Mark R. Vermeulen [CSBN 115381]
Law Office of Mark R. Vermeulen
755 Florida Street #4
San Francisco, CA 94110-2044
Tel: (415) 824-7533
Fax: (415) 824-4833
vermeulen@mindspring.com

Ben Rosenfeld [CSBN 203845]
Law Office of Ben Rosenfeld
115 1/2 Bartlett Street
San Francisco, CA 94110
Tel: (415) 285-8091
Fax: (415) 285-8092
ben.rosenfeld@comcast.net

Attorneys for Defendant
ERIC McDAVID

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

UNITED STATES,

Plaintiff,

v.

ERIC MCDAVID,

Defendant.

No. 2:06-cr-035-MCE-EFB P

**DEFENDANT'S SUPPLEMENTAL 28 U.S.C. § 2255 MEMORANDUM IN SUPPORT OF *BRADY* CLAIMS AND RELATED MOTION FOR DISCOVERY**

**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

**Cases**

**Statutes**



**Rules**

## SUMMARY

Defendant Eric McDavid, through his undersigned counsel, submits this supplemental memorandum in support of his *Brady* claims and his related motion for discovery, in compliance with the Court's May 16, 2014 Order (Doc. 441). This memorandum identifies the documents or classes of documents which the government withheld from the defense prior to trial and explains why they were material.

Mr. McDavid's *Brady* claims bear on two key pillars of his defense:

(1) His defense was based on entrapment and lack of predisposition prior to his contact with the government informant, "Anna." Therefore, documents which the government withheld because they were "benign" or "non-derogatory" are indeed material under *Brady*.[1] And,

(2) The government's case hinged on the testimony and credibility of its informant, Anna. Throughout the trial, Anna made numerous allegations and damning statements about McDavid which were not corroborated by any other source or document. Therefore, evidence withheld by the government which could in any way impeach Anna was crucial to the defense.

While Mr. McDavid is able to highlight documents he has obtained since trial which reveal clear breaches of the government's *Brady* obligations, those documents also point to the existence of other documents which defendant has never seen. Defendant therefore also seeks leave to conduct discovery, as noted *post*.

## ARGUMENT

### I. APPLICABLE LEGAL PRINCIPLES OF *BRADY* AND ITS PROGENY

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that under the due process clause of the Fourteenth Amendment, the prosecution has a constitutional duty to disclose to the defense all favorable evidence material to guilt or punishment. *Id.* at 87. Nondisclosure of exculpatory or impeaching evidence under *Brady* violates due process by

[1] See *Government's Opposition to Defendant's Section 2255 Motion*, Doc. 420 (hereinafter "Gov't Opp.") at 31:23, and see *Declaration of Nasson Walker* filed Oct. 12, 2012, Doc. 420-2 (hereinafter "*Walker Decl.*").

"depriving a defendant of liberty through a deliberate deception of court and jury . . . [which is] as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." *Id*. at 86 (citation omitted).

To prevail on a *Brady* claim in post-conviction proceedings, a defendant must demonstrate the following:

1. The evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching;
2. The evidence must have been suppressed by the State, either willfully or inadvertently; and
3. The evidence must be material – i.e., prejudice must have ensued.

*Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Anderson v. Calderon*, 232 F.3d 1053, 1062, (9th Cir. 2000), *cert. denied*, 534 U.S. 1036 (2002).

Overall, a defendant is entitled to relief under *Brady* and under § 2255 if he can demonstrate that "there is a reasonable probability that the result of the trial would have been different if the suppressed documents had been disclosed to the defense." *Strickler*, 527 U.S. at 289 (internal quotation marks omitted). "As we stressed in *Kyles*: 'The adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.'" *Id*. at 289-90, quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (a "reasonable probability" is a probability "sufficient to undermine confidence in the outcome").

### A. The Prosecutor's Duty Extends to Producing *Brady* Materials Known Only to Those Assisting the Prosecution, Including Investigators and Police

The prosecutor's duty under *Brady* includes the duty to seek out and disclose favorable evidence known to others acting on the prosecution's behalf, including the police. *Brady* applies not only to information known to the prosecutor, but also to "evidence 'known only to police investigators and not to the prosecutor.'" *Strickler*, 527 U.S. at 281-82, quoting *Kyles*, 514 U.S. at 438); *accord*, *Jackson v. Brown*, 513 F.3d 1057, 1068-69 (9th Cir. 2008) ("The Supreme Court

has made abundantly clear ... that the prosecutor's duty to disclose evidence favorable to the accused extends to information known only to the police.").

### B. *Brady* Material Includes Both Exculpatory and Impeachment Evidence, and May Relate Either to Guilt or Punishment

*Brady* encompasses all evidence "favorable to the accused and 'material either to guilt or to punishment,'" *United States v. Bagley*, 473 U.S. 667, 674 (1985), quoting *Brady*, 373 U.S. at 87, and includes both direct and impeachment evidence. *Id.* at 676. *Brady* information is not limited to information which is directly admissible at trial, particularly where that information may be used on cross-examination to impeach a witness. *See Wood v. Bartholomew*, 516 U.S. 1 (1995) (suggesting otherwise inadmissible polygraph results could be subject to *Brady* if they met prejudice standard). "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of events affecting credibility falls within th[e] general rule [of *Brady*]." *Giglio v. United States*, 405 U.S. 150, 154 (1972). Evidence "need not have been independently admissible to have been material. Evidence is material if it might have been used to impeach a government witness, because 'if disclosed and used effectively, it may make the difference between conviction and acquittal.'" *Carriger v. Stewart*, 132 F.3d 463, 481 (9th Cir. 1997), quoting *Bagley*, 473 U.S. at 676; *accord*, *Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.").

### C. A Defendant Is Entitled Under *Brady* To All Favorable Information, Including Actual Documents, Not Just To The Government's Summaries

It is elementary that the defense is in the best position to know how to use impeaching or exculpatory information. The "need to develop all relevant facts in the adversary system is both fundamental and comprehensive." *United States v. Nixon*, 418 U.S. 683, 709 (1974). Therefore, absent narrow grounds for withholding, the government must furnish the defense with complete material documents, such as interviews or notes of interviews with witnesses, rather than

selective summaries. "Summaries of conversations prepared by the government are not the equivalent of actual notes for several reasons." *United States v. OK Park*, 319 F.Supp.2d 1177, 1179 (N.D. Cal. 2004), *cert. denied*, 547 U.S. 1169 (2006).

> First, summaries invariably involve a process of interpretation and characterization. That is the essence of a summary. Different individuals may hear or read the same words and summarize their meaning differently. Second, context, emphasis, and subtle distinctions may not be precisely captured by summaries. For example, it may be significant that a witness repeated an answer multiple times. The general topics being discussed at the time a statement is made may also explain the statement. Third, because the government is not necessarily privy to the defense's strategy, seemingly innocuous or immaterial statements by a witness may not be included in a summary. These seemingly innocuous or immaterial statements may, because of different facts known to the defense, be important for purposes of impeachment.

*Id.* *See also*, *Paradis v. Arave*, 240 F.3d 1169, 1173 (9th Cir. 2001) (defendant prejudiced under *Brady* by prosecution's failure to produce full notes of interviews with a government witness). Likewise, the government must produce complete interview memoranda, not just selected content which the government deems exculpatory. *United States v. Bergonzi*, 216 F.R.D. 487, 499, 502 (N.D. Cal. 2003). *Cf. United States v. Sedaghaty*, 728 F.3d 885, 904-905 (9th Cir. 2013) (Even under the Classified Information Procedures Act, a court may allow the government to substitute summaries for documents only "if it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information."), quoting 18 U.S.C. app. 3 § 6(c)(1).

**D. Materiality and Admissibility**

The fundamental question in the materiality analysis is whether, despite the prosecution's errors, the defendant "received ... a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434. A "showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Id.* (emphasis added). Consistent with this fundamental statement of the test, evidence is "material" under *Brady* when it is either admissible or would have led to admissible

evidence. *Coleman v. Calderon*, 150 F.3d 1105, 1116–17 (9th Cir.), *rev'd on other grounds*, 525 U.S. 141 (1998); *United States v. Kennedy*, 890 F.2d 1056, 1059 (9th Cir. 1989).

Because each additional *Brady* violation further undermines confidence in the jury's decision, the errors must be analyzed "collectively." *Kyles*, 514 U.S. at 436.

## II. THE *BRADY* MATERIALS WITHHELD FROM THE DEFENSE AND WHY THEY ARE MATERIAL

The government concedes that documents in its possession relevant to Mr. McDavid's case were not turned over to the defense, stating that "a relatively small amount of information pertaining to the case was apparently not disclosed to the defense." (Gov't Opp. at 31:20-21.) Quite the contrary, in 2010, long after Mr. McDavid's conviction, the FBI produced 2,449 pages pursuant to a Freedom of Information Act request by Mr. McDavid (hereinafter "FOIA documents" or "the FOIA production"), most of which were never produced to the defense before trial, while withholding an additional 868 pages deemed "exempt from disclosure." The request specifically sought documents "which pertain to me, Eric McDavid ... going back to 2000," so it can be presumed that every document produced or withheld bears in some way on the FBI's scrutiny of Mr. McDavid within that time frame. (See *Exhibit 4, Part 1 In Support of Defendant's § 2255 Motion* (Doc. 403) at DEF000014-22.)

Clear *Brady* violations appear on the face of the FOIA documents. The FOIA documents also refer to or imply the existence of additional documents which have not been produced. Below, defendant discusses the specific *Brady* violations which appear from the face of the FOIA documents, with textual citation to the documents themselves. Further discovery is needed to determine what is contained in the still-missing documents, what text lies under the redactions, and what additional relevant documents may exist. Mr. McDavid's discussion below is organized under four categories, each one bearing materially and critically on his defense. These categories are:

A. Documents Impeaching Informant Anna's credibility;

B. Correspondence between Mr. McDavid and Anna the informant;

C. Documents pointing to government sources other than Anna;

D. Reports withheld by the FBI/Anna.

**A. Documents Impeaching Informant Anna's Credibility**

The FOIA documents revealed for the first time that the government urgently called for a polygraph examination of Anna the informant, and SA Walker's declaration reveals that the polygraph was inexplicably canceled. The FBI polygraph order states in pertinent part:

> Synopsis: To request a polygraph examination in connection with requested matter.
>
> Details: A. Request: SAC authorization to afford a polygraph examination to Source [REDACTED] in connection with captioned investigation.
>
> B. Purpose of Polygraph Examination: The purpose of the requested Polygraph examination is to confirm veracity of CW reporting prior to the expenditure of substantial efforts and money based on source's reporting. To facilitate investigation it is requested that the polygraph be administered by 11/17/2005
>
> ...
>
> D. Use of Polygraph: The polygraph is not being used as an initial screening device o[r] a substitute for logical investigation. It is being used to verify source reporting and boost the veracity of the source.
>
> E. Opinion of the U.S.A.O.: AUSA [REDACTED] concurred on 11/03/2005.

(Appendix hereto at DEF000023-24, memo dated 11/03/2005).[2] Describing these documents, FBI lead case agent Nasson Walker explained that

> FBI Philadelphia requested a polygraph examination by way of an EC (Electronic Communication) dated 11/3/2005 ... The request was approved as evidenced by the document being serialized to the case file. However, after receiving this approval, the source's handler, SA Rick Torres, decided not to proceed. The source was never administered a polygraph examination.

[2] For the Court's convenience, the Appendix hereto contains the referenced excerpts from the FOIA documents, all of which were filed previously as Exhibit 4 to defendant's 2255 motion, Docs. 403-405. The Bates page numbers in the Appendix mirror the Bates page numbers appearing in Exhibit 4.

The term "[REDACTED]" is used to reflect redactions in the FOIA documents. The redactions range from a single word, to paragraphs, to entire pages.

(*Walker Decl*. at 1.) The circumstances surrounding why the FBI requested – and then cancelled – a polygraph of Anna have never been disclosed to the defense and remain shrouded in mystery.

At trial, Mr. McDavid sought to show that he was not predisposed to commit the indicted offense before Anna first contacted him and then pursued him at the FBI's direction; that she fomented the alleged conspiracy, literally herding defendants together from around the country for meetings, badgering them to form a plan, and mocking and berating them when they showed disinterest; and that she manipulated McDavid by withholding sex from him until after "the mission," as the FBI directly encouraged her to do. (See detailed discussion in *Amended Memorandum of Law*, Doc. 410 (hereinafter "*Am'd Memo*") at 6-23, and *Amended Reply Memorandum*, Doc. 432 (hereinafter "*Am'd Reply Memo*") at 1-8; *see also*, *Declaration of Co-Defendant Zachary Jenson*, Ex. 1 to Motion, Doc. 400 (hereinafter "*Co-Defendant Jenson Decl.*") at 2-4.)

Anna was the linchpin of the government's case, and its sole source of information for many of the most damning allegations against Mr. McDavid. Mr. McDavid showed at trial that numerous allegations made by Anna, including her most inflammatory statements about McDavid's alleged propensity for criminality, lacked corroboration in any of the myriad recordings the government made, while such allegations were undermined or flatly contradicted by the cooperating co-defendants. (See discussion and citations in *Am'd Memo* at 21:9-11 and *Am'd Reply Memo* at 7, 8-9, 12-16, 31 n. 11, 33 n. 12.) As such, Anna's credibility, or lack thereof, was thus fundamental to the case. "Impeachment evidence is especially likely to be material when it impugns the testimony of a witness who is critical to the prosecution's case." *Silva v. Brown*, 416 F.3d 980, 987 (9th Cir. 2005).

Separate from the question of whether polygraph results could have been admissible at trial, if the defense had been informed that Anna's FBI handlers had serious doubts about her credibility sufficient to warrant calling for a polygraph (and calling for it to occur within 14 days), the defense could have used this information to impeach not only Anna's credibility but that of the principal FBI investigators, Anna's handler S.A. Rick Torres and lead case agent

Nasson Walker, by questioning all of them about it on the stand.

Whether or not polygraph results would have been inadmissible at trial is beside the point. The FBI's doubts about the veracity of its informant and key witness are plainly admissible for impeachment value. *See, e.g.*, *United States v. Brumel-Alvarez*, 991 F.2d 1452, 1458 (9th Cir. 1992) (Government information criticizing the integrity of a confidential informant is *Brady* material.) Likewise, the abrupt and inexplicable cancellation of her polygraph examination could have been used to undermine confidence in the integrity of the investigation and the allegations which flowed from it by showing that the FBI went out of its way to avoid tainting its key witness. Moreover, even if polygraph results themselves were inadmissible, a misstatement by the prosecution regarding their existence is to be condemned "in the strongest terms." *Wood*, 516 U.S. at 5. Additional documents which have not been produced regarding the ordering and cancelling of Anna's polygraph could further anchor the government's doubts about her veracity and credibility, and the government's failure to properly vet its informant.

The timing of the FBI's doubts likewise was significant. The FBI specifically requested that the polygraph of Anna be completed by November 17, 2005 to "facilitate investigation," just one day before Anna/the FBI had gone to great pains to gather the group at McDavid's parents' house in Foresthill (near Sacramento), and a little over a month before the FBI gave Anna the green light to engage in OIA (Otherwise Illegal Activity). (*Walker Decl*. at 1; E.R. 1154:13-24.) Relying on Anna's reporting, the government has steadfastly maintained that "plans were formulated to commit acts of eco-terrorism during the get together at McDavid's parents' house in November 2005." (Gov't Opp. at 9:23-24, citing to E.R. 732:17-733:7.) But on cross-examination, Anna admitted that she orchestrated the November 2005 meeting for the FBI, buying Co-Defendant Weiner a plane ticket and literally delivering the co-defendants to McDavid's doorstep at his parents' house, in order to overcome McDavid's declination to participate. Anna stated that McDavid had not made contact in some time and that the FBI was therefore "worried as to where he had disappeared to." (E.R. 728:5-6.) Co-Defendant Jenson

stated: "If it had been left to Eric [McDavid], that meeting would have never occurred. It took Anna's logistical p[l]anning, interpersonal manipulation and financial assistance to make that meeting happen." (See discussion and citations in *Am'd Reply Memo* at 9-11.) The discrepancies among the various characterizations of the November 2005 meeting are one more reason why Anna's veracity, or lack thereof, was fundamental to the case.

While the parties may argue about the weight or credibility of Anna's disputed testimony, it is nevertheless axiomatic that depriving Mr. McDavid of the ability to present evidence or testimony about the FBI's own doubts as to her credibility was deeply prejudicial. "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of events affecting credibility falls within th[e] general rule [of *Brady*]." *Giglio*, 405 U.S. at 154. "'The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination.' [Citation.] It is for precisely that reason that we require 'that relevant evidence bearing on the credibility of an informant-witness be timely revealed' to the defense." *Carriger*, 132 F.3d at 481, quoting *United States v. Bernal-Obeso*, 989 F.2d 331, 335 (1993). "Evidence is material if it might have been used to impeach a government witness, because 'if disclosed and used effectively, it may make the difference between conviction and acquittal.'" *Id*., quoting *Bagley*, 473 U.S. at 676. *Accord*, *Napue*, 360 U.S. at 269 ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence ...."); *Giglio*, 405 U.S. at 154; *Silva*, 416 F.3d at 987; *Kyles*, 514 U.S. at 446 (had hearsay statements been produced, "the defense could have examined the police to good effect on their knowledge of [a witness's] statements and so have attacked the reliability of the investigation...")

**B. Correspondence Between Mr. McDavid And Informant Anna**

Central to Mr. McDavid's entrapment defense was the contention that Anna manipulated him sexually, exactly as she was taught and instructed to do by her FBI handlers and the FBI's Behavioral Analysis Unit. Anna stoked Mr. McDavid's romantic interest in her and conditioned

sexual fulfillment on completion of the mission first.[3] The government produced exactly one love letter (an email) from McDavid to Anna, along with her response, and the defense questioned Anna about it, such as it was, on the stand. Now, the FOIA documents reveal that the government withheld *at least 10 other emails, and one handwritten note* from McDavid to Anna, all of which McDavid could have used at trial to bolster his entrapment/sexual inducement defense. It is a fair assumption that the emails the government failed to turn over are romantic in nature as the government acknowledges sending them for analysis to the same Behavioral Analysis Unit which Anna affirmed on the stand trained her to condition sex with McDavid on completion of a mission (E.R. 1067:23 - 1068:12), and Anna admitted that she received at least three "love letters" from Mr. McDavid. (E.R. 1091:7-11.) (See full discussion and citations in *Am'd Memo* at 2-3, 8-9, and *Am'd Reply Memo* at 3-6; *Co-Defendant Jenson Decl.* at 2.)

The redacted FOIA documents, coupled with Agent Walker's declaration, reveal that the FBI had and analyzed ten emails and one handwritten note from McDavid to Anna, which were not produced in discovery and which the defense has never seen:

> Details: Enclosed is the correspondence of ERIC MCDAVID. It is requested that BAU analyze the writings for behavioral insight into ERIC MCDAVID.
>
> Correspondence consists of one handwritten note and ten Email communications.

(Appx. hereto at DEF000039, dated 9/30/05.)

> Details: Enclosed are Email communications of ERIC MCDAVID and [REDACTED] as well as a handwritten note from MCDAVID. The MCDAVID communications were sent to the Behavioral Analysis Unit for review on 10/04/05.

(Appx. hereto at DEF000041, dated 10/6/05.)

Special Agent Walker characterized the contents of these FOIA documents as follows:

[3] Inducement for purposes of entrapment can include "promises of reward." *United States v. Davis*, 36 F.3d 1424, 1428 (9th Cir. 1994).

> Philadelphia request for BAU [Behavior Analysis Unit] analysis of 1 letter and 10 emails from McDavid [and] Philadelphia EC enclosing 1 letter and 10 emails to CHS [confidential human source] from McDavid.

(*Walker Decl.* (Doc. 420-2) at 6.) The FOIA production thus reveals that the FBI chose ten emails and one note/letter from Mr. McDavid to Anna (the "CHS") to submit to the Behavioral Analysis Unit – the unit which instructed Anna how to lead Mr. McDavid on sexually – for analysis. The FOIA production does not contain these documents and the defense has never seen them. (See further discussion, *Am'd Reply Memo* at 60.)

Discovery is needed to obtain the actual emails and letter, together with Anna's responses, the BAU's analysis, any instructions to Anna, any additional correspondence between McDavid and Anna, and all other related documents. But even on its face, the government's failure to produce McDavid's and Anna's complete romantic correspondence was plainly prejudicial to McDavid's ability at trial to present his entrapment defense, as well as his ability to impeach Anna's credibility.[4]

In light of the aforementioned electronic communications suppressed by the government and recent admissions by the US Solicitor General that the Justice Department has engaged in a blanket denial of the existence of National Security Agency (NSA) wiretap evidence in federal criminal prosecutions, McDavid also requests that any electronic communications involving him obtained by the NSA be turned over to the defense. McDavid made such a request in pretrial discovery (Doc. 124), but the government denied the existence of such evidence and the Court denied McDavid's motion (Doc. 181).[5]

---

[4] The government's failure to produce McDavid's own written statements also appears to have been a violation of F.R.Crim.P. 16(a)(1)(B)(i), and its failure to produce Anna's responses appears to have been a violation of F.R.Crim.P. 26.2(a) & (b), a proper sanction for which would have been to strike Anna's testimony or declare a mistrial. F.R.Crim.P. 26.2(e). Defense Counsel made a Rule 16 discovery request. (See Doc. 124 at 5, 6, 24; Doc. 181 at 1, 2, 5.)

[5] See *New York Times*, "Door May Open for Challenge to Secret Wiretaps," 10/16/13 (http://www.nytimes.com/2013/10/17/us/politics/us-legal-shift-may-open-door-for-challenge-to-secret-wiretaps.html.) Recent revelations about NSA wiretapping and data collection indicate that even entirely domestic electronic communications were collected by the NSA. See *The Guardian*, "NSA collecting phone records of millions of Verizon customers daily," 6/5/13 (http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order).

**C. Documents Pointing To Government Sources Other Than Anna**

Because Mr. McDavid's entrapment defense depended on showing that he was not predisposed to commit the indicted offense before his contact with Anna, and that she induced him to commit the indicted offense, information showing that he was not criminally predisposed was material and critical to his defense. Anna herself had initially reported to her handlers that Mr. McDavid was "gentler" than others, "non-threatening," "inconsequential," "a college student and not of interest to the FBI" (E.R. 690:9-12; E.R. 890:5-23). The FOIA documents reveal that the government gathered information on Mr. McDavid during critical periods of the investigation from confidential sources other than Anna which was not produced to the defense.

The government defends its failure to disclose extensive other investigative and source information revealed by the FOIA production on the grounds that it was "benign," or that it contained "no derogatory information" regarding Mr. McDavid, or that it contained "no discussion of politics or violent action" by Mr. McDavid. (See *Walker Decl.* at 5, 7-9.) On their face, these descriptions mark these documents as containing *Brady* information favorable to McDavid's defense that he lacked predisposition. Mc.David was entitled to use such information not only to show his lack of predisposition but to impeach Anna and her uncorroborated and dubious allegations at trial that he showed interest in bombing and violence. (See discussion in *Am'd Reply Memo* at 11-16, 31 n.11.)

Although the FOIA documents point for the first time to extensive investigative and source information regarding Mr. McDavid which the government withheld from the defense, they do not reveal the fruits of the government's investigations both because they are heavily redacted and they are incomplete (pointing as they do to other documents not contained in the FOIA production). Although the missing information makes it impossible to determine details, SA Walker's declaration summarizing the FOIA production helps to establish its materiality. SA Walker describes: "investigative reports from Anna mentioning McDavid with no exculpatory information" (*Walker Decl.* at 5:5-6); three "investigative reports from confidential informant (not Anna) that mention McDavid with no derogatory or exculpatory information"

(*Walker Decl.* at 5:8-9); nine interviews or reports from other people, *including two CHS's*, mentioning Mr. McDavid but containing "no derogatory information" about him (*Walker Decl.* at 7-9); and seven documents pertaining to a source named Sarah Strayer. (*Walker Decl.* at 7-8.) Government witnesses testified that Sarah Strayer had a relationship with Mr. McDavid, and that at one time the government viewed her as a participant in the group. (E.R. 1552:10-12; E.R. 1065:22-1066:5.) Based on this evidence, Strayer would have had intimate awareness of McDavid's thoughts and inclinations. This makes it highly probable that the information she provided to the FBI, and which the government withheld from the defense, bore on McDavid's lack of predisposition and inclination to join any conspiracy – else, why would the government have withheld it? Revealingly, SA Walker's summary of an FBI interview with Strayer states that she described "*traveling with McDavid with no derogatory information, no discussion of politics or violent action*." (*Walker Decl.* at 7-8 (emphasis added).)

Specifically, the FOIA documents state the following with regard to investigative and source information which was not furnished to the defense prior to trial:

Numerous documents state:

> Dissemination of this information without redaction could compromise a sensitive and reliable source.
>
> An individual not in a position to testify, provided the following information. [REDACTED]

(Appx. hereto at DEF000034-37, DEF000096-97, DEF000110-113, and DEF000122-139 (various FBI memos dated between 6/1/05 and 7/21/05).) Each of these documents is heavily redacted, devoid of any details.

> Sacramento requests that Philadelphia delay Sacramento's previous request (7/6/05) to interview residents of [REDACTED], Philadelphia, PA about Eric McDavid until source, [REDACTED], has had sufficient opportunity to obtain information directly from him.

(Appx. hereto at DEF000066, FBI memo dated 7/7/05.) It is not clear from the FOIA documents whether the referenced interviews were conducted, or what fruits, if any, resulted from those interviews.

> As [redacted] appears to have some knowledge about the group's intentions, she may be a valuable witness at a future time. A 11/4/2005 posting on [REDACTED] website offers intelligence on [REDACTED] legal condition that may be exploitable during an interview …

(Appx. hereto at DEF000074-75, FBI memo dated 11/9/05.)

> [REDACTED], born [REDACTED], Social Security Account Number [REDACTED], with a home address of [REDACTED] was advised of the identities of the interviewing agents and the nature of the interview. [REDACTED] was contacted in [REDACTED] was served a Federal Grand Jury Subpoena for her appearance in Sacramento, California on January 25, 2006. [REDACTED] was advised of her rights from form FD-395 and waived her rights and agreed to speak with the interviewing agents [REDACTED] signed the Advise of Rights form and provided the following information: [REDACTED]

(Appx. hereto at DEF000084-85, FBI 302 dated 1/18/06.) The redacted information in these documents constitutes about one full page.

> [REDACTED] a White male born [REDACTED] residing at [REDACTED] , home cellular telephone number [REDACTED] work telephone number [REDACTED] telephonically contacted the Federal Bureau of Investigation and provided the following information: [REDACTED] is [REDACTED]….

(Appx. hereto at DEF000086, FBI memo dated 1/20/06.)

> [REDACTED] advised that [REDACTED] attended high school with ERIC MCDAVID and that the two remained in periodic contact after graduation. [REDACTED] recalled seeing MCDAVID around [REDACTED]. He did not know MCDAVID had any inclination toward illegal activity.

(Appx. hereto at DEF000120, FBI 302 dated 4/14/06.)

The documents withheld and redacted – both those contained in the FOIA production, and those pointed to by the FOIA production – appear to make out *prima facie Brady* violations. Discovery is needed to uncover all of the "benign" and "non-derogatory" source information which the government has withheld, including to uncover the redactions in the FOIA documents themselves.

///

///

**D. Reports Withheld By The FBI/Anna**

Finally, the FOIA production reveals the existence of numerous FBI reports originating with Anna and containing information about Mr. McDavid which the government never produced to the defense.

For example, the FOIA adverts to the following:

> As per referenced EC, attached are copies of fifty-one (51) FD-302s from [REDACTED] for possible use by the US Attorney's Office, Southern District of California, in the trial of Eric McDavid. It is requested Miami be notified if/when these documents are to be presented at trial.

(Appx. hereto at DEF000026 dated 3/9/07.) In addition, several heavily redacted pages reference reports by Anna from the Des Moines, Iowa "CRIMETHINC convergence" in August 2004 (Ex. 5 to Motion (Doc. 406), Appx. hereto at DEF000187-190, dated 8/21/04.), where she first met Mr. McDavid, and where she first described Mr. McDavid to her handlers as "gentler" than others, "non-threatening," "inconsequential," "a college student and not of interest to the FBI." (E.R. 690:9-12; E.R. 890:5-23).

Once again, what the government characterizes as irrelevant (see *Walker Decl.* at 10-11) is favorable and exculpatory to the defense in demonstrating McDavid's lack of predisposition. For instance, one can intuit from SA Walker's declaration that if Anna's redacted reports to her FBI handlers from Des Moines meshed with her testimony that her initial impressions of McDavid were that he was gentle, non-threating, etc., SA Walker and the government would deem such information "benign" and "non-exculpatory." However, the exact opposite is true, and McDavid was entitled to rely on such favorable information at trial. "'Where the withheld evidence opens up new avenues for impeachment, [even if significant impeachment evidence was already introduced] it can be argued that it is still material.'" *Sedaghaty*, 728 F.3d at 900, quoting *Gonzalez v. Wong*, 667 F.3d 965, 982 (9th Cir. 2011) (brackets in original).

According to SA Walker, FBI Miami forwarded 51 reports containing information originating with Anna to FBI Sacramento in preparation for the trial of Mr. McDavid. (*Walker Decl.* at 2.) Although SA Walker states that only 16 of these documents mention McDavid, and

that five of them were produced to the defense in discovery (*Walker Decl*. at 2), the first four he discusses relate to the 2004 Des Moines Crimethinc gathering and the 2004 Republican National Convention (*Walker Decl.* at 2-4, re: items nos. 1-4) – periods from which the defense received almost no discovery.

Notably, SA Walker incorrectly describes Mr. McDavid as "a leader/organizer of [the Crimethinc] event." (*Walker Decl.* at 3, re: item no. 2). This is false; it cannot be disputed that McDavid was merely an attendee, not a "leader/organizer." He never lived in Iowa and he was traveling just before the event. This post-trial revelation that Anna incorrectly pegged McDavid to the FBI as a "leader/organizer" of an anarchist event when she first met him in 2004 could have changed everything at trial if the government had provided the defense with this plain *Brady* information: (1) This information goes directly to impeaching Anna; (2) it supports defendant's entrapment defense by providing context for why the FBI targeted him from among a large group of people in the first place; and (3) it might therefore have carried the day in persuading the Court to accept the defense argument that Anna's first contact with Mr. McDavid, for purposes of evaluating his lack of predisposition, was in August 2004 – not in July 2005 – and to so instruct the jury. (See detailed discussion of the significance at trial of the date of first contact in *Am'd Memo* at 6-7, 18, 21-22, 31-35, 38-45, and *Am'd Reply Memo* at 7-8, 26-27, 30-43.)

### E. The Defense Should Not Have To Rely On The Government's Characterizations Of The Withheld Documents or SA Walker's Summary, Which Is Demonstrably Inaccurate In Places

It is well settled under *Brady* that Mr. McDavid was entitled prior to trial to actual favorable documents, including FBI 302 "interview memoranda" of witnesses, not just to the government's summaries, much less redacted versions of those documents. *Paradis*, 240 F.3d at 1173; *Bergonzi*, 216 F.R.D. at 499, 502 ; *OK Park*, 319 F.Supp.2d at 1179.

Nor are the government's summaries of the withheld documents reliable in this case. First, it must be remembered that SA Walker only undertook to summarize a limited set of documents which Mr. McDavid obtained collaterally from the FBI through a FOIA request after his conviction rather than through supervised pretrial discovery in the case itself. As discussed

above, the FOIA documents advert to numerous other documents which were not included in the production. In addition to the lacunae discussed above, an 11/7/05 memo references "items" provided by an unnamed source to the FBI, but the "items," whatever they are, are not included or described in the FOIA production. (Appx. hereto at DEF000113.)

Second, SA Walker's summary does not account for every page of the FOIA production.

Third, as discussed above, SA Walker's summary is demonstrably inaccurate and unreliable in various ways. Most fundamentally, he misapprehends the fact that "benign" and "non-derogatory" information about Mr. McDavid collected by the FBI is in fact exculpatory and impeaching in the province of his entrapment defense. And he re-propagates Anna's demonstrably false statement that McDavid was a "leader/organizer" of the 2004 Crimethinc event.[6]

## III. MR. MCDAVID SEEKS LEAVE TO CONDUCT DISCOVERY IN SUPPORT OF HIS *BRADY* CLAIMS

Rule 6(a) of *The Rules Governing Section 2254 And 2255 Cases* permits discovery with leave of Court:

> A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery. If necessary for effective discovery, the judge must appoint an attorney for a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A.

The movant need not state a *prima facie* case for relief prior to seeking discovery. Rather, Rule (6)(a)'s "good cause" standard permits the use of discovery in order to establish a *prima facie* claim for relief. *Bracy v. Gramley*, 520 U.S. 899, 908 (1977). "Good cause" is shown even if the petitioner's allegations support "only a theory ... [that] is not supported by any solid evidence at the time of the discovery request." *Id.* Upon a showing of good cause, it is an abuse of

[6] In addition, SA Walker incorrectly states that Mr. McDavid "presented video on how to make molotov cocktails." (*Walker Decl.* at 3:12-13.) In point of fact, as Anna and SA Torres admitted on the stand, Mr. McDavid merely watched a video as an audience member at a film festival. (See discussion, *Am'd Reply Memo* at 16 n.5.)

discretion not to grant discovery. *Id*. at 909.[7] *See also, Blackledge v. Allison*,431 U.S. 63, 78, 82-83 (1977) (a federal habeas petitioner is "entitled to careful consideration and plenary processing of [his claim], including full opportunity for presentation of the relevant facts"); *Wagner v. United States*, 418 F.2d 618, 621 (9th Cir. 1969).

The Court should permit a scope of discovery which is "reasonably fashioned to elicit facts necessary to help the court to dispose of the matter as law and justice require." *Harris v. Nelson*, 394 U.S. 286, 290 (1969), quoting 28 U.S.C. § 2243.

Based on Mr. McDavid's good cause showing above that numerous documents in the FOIA production point to the existence of redacted content and other documents which would have been exculpatory or impeaching but which were withheld from the defense, Mr. McDavid seeks discovery within the province of these § 2255 proceedings in order to determine the full scope of the government's *Brady* violations herein. Specifically, Mr. McDavid seeks the following discovery:

1. The complete correspondence between Mr. McDavid and Anna, including but not limited to the ten emails and one note sent to the FBI's Behavioral Analysis Unit;

2. All other documents related to FBI's request for analysis of the correspondence and the results of such analysis, including any instructions to Anna regarding how to leverage Mr. McDavid's romantic interest in her or how to otherwise interact with him;

3. All documents related to the FBI's concerns about Anna's veracity, including all documents related to the ordering, approval, and/or cancellation of a polygraph examination of her (or the polygraph documentation and results themselves if one was actually administered);

///

///

[7] In *Bracy*, petitioner was convicted of murder before a state court judge who was later found guilty of extortion. On habeas, petitioner alleged that the judge was biased against him in order to hide the fact that he took bribes in other criminal cases. Both the district and the appellate courts denied requests for discovery on the grounds that there were insufficient factual allegations to support such a claim. The Supreme Court reversed, holding that the allegations were sufficient to entitle petitioner to discovery of sealed transcripts of the trial judge's corruption trial, the prosecutor's materials, and the judge's ruling in other cases to search for a pattern of prosecution bias, and to depose the judge's associates.

4. All FBI Form 302 interview memoranda, interview notes, summaries, statements, or recordings of sources who provided information about Mr. McDavid, including information which the government has characterized as "benign" or containing "no derogatory information," including any and all information provided about Mr. McDavid by Anna and by Sarah Strayer, and including information provided by Anna about or concerning Mr. McDavid during the 2004 "Crimethinc convergence" in Des Moines, Iowa;

5. All recordings containing statements by Mr. McDavid, Anna, and/or either of the Co-Defendants which were not produced to the defense;

6. The "items" reportedly provided by an unnamed source to the FBI (Appx. hereto at DEF000113);

7. All 51 reports containing information originating with Anna which FBI Miami forwarded to FBI Sacramento "for possible use ... in the trial of Eric McDavid," including particularly the 16 such reports which SA Walker acknowledges contain information about Mr. McDavid;

8. Depositions of principal witnesses concerning the above-described information, including Anna, SA Rick Torres, and SA Nasson Walker;

9. Any electronic communications involving McDavid obtained by the NSA.

## CONCLUSION

For the foregoing reasons, and for those stated in Mr. McDavid's *Amended Memorandum of Law* and *Amended Reply Memorandum*, he respectfully requests that the Court (1) grant Mr. McDavid leave to obtain the above-listed discovery and permit further discovery and expansion of the record as needed, (2) order an evidentiary hearing so that Mr. McDavid may prove up his claims, and (3) grant such further relief as the Court deems just and proper.

Dated: July 14, 2014

Respectfully submitted,

Mark R. Vermeulen
Ben Rosenfeld
Attorneys for Defendant
ERIC MCDAVID

By: /s/ *Ben Rosenfeld*
Ben Rosenfeld