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4  
5 Attorney for Defendant  
ERIC MCDAVID

6  
7 IN THE UNITED STATES DISTRICT COURT  
8 FOR THE EASTERN DISTRICT OF CALIFORNIA  
9

10 UNITED STATES OF AMERICA, )  
11 Plaintiff, )  
12 v. )  
13 ERIC MCDAVID, )  
14 Defendant. )  
15  
16 \_\_\_\_\_  
17 -

Case No. CR.S-06-0035-MCE  
DEFENDANT'S NOTICE OF MOTION  
AND **MOTION TO DISMISS THE  
INDICTMENT BASED UPON  
VIOLATION OF THE DUE PROCESS  
CLAUSE/OUTRAGEOUS GOVERNMENT  
MISCONDUCT IN THE FBI AND  
THEIR INFORMANT IN THE  
GENERAL NATURE OF THE MANNER  
OF INVESTIGATION**; MEMORANDUM  
OF POINTS AND AUTHORITIES  
IN SUPPORT THEREOF; REQUEST  
FOR EVIDENTIARY HEARING.

18  
19 Date: February 6, 2007  
20 Time: 8:30 A.m.  
21 Judge: Hon. Morrison C.  
England

22 To: McGregor W. Scott, R. Steven Lapham, attorneys for  
23 plaintiff: PLEASE TAKE NOTICE that on the above date in the  
24 above entitled action, defendant, through counsel Mark J.  
25 Reichel, will move this Honorable Court to issue an order  
26 dismissing with prejudice the indictment in this matter.

27 This motion is made upon the grounds that the due  
28 Mot Dism indictment based upon informant and FBI  
general manner of investigation

1 process clause prevents the prosecution of the defendant in  
2 the instant matter.

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

7 Respectfully submitted

8 DATED: December 19, 2006.

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MARK J. REICHEL  
ATTORNEY AT LAW  
Attorney for defendant

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/S/ Mark Reichel

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 SUPPORTING FACTS<sup>1</sup>

3 In or about Summer of 2004, Anna, an FBI informant,  
4 befriend this defendant. The defendant was at that time  
5 traveling and attending political demonstration. Unbeknownst  
6 to the defendant, Anna was targeting people like the  
7 defendant, part of an FBI campaign to infiltrate groups who  
8 might be sympathetic to the "Earth Liberation Front" and the  
9 "Animal Liberation Front."

10 Anna immediately worked her charms with the defendant.  
11 Soon thereafter, defendant became romantically involved with  
12 Anna. Although there is no evidence in the discovery of  
13 sexual relations between the two, all persons who saw the two  
14 assumed they were a couple, and in fact, the other two co  
15 conspirators thought that the two were a couple. Anna  
16 encouraged this with McDavid, in many ways,. In fact, she  
17

18 <sup>1</sup> This factual background comes from the discovery  
19 provided by the government, defense investigation conducted  
20 to date, and the anticipated testimony and evidence to be  
21 submitted at the hearing of the motion. The criminal  
22 complaint also sets forth the government's version of events  
23 in detail.

24 A succinct account is that the defendant Eric McDavid  
25 first met "Anna," not her real name, who was an untrained  
26 full time government informant in or about the Summer of  
27 2004. Defendant was at that time traveling in Des Moines  
28 Iowa and was committing no crime but was actually "targeted"  
for contact and infiltration by Anna as part of a "profile"  
she used for the FBI to meet, maintain contact with, provide  
information on and collect data about. From 2004 until June  
of 2005, defendant McDavid and Anna kept in contact via e  
mail and otherwise. At some time, but at least by June of  
2005, Anna informed the FBI that McDavid was involved in a  
conspiracy to commit certain crimes. McDavid was arrested in  
Anna's presence in January 2006 and charged in the instant  
case.

1 encouraged and urged him on, to write love letters and e  
2 mails to her. This occurred long before the operative  
3 periods listed in the indictment, June of 2005 to January  
4 2006. Nevertheless, it continued on-even more  
5 intensely-throughout the period of the indictment.

6 Anna also was the only one of the three codefendants to  
7 have any money whatsoever. The other three were vagabonds,  
8 without jobs and in essence homeless. None had a car. Anna,  
9 throughout the term of the indictment, June of 2005 to  
10 January 2006, paid for just about everything-including air  
11 fair, laptop computers, food and all other necessities of  
12 life.

13 Anna spurred the group on repeatedly, especially when  
14 the group was losing interest in any plans for "direct  
15 action." As well, at times that she was not with the group,  
16 Anna maintained her microphone on and recorded conversations  
17 with others who were not suspects nor connected with these  
18 three defendants.

19 The entire general manner of the investigation by Anna,  
20 even without reference to the making of an explosive device,  
21 which is the subject of its own motion, was in violation of  
22 Attorney General Guidelines, FBI guidelines, and all commonly  
23 accepted norms.

#### 24 LEGAL ARGUMENT

25 United States v. Barrera-Moreno, 951 F.2d 1089, 1091  
26 (9th Cir. 1991) holds that a district court may dismiss an  
27 indictment either to remedy outrageous governmental conduct  
28 amounting to a due process violation, or under the court's

1 supervisory powers to remedy a constitutional violation, to  
2 protect judicial integrity, or to deter future illegal  
3 conduct.

4 It is best articulated that outrageous misconduct occurs  
5 when "...the challenged conduct violates commonly accepted  
6 norms of fundamental fairness and is shocking to the  
7 universal sense of justice." United States v. Russell, 411  
8 U.S. 423, 431-432 (1973). As such, Anna's conduct must be  
9 judged according to "commonly accepted norms..."

10 Numerous commentators have written recently to denounce  
11 the use of informants by police to become "romantic" with  
12 suspects while undercover. It is clearly a form of outrageous  
13 government misconduct.<sup>2</sup> In this vein, it is summed up best by  
14 one commentator that

15 People need to assume a level of good faith and trust in  
16 intimate relations, and because privacy is an essential  
17 constitutional right, this type of law is the only one  
18 that makes sense. Even if the defendant was predisposed  
19 to committing the crime, it is not fair to allow law  
20 enforcement officials to use any type of means necessary  
21 to catch the defendant. The use of sex and intimate  
22 romance is a technique that is so distasteful, its use  
23 should be prohibited. Police activity must be regulated  
24 by something more than the law--it must respect the  
25 values of a community, and by forbidding this type of  
26 "intimate surveillance" this goal is accomplished.  
27 Government cannot afford to ignore what is important to  
28 human beings (trusting and intimate relationships).  
Abandonment of respect for such relationships "... will  
seriously diminish the worth of the social order to

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24 <sup>2</sup> See Sexual Misconduct and The Government: Time to Take a Stand 48 Cleveland State Law  
25 Review 793 (2000) ("Finally, this Note concludes that the use of sexual or emotional intimacy by  
26 undercover agents/informants as an investigative tool is unconstitutional, outrageous and should be  
27 forbidden. There is no possible way to draw a line or develop a proper standard to apply when undercover  
28 agents use sexual conduct. This type of conduct is outrageous across the board and will lead to a lack of  
trust in law enforcement by all people in society. The solution is that this conduct should be prohibited  
altogether."); Official Indiscretions: Considering Sex Bargains with Government Informants 38 U.C.  
Davis Law Review 1643. There are numerous other such articles, but these two are recent and catalogue  
issues raised in the others.

1 people." Moreover, privacy has become an important  
2 constitutional right that has continuously been  
3 litigated, and the current trend leans toward ruling in  
4 favor of the individual's privacy. If the courts  
5 continue to recognize sex and intimacy as an appropriate  
6 investigative tool, then this recognition may actually  
7 serve as an incentive for sexual misconduct in the  
8 United States. In order to promote morality and decency  
9 in the world, sexual misconduct by government  
10 agents/informants must be forbidden. No other  
11 alternatives are available.

12 See Sexual Misconduct and The Government: Time to Take a Stand 48  
13 Cleveland State Law Review 793 (2000)

14 **CONCLUSION.**

15 For the reasons stated above, defendant respectfully  
16 asks that the Court grant his motion to dismiss the  
17 indictment with prejudice.

18 Respectfully submitted

19 DATED: December 19, 2006.

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

23 /S/ Mark Reichel  
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