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

10 UNITED STATES OF AMERICA,) No. 2:06-cr-00035 MCE
)
11 Plaintiff,) **GOVERNMENT'S RESPONSE TO**
) **DEFENDANT'S SENTENCING**
12 v.) **MEMORANDUM**
)
13 ERIC McDAVID,) Date: May 8, 2008
) Time: 9:00 a.m.
14 Defendant.) Hon. Morrison C. England, Jr.
)
15

16 **I. INTRODUCTION**

17 Defendant Eric McDavid is set for judgment and sentencing
18 before this Court on Thursday, May 8, 2008, at 9:00 a.m. The
19 purpose of this memorandum is to set forth the government's
20 recommendation and to address issues raised in the defendant's
21 sentencing memorandum.

22 **II. RECOMMENDATION**

23 The United States recommends that the Court sentence the
24 defendant to a term of imprisonment of 240 months. Although not
25 set forth in the Presentence Report, the advisory Sentencing
26 Guideline range, but for the statutory maximum, would be 235-293
27 months (33/VI). Therefore, a sentence of 240 months is at the
28 low end of the applicable guidelines and, in the government's

1 view is sufficient, but no greater than necessary, to address the
2 seriousness of this particular crime, the defendant's history and
3 character, and to comply with the purposes of subsection (a)(2)
4 of Title 18, United States Code, Section 3553.

5 Twenty years' incarceration is a long time. The United
6 States understands this, and does not make its recommendation
7 lightly. The severity of a 20-year sentence accords with the
8 defendant's intent and actions, and it strikes a balance among
9 the goals of the federal government's judicial, legislative, and
10 executive branches. While Eric McDavid's sentence represents
11 punishment for his crime, his sentence also represents the need
12 to protect the public from those who would inflict grievous harm
13 and the need to deter those who would engage in similar crimes.

14 The defense asks for a sentence of 5 years' incarceration.
15 The probation officer recommends a sentence of 13 years'
16 incarceration. As addressed below, both are insufficient and do
17 not reflect the seriousness of the defendant's crime. Although
18 the need for non-disparate sentences is important, the reasoning
19 underlying the recommendations is thin and does not support a
20 lenient sentence.

21 **III. THE CALCULATED ADVISORY SENTENCING GUIDELINE RANGE**
22 **IS CORRECT AND A SENTENCE AT THE LOW END OF THAT**
23 **RANGE SUFFICIENTLY REPRESENTS PUBLIC INTERESTS**

24 The probation officer correctly calculated the defendant's
25 advisory Sentencing Guideline range. Further, the application of
26 the terrorism enhancement is appropriate and warranted in this
27 situation, and the statutory maximum provides a suitable cap on
28 the period of incarceration. The defendant asks this Court to
ignore the Sentencing Guidelines - essentially casting aside the

1 research, policy review, and careful consideration of the many
2 penal, civic, and judicial issues that form the foundation of the
3 United States Sentencing Commission's Guideline Manual.¹ The
4 Guidelines provide a solid foundation for sentencing, and coupled
5 with an analysis of the defendant's individual situation, the
6 advisory range provides a consistent recommendation that
7 addresses the relevant public and private interests regarding the
8 defendant's incarceration. A sentence of 20 years' imprisonment,
9 the low end of the advisory Guidelines Range, is both necessary
10 and sufficient.

11 **A. The Guideline Calculation Is Correct**

12 Paragraphs 30 through 40 of the Presentence Report (PSR) set
13 forth the probation officer's calculation of the defendant's
14 total offense level and his criminal history category. PSR at 9-
15 11. The probation officer determined that the defendant's total
16 offense level is 33 and his criminal history is VI.

17 In a letter dated February 12, 2008, McDavid objected to the
18 base offense level of 24 and the imposition of the 12-level
19 terrorism enhancement as set forth in the PSR, but the probation
20 officer declined to make changes, setting forth her rationale in
21 a letter dated February 21, 2008. McDavid makes the same
22 objections in his sentencing memorandum (at 14-17), and
23 improperly submits juror declarations and ignores the evidence
24

25
26 ¹ The defendant's cursory commentary regarding "the law of
27 federal sentencing since 1999," in which he pulls quotations from
28 a variety of cases without analysis, does not create an issue for
exploration. The Court is aware of what should and should not be
considered at sentencing, and the United States submits its
recommendation having considered carefully the advisory
Sentencing Guidelines and the § 3553 factors.

1 from trial proving that the defendant did conspire to damage or
2 destroy government property as set forth in the indictment. The
3 base offense level of 24 is correct, and the 3-level reduction as
4 a specific offense characteristic for conspiracy appears
5 appropriate.

6 Additionally, the probation officer recommends a 12-level
7 upward adjustment to the base offense level pursuant to U.S.S.G.
8 § 3A1.4, which addresses felonies that involve or intend to
9 promote a federal crime of terrorism. The Guidelines Manual
10 defines a "federal crime of terrorism" as 1) an "offense that is
11 calculated to influence or affect the conduct of the government
12 by intimidation or coercion or to retaliate against government
13 conduct," and 2) that violates certain identified Code sections,
14 including 18 U.S.C. § 844(f). See U.S.S.G. § 3A1.4 cmt. n.1
15 (stating that "for purposes of this guideline, 'federal crime of
16 terrorism' has the meaning given that term in 18 U.S.C. §
17 2332b(g)(5)"). The terrorism enhancement also requires that the
18 criminal history category be increased to VI if the defendant's
19 scored criminal history is less than a category VI. See U.S.S.G.
20 § 3A1.4(b). As discussed in more detail below, and as the
21 probation officer noted in her response, the evidence in this
22 case clearly demonstrates that the enhancement applies.

23 Thus, the probation officer's determination of the total
24 offense level and criminal history category is correct. The
25 advisory Guideline range, but for the 240-month statutory
26 maximum, is 235-293 months (19.58 - 24.42 years).

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1 **B. A 20-Year Sentence Addresses the Public Interests**
2 **as Set Forth by Congress and Adequately Ensures That**
3 **the Defendant's Severe Crime Is Punished in Kind**

4 McDavid clearly sought to intimidate public officials and
5 retaliate against the government's conduct. Trial testimony and
6 recorded evidence demonstrate this. The goals of terrorism are
7 fear and destruction. McDavid sought to strike out against the
8 government, and his plans, especially arson at the Institute of
9 Forest Genetics (IFG), would have caused chaos and widespread
10 damage. One only needs to visit the IFG to see that any sort of
11 incendiary device would burn not only the government facility,
12 but could easily rage beyond the control of firefighters and
13 cause damage to the surrounding forest and private property as
14 well. If the Court will recall, the witness from the IFG
15 testified that if one of the chemical sheds on the property,
16 which, from the map McDavid drew, he plainly saw, had caught
17 fire, the responding firefighters may not have been able to
18 respond, but, instead, would have had to let the entire area
19 burn, because of the toxic smoke that would be released.

20 The statutory maximum term of imprisonment under 18 U.S.C. §
21 844(f) and the terrorism enhancement under U.S.S.G. § 3A1.4
22 combine to create a reasonable sentence of 20 years. Congress
23 has legislated the 20-year maximum term for arson, reflecting
24 society's position regarding punishment for such a crime that
25 does not result in personal injury. See 18 U.S.C. § 844(f)(2)
26 (mandating a sentence of no less than 7, but no more than 40,
27 years' imprisonment if the conduct "directly or proximately
28 causes personal injury or creates a substantial risk of injury to
 any person"); 18 U.S.C. § 844(f)(3) (mandating that if such

1 conduct directly or proximately causes the death of any person,
2 the defendant "shall be subject to the death penalty, or
3 imprisoned for not less than 20 years or for life"). As the
4 statute indicates, had McDavid caused the death of any of the
5 scientists that he knew lived on the IFG property, he would be
6 facing the death penalty. 18 U.S.C. § 844(f)(3).

7 Similarly, the terrorism enhancement promulgated by the
8 Sentencing Commission pursuant to the United States Code creates
9 a reasonable advisory baseline sentence for those who would
10 conspire to or inflict grievous harm on the persons of the United
11 States for the purpose of terrorizing the public and the
12 government. See U.S. Sentencing Guideline Manual, App. C, vol.
13 I, amend. 526 at 449-50 (creating enhancement for terrorism and
14 deleting upward departure provision for terrorism, § 5K2.15)
15 (subsequently amended in 1996, 1997, and 2002). Under § 3A1.4, a
16 defendant who meets the very narrow criteria for terrorism faces
17 a minimum advisory sentence of 210 months, representing an
18 offense level of 32 and criminal history category of VI. See
19 U.S.S.G. Ch. 5, pt. A, Sentencing Table. Here, in McDavid's
20 case, the base offense level is higher because the underlying
21 charge is more significant.

22 McDavid's home-grown brand of eco-terrorism is just as
23 dangerous and insidious as international terrorism. A 20-year
24 term of imprisonment demonstrates that the public does not
25 tolerate those who would generate fear and inflict massive
26 property damage in order to oppose government policy. The fact
27 that McDavid did not ultimately commit arson is irrelevant,
28 because the Sentencing Guidelines took into account the

1 conspiracy and a downward 3-level offense adjustment was applied.
2 (See PSR at ¶ 32). Had there not been an informant within the
3 group, it is highly likely that McDavid would have damaged some
4 property, possibly the IFG, especially when the conspirators
5 discussed the testing and use of alternative incendiary devices
6 such as a container combining gasoline and diesel fuel. The
7 capped term of imprisonment under the statute is a check against
8 the factors determining sentencing under the advisory Guidelines.
9 A sentence of 20 years' incarceration is the point where the two
10 meet. Such a sentence is reasonable and reflects the will of the
11 people as implemented through legislation, and reflects the
12 experience of the judiciary and the goal of consistent sentencing
13 through the promulgation of the Sentencing Guidelines.

14 **IV. DEFENDANT'S PROFFERED REASONS FOR A LOWER SENTENCE**

15 **A. Alleged Sentencing Disparity**

16 **1. Alleged Disparity With Sentences of Co-Defendants**

17 In return for their cooperation and testimony at trial, the
18 co-defendants in this case were each permitted to plead guilty to
19 an offense that contains a maximum penalty of five years
20 imprisonment. The Court has had an opportunity to see these
21 defendants firsthand and can perhaps understand the reason the
22 government extended these offers. Both defendant are very young,
23 both in terms of their chronological age as well as maturity. At
24 the time of the events for which they are convicted Zach Jenson
25 was 20; Lauren Weiner 19. Upon indictment, both immediately
26 recognized the seriousness - and foolishness - of their conduct,
27 and made the decision to plead guilty and cooperate. In
28 contrast, McDavid was significantly older than the others - 28 at

1 the time of the charged events. He was also the person who
2 recruited Jenson and Weiner, the person who first raised the
3 subject of the use of explosives, and the person who, among all
4 the members of the group, expressed no reservation about the
5 possibility that someone might be accidentally killed as a result
6 of their actions.

7 McDavid was offered multiple chances to accept a plea
8 agreement which would have given him a chance to argue for a
9 lower sentence than he now faces. That, however, would have
10 branded him a traitor to the eco-terrorist movement, a fate he is
11 apparently unwilling to endure.² Nor has the defendant ever
12 renounced his ties to the eco-terrorist movement in general or
13 his conduct in this case in particular. His opportunity to do so
14 was when the Probation Officer sought to interview him but he
15 declined to be interviewed on advice of counsel.

16 It is, of course, McDavid's choice if he wishes to be a
17 martyr to the cause, but he should face the consequences of his
18 choices.

19 **2. Ryan Lewis case**

20 McDavid attempts to compare himself to Ryan Lewis, who
21 received an 6-year sentence for committing or attempting to
22 commit three ELF-inspired arsons. (Def. Sent. Mem. at 8). There
23 are at least two significant differences between the McDavid and
24

25 ² As a result of their pleas, both Jenson and Weiner were
26 branded as snitches and traitors to the radical environmental
27 movement, and their photos and plea agreements have been posted
28 on the Internet. See <http://portland.indymedia.org/en/2006/07/342853.shtml> (Jenson) and <http://portland.indymedia.org/en/2006/07/340220.shtml> (Weiner); http://forums.scootaround.com/tool/post/whosarat/show_single_post?pid=23259194&postcount=217 (a message board posting at www.whosarat.com about the case.

1 Lewis cases. First, Ryan Lewis pled guilty and received a three-
2 point reduction for acceptance of responsibility.

3 Second, although the government believes that Lewis richly
4 deserved the terrorism enhancement, he did not meet the technical
5 requirements under U.S.S.G. § 3A1.4 for that enhancement to
6 apply. As discussed above, that definition requires that the
7 conduct in question must be "calculated to influence or affect
8 the conduct of government by intimidation or coercion or to
9 retaliate against government conduct." See 18 U.S.C. §
10 2332b(g)(5); U.S.S.G. § 3A1.4, cmt. n.1. Lewis did not meet that
11 definition because his crimes were directed at private property -
12 a home under construction, a medical office building, and an
13 apartment complex - as a protest against private development. In
14 contrast, McDavid's conduct was directed at government
15 facilities, including the Institute of Forest Genetics and the
16 Nimbus Dam and Fish Hatchery, as a protest against governmental
17 action, specifically, the genetic modification of trees and the
18 damming of waterways and control of the salmon migration.
19 McDavid made it clear that he opposed government "intrusion" and
20 proposed and supported the targeted federal sites accordingly.

21 **3. Oregon Defendants**

22 McDavid also compares himself to three Oregon defendants -
23 Nathan Block, Daniel McGowan, and Jonathan Paul - who were
24 respectively sentenced to 92, 84, and 48 months' imprisonment.
25 Like Ryan Lewis, however, these defendants also stand in a
26 significantly different relationship than McDavid.

27 First, McDavid's claim to the contrary notwithstanding (Def.
28 Sent. Mem. at 10-11), all three defendants pled guilty, were

1 debriefed, and received sentence reductions based on cooperation.
2 Although Block and McGowan received the terrorism enhancement,
3 Paul was not eligible for that enhancement, which explains his
4 lower sentence.

5 Second, as defendant's sentencing memo indicates, the Oregon
6 indictment charged offenses that were, at the time of indictment,
7 between 5 and 10 years old and were highly dependent on the
8 testimony of co-conspirators describing the roles of the
9 defendants. Under such circumstances, it would not be surprising
10 if the prosecution discounted the case to some extent based on
11 the perceived quality of the evidence. Here, in contrast, the
12 government's evidence left little doubt as to the defendant's
13 involvement in the conspiracy.

14 **4. A More Appropriate Comparison: U.S. v. Patterson**

15 Generally, the government does not believe that it is a
16 fruitful exercise to attempt to compare sentences between cases.
17 A multiplicity of factors may account for an apparent disparity
18 in sentences, such as the quality of the government's evidence,
19 whether the defendant's testimony was critical to securing the
20 conviction of others, as well as aggravating or mitigating
21 factors peculiar to a particular defendant.

22 Nevertheless, if the Court is looking for a closer
23 comparison from the Eastern District, it might try United States
24 v. Patterson, CR. S-99-551 EJJ. That was a 2002 conviction
25 following a jury trial for conspiracy to blow up two large
26 propane storage tanks near Elk Grove. The defendants were part
27 of the so-called "militia movement" and undertook their actions
28 as a protest against policies of the federal government with

1 which they disagreed.

2 As in this case, the government had a cooperating witness
3 who provided tape recordings of the conspirators discussing their
4 plans. As in this case, nothing was ever blown up. In fact,
5 although the defendants had procured the components necessary to
6 create an improvised explosive device, they were never permitted
7 to get anywhere close to actually constructing a bomb.
8 Nevertheless, upon conviction, both defendants received the
9 terrorism enhancement. Defendant Kevin Ray Patterson received a
10 sentence of 293 months' imprisonment and Defendant Charles Kiles
11 received a sentence of 264 months' imprisonment.

12 **5. Other Cases applying the Terrorism Enhancement**

13 Other reported cases demonstrate that defendants across the
14 nation have received substantial sentences for terrorism-based
15 offenses, including arson and solicitation of murder.

16 For instance, in United States v. Hale, 448 F.3d 971 (7th
17 Cir. 2006), the defendant, the founder of the hate-mongering
18 World Church of the Creator, was sentenced to a total of 480
19 months imprisonment for soliciting the murder of a federal
20 district judge and obstructing justice. Id. at 982. That
21 sentence, imposed post-Booker, equaled the statutory maximum
22 penalty of 20 years for the solicitation count, and 10 years for
23 each obstruction of justice count. Id. The defendant - who had
24 no prior criminal record - was a law school graduate and the son
25 of a retired police officer. Id. at 989. Nevertheless, his
26 total offense level, was 45, and his criminal history category
27 was VI, following the affirmed imposition of the terrorism
28 enhancement. Id. at 982. The defendant was not successful in

1 procuring the murder of Judge Lefkow, just as McDavid did not
2 burn down the IFG, yet a substantial sentence was warranted, as
3 it is here, in order to address the severity of the crime and
4 deter others from similar criminal conduct.

5 Additionally, in United States v. Dowell, 430 F.3d 1100
6 (10th Cir. 2005), the defendant was convicted at trial of
7 destroying government property, an IRS office, by fire or
8 explosive, in violation of 18 U.S.C. §§ 841(f)(1), (2), in
9 addition to other charges. Id. at 1104. The circuit court
10 affirmed the use of the terrorism enhancement and held that no
11 Sixth Amendment violation had occurred. Id. at 1110. In Dowell,
12 the district court determined that the defendant's applicable
13 Guideline range was 324-405 months, and sentenced the 57-year old
14 defendant to a 360-month term of incarceration - essentially a
15 life sentence.³ The circuit court went on to determine that the
16 Booker error that occurred was harmless, because the district
17 court, in sentencing the defendant to the middle of the range,
18 demonstrated that it knew it had the discretion to impose a
19 lesser sentence. Id. at 1112. Further, the district court also
20 addressed the section 3553(a) factors when imposing sentence.
21 Id. at 1112 n.11.

22 Finally, in United States v. Harris, 434 F.3d 767 (5th Cir.
23 2005), the circuit court held that the district court correctly
24 applied the terrorism enhancement and that it did not commit
25 plain error by imposing the Guideline sentence under the pre-
26 Booker regime. Id. at 773-74. The defendant in Harris pled
27

28 ³ The crime of 18 U.S.C. § 844(f)(2) carries a statutory 40-
year maximum term of imprisonment.

1 guilty to maliciously damaging and destroying a municipal
2 building by means of fire and explosive, a violation of 18 U.S.C.
3 § 844(i), and furthering that crime of violence with a
4 destructive device, a violation of 18 U.S.C. § 924(c)(1). He was
5 sentenced to 240 months' incarceration on the arson count,
6 followed consecutively by 120 months' imprisonment on the
7 destructive device count. Id. at 770.

8 While the two arson cases involved the actual destruction of
9 property by fire and explosive, the courts appeared to take that
10 into account by stacking the sentences consecutively and imposing
11 sentences above the lowest Guideline range.

12 **B. Defendant's Alleged Medical Condition**

13 In April 2007, a physician at the Sacramento County Jail
14 diagnosed McDavid as suffering from pericarditis. Pericarditis
15 is a swelling and irritation of the sack around the heart, the
16 cause of which is generally unknown but thought to be a viral
17 infection. See [http://www.webmd.com/heart-disease/tc/
18 pericarditis-topic-overview](http://www.webmd.com/heart-disease/tc/pericarditis-topic-overview). Pericarditis usually does not cause
19 serious problems. Most people improve within 7 to 10 days. Id.
20 If there are no other problems, pericarditis usually goes away on
21 its own, but a doctor may suggest non-prescription pain relievers
22 to help with the pain or discomfort and, in some cases, may
23 prescribe stronger medicine. Id. Because pericarditis can
24 sometimes be caused by a more serious problem, like a heart
25 attack, it is important to be evaluated by a doctor. Early
26 treatment can also prevent pericarditis from leading to other
27 problems. Id.

28 ////

1 When the defendant developed his problem in April 2007,
2 defense counsel, quite prudently, sought additional medical
3 treatment for his client and filed a declaration with the Court
4 from a cardiologist laying out the dire consequences if the
5 condition were to develop into something worse. Declaration of
6 Dr. Raye Bellenger filed 4/15/07. Like the voiceover at the end
7 of a prescription drug commercial, these are posible, but not
8 common, consequences. McDavid, however, now repeats the
9 substance of those statements in his sentencing memorandum as if
10 they are a likely scenario. (Def. Sent. Mem. at 11)

11 As far as the United States Attorneys Office can ascertain,
12 the defendant has suffered no recurrence of that condition and no
13 residual side effects.⁴ Nor does the Court have any evidence
14 before it indicating this to be the case. In any event, the
15 Bureau of Prisons is equipped to handle medical issues of far
16 greater severity than the defendant presents here. Accordingly,
17 this should not be a basis for a lower sentence.

18 **C. Character**

19 The government typically does not comment about character
20 references, but here an exception is warranted. The letters all
21 seem very heartfelt but they seem to be describing a person who
22 no longer exists. They describe a kind and gentle and caring
23 young man who played football, attended college, assisted his
24 sister at church camp and was helpful to friends and family.
25 None of the letters address what Eric McDavid became.

26
27 ⁴ The undersigned contacted the United States Marshal who,
28 in turn, contacted the jail nurse. The United States Marshal was
informed that there had been no recurrence of the defendant's
pericarditis and no residual effects requiring treatment.

1 Apparently, sometime after he left home to travel the country he
2 became increasingly more radical. Perhaps this was a side of his
3 personality that he did not want friends and family to see.⁵

4 What is undeniable is that McDavid became a follower of
5 Derrick Jensen, the radical environmentalist whose interview
6 McDavid passed out to his co-conspirators when they assembled at
7 the McDavid family home in November, 2005. Here is what Jensen
8 said when he was asked how he feels about the Earth Liberation
9 Front and the Animal Liberation Front:

10 I have no criticism of the ELF or ALF. That
11 said, I would like to see further actions that
12 move up the infrastructure, because they are
13 doing what I would call endpoint sabotage. I see
14 a difference between symbolic and non-symbolic
15 actions; . . . When you burn four SUVs - and this
16 is not pejorative at all, I want that explicit -
17 that's a symbolic action, because four SUVs
18 doesn't make that much difference. . . I've got
19 that line: "every morning I wake up and ask
20 myself whether I should write or blow up a dam.
21 A few people have written to me and said: "that's
22 not the best way to get your message out." I
23 always respond that if I were to take out a dam
24 it would not be to send a message; if I want to
25 send a message, I'm going to write a book. Taking
26 out a dam would help a river liberate itself and
27 to help the salmon. That would be non-symbolic
28 action. We, in the environmental movement, are
far too fond of symbolic action.

. . . .

21 When I say it's a government of occupation and a
22 culture of occupation, I'm not speaking meta-
23 phorically. What did Russian partisans in WWII
24 do? What did members of the Dutch underground do
25 to try and undermine the Nazi Army? Did they
26 hold up banners? What did they do? How did they
27 do it?

28 Why do I write? I'm a recruiter for the revolu-
tion. I think all the ELF actions are great for

28 ⁵ One of the letter-writers, in fact, noted that "many of his old
friends barely were aware of his political positions on any issues." Letter
of Dr. Christine Peterson.

1 that because you get "oh my god, somebody else
2 did this. It's a great idea." It encourages
3 other people to do it too. This kind of stuff
happens all the time, we just don't hear about it
very much.

4 Govt. Exh. 21 at 8-9.

5 This is the writing that, in November 2005, McDavid found so
6 compelling that he made Weiner, Jensen, and Anna read and then
7 discuss it. During the ensuing discussion McDavid referenced
8 Jensen's response to the argument that violent acts will alienate
9 the "fence-sitters" by saying that the "fence-sitters" will
10 probably not be won over anyway. Clearly, if there was a time
11 when McDavid was gentle and favored non-violence, he had grown
12 out of it.

13 What is also undeniable is that McDavid was the one who
14 first advocated using explosives when he recruited Weiner and
15 Jensen in August, 2005; that he did so because, as he told
16 Weiner, he no longer believed that non-violent protest was
17 working; that he told the others that what they were doing was a
18 crime; that his preferred target was the Institute of Forest
19 Genetics, the so-called "tree factory"; that he knew that people
20 were living at that facility; and that he was indifferent to the
21 possibility that someone might be accidentally killed as a result
22 of that attack.

23 Clearly, the defendant became a different person than his
24 friends and family recall from his youth. He began attending
25 Crimethinc meetings and anarchist gatherings. And somewhere
26 along the line he became the type of person who could threaten to
27 kill a young woman if she turned out to be an informer and the
28 type of person who could express regret over not being involved

1 in the death of a police officer. There is nothing before the
2 Court to suggest that the defendant has renounced these views and
3 would not continue to be a threat after he is released from
4 prison.

5 **D. Imperfect Entrapment**

6 The defendant argues that the Court should depart downward
7 because, although he was not entrapped as a matter of law, the
8 government nevertheless engaged in outrageous conduct which
9 constitutes "imperfect entrapment". (Def. Sent. Mem. at 17). At
10 the conclusion of all the evidence, the Court opined that the
11 evidence that the defendant had been entrapped was "slight," but
12 nevertheless permitted the issue to go to the jury. In its order
13 denying the defendant's post-trial motions, the Court rejected
14 the defendant's argument of outrageous government conduct stating
15 "the government attached itself to an ongoing plan, and created
16 an opportunity for the offense to be committed." Order filed
17 3/28/08 at 20.

18 The government's position on this has been expressed in
19 previous court filings. In light of the Court's rulings, the
20 government will not repeat those arguments here except to say
21 that they provide no basis for a downward departure.

22 **E. Sentencing Entrapment**

23 The defendant asserts that the evidence at trial established
24 that it was Anna who pushed the idea of attacking the Institute
25 of Forest Genetics. (Def. Sent. Mem. at 18-19). That is
26 incorrect. The subject first came up during a car ride from
27 Bloomington to Chicago following the July, 2005 Crimethinc
28 convergence. During that car ride McDavid confided to "Anna"

1 that during Winter 2005-06 he planned to target with explosives
2 several facilities, including banks, mountaintop removal mining
3 companies, and a United States Forest Service (USFS) genetic
4 engineering facility in Placerville, California. During the
5 November meeting, when each member of the conspiracy was asked to
6 pick a target, the defendant, without prompting, selected the
7 "tree factory." Later, in January, when Weiner showed evident
8 confusion on why the IFG should be a target, it was McDavid who
9 was able to give the rationale.

10 **V. CONCLUSION**

11 For the reasons set forth above, the United States
12 respectfully requests that Defendant be sentenced to a term of
13 imprisonment of 240 months.

14 Dated: May 6, 2008

Respectfully submitted,

McGREGOR W. SCOTT
United States Attorney

17 /s/ R. Steven Lapham
18 By: /s/ Ellen V. Endrizzi

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