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7
8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10
11 UNITED STATES OF AMERICA,)
12 Plaintiff,) Case No. CR.S-06-0035-MCE
13 v.) DEFENDANT'S MOTION FOR
14) JUDGEMENT OF ACQUITTAL UNDER
15 ERIC MCDAVID,) FED.R.CRIM.PRO. 29 AND
16 Defendant.) MOTION FOR NEW TRIAL UNDER
17) FED.R.CRIM.PRO. 33
Date: November 15, 2007
Time: 8:30 A.m.
Judge: Hon. Morrison C. England

18 Defendant respectfully moves the Court for a judgement
19 of acquittal under Fed.R.Crim.Pr. 29, or in the alternative,
20 for a new trial under Fed.R.Crim.Pr. 33.

21 The transcript of the trial is not completed yet, and
22 the court reporter is unavailable until October 9, 2007. As
23 such, the defendant hereby files this motion based upon
24 information and belief as to the record in the case, and will
25 supplement the record as soon as is practicable, to include
26 additional authorities and facts as they become available.

27
28 Defense Mot For Judgement of Acquittal
and New Trial Motion

1 Brief introductory facts for judgement of acquittal.

2 Defendant was charged with the co defendants who testified
3 against him in exchange for reduced charges. These witnesses
4 specifically testified that the defendant did not agree with
5 them on any fixed "target" for the offense. As well, these
6 witnesses testified that the defendant was homeless,
7 penniless, a transient, and without the wherewithal to commit
8 this crime but for the government informant's FBI supplied
9 resources-which were substantial: the place, the recipe, the
10 transportation, the chemistry set, the instruction and
11 advice, the motivation, encouragement and the much needed
12 money. Defense character witnesses testified to the
13 defendant's peaceful nature and non violent nature.

14 The jury asked several questions following the evidence,
15 all relating to the elements of the entrapment defense and as
16 to the "time frame" that they should be looking at.

17 **MOTION FOR JUDGEMENT OF ACQUITTAL**

18 Argument. The evidence, even taken at its best inference
19 for the United States, is insufficient for a jury to find
20 each of the elements of the offense beyond a reasonable
21 doubt. As such, this court must enter a judgement of
22 acquittal as to the indictment.

23 The Constitution requires criminal convictions to rest
24 upon a jury determination that a defendant is guilty of every
25 element of the crime with which he is charged, beyond a
26 reasonable doubt. The Fifth and Sixth Amendments require
27 conviction by a jury of all elements of a crime. The
28 prosecution bears the burden of proving all elements of the

1 offense charged, and must persuade a factfinder beyond a
2 reasonable doubt of the facts necessary to establish each of
3 those elements.

4 To support a conviction under 18 U.S.C.S. §
5 844(n), (F) (1) and (i), the government must establish, among
6 other elements, that the defendant (1) conspired (2) with the
7 individuals listed in the indictment, (3) in the time frame
8 set forth in the indictment (June 2005 to January 2006) to
9 (4) maliciously damage or destroy; (5) by means of a fire or
10 an explosive; (6) a building, vehicle, or other real or
11 personal property (7) and that the building, vehicle, or
12 other real or personal property was either a recipient of
13 federal funding and/or the private property was used in
14 interstate or foreign commerce or in an activity affecting
15 interstate or foreign commerce. 18 U.S.C. § 844(i). Although
16 § 844(i) does not define the term "maliciously," based on
17 common law and the legislative history of the statute, the
18 term includes acts done intentionally or with willful
19 disregard of the likelihood that damage or injury would
20 result.

21 **1.** Here, the evidence was insufficient that the
22 defendant had actually conspired with either of the 2 co
23 defendants to commit the crimes of 844 (i) and f(1). First,
24 as to government property or private property with an
25 interstate commerce link, required to convict, there was a
26 stipulation of the parties entered into evidence that the
27 Institute of Forest Genetics ("IFG"), the Nimbus Dam and cell
28 phone towers, either received government funding and/or were

1 involved in interstate commerce. However, there was **no other**
2 **evidence** presented by the government that any other potential
3 "object" of the conspiracy either received government funding
4 or effected interstate commerce. The problem then becomes
5 this for the government in this area: First, the co
6 defendants testified that defendant McDavid had **no agreement**
7 **as to these targets with either of them.** As such, there must
8 be an agreement for some other object which has this "nexus"
9 and yet there was no such evidence before the jury. Secondly,
10 along this line the government argued to the court at the
11 close of the evidence, and just prior to instruction and
12 closing argument, that it did not have to prove as an element
13 that the defendant conspired to damage one of the three
14 targets mentioned above (the IFG, Nimbus, Cell towers),
15 despite these being the only possible "objects" of which
16 there was evidence had received the funding or had a commerce
17 nexus. The government then actually made that argument to
18 the jury-in essence, instructing them that it was not
19 necessary to find that he conspired for 1 of these 3 targets.
20 As such, without any evidence that there were any other
21 objects which satisfied this statutorily required nexus
22 (government property or interstate commerce effect), the
23 government did not have sufficient evidence.

24 Third, there can be no other alternative "object" the
25 defendant illegally conspired with a co defendant upon in
26 violation of this statute because there was no evidence of
27 any agreement, let alone to specifically "damage or destroy"
28 nor was there any agreement as to a means of "fire or an

1 explosive" for any such "alternative" object other than what
2 was in the indictment.

3 **2.** There was a fatal variance at the trial from the
4 indictment. The indictment specifically states that the
5 defendant was charged with conspiring with the 2 co
6 defendants to damage or destroy, by means of fire or an
7 explosive, the IFG, cell phone towers and the Nimbus Dam. The
8 indictment does not state that the defendant conspired with
9 the others to "generally" violate 844(f) and (i). Rather, the
10 indictment alleges that the charge is "...by means of fire
11 and an explosive, (1) a building and personal and real
12 property of the United States Forest Service, U.S. Department
13 of Agriculture, (2) a building, and personal property and
14 real property of an institution and organization receiving
15 financial assistance from the US Bureau of Reclamation,
16 United States Department of the Interior, and (3) personal
17 and real property used in interstate commerce and in an
18 activity affecting interstate commerce, specifically,
19 cellular telephone towers and electric power stations, in
20 violation of 18 U.S.C. 844 (f) and (i).

21 At the trial, the government had stipulations on the
22 interstate commerce nexus of cell phone towers, and that the
23 Nimbus Dam and IFG received federal funding. However, the
24 evidence at trial, from the mouths of the witnesses for the
25 government, was that the defendant did not conspire with
26 these co defendants as to these targets. As such, the
27 government then requested permission from the court to argue
28 to the jury, and instruct the jury, that the government need

1 not prove that these 3 areas were the targets, in order to
2 convict the defendant. Defense counsel objected, citing the
3 grand jury clause of the U.S. Constitution, and argued that
4 such a process would be a fatal variance as well under the
5 Fed.R.Crim.Pro Rule 7. The objection was over ruled.

6 It is a fundamental principle of the Fifth Amendment
7 that a defendant may be tried "only on the charges included
8 in the grand jury's indictment." United States v. DiPentino,
9 242 F.3d 1090, 1094 (9th Cir. 2001) (citing, United States v.
10 Stirone, 361 U.S. 212, 215-216 (1960)). "[A] court cannot
11 permit a defendant to be tried on charges that are not made
12 in the indictment against him." Stirone, 361 U.S. at 216
13 (citing, Ex Parte Bain, 121 U.S. 1 (1887)). A conviction on a
14 charge that is not contained in the indictment must be
15 vacated as a fatal variance or an illegal constructive
16 amendment of the indictment.

17 The risk of fatal variance that arises when the
18 government is allowed to prove a charge not included in the
19 indictment was illustrated recently in United States v. Choy,
20 309 F.3d 602, 607 (9th Cir. 2002). The Choy court overturned
21 a conviction because the underlying theory "constituted a
22 fatal variance from the offense alleged in the indictment,
23 violating Choy's Fifth Amendment right to be charged by a
24 grand jury." In that case, the indictment alleged that the
25 defendant committed bribery by giving a "thing of value" to a
26 public official. **Id.** However, the government then presented
27 evidence that the defendant gave cash to a private individual
28 and argued that this indirectly benefitted the public

1 official. This relatively minor variance in theory was
2 sufficient to violate the mandates of the Fifth Amendment and
3 warrant reversal.

4 There is no difference between that case-Choy-and the
5 present case. There was a fatal variance from the charges in
6 the indictment.

7 **3.** There was no trial evidence of "explosive device" or
8 "fire" for the charges in the indictment. While the jury was
9 not instructed in this area, there was still not sufficient
10 evidence for them to find this element beyond a reasonable
11 doubt: explosive has a definition in 18 USC 844, and there
12 was insufficient evidence in the record that this definition
13 was met.

14 **4.** The defendant was entrapped as a matter of law.

15 The evidence was very clear from both parties: the
16 defendant was not pre disposed to commit this act prior to
17 his first contact with law enforcement, and, as well, the
18 government induced the defendant to commit the act.

19 Predisposition is the defendant's willingness to commit
20 the offense prior to first being contacted by government
21 agents, coupled with **the wherewithal to do so**. While
22 inducement and predisposition are separate inquiries, the
23 two are obviously related: If a defendant is predisposed to
24 commit the offense, he will require little or no inducement
25 to do so; conversely, if the government must work hard to
26 induce a defendant to commit the offense, it is far less
27 likely that he was predisposed.

28 Even very subtle governmental pressure, if skillfully

1 applied, can amount to inducement. For example, the
2 inducement may consist of repeated requests, made in an
3 atmosphere of comradery; as well the inducement may consist
4 of nothing more than giving the defendant the idea of
5 committing the crime, coupled with the means to do it. United
6 States v. Poehlman, 217 F.3d 692 (9th Cir. 2000). The
7 foregoing comes as almost an exact quote from the Ninth
8 Circuit in Poehlman.

9 The defendant was entrapped as a matter of law.

10 **5.** There was no agreement by the conspirators at all.
11 The witnesses who were alleged to be the co conspirators
12 testified for the government that they were indeed "acting"
13 at the times of importance that they interacted with the
14 defendant in the case. The Ninth Circuit teaches district
15 courts that "Since the act of agreeing is a group act, unless
16 at least two people commit it, no one does. When one of two
17 persons merely pretends to agree, the other party, whatever
18 he may believe, is in fact not conspiring with anyone.
19 Although he may possess the requisite criminal intent, there
20 is no criminal act. The formal requirements of the crime of
21 conspiracy have not been met unless an individual conspires
22 with at least one bona fide co-conspirator. United States v.
23 Escobar de Bright, 742 F. 2d 1196, 1198-1199 (9th Cir. 1984).

MOTION FOR NEW TRIAL

Brief introductory facts.

Prior to trial. Defendant moved prior to trial to disallow any government expert witness testimony based upon a lack of pre trial notice to the defendant, and because a Daubert/Khumo hearing was needed as well as a 403 and 404(b) hearing prior to introduction of the evidence. The defendant moved in limine to prevent any FRE 404(b) prior bad act or "propensity" evidence testimony, again based upon a lack of pretrial notice to the defense. The defendant also moved, prior to trial and then throughout the trial, (quite extensively), for all information of a discoverable nature about the testifying government informant. As well, the defendant moved in limine to preclude the use of any 403 prejudicial evidence.

The trial. At the trial, the government witness, the "expert" Mr. Naliboff, then testified upon a subject which was based upon his training and experience, and was something not within the jury's general knowledge of ELF/ALF or "anarchy." This was established by the court's voir dire, where the jurors all had not voiced any knowledge of such matters. Despite his testimony, the government did not seek to qualify him as an expert, and the court refused to strike the testimony.

Throughout the trial, the government introduced extensive 404(b) evidence of Mr. McDavid's "bad character" and "propensity" for violence. The defendant objected on FRE 401, 403 and 404(b) grounds, all were denied.

1 Once the testimony of the government informant was
2 complete, defense counsel was provided written documentation
3 about the informant, maintained by the FBI, but the existence
4 of which had been denied by the government prior to and
5 during the initial trial phase.

6 At the close of the government's evidence, the defendant
7 made a motion for judgment of acquittal and also renewed his
8 prior motions for a dismissal based upon outrageous
9 government misconduct and to suppress evidence based upon an
10 illegal and warrantless search of a residence McDavid resided
11 in--to wit, the cabin rented by the FBI. These motions were
12 denied.

13 The defense called character witnesses who were then
14 precluded from testifying as to McDavid's character for
15 peaceful and non violent nature prior to June 2005, based
16 upon the court's ruling that June 2005 was the relevant time
17 period for such evidence.

18 At the close of all evidence, the defendant requested
19 several jury instructions which were denied. Specifically,
20 the defense requested an instruction on the lesser included
21 offense of conspiracy, 18 USC 371, the exact same charge to
22 which the co defendants plead guilty. The court initially
23 agreed with defense counsel on the matter. The government
24 originally was not successful in talking the court out of the
25 instruction, but eventually succeeded. The government did
26 this by arguing to the court that the general conspiracy
27 charge of 371 was in essence the same charge that the
28 defendant was indicted under: to wit, the government stated

1 that to convict the defendant under the charges in the
2 indictment, the government would have to prove the defendant
3 conspired to damage or destroy the targets listed in the
4 indictment; as well, the government argued to the court, a
5 conviction under 371 required a agreement to destroy/burn
6 something, and in this case, it was *only* alleged that it was
7 1 of the things listed in the indictment. The court correctly
8 on the record then noted that the jury could in fact convict
9 this defendant of the general conspiracy (the lesser
10 included) for a conversation and agreement he possibly had
11 with the other defendants to commit a federal crime, possibly
12 about some other target/object and yet still acquit him of
13 the present indictment. However, because the government kept
14 asserting that the 371 charge had evidence in this case **only**
15 **that the "agreement" was for 1 of the objects/targets in the**
16 **indictment**, that 371 would in essence "be the same charge."
17 The court relented and refused to instruct on the lesser
18 included offense. This is a very important position taken by
19 the government, and a very important point for the defense,
20 as will be discussed immediately hereafter.

21 Specifically, a while later, after argument on several
22 other legal matters, the discussion shifted to the charges in
23 the indictment and what language for an instruction was to be
24 provided to the jury as to the elements and what must be
25 proven. At that point the court relented to the government
26 again and advised that the government need not prove that the
27 "targets" or "objects" listed in the indictment needed to be
28 proven to the jury beyond a reasonable doubt. The defendant

1 objected, to no avail. This argument by the government was
2 directly contrary to what they had argued in regard to the
3 lesser included offense.

4 On the issue of entrapment, the defendant requested
5 instructions which defined entrapment as it relates to this
6 case, as to what predisposition is, and as to what inducement
7 is. These instructions were denied.

8 During the government's rebuttal closing argument, the
9 government impermissibly shifted the burden of proof to the
10 defense. The government prosecutor stated something to the
11 effect that "this is a double edged sword. Mr. Reichel has
12 all the tapes and other stuff in this case, if he had
13 something showing his client was entrapped he would surely
14 show that to you.." Defense counsel objected that first of
15 all, he had only the tapes that Mr. Lapham provided in the
16 case, as he gets them solely from the government, and
17 secondly, that the defense is under no obligation to produce
18 or present evidence, that such is the governments's burden.
19 The court overruled this objection.

20 Once the jury retired, the parties had a discussion on
21 the record whereby the court requested that counsel
22 stipulate that any jury questions on legal matters or
23 evidence be taken by the court, and a response to the jury
24 only *after consultation* with the attorneys for the parties.
25 All agreed.

26 The jury came back with at least 4-6 questions about the
27 evidence and law, all regarding entrapment. On the last day
28 of deliberations, about 10:30 a.m. Thursday, September 27,

1 2007, the jury was read 3 answers from the court. The jury
2 was told that "Anna" was a government informant in August of
3 2004. As well, the government's instruction on
4 predisposition-not the defendant's-was given to the jury at
5 that time. This was an amended version of Ninth Circuit
6 Manual of Model Jury Instructions 6.2; it specifically did
7 not include defense counsel's request that the jury be
8 instructed that they must look at predisposition "prior to"
9 first government contact. Finally, over the defense
10 objection, the jury was instructed that "contact" for 6.2
11 meant at a time after the defendant and others began
12 discussing the crimes in the indictment. After their oral
13 instruction, to be followed with written format, the jury
14 asked a question of the court in open court. The question
15 was an important one, the jurors all agreed. Specifically,
16 the question was: "what is the time period for the relevant
17 evidence we should be looking at. The relevant evidence is in
18 what time period?" Despite the agreement with the parties
19 that any such questions would be discussed with the parties,
20 the court answered the jury question without seeking the
21 attorney's input. The court instructed the jury that the
22 instruction that they received on "contact" would answer that
23 question. Defense counsel asked for a side bar, which was
24 denied, and the jury was sent back to deliberate. Defense
25 counsel then moved the court for an instruction on entrapment
26 and pre disposition which required the government to prove
27 beyond a reasonable doubt the defendant's predisposition
28 prior to first contact, which was again denied by the court.

1 The answers to the juror questions were then typed up and
2 provided in the jury room. An error was then made in the
3 written response for the jury. Specifically, the court
4 replied, in the writing, with a "NO" as to the jury question
5 "Was Anna a government agent as of August of 2004? If not,
6 when did she become one." The correct answer, agreed upon by
7 all parties prior to the response actually provided to the
8 jurors, was "Yes."

9 Not surprisingly, the jury returned a guilty verdict
10 shortly thereafter.

11 After the verdict. After the verdict, the jurors desired
12 to speak with the attorneys for both sides. The government
13 attorneys chose not to be there; in their stead, they left
14 FBI Agent Walker and CHP Officer St. Amant. Defense counsel
15 and his investigator stayed and spoke with 7 members of the
16 jury for approximately 1 hour.

17 The jurors advised the FBI, Mr. Amant, and defense team
18 members that they felt that "Anna" was too pushy in the case;
19 they felt the FBI should be "ashamed of themselves" for what
20 they did in the case-providing all of the complete resources
21 for the commission of the crime. All but 1 juror advised
22 that they found Anna's testimony credible only if it was
23 backed up on tape. As well, they found that the defendant
24 would have been immediately found not guilty in their
25 deliberations if the "relevant time period" began in August
26 2004. They advised that the court's final instruction on
27 "contact" in response to the question on the issue of
28 "relevant evidence time period" was what ended their

1 deliberations. The jurors also advised that they did not find
2 that the defendant agreed with either of the co defendants on
3 any 1 target or "object" as set forth in the indictment.

4 One juror spoke to the television media, Channel 10, and
5 stated the foregoing on the news. A few of these jurors also
6 told the same comments to the Sacramento Bee. One juror has e
7 mailed the defense counsel regretting the verdict and
8 requesting to change her mind, and advising that the
9 foregoing summary of the comments is correct.

10 Argument. Federal Rule of Criminal Procedure 33
11 governs requests for new trials. The rule provides, in
12 relevant part, that "[t]he court on motion of a defendant may
13 grant a new trial to that defendant if required in the
14 interest of justice." Fed. R. Crim. P. 33. The decision to
15 grant or deny a new trial is within the sound discretion of
16 the district court. United States v. Powell, 932 F.2d 1337,
17 1340 (9th Cir.), cert. denied, 502 U.S. 891 (1991). Well
18 reasoned authority recognizes that new trial motions "should
19 neither be favored *nor disfavored*" but rather be subject to
20 "what the interest of justice requires," 3 C. Wright, Federal
21 Practice & Procedure: Criminal 2d § 551 at 237 (1982 & 1995
22 Supp).

23 A district court's power to grant a motion for new
24 trial, on the ground that the verdict is against the weight
25 of the evidence, is much broader than its power to grant a
26 motion for judgment of acquittal. United States v. A. Lanoy
27 Alston, D.M.D., P.C., 974 F.2d 1206, 1211 (9th Cir. 1992).
28 See 3 C. Wright, Federal Practice and Procedure: Criminal 2d

1 § 553 at 245 (1982 & 1995 Supp.). "The district court need
2 not view the evidence in the light most favorable to the
3 verdict; it may weigh the evidence and in so doing evaluate
4 for itself the credibility of the witnesses." A. Lanoy
5 Alston, 974 F.2d at 1211 (quoting United States v. Lincoln,
6 630 F.2d 1313, 1319 (8th Cir. 1980)); accord, United States
7 v. Indelicato, 611 F.2d 376, 387 (1st Cir. 1979). Where the
8 new trial motion is based on the ground that the verdict is
9 against the weight of the evidence, the trial judge sits as a
10 "thirteenth juror." United States v. Rodriguez, 738 F.2d 13,
11 17 (1st Cir. 1984). "If the court concludes that, despite
12 the abstract sufficiency of the evidence to sustain the
13 verdict, the evidence preponderates sufficiently heavily
14 against the verdict that a serious miscarriage of justice may
15 have occurred, it may set aside the verdict, grant a new
16 trial, and submit the issues for determination by another
17 jury." A. Lanoy Alston, 974 F.2d at 1211-12 (quoting
18 Lincoln, 630 F.2d at 1319).

19 The new trial motion should be granted upon the
20 **foregoing** grounds which are set forth **above** in the motion for
21 judgment of acquittal, as well as the following additional
22 grounds.

23 1. The prejudice of Naliboff testimony. The testimony was
24 what ELF and ALF "stood for," and as to what "Anarchist" are.
25 The testimony talked about the "manner" of ELF/ALF action.
26 The testimony was highly prejudicial as it related the other
27 destructive and dangerous acts attributed to ELF/ALF.
28 Despite this clearly being covered by the rules on expert

1 testimony, the government never moved to qualify Mr. Naliboff
2 as an expert; the defense objection was over ruled on this
3 point.

4 A new trial must be granted on this ground alone.

5 2. The illegal 404(b) evidence. The government
6 introduced extensive evidence for the sole purpose of proving
7 defendant's "bad character" and "propensity" toward violence.
8 They started with his connection to Ryan Lewis, a theme that
9 ran throughout and all the way to closing; that Lewis was an
10 ELF fire bomber, and was McDavid's close friend. That McDavid
11 was at Crimethink in 2004, what went on at Crimethink etc.
12 That McDavid spoke of Molotov cocktails in New York in August
13 2004, and that McDavid spoke of killing police officers,
14 killing the informant, killing innocent civilians and fence
15 sitters, reading Derek Jenson and Ted Kaczinski, among just a
16 few instances. On each, the defense objected as illegal
17 404(b) evidence and that was denied.

18 As to each, the defense also objected as to what
19 relevance did the evidence have to prove the crime charged,
20 as well as 403 as it's probative value was outweighed by the
21 prejudice to the defendant. On each, the objection was over
22 ruled.

23 The evidence only had probative value under 404, as it
24 was introduced to show defendant's propensity band bad
25 character. However, that is illegal unless a 404(b) exception
26 applies. Whether there was one or not, the government
27 specifically told the court and defense counsel prior to
28 trial, at the in limine hearing, that there was no 404(b)

1 evidence from the government. Interestingly, but not
2 surprisingly, the very first question the jury had after they
3 began their deliberations was for the actual news article for
4 them to read-about Ryan Lewis's arrest and federal arson
5 charges from 2005.

6 A new trial must be granted.

7 3. 403 errors. Rule 403 requires the court to weigh on
8 *the record* the factors under FRE 403. Doe v. Glanzer 232 F.3d
9 1258 (9th Circuit 2000). On numerous instances that the
10 defense made such an objection, the court simply over ruled
11 the objection and did not weigh the factors on the record.

12 A new trial must be granted.

13 4. Failure to provide discovery on the informant. Prior to trial,
14 and during the trial, defense counsel kept asking for all written
15 documents regarding he informant,. Each time, he was told none existed.
16 However, the informant testified to signing several agreements with the
17 FBI, and to having written documents generated by the FBI on and for
18 her. As well, that she filled out a 240 question psychological
19 assessment of the defendant for the FBI, and that they responded to her
20 on the subject, advising how to handle the defendant in the future.

21 Defense counsel got this information-what it did get-after the
22 government's case in chief.

23 A new trial must be granted.

24 5. Allowing the government to re open out of the presence of the
25 jury to admit their main exhibits. Following the close of the
26 government's case, and during the defense case in chief, the government
27 asked the court, during a recess and out of the jury presence, if it
28 could re open to admit main government exhibits which it had neglected

1 to admit into evidence. Over a defense objection, the court agreed.

2 A new trial must be granted in this respect.

3 6. The defense dispositive pre trial motions should have been
4 granted at the close of the government's case when they were renewed.

5 The governmental conduct was outrageous—as evidence by the jurors
6 statements themselves. Also, the installation of the video and audio
7 devices in the house, without a warrant, was illegal. The evidence from
8 Anna was that every part of the house was subject to surveillance by
9 the FBI. The original motion should have been granted when the defense
10 re raised it after the close of the government case.

11 7. The restriction on character evidence testimony as to any time
12 prior to June 2005 was prejudicial error. In an entrapment case
13 especially, where the Supreme Court teaches that the proof must show to
14 a time prior to government contact, the failure to let the defendant
15 establish his predisposition prior to June 2005 is prejudicial error.

16 8. Failure to instruct on the lesser included offense.
17 United States v. Skinner, 667 F.2d 1306, 1309 (9th Cir. 1982), cert.
18 denied, 463 U.S. 1229 (1983). "This instruction is appropriate where a
19 lesser offense is identified within the charged offense and a rational
20 jury could find the defendant guilty of the lesser offense but not
21 guilty of the greater one." Keeble v. United States, 412 U.S. 205, 208
22 (1973) "The lesser included offense instruction must be given if it is
23 requested and is appropriate to the case." United States v. Warren, 984
24 F.2d 325, 330-31 (9th Cir. 1993) "When a lesser included offense
25 instruction is appropriate, a defendant has the right to elect whether
26 all or only some of the jurors must not be convinced beyond a
27 reasonable doubt of guilt of the greater offense."

28 9. Failure to instruct on "wherewithal" as it relates to

1 entrapment. The evidence was un contested that the defendant did not
2 have the "wherewithal" to commit the crime. Yet, the court refused to
3 make an instruction, as requested by the defense, that "Predisposition,
4 is the defendant's willingness to commit the offense prior to being
5 contacted by government agents, *coupled with the wherewithal to do so.*"
6 which is exactly as the Ninth Circuit instructs. United States v.
7 Poehlman, 217 F.3d 692 (9th Cir. 2000).

8 Had the jury been provided this instruction, they would have
9 acquitted.

10 10. Failure to correctly instruct the jury that Anna was a
11 government informant as of August 2004.

12 The jury asked this question, part of 3 questions; in regard to
13 this question though, they also asked "If not, when did she become
14 one?" The parties then discussed the matter. The parties specifically
15 agreed that very clearly, Anna was a government agent in August of 2004
16 and that the jury was going to be so instructed, in writing and orally
17 as well.

18 When the jury was then present, the next morning, the court
19 answered the jury questions--there were 3 at that time-- and started the
20 discussions with "you don't have to write this down, we will type these
21 answers up for you." It is believed that the court repeated this at
22 least one more time to the jury. The jurors then stopped writing in
23 their note pads and listened.

24 The court orally instructed the jury that Anna was considered a
25 government agent in August 2004. It also provided answers to the other
26 2 questions.

27 Importantly, the jurors then asked a 4th question, orally, from the
28 jury box. There is no transcript at present, but, it was something

1 along these lines: "What is the time period for the relevant evidence
2 we should be focusing on; I think we all agree we need to know what si
3 the time period for the relevant evidence?" Without discussing the
4 matter with counsel, the court replied "The instruction on contact you
5 have been given will answer that for you."

6 The jurors then left to deliberate, at about 11:30 a.m.

7 They returned a verdict of guilty at about 3 p.m.

8 The jurors told the defense team, the FBI, and even the news media
9 immediately after their verdict that "given the time frame and
10 instructions form the court, we had to find the defendant guilty."
11 Again, they all expressed the view that there was entrapment, that the
12 informant was too pushy, but that the instructions from the court
13 resulted in their verdict.

14 The jurors, given this written response of "No" to the issue of
15 Anna in 2004 requires a new trial from this court. *It is assumed that*
16 *the government will probably agree on this point.*

17 11. Not instructing as to "predisposition" as requested by the
18 defense. The defense requested prior to the closing argument, during
19 the settling of instructions, that the jury be instructed on
20 predisposition, along the lines of the defense request. The request was
21 denied. The jury then requested, in a question, a definition of
22 predisposition. The court gave the version from the government, over
23 the defense objection, and then the defense requested that the court
24 make sure to at least include the language form the 9th Circuit Model
25 Jury Instruction comment, as well as from the Supreme Court in
26 Jacobson, that the government bears the burden of proving beyond a
27 reasonable doubt that the defendant was disposed to commit the criminal
28 act prior to first being approached by the government agents.

1 The failure to so instruct about disposition "prior to" contact
2 requires a new trial.

3 12. The failure to define inducement, as requested in the
4 defendant's requested instruction, was error.

5 In this case, there was no special verdict form about
6 predisposition and/or inducement. The defense requested the exact
7 language from the 9th Circuit in Poehlman in the defense special
8 instruction. The court declined to do so. The evidence was
9 overwhelming of inducement; exactly as defined and discussed in
10 Poehlman. It was error to not so instruct.

11 13. It was error to define contact as the court defined it.

12 The defendant objected to the court defining "contact" as it did
13 for the jury. Over the defense objection, the jury was so instructed.

14 In the case, Anna testified that Mr. McDavid became in late August
15 2004 a person that the FBI should list as someone who would engage in
16 *illegal protest activity* after the RNC. She was an FBI informant
17 investigating these certain "groups" and therefore doing her
18 investigative work at the express request of the FBI, and during the
19 RNC protest in New York, August 2004, she determined Mr. McDavid was
20 now someone of interest to the FBI, as per her duties.

21 Mr. McDavid was thus clearly in "contact" with the government
22 agent in August 2004 for an obviously relevant criminal investigation.

23 Anna testified that Mr. McDavid "During the RNC had made comments
24 about engaging in some sort of illegal protest, and at that time I was
25 able to contact the FBI and list him as someone who would engage in
26 illegal protest activity after the RNC..." She then kept in contact
27 with McDavid, via email and possible writings by McDavid. She sought
28 him out, to get he and co defendant Zach jenson to come to Philadelphia

1 and also Florida. She was a government agent, in contact with the
2 defendant; he simply was not predisposed at the time, however, that
3 does not mean she was not in "contact" with him at that time.

4 As under Jacobson and Poehlman, the use of the word "any" in the
5 phrase "before he has **any** contact with government agents" precludes the
6 government's proposed jury instruction as to "contact." "Quite
7 obviously, by the time a defendant actually commits the crime, he will
8 have become disposed to do so. However, the relevant time frame for
9 assessing a defendant's disposition comes before he has had **any contact**
10 with government agents, which is doubtless why it's called
11 predisposition." (Emphasis added by defense counsel.) The quote is from
12 the first paragraph of the "predisposition" section of Poehlman.

13 As such, a new trial must be granted.

14 14. It was error to allow the government to re open their case to
15 admit their main exhibits they forgot to introduce in their case in
16 chief following the defendant's Rule 29 motion for acquittal. Such a
17 practice is allowed if in fact the government needs it to correct some
18 errors "or some other compelling circumstance . . . justifies a
19 reopening and no substantial prejudice will occur." United States v.
20 Hinderman, 625 F.2d 994, 996 (10th Cir. 1980). Here the prejudice was
21 manifest—the government was done and yet their evidence was n not
22 admitted.

23 15. It was error for the court to answer a very important jury
24 question without first consulting with the attorneys.

25 The jurors orally asked a question, following the reading of the
26 court's answers to 3 questions. The jury asked the court, in open
27 court, following the reading of answers to prior questions: "What time
28 period is the relevant evidence we should be focusing on?" or something

1 to that effect. This, in an entrapment case, is a very crucial
2 question.

3 As discussed, "pre" disposition is for a time period. As such, the
4 defense put on character witnesses about the issue, and the government
5 spent considerable amount of time about the time period prior to the
6 actual commission of the crime which they alleged was in June or July
7 of 2005.

8 The court advised the jury that "your answer on contact will
9 answer that for you." The defense requested an immediate sidebar,
10 before the jury was dismissed to re new their deliberations; this was
11 denied by the court. After the jury went to the jury room, defense
12 counsel requested that the court immediately provide further response
13 to that question. This was also denied.

14 The jury returned a verdict of guilt about 4 hours later.

15 Jury messages should be "answered in open court and . . .
16 petitioner's counsel should [be] given an opportunity to be heard
17 before the trial judge responds." United States v. Barragan-Devis, 133
18 F.3d 1287 (9th Cir. 1998) See Rogers v. United States, 422 U.S. 35, 39,
19 45 L. Ed. 2d 1, 95 S. Ct. 2091 (1975) (citations omitted). See United
20 States v. Frazin, 780 F.2d 1461, 1469 (9th Cir. 1986) (holding
21 "constitutionally fatal" the absence of both defendants and counsel in
22 formulating judge's response to jury, without deciding whether
23 defendants personally must be present at conference). In this case,
24 counsel for defendant would have obviously used such a conference to
25 try and persuade the judge on how to respond—that in essence, the
26 question was a dangerous one, and to begin, that all evidence in the
27 trial that had been admitted was obviously "relevant" for the jury to
28 consider (recall, Fed. R. Evid. 402 states that *only* "relevant"

1 evidence is admissible at trial), and that the court had previously
2 told both counsel it (the court) was not going to instruct the jury as
3 to any "specific time periods" they should focus their time upon.
4 Defense counsel would have explained that the court was in essence
5 instructing the jury to only look at evidence after June or July of
6 2005, a position at odds with even the government's view of the case
7 and appropriate law. The trial judge's failure to provide that
8 opportunity to defense counsel was error.

9 Further, an instruction is defective if it permits a jury to draw
10 a permissive inference from isolated facts. United States v.
11 Rubio-Villareal, 967 F.2d 294 (9th Cir. 1992) (en banc) at 299-300. The
12 instruction here allowed the jury to make a finding that the only
13 relevant evidence began in the trial from July 2005 forward-contrary to
14 the correct law. The concern is such a response was an inappropriate
15 intrusion into the jury's deliberations and permitting the jury to
16 convict without considering all the evidence presented at trial. See
17 id. at 300.

18 In fact, the instruction here was even more prejudicial than the
19 one in Rubio-Villareal, because it permitted the jury to make a finding
20 and not just draw an inference. An inference is weaker than a finding;
21 an inference needs additional evidence before it becomes a finding.
22 Thus, if a judge may not instruct a jury that they may infer knowledge
23 from certain facts (Rubio-Villareal, 967 F.2d at 300), he may
24 certainly not instruct a jury that they may find lack of predisposition
25 from facts about a certain limited time period.

26 Because the error implicates the defendant's constitutional
27 rights, the error must result in a new trial. When constitutional
28 requirements are involved, the proper execution of this duty is a

1 matter of insuring due process of law as guaranteed by the Fourteenth
2 Amendment. McDowell v. Calderon, 130 F.3d 833 (9th Cir. 1997). The
3 district court's failure to speak with defense counsel resulted in the
4 government being relieved of their burden of proving "prior"
5 disposition and a host of other elements of the case. (See Sullivan v.
6 Louisiana, 508 U.S. 275, 113 S. Ct. 2078 (1993). Supreme Court
7 reconfirmed that "[a] mandatory presumption - for example, the
8 presumption that a person intends the ordinary consequences of his
9 voluntary acts - violates the Fourteenth Amendment, because it may
10 relieve the State of its burden of proving all elements of the
11 offense." 508 U.S. at 280. (Such an erroneous presumption "vitiates all
12 the jury's findings." Sullivan, 508 U.S. at 281.

13 By this response, it became the Court and not the jury who judges
14 the defendant guilty, contrary to the guarantees of the Sixth
15 Amendment. Id. at 277, 281; Rose v. Clark, 478 U.S. 570, 578, 92 106 S.
16 Ct. 3101 (1986).

17 The Sixth Amendment guarantees that "in all criminal prosecutions,
18 the accused shall enjoy the right to a speedy trial, by an impartial
19 jury. . . ." U.S. Const. amend. VI. The most important aspect of this
20 right is to have a jury, and not the judge, determine guilt or
21 innocence. Sullivan 508 U.S. at 277; Sparf v. United States, 156 U.S.
22 51, 105-06, 15 S. Ct. 273 (1895). By allowing the jury to apply only
23 evidence adduced which related to a point after "contact," the district
24 court violated the due process clause by relieving the government of
25 its burden of proving each element of the crime charged. The jury
26 verdict must therefore be vitiated. It is folly at that point to
27 speculate about what a reasonable jury might hold were it not so
28 instructed.

1 16. It was error and a new trial must be granted when the
2 government, in its closing rebuttal, impermissibly shifted the burden
3 of producing evidence to the defendant in the case.

4 Mr. Lapham told the jury something to the effect that "this is a
5 double edged sword. Mr. Reichel has all the tapes and other stuff in
6 this case, if he had something showing his client was entrapped he
7 would surely show that to you.." Defense counsel objected that first
8 of all, he had only the tapes that Mr. Lapham provided in the case, as
9 he gets them **solely from the government**, and secondly, that the defense
10 is under no obligation to produce or present evidence, that such is the
11 governments's burden. The court overruled this objection.

12 It is well established that the privilege against
13 self-incrimination prohibits a prosecutor from commenting on a
14 defendant's failure to testify. Griffin v. California, 380 U.S. 609,
15 615, 85 S. Ct. 1229 (1965). As well, a prosecutor may not comment in a
16 manner which is to call attention to the defendant's failure to
17 testify, and is . . . of such a character that the jury would naturally
18 and necessarily take it to be a comment on the failure to testify."
19 United States v. Bagley, 772 F.2d 482, 494 (9th Cir. 1985), cert.
20 denied, 475 U.S. 1023, 106 S. Ct. 1215, (1986).

21 That is exactly what happened in the present case.

22 17. The totality of errors requires a new trial.

23 A new trial must be granted based upon the totality of the errors
24 that occurred in the case. Based upon the errors outlined herein, and
25 based upon the totality of the errors when compounded, justice requires
26 a new trial in the case.

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Defendant will supplement this motion with additional authorities and facts when available and following response by the government.

Dated: October 4 2007

MARK J. REICHEL
ATTORNEY AT LAW
Attorney for defendant

/S/ Mark Reichel