

1 MARK JOSEPH REICHEL, State Bar #155034  
2 THE LAW OFFICES OF MARK J. REICHEL  
3 655 University Avenue, Suite 215  
4 Sacramento, California 95825  
5 Telephone: (916) 974-7033  
6 mreichel@donaldhellerlaw.com

7 Attorney for Defendant  
8 ERIC MCDAVID

9  
10 IN THE UNITED STATES DISTRICT COURT  
11 FOR THE EASTERN DISTRICT OF CALIFORNIA

12 UNITED STATES OF AMERICA, )  
13 Plaintiff, )

14 v. )

15 ERIC MCDAVID, )  
16 Defendant. )

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

**DEFENDANT ERIC MCDAVID'S  
MOTION TO DISMISS THE  
INDICTMENT**

DEFENDANT'S NOTICE OF MOTION  
AND **MOTION TO DISMISS THE  
INDICTMENT BASED UPON  
VIOLATION OF THE SIXTH  
AMENDMENT FOR DISPARAGING  
DEFENSE COUNSEL AND  
ATTEMPTING TO VIOLATE HIS  
RIGHT TO COUNSEL OF HIS  
CHOOSING**; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF; REQUEST FOR  
EVIDENTIARY HEARING.

Date: February 6, 2007  
Time: 8:30 A.m.  
Judge: Hon. Morrison C.  
England

17  
18  
19  
20  
21 To: McGregor W. Scott, R. Steven Lapham, attorneys for  
22 plaintiff: PLEASE TAKE NOTICE that on the above date in the  
23 above entitled action, defendant, through counsel MARK J.  
24 REICHEL, will move this Honorable Court to issue an order

25  
26  
27 Mot.Dism. Indictment as it violates Sixth  
28 Amend by disparaging def. counsel

1 dismissing with prejudice the indictment in this matter.

2 This motion is made upon the grounds that the due  
3 process clause and the Sixth Amendment prevents the  
4 prosecution of the defendant in the instant matter.

5 This motion is based on the United States Constitution,  
6 the Federal Rules of Criminal Procedure, the Points and  
7 Authorities submitted in support, and such argument and  
8 evidence of counsel at the hearing on the motion.

9 Respectfully submitted

10 DATED: December 19, 2006.

11

12

MARK J. REICHEL  
ATTORNEY AT LAW  
Attorney for defendant

13

14

/S/ Mark Reichel

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 SUPPORTING FACTS<sup>1</sup>

3 The government, for whatever reason, set out to replace  
4 McDavid's retained counsel in this case shortly after his  
5 indictment in January of 2006. McDavid had been arrested  
6 January 13, 2006, and the court appointed CJA panel attorney  
7 Michael Long. Co defendant Jenson was appointed the Office of  
8 the Federal Defender. Co defendant Weiner had private  
9 counsel.

10 McDavid retained present counsel Mark Reichel on or  
11 about January 24, 2006.

12 At about that time, the Office of the Federal Defender  
13 contacted CJA panel counsel Chris Haydenmeyer and provided  
14 the file to him and attempted to substitute out of the  
15 matter, for internal reasons.

16 The government refused to deal with Haydenmeyer, and  
17 opposed the appointment of panel counsel for codefendant  
18 Jenson and the substitution out of the representation of  
19 Jenson by the public defender. The government requested a  
20 hearing on the matter set for February 21, 2006..

21 As the hearing approached, it became quite clear that  
22 the sole purpose for the government's opposition was because  
23 the government really wanted Mr. Reichel, McDavid's attorney,  
24 removed from the case "for a conflict."

25  
26  
27 <sup>1</sup> This factual background comes from the discovery  
28 provided by the government, defense investigation conducted  
to date, and the anticipated testimony and evidence to be  
submitted at the hearing of the motion.

1 At the hearing, despite Black Letter Law on the secrecy  
2 of grand jury investigations, the government told the court  
3 that Mr. Reichel had to get off of the McDavid case as "The  
4 government has taped conversations from Mr. Lewis at least  
5 six months before Mr. Reichel says he ever met him. We also  
6 are conducting a *Grand Jury witness tampering investigation*  
7 *that has evidence that Mr. Reichel* has been in touch with the  
8 Lewises at least one month ago. So, if the Court would like  
9 to take a look at the *Grand Jury tampering issue* in camera, I  
10 would submit it. But it's definitely an issue here, and I  
11 think it needs to be investigated if you're going to keep Mr.  
12 Reichel on it." (Emphasis added.) Reporter's Transcript of  
13 February 21, 2006.

14 The government was telling the parties and the court, in  
15 open court, as to the details of a present grand jury  
16 investigation and also that Mr. Reichel is either the subject  
17 or target of that grand jury investigation.

18 As time passed, it became very obvious that Mr. Reichel  
19 was not involved in any witnesses tampering in connection  
20 with the Lewis's.

21 The Sixth Amendment rights of McDavid were violated.

#### 22 **LEGAL AUTHORITY**

23 In United States v. Almani, 111 F3d. 705, 710 (9<sup>th</sup> Cir.  
24 1997), the Ninth Circuit reversed a conviction and remanded  
25 for an evidentiary hearing simply upon the claim that the  
26 government had disparaged defense counsel in the presence of  
27 the defendant. The allegation was that the AUSA told the  
28 defendant and his family that the retained attorney did not

1 care about them, that he was not competent, and that he could  
2 not prevent the conviction. The family then hired new  
3 counsel, and the defendant was eventually convicted. The  
4 claim had been raised in district court, but the trial judge  
5 refused to even hold a hearing.

6 Deciding the claimed Sixth Amendment violation, the  
7 Ninth Circuit noted that "...disparagement is inappropriate  
8 even in the presence of defense counsel" and that "...the  
9 right is not so limited, however, that the availability of  
10 adequate replacement counsel allows the government  
11 effectively to veto defendant's choice of counsel by  
12 intentionally undermining his confidence in the  
13 attorney-client relationship through disparagement." Id at  
14 710. The court then detailed that "Amlani contends that he  
15 need not show prejudice in the form of inadequacy of  
16 replacement counsel to prove a Sixth Amendment violation..."  
17 Finding that "Prejudice can result from 'government influence  
18 which destroys the defendant's confidence in his attorney.'  
19 Irwin, 612 F.2d at 1187 (finding no prejudice because the  
20 defendant produced no evidence of disparagement), the court  
21 then instructed that "Although we decide that the allegations  
22 state a Sixth Amendment claim, we grant the government's  
23 request for a remand and an opportunity to rebut the  
24 allegations..."

25 The government would do well to obtain instruction from  
26 our Supreme Court who just last term vacated a conviction and  
27 held that it is always *structural* reversible error when the  
28 right to counsel of one's choice is violated at the trial

1 level. In United States v. Gonzalez-Lopez, 126 S. Ct. 2557  
2 (2006), the highest court held that the erroneous denial of  
3 the right to counsel of choice is "structural error,"  
4 entitling the defendant to automatic reversal of his  
5 conviction without any showing of prejudice. Such a ruling  
6 reaffirms both the mythically unique character of the trial  
7 lawyer and that an individual's right to choose his lawyer  
8 protects an "autonomy" right that is too precious to subject  
9 to after-the-fact prejudice inquiries. As Justice Scalia -  
10 who later wrote the Court's opinion - put it at oral  
11 argument, a defendant with the means to retain counsel wants  
12 the most inventive, creative, and vigorous defense that money  
13 can buy: not just a professionally adequate defense that any  
14 public defender might provide, but a "Twinkie defense," a  
15 novel approach that an ordinary lawyer would never find but  
16 that leads to victory.

17 The court explained that the Sixth Amendment right to  
18 counsel of choice commands not that a trial be fair but that  
19 a particular guarantee of fairness be provided--to wit, that  
20 the accused be defended by the counsel he believes to be  
21 best. The U.S. Constitution guarantees a fair trial through  
22 the Due Process Clauses, but it defines the basic elements of  
23 a fair trial largely through the several provisions of the  
24 Sixth Amendment, including the Counsel Clause. In sum, where  
25 the right at stake is the right to counsel of choice, not the  
26 right to a fair trial, and that right is violated because a  
27 deprivation of counsel was erroneous, no additional showing  
28 of prejudice is required to make the violation complete.

1 Where the right to be assisted by counsel of one's  
2 choice is wrongly denied, it is unnecessary to conduct an  
3 ineffectiveness or prejudice inquiry to establish a Sixth  
4 Amendment violation. Deprivation of the right is complete  
5 when a defendant is erroneously prevented from being  
6 represented by the lawyer he wants, regardless of the quality  
7 of the representation he received. To argue otherwise is to  
8 confuse the right to counsel of choice--which is the right to  
9 a particular lawyer regardless of comparative  
10 effectiveness--with the right to effective counsel--which  
11 imposes a baseline requirement of competence on whatever  
12 lawyer is chosen or appointed.

13 Both the Fifth Amendment's right to due process and the  
14 Sixth Amendment's right to counsel mandate a prosecutor to  
15 refrain from such attacks against defense counsel. As the  
16 Supreme Court observed in Gideon v. Wainwright, defense  
17 lawyers play a key role in ensuring that every defendant  
18 receives a fair trial - they are "necessities, not luxuries."  
19 372 U.S. 335, 344, 83 S. Ct. 792 (1963). Any comment by the  
20 prosecution that disparages a defendant's decision to  
21 exercise his Sixth Amendment right to counsel is thus  
22 improper. See Bruno v. Rushen, 721 F.2d 1193, 1194-1195 (9<sup>th</sup>  
23 Cir. 1983) United States v. McDonald, 620 F.2d 559, 564 (5<sup>th</sup>  
24 Cir. 1980). In addition, a defendant possesses a due process  
25 right to present his case to the jury, and a prosecutor's  
26 disparaging comments about defense counsel may impermissibly  
27 strike at this fundamental right. Bruno, 721 F.2d at 1195.  
28 Also see United States v. Xiong, 262 F.3d 672, 675 (7<sup>th</sup> Cir.

1 2001) (holding that "disparaging remarks directed at defense  
2 counsel are reprehensible").

3 The inflammatory, incorrect, illegal and bad faith  
4 disclosure of grand jury information in the attempt to  
5 violate McDavid's right to counsel of his choice must not be  
6 countenanced by the court.

7 The indictment must be dismissed.

8 **CONCLUSION.**

9 For the reasons stated above, defendant respectfully  
10 asks that the Court grant his motion to dismiss the  
11 indictment.

12 Respectfully submitted

13 DATED: December 19, 2006.

14  
15 MARK J. REICHEL  
16 ATTORNEY AT LAW  
Attorney for defendant

17 /S/ Mark Reichel  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28