During 4-5 hours of questioning following his capture, "Perdomo displayed no cuts, bruising, shaking, tremors, excessive sweatiness, signs of malnourishment, or apparent strange behavior." *Id*. He was later taken to the hospital and admitted to the emergency room, where his blood sugar level was recorded at 340. *Id*. Dr. Vincent Knauf, Perdomo's treating emergency physician, characterized his glucose level as a "severe elevation." *Id*. "However, Dr. Knauf [opined that], Perdomo was not facing serious or imminent risk of bodily harm at that time; although he needed longer-term care, Perdomo was classified as a "non-urgent" patient." *Id*. Because "Dr. Knauf concluded that Perdomo was in no immediately dire medical condition when he was treated in the emergency room[,]" the Ninth Circuit found that Perdomo's crossing was not averting any objective, imminent harm. *Id* at 988.

This court applies the same reasoning to the current case in evaluating whether Powers harm was imminent. Powers called Dr. Jeff Hardin as a witness. Dr. Hardin is board certified in emergency medicine and has practiced medicine for more than 25 years. The court found Dr. Hardin to be a credible witness based on his certifications, training, and experience. He treated Powers upon his arrival to Sedona Emergency Department on May 28, 2018 and diagnosed him with acute renal failure, rhabdomyolysis, dehydration, and heat exhaustion. Although he testified stating these conditions can be severe and cause permanent damage, he further explained that Powers conditions were moderate when asked about the severity of his diagnosis. He testified that Powers was moderately dehydrated, that Powers was suffering from heat exhaustion (but not heat stroke), and that Powers was suffering from early onset renal failure (but that this diagnosis was of mild severity). The court finds that while these ailments could cause significant discomfort, Mr. Powers was

not yet in a life-threatening state, which necessitated the actions of starting a series of fires[18]. Therefore, the court finds that Powers harm was not imminent.

The court also finds that Mr. Powers had alternatives other than starting or potentially starting a series of unrestrained forest fires. First, Powers could have cleared one or more areas to start a signal fire. *See Launder*, 743 F.2d at 688 (Launder "cleared an area on a rock ledge approximately five to ten feet across and, using small twigs, leaves and grass as fuel, lit a signal fire."). He further could have built a fire ring or dug a fire pit. It is undisputed that there were materials available for him to build a fire ring, and the defendant had tools with him that he could have used to dig a fire pit. (*See, e.g.*, Pl. Ex. 15.) Powers could have also started a signal fire at the Taylor Cabin in the fire pit at a time when he still had food, water, and shelter. Lastly, as to the Sycamore Fire, he could have made sure the fire was out before leaving it unattended. While the court notes that these crimes would have still been *per se* illegal based on the Forest Service Orders, Powers had other objectively reasonable options in the manner in which he choose to start signal fires, and choose not to.

Thus, because Powers was not experiencing imminent harm and his actions were not objectively reasonable, the court finds that Powers did not satisfy, by preponderance of the evidence, a necessity defense.

b. Defendant Created the Necessity

Powers necessity defense fails because he created the conditions underlying the supposed necessity. Powers was reckless and negligent in his preparation for a hike of this magnitude from the outset. "[The necessity defense is] unavailable where the defendant fails to show he or she did not recklessly or negligently place him- or herself in circumstances in which he would probably be forced to commit a crime." 115 Am. Jur. 3d *Proof of Facts* §4 (2022).

[18] Dr. Hardin stated that his condition would have become life-threatening in another 24-hours. *See supra*, at 11 ¶ 59.

Powers, who testified that he was an experienced outdoorsman with decades living in Arizona, was going on a relatively long and strenuous hike in a wilderness area in the Upper Sonoran Desert during Stage 2 fire restriction with daytime temperatures over 100 degrees. He further testified that he knew the area was hot, knew the area was dry, and knew of the fire restrictions. Yet, he only brought about 116 ounces of water for a hike that was at least 18.8 miles long. While the defendant maintained at trial that this was enough water for his planned hike, Dr. Hardin's testimony and common sense, contradicts that claim. The Court finds that Powers' testimony that he had sufficient water for the hike not credible. During his initial interviews in 2018 that were recorded on body camera, Powers indicated that he expected to find water on the trail. (*E.g.*, Pl. Ex. 7, 7:54-8:22.; Pl. Ex. 8, 7:45-8:50.) At trial, Powers testified that he knew it was dry and he would not find water before he started the hike, but that he had enough water with him. Powers also brought minimal food items, certainly not enough for the conditions faced or even the planned distance.

In addition to lack of water, Powers recklessly relied on one device (his cellphone) for navigation, communication, and as a light source. Cell service in the Sycamore Canyon Wilderness Area was sporadic and largely unavailable, a fact worth determining before depending on this coverage. This lack of service rendered his device useless for purposes of navigation and communication, especially once his battery was drained on May 28, 2018. He failed to bring paper maps, guidebook, compass or GPS. These could have kept him on trail rather than having to turn around. The court further finds that Powers failed to pack emergency essentials such as another light source, medical or first aid kit or communication or signaling device (e.g., mirror) in the event that he became lost or injured, a risk heightened when hiking solo. Powers, who claimed to be an experienced hiker, was without sufficient water, food, navigation or basic emergency precautions/gear.

"[T]he defense of necessity, or choice of evils, traditionally covered the situation where physical forces *beyond the actor's control* rendered illegal conduct the lesser of two evils." *United States v. Bailey*, 444 U.S. 394, 410 (1980) (emphasis added). Here,

the court finds that the "choice of evils" was dictated by physical forces that were under the defendant's control. Had Powers engaged in adequate preparation in planning and carried adequate water, food and gear, he would not have found himself in his circumstances. Thus, the court finds that Powers necessity defense fails as he created the conditions necessitating the commission of the fires, and his subsequent rescue.

After consideration of the testimony of witnesses, admitted exhibits, memorandum submitted by the parties, the record, and federal and state law, the Court finds Defendant, Philip Alejandro Powers III, guilty on Counts 1 through 7 of the Complaint (Compl., ECF No. 1.).

IT IS ORDERED that

The Clerk of the Court shall enter separate judgment accordingly.

Dated this 13th day of February, 2023.

Camille D. Bibles
United States Magistrate Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 20 2025

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. PHILIP ALEJANDRO POWERS III, AKA Philip Alejandro Powers, Defendant - Appellant.	No. 23-2218 D.C. No. 3:23-cr-08027-MTL-1 District of Arizona, Prescott ORDER

Before: M. SMITH, BADE, and FORREST, Circuit Judges.

The panel has voted to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

The petition for rehearing en banc, Dkt. 37, is DENIED.

APPENDIX D