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

11 UNITED STATES OF AMERICA,) NO. 2:06-cr-00035 MCE
12)
Plaintiff,) **UNITED STATES' MOTION IN LIMINE TO**
13) **PRECLUDE AN ENTRAPMENT DEFENSE**
v.)
14)
ERIC McDAVID,) Date: September 7, 2007
15) Time: 9:00 a.m.
Defendant.) Honorable Morrison C. England, Jr.
16)

17 The United States respectfully moves this Court to preclude the
18 defendant, Eric McDavid, from raising an entrapment defense. McDavid
19 cannot present evidence of a prima facie case of entrapment, and for
20 that reason, any testimony regarding inducement and predisposition
21 should be excluded as irrelevant and misleading. See Fed. R. Evid.
22 402, 403.

23 A district court may require a criminal defendant to make a
24 pretrial offer of proof to demonstrate that the evidence in support
25 of an affirmative defense is sufficient as a matter of law to satisfy
26 the elements of the defense. See United States v. Moreno, 102 F.3d
27 994, 997-99 (9th Cir. 1996) (holding that evidence related to an
28 affirmative defense is not admissible if the defendant fails to make

1 a prima facie case of the defense); United States v. Brebner, 951
2 F.2d 1017, 1023-24 (9th Cir. 1991). If the defendant fails to
3 present sufficient evidence, the district court may preclude the
4 defendant from presenting the defense at trial, as well any evidence
5 supporting the defense. See id.

6 Entrapment has two elements: 1) government inducement to commit
7 the crime; and 2) the absence of predisposition to commit the crime.
8 United States v. Thickstun, 110 F.3d 1394, 1396 (9th Cir.), cert.
9 denied, 522 U.S. 917 (1997). The government induces a crime when it
10 creates a special incentive for the defendant to commit the crime.
11 Inducement is "any government conduct creating a substantial risk
12 that an otherwise law-abiding citizen would commit an offense."
13 United States v. Sandoval-Mendoza, 472 F.3d 645, 648 (9th Cir. 2006)
14 (citations omitted). However, "the fact that officers or employees
15 of the Government merely afford opportunity or facilities for the
16 commission of the offense does not defeat the prosecution. Artifice
17 and stratagem may be employed to catch those engaged in criminal
18 enterprises." Sorrells v. United States, 287 U.S. 435, 441 (1932).

19 Even if evidence exists that a government agent induced a
20 defendant, s/he is not protected by the "narrow" entrapment defense
21 if the defendant was predisposed to commit the crime "at a time prior
22 to the Government acts intended to create predisposition." United
23 States v. Skarie, 971 F.2d 317, 321 (9th Cir. 1992); see Sandoval-
24 Mendoza, 472 F.3d at 649. The Ninth Circuit has identified five
25 factors to consider when determining predisposition: 1) the
26 defendant's character or reputation; 2) whether the government first
27 suggested the criminal activity; 3) whether the defendant profited
28 from the activity; 4) whether the defendant demonstrated reluctance;

1 and 5) the nature of the government's inducement. United States v.
2 Citro, 842 F.2d 1149, 1152 (9th Cir. 1988). "Although none of the
3 factors is conclusive, the defendant's reluctance is the most
4 important." Thickstun, 110 F.3d at 1396-97. The Supreme Court has
5 explained that "the ready commission of the criminal act amply
6 demonstrates the defendant's predisposition." Jacobson v. United
7 States, 503 U.S. 540, 549-50 (1992).

8 McDavid is charged with conspiring to damage property by fire or
9 explosives; he will have to proffer evidence that the United States'
10 cooperating witness, "Anna", entrapped him into making the agreement,
11 not into committing an overt act. The Court is already familiar with
12 the facts of this case as the record in the magistrate court has been
13 extensive and McDavid has appealed his pretrial detention and has
14 filed a myriad of motions. See C.R. 52-60, 64-68, 84-85, 99, 124-
15 151, 184. In none of these motions does McDavid identify the
16 "special incentive" used to induce him to commit the crime. The
17 closest McDavid comes is the unsupported allegation that Anna of
18 "worked her charms" on the defendant, to influence him romantically,
19 but McDavid does not provide any evidence of this, video, audio, or
20 documentary. C.R. 129 at 3:10-4:4:5. To the contrary, there is
21 evidence that "Anna" rebuffed McDavid's unwanted advances, which is
22 recorded on audio and video. The Court denied McDavid's motion to
23 dismiss the indictment based on Anna's alleged misconduct. C.R. 192.
24 McDavid should not be permitted to slander the witness by suggesting
25 an improper relationship without proof.

26 In a separate motion to dismiss, McDavid alleges "outrageous
27 government misconduct in the FBI and their informant urging,
28 teaching, explaining and paying for the making of a dangerous

1 explosive device." C.R. 128 at caption. In that motion, McDavid
2 essentially argues that Anna induced him into committing the crime.
3 See C.R. 128 at 3:8-4:15. Again, McDavid provides no evidence of
4 this, just argument. The Court denied this particular motion as
5 well. C.R. 192. As stated above, even if Anna had provided the
6 opportunity to commit the crime, that, in and of itself, is not
7 entrapment. See Sorrells v. United States, 287 U.S. at 441; United
8 States v. Winslow, 962 F.2d 845 (9th Cir. 1992) (undercover agent
9 purchased beer and food for defendants, paid for a trip to Seattle,
10 and paid for bomb components in connection with a plot to detonate a
11 bomb at a gay bar in Seattle).¹ McDavid should not be permitted to
12

13 ¹ The Ninth Circuit has repeatedly rejected claims of outrageous
14 government conduct: United States v. Gurolla, 333 F.3d 944, 950 (9th
15 Cir. 2003) (government informant pretended to be an experienced money
16 launderer, approached the defendant, proposed that they launder money,
17 and then provided the money to be laundered); United States v. Haynes,
18 216 F.3d 789, 797 (9th Cir. 2000) (government informant encouraged
19 defendants to engage in new criminal activity); United States v.
20 Franco, 136 F.3d 622, 629 (9th Cir. 1998) (government informant
21 supplied precursor chemicals used to manufacture illegal drugs);
22 United States v. Garza-Juarez, 992 F.2d 896, 904 (9th Cir. 1993)
23 (government agent initiated all contacts, raised subject of illegal
24 firearms, and offered to supply materials); United States v. Hart, 963
25 F.2d 1278, 1283-84 (9th Cir. 1992) (government used an informant who
26 befriended the defendant allegedly during a time of emotional turmoil
27 and induced him to buy drugs); United States v. Berrera-Moreno, 951
28 F.2d 1089, 1092 (9th Cir. 1991) (government failed to be aware of and
stop informant's use and distribution of cocaine and falsely asserted
that informant was tested for drug use); United States v. Citro, 842
F.2d 1149, 1152-53 (9th Cir. 1988) (undercover agent proposed and
explained details of credit card scheme and supplied defendant with
counterfeit credit cards); United States v. Stenberg, 803 F.2d 422,
430 (9th Cir. 1986) (the commission of equally serious offenses by an
undercover agent as part of the investigation); Shaw v. Winters, 796
F.2d 1124, 1125 (9th Cir. 1986) (use of false identities by undercover
agents); United States v. Wiley, 794 F.2d 514, 515 (9th Cir. 1986)
(government introduced drugs into a prison to identify a distribution
network); United States v. Williams, 791 F.2d 1383, 1386 (9th Cir.

1 suggest that there is anything improper about the government
2 providing money, transportation, or resources.

3 McDavid cannot proffer evidence regarding government inducement,
4 and he cannot proffer evidence demonstrating that he was not
5 predisposed to the crime prior to his contact with Anna. To the
6 contrary, there is overwhelming evidence of McDavid's predisposition.
7 McDavid attended the July 2005 CrimethInc Convergence in Bloomington,
8 Indiana², which was organized by the "Roadless Summer" group of
9 anarchists and environmentalists who oppose the Interstate 69
10 expansion in Indiana.³ At the Convergence, workshops were held on
11 topics such as dagger fighting, urban survival, train hopping,
12 handcuff escape, prisoner support, urban guerrilla warfare. Anna
13 attended the Convergence and observed that McDavid had participated
14 in the prisoner workshop and commented that he had a "buddy in
15 California [Ryan Lewis] looking at 40 years."

16 Anna also observed that McDavid participated in a guerrilla
17 warfare workshop discussion. In that workshop, McDavid said that
18 "direct action" is the only way to accomplish anything and advised
19 that attacking semi trailer trucks and transportation networks would
20 be effective in keeping products off the shelves and causing fear in
21 society.

22 Later in the week during the Convergence, Anna spoke with
23 McDavid. McDavid told Anna that his friend Ryan Lewis had burned

24 _____
25 1986) (the assistance and encouragement of escape attempts).

26 ² McDavid had also attended the 2004 CrimethInc Convergence held
27 in Des Moines, Iowa.

28 ³ Co-conspirator Zachary Jenson also attended the Convergence
with McDavid.

1 down several apartment complexes in Auburn and Lincoln, California.
2 While McDavid denied participating in the arson, he told Anna that
3 Lewis should not have committed the acts so close to home. It was at
4 that time that McDavid shared with Anna his plan to blow something
5 up. McDavid said that he would blow something up this winter
6 [2005/06] and then disappear. During this conversation, McDavid told
7 Anna that he was going to make homemade C4 [an explosive] from a
8 recipe in the Anarchist's Cookbook. McDavid identified the following
9 as targets of his future attack: a genetically engineered tree
10 factory in Placerville, California [USFS Institute of Forest
11 Genetics], banks, construction sites, West Virginia mountaintop
12 removal sites and mines, and communist party offices. McDavid
13 further explained his bombing plans to Jenson and Weiner during
14 "Pointless Fest" held in Philadelphia, Pennsylvania in August 2005,
15 and told them that he wanted Anna to be part of their group. Weiner,
16 Jenson, and Anna will testify that McDavid recruited them to help him
17 achieve his bombing plans. McDavid cannot demonstrate that he had an
18 absence of predisposition before Anna made any contributions to his
19 bombing campaign.

20 Thus far, McDavid has not proffered any evidence that would
21 support an affirmative defense of entrapment. Instead, McDavid
22 attempts to discredit Anna and smear the FBI by making
23 unsubstantiated claims and wild accusations. The United States
24 respectfully requests that the Court bar McDavid from presenting an
25 entrapment defense if he can not proffer particular evidence of a
26 prima facie case of entrapment prior to trial. If McDavid cannot
27 argue entrapment at trial, then the United States requests that he be
28 barred from suggesting, commenting on, or asking questions regarding

1 issues relating to inducement or predisposition.

2 The preclusion of the entrapment defense does not affect a
3 defendant's constitutional right to testify. "The constitutional
4 right to testify is not absolute." United States v. Moreno, 102 F.3d
5 994, 998 (9th Cir. 1996) (citing Rock v. Arkansas, 483 U.S. 44, 55
6 (1987)). As the Moreno Court wrote, "In Rock, the Supreme Court
7 referred to this guarantee as 'the right to present relevant
8 testimony.'" Id. (emphasis in original). Further, "the Rock Court
9 noted that '[t]he right may, in appropriate cases, bow to accommodate
10 other legitimate interests in the criminal trial process.'" Id.
11 (internal quotation marks and citations omitted). It is undisputed
12 that the United States has a legitimate interest in excluding
13 evidence that is not relevant or is confusing under Rule 402⁴ and
14 Rule 403⁵ of the Federal Rules of Evidence. As noted above, evidence
15 of entrapment is not relevant if McDavid fails to present evidence of
16 a prima facie case of the affirmative defense. See Moreno, 102 F.3
17 at 998.

18 For the reasons set forth above, the United States respectfully
19 requests that the Court grant its motion.

20 Dated: August 31, 2007

21 McGREGOR W. SCOTT
22 United States Attorney

23 By: /s/ Ellen V. Endrizzi

24 R. STEVEN LAPHAM

25 ⁴ Rule 402 provides in pertinent part: "Evidence which is not
26 relevant is not admissible."

27 ⁵ Rule 403 permits exclusion of relevant evidence "if its
28 probative value is substantially outweighed by the danger of ...
confusion of the issues, or misleading the jury."

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