

1 MARK J. REICHEL, State Bar #155034  
THE LAW OFFICES OF MARK J. REICHEL  
2 555 CAPITOL MALL, 6<sup>TH</sup> FLOOR, Suite 600  
Sacramento, California 95814  
3 Telephone: (916) 498-9258  
FAX: (916) 441-6553  
4 [mark@reichellaw.com](mailto:mark@reichellaw.com)  
[www.reichellaw.com](http://www.reichellaw.com)

5 Attorney for Defendant  
6 ERIC MCDAVID

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

10  
11 UNITED STATES OF AMERICA, )

12 Plaintiff, )

13 v. )

14 )  
15 ERIC MCDAVID, )

16 Defendant. )

Case No. CR.S-06-0035-MCE

**DEFENDANT ERIC MCDAVID'S  
REPLY SENTENCING MEMORANDUM  
REQUESTING THE COURT TO  
STRIKE THE GOVERNMENT'S  
SENTENCING MEMORANDUM FILED  
LESS THAN 40 HOURS PRIOR TO  
THE TIME FOR SENTENCING**

17 Date: May 8, 2008  
18 Time: 9:00 A.m.  
19 Judge: Hon. Morrison C.  
England

20 **DEFENSE REPLY SENTENCING MEMORANDUM**

21 **The Memorandum must be stricken.** Without any request for  
22 a finding of "good cause" having been shown by the  
23 government, the government filed an extensive 18 page  
24 Sentencing Memorandum late in this case, less than 40 hours

25  
26  
27  
28 DEFENSE REPLY SENTENCING MEMORANDUM

1 prior to the sentencing hearing.<sup>1</sup> Local Rule Crim 32-460  
2 expressly **prevents just that**; additionally, the government  
3 never--to defense counsel's knowledge--submitted their  
4 informal objections to the probation officer's report, an  
5 earlier violation of the same rules. The probation officer  
6 would have had no knowledge of this position by the  
7 government until less than 40 hours prior to sentencing--long  
8 after their final report was provided to the court and the  
9 parties.

10 In relevant part, RULE Crim 32-460 provides

11 DISCLOSURE OF PRESENTENCE REPORTS AND RELATED RECORDS

12 (d) Objections to the Report... Not less than three (3)  
13 weeks prior to the date set for the sentencing hearing,  
14 counsel for defendant **and the Government** shall each  
15 deliver to the probation officer and exchange with each  
16 other a written **statement of all objections** they have to  
17 statements of material fact, sentencing classifications,  
18 sentencing guideline ranges, and policy statements  
19 contained in or omitted from the presentence report.  
20 These objections are not and shall not become part of  
21 the Court file. After receipt of the objections, the  
22 probation officer shall conduct any further  
23 investigation and make any necessary revisions to the  
24 presentence report.

19 (f) Formal Objections to Report. **Not less than one (1)**  
20 **calendar week prior to the sentencing hearing**, counsel  
21 for the defendant **and the Government** shall each file  
22 with the Clerk and personally serve on each other and  
23 the probation officer, or hand deliver to their offices,  
24 a concise memorandum of all objections and facts in  
25 dispute to be resolved by the Court. ...This memorandum  
26 must specifically identify each item in the report which  
27 is challenged as inaccurate or untrue, must set forth  
28 the remedy sought (i.e., specified findings or the  
Court's agreement to disregard the disputed

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26 <sup>1</sup> Defense counsel had gone home for the evening May 6, 2008, and noted this government filing  
27 on his Blackberry phone. He returned to the office downtown to draft and file this Reply so that it would  
be on file within 5 hours later. He did not have time Wednesday for the Reply.

1 information), and must set forth the reason that the  
2 contested information will affect the sentencing  
3 guideline, departure or adjustment in the particular  
4 case. This requirement is not satisfied by submission of  
5 the written objections to the probation officer as set  
6 forth in paragraph (d) herein.

7 (g) Limitation on Objections. Except for good cause  
8 shown, **no objections may be made to the presentence  
9 report other than those previously submitted** to the  
10 probation officer pursuant to paragraph (d) and those  
11 relating to information contained in the presentence  
12 report that was not contained in the proposed  
13 presentence report.

14 Thus, without a request and actual support for the  
15 request, the government's Sentencing Memorandum must be  
16 stricken; (a) the court does not have before it a *request for*  
17 *a finding of good cause* from the government, and (b) nor is  
18 there any evidence provided to support such a requested  
19 finding. Finally, it would undoubtedly be denied by the court  
20 as the government did not even file informal objections with  
21 the probation officer's draft report, as it is defense  
22 counsel's **very clear understanding** that the government  
23 planned to agree with the probation officer's recommendation  
24 for a sentence of approximately 13 years, as late as last  
25 week.

26 Inappropriate material in the government's Memorandum.

27 Despite the fact that the government's Sentencing  
28 Memorandum will be stricken by the court, the defendant  
hereby briefly replies to completely inappropriate material  
contained in the government's soon--to--be--stricken  
Memorandum.

DEFENSE REPLY SENTENCING MEMORANDUM

1           1. Plea offers. Defense counsel has assumed for over 18  
2 years that evidence and statements made during plea  
3 negotiations were inadmissible. Fed.R.Crim. Pro. 11(f) and  
4 Fed.R.Ev.410. Evidently not, according to the government  
5 brief. (See Sentencing Memorandum of Government at page 7,  
6 Part IV. There, the government asserts that the defendant  
7 should get the sentence of 20 years because he had the  
8 opportunity to accept plea offers for a reduced sentence and  
9 yet refused. The government has "opened the door" and may  
10 not benefit from a one sided version of the facts.

11           Their version is untrue. From day one, the defendant was  
12 not offered any plea agreement which even closely  
13 approximated what the other defendants were offered: release  
14 from jail and a five (5) year maximum. Rather, the defendant  
15 was offered at various times, 7-13 years, although the  
16 government was never exact as to whether these were binding  
17 plea offers. It was very difficult for defense counsel and  
18 the defendant to make an informed decision on these issues.  
19 Indeed, the exact position from the government on most  
20 occasions regarding settlement was that they would not give  
21 the defendant the charge with a 5 year maximum, and they  
22 could not "figure out" how to get him less than 20 years  
23 under the USSG because of the Domestic Terrorism enhancement  
24 in the USSG. The government would advise defense counsel on  
25 numerous occasions that they felt McDavid did not deserve the  
26 20 years, and they'd "like to get him less." However, they

1 could not "figure out how to get there." As is obvious, this  
2 was very difficult for defendant McDavid and his counsel to  
3 rely upon or make an informed decision—his offer was in  
4 essence to: plead guilty to 20 years even though the  
5 government felt his conduct justified 8 years; the government  
6 would not help him get a reduced sentence below 20; and his  
7 co defendants were getting less than 5 years. Not much of an  
8 "offer", as the term is commonly understood.

9 Indeed, if the government feels that McDavid deserves  
10 the 20 years, it would be late in the day on May 6, 2008 that  
11 they first articulated that, based upon plea discussions in  
12 the past and their clearly intentional failure to file  
13 informal objections to the 13 year draft PSR report and  
14 recommendation.

15 As well, there is absolutely no evidence whatsoever that  
16 McDavid would not have plead guilty because he would be  
17 deemed a "traitor" to any "movement", as argued by the  
18 government on page 8, line 9 of their Memorandum. McDavid  
19 engaged in extensive discussions with the government to  
20 settle the case, and never renounced the negotiations because  
21 he wanted to be a "martyr;" the government pulls such an  
22 argument out of thin air. They simply make up the facts as  
23 they need them, there can be no other explanation.<sup>2</sup>  
24 Seriously.

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25  
26 <sup>2</sup> The government states "It is, of course, McDavid's choice if he wishes to be a martyr to the  
27 cause, but he should face the consequences of his choices." Page 8 lines 16.

1 Finally, the government asserts that McDavid should have  
2 spoken to the probation department in his interview about the  
3 facts of the offense. McDavid was very cooperative with the  
4 probation officer, and she in fact made a recommendation for  
5 a reduced sentence following the interview. She did not under  
6 any circumstance "penalize" McDavid for the one area of the  
7 interview he did not speak about on the advice of counsel,  
8 the facts of the offense. As the government hopefully well  
9 knows, the Supreme Court has taken the time to teach us that  
10 all defendants retain their Fifth Amendment Rights at  
11 sentencing. Mitchell v United States 526 US 314, 119 S Ct  
12 1307, (1999).

13 McDavid has a multitude of appellate issues, as the  
14 court and the government know. His statements to probation  
15 are admissible against him in any future trial, should he  
16 prevail on appeal. His decision, on the advice of counsel, to  
17 not discuss this area with probation, is a totally off limits  
18 area for the government to comment upon in their anemic  
19 argument to increase this young man's sentence to 20 years.

20 Ryan Lewis case. Ryan Lewis got a **6** year sentence, not  
21 an **8** year sentence as the government advises the court in  
22 their Memorandum. It is a matter of public record, on the  
23 docket of the case. As well, contrary to the government's  
24 suggestion, page 9, Ryan Lewis did not get a reduced sentence  
25 for cooperation at all. For the reasons the probation  
26 officer likened the present case to Ryan Lewis's in the PSR,  
27

1 it is obvious the cases share similarity.

2 His case is very similar to McDavid's

3 **CONCLUSION.**

4 Before the Court is a young man with great family ties  
5 and no prior criminal record. He faces a lengthy prison  
6 sentence. Without consideration of the charged crime he is an  
7 exemplary young man, from an exemplary family. He is now  
8 convicted of an extremely high profile crime, and will face  
9 intense pressure when incarcerated; he is no longer the young  
10 man he was before this case was brought, both physically,  
11 emotionally, and mentally.

12 The foregoing factors, the exhibits and authorities  
13 referenced in the Defense Sentencing Memorandum, compel the  
14 sentence requested by the defense in this case.

15 At the time of sentencing the defense will request a  
16 certain designation for incarceration and for bail pending  
17 the potential appeal.

18 Respectfully submitted

19 DATED: May 6, 2008.

20  
21 MARK J. REICHEL  
22 ATTORNEY AT LAW  
23 Attorney for defendant

24 /s/

25 Mark Reichel