

1 MARK J. 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'S MOTION TO  
DISMISS INDICTMENT/BAR  
EVIDENCE FOR ILLEGAL CONTACT  
WITH A REPRESENTED PARTY.**

DEFENDANT'S NOTICE OF MOTION  
AND MOTION TO DISMISS THE  
INDICTMENT AND BAR EVIDENCE  
FOR THE PROSECUTION'S  
**ILLEGAL CONTACT WITH A  
PERSON REPRESENTED BY  
COUNSEL;** 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

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23 **TO: MCGREGOR SCOTT, United States Attorney, and Assistant  
24 United States STEVEN R. LAPHAM:**

25 **PLEASE TAKE NOTICE THAT** at the above date and time, or  
26 as soon thereafter as the matter may be heard, defendant,  
27 through his attorney, will and hereby does move for an order

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with represented person

1 dismissing the indictment with prejudice and/or bar the use  
2 of all evidence obtained following the contact with defendant  
3 after the government learned the defendant was represented by  
4 an attorney.

5 **MOTION**

6 Defendant Eric McDavid moves the Court for an order  
7 dismissing the indictment with prejudice and/or barring the  
8 use of certain evidence on the grounds that his many rights  
9 were violated when the government illegally continued its  
10 investigation of him following their learning that he was  
11 represented by counsel in the exact issue upon which they  
12 were investigating him.

13 This motion rests on the files and records of this case  
14 and the attached Memorandum of Points and Authorities.  
15 Additional evidence or argument may be offered at or before  
16 the hearing.

17 This motion is based on the United States Constitution,  
18 the Federal Rules of Criminal Procedure, the Points and  
19 Authorities submitted in support, and such argument and  
20 evidence of counsel at the hearing on the motion.

21 Respectfully submitted

22 DATED: December 2006.

23  
24 MARK J. REICHEL  
25 ATTORNEY AT LAW  
Attorney for defendant

26 /S/ Mark Reichel  
27  
28

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 SUPPORTING FACTS<sup>1</sup>

3 In December of 2004 and early 2005, there were a series  
4 of arson attacks around Sacramento, California, linked to the  
5 group "ELF." "Eco terror" graffiti was sprayed on the sites,  
6 and letters claiming responsibility were mailed in claiming  
7 to be from "ELF" and "Crimethink" and tied to "Anarchy." Ryan  
8 Lewis, a local college youth was arrested on February 9,  
9 2005, apparently confessed, and was then charged by criminal  
10 complaint. It was clearly obvious that others were involved  
11 with Lewis, and the search was on.

12 AUSA Steve Lapham brought the case. An investigation  
13 was then underway, using among other tools, the federal grand  
14 jury in Sacramento. Through statements of Lewis and others,  
15 it was learned that Lewis attended Sierra College in Rocklin,  
16 California. There, he was a member of the campus Social  
17 Justice Club. Members of that club were subpoenaed to the  
18 grand jury to testify. Questions were asked about "green  
19 anarchy," other members of the club, who would be able to do  
20 such a thing, and who did Lewis hang out with and get along  
21 with. Eric McDavid was the focus of the investigation, as an  
22 outspoken member of the club, and an acquaintance of Lewis  
23 through the club.

24 Shortly thereafter, Eva and Lilla Holland, young women  
25 from the Auburn area, as well as Jeremiah Colcleasure, were

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26 <sup>1</sup> The factual background comes from the discovery provided by the government, defense  
27 investigation conducted to date, and the anticipated testimony and evidence to be submitted at the hearing  
28 of the motion. Familiarity with the facts is assumed and the government's version of events is succinctly  
stated in the Criminal Complaint, incorporated herein by reference.

1 arrested and charged with the crimes as codefendants with  
2 Lewis. The Hollands immediately confessed.

3 Surprisingly, despite these arrests, similar vandalism  
4 continued in the Auburn area, with all the hallmarks of ELF  
5 and similar to what Lewis was doing before arrested. The  
6 grand jury, the FBI and AUSA Lapham were very interested in  
7 McDavid as a suspect.

8 FBI Agents went to McDavid's parents house locally  
9 looking for him; they found out that McDavid had left town  
10 for a good period of time recently, without a lot of contact  
11 information. McDavid had moved up to be a prime suspect.

12 In June of 2005, McDavid was re contacted in  
13 Philadelphia by a "cooperating source" named "Anna" while  
14 McDavid was attending a lawful protest activity there.  
15 McDavid had been befriended by "Anna" previously, in 2004  
16 when he was traveling and attending protests, as she had been  
17 an FBI informant since at least 2003. She met McDavid in  
18 2004 and spent considerable time with him; the two became  
19 very close, almost romantically linked in 2004. They kept in  
20 touch -barely--thereafter.

21 Anna was an FBI informant, who from 2003 onward, was  
22 infiltrating groups which included young males, those who  
23 were sympathetic to modern "anarchy" thought. When Anna re  
24 contacted McDavid in June of 2005, he explained that he was  
25 from the Auburn area, was a suspect in the Lewis federal  
26 criminal matters that the federal grand jury was  
27 investigating, and that the FBI was looking for him, and that  
28 he had a criminal attorney advising him on the issue, and

1 that he was following the lawyer's advice at that time to  
2 "stay away" from that area (Northern California).<sup>2</sup>

3 It is very likely that some federal prosecutor knew, at  
4 this time, summer of 2005, of Anna and McDavid. The court  
5 must allow discovery on this issue and order the government  
6 to provide this information.<sup>3</sup> McDavid had numerous  
7 conversations with "Anna" on this matter after that, and many

8  
9 <sup>2</sup> In court, when trying to keep McDavid detained on the present charges, the government has  
10 repeatedly urged the truth of this statement regarding McDavid telling Anna that he was following his  
11 attorney's advice by staying away from Auburn and that the feds were looking for him. That was the  
12 position that they have taken in the litigation on the record, before the court. There are FBI 302 Reports of  
13 Interviews with Anna done well prior to McDavid's arrest. The government must be bound by that  
14 position and not now "shift" to gain a different advantage in the litigation.

15  
16 <sup>3</sup>This is a very important fact. Except for the fortuity of "Rick Blaine" in Casablanca, it isn't too  
17 often that an old love walks back in to your life in such a manner.

18  
19 Potential prosecutorial misconduct can occur. The story of the "Detroit sleeper cell" provides an  
20 example of the misuse of prosecutorial powers in a "terrorism" case. In June 2003, Karim Koubriti and  
21 Abdel Ilah El Maroudi were found guilty of conspiring to provide material support and resources to  
22 terrorism efforts. Then-acting Attorney General John Ashcroft stated that the convictions were a victory  
23 and that "every victory in the courtroom brings us closer to our ultimate goal of victory in the war on  
24 terrorism." Soon after, the defendants, in their motion to set aside the verdict and for a new trial, alleged  
25 that the Government suppressed evidence, knowingly used false testimony, and improperly vouched for  
26 and bolstered the testimony of witnesses. During a hearing on the motion, Judge Rosen discovered that the  
27 prosecution did withhold exculpatory and impeachment material and thus ordered the Government to  
28 conduct a review to determine whether there were additional suppressed documents. On September 2,  
2004, the DOJ issued a sixty-page report on the prosecutorial misconduct of Richard Convertino, the  
AUSA who spearheaded the prosecution. The DOJ report also recommended that the court dismiss the  
terrorism charges against Karim Koubriti and Abdel Ilah El Maroudi without prejudice.

After a nine-month investigation, the DOJ report concluded that the "prosecution failed to disclose  
matters, which viewed collectively, were 'material' to the defense." The DOJ memorandum addressed the  
many missteps in the prosecution's disclosure and the prosecution's misrepresentation of the facts. The  
DOJ report, however, failed to explain how one prosecutor was permitted to argue fault-ridden theories in  
such a highly-publicized case.

Later investigations by the New York Times uncovered the DOJ's complicit nature in the wrongful  
handling of the Detroit case. Convertino may have been a rogue lawyer in part, but according to an  
internal memorandum, the DOJ knew that the evidence was weak to begin with and charged the men with  
"the hope that the case might get better." Furthermore, senior DOJ officials believed that Convertino was  
withholding information from the DOJ, but the only effort made to rectify the matter was to "rein"  
Convertino in. Nonetheless, these attempts at departmental oversight of Convertino failed. (See NOTES  
AND COMMENT: HOW TERROR CHANGED JUSTICE: A CALL TO REFORM SAFEGUARDS  
THAT PROTECT AGAINST PROSECUTORIAL MISCONDUCT 14 J.L. & Pol'y 377 (2006))

Obviously, it is therefore *essential* to determine if "Anna" was directed to find McDavid after  
February of 2005 and/ or when she first reported her contact with McDavid and *to whom she reported it*.  
Mot.Dsm or bar evid for illegal contact  
with represented person

1 were overheard by her FBI agent handlers when the  
2 investigation began using bugging devices. Prior to the use  
3 of the bugging devices, Anna was telling the FBI about  
4 McDavid having counsel and they were recording it in FBI 302  
5 reports.

6 Undoubtedly, the United States Attorney's Office was  
7 aware of this at some point.

8 **THE APPLICABLE LAW**

9 FBI Agents. The FBI is trained on and bound by the  
10 direction from The Attorney General's Guidelines On General  
11 Crimes, issued September 2002 by former Attorney General John  
12 Ashcroft, available on line at  
13 [www.usdoj.gov/olp/generalcrimes2.pdf](http://www.usdoj.gov/olp/generalcrimes2.pdf)

14 There, at page 20, General Ashcroft commands that "Whenever  
15 an individual is known to be represented by counsel in a  
16 particular matter, the FBI shall follow applicable law and  
17 Department procedure concerning contact with represented  
18 individuals in the absence of prior notice to their counsel.  
19 The SAC or his designee and the United States Attorney shall  
20 consult periodically on applicable law and Department  
21 procedure. Where issues arise concerning the consistency of  
22 contacts with represented persons with applicable attorney  
23 conduct rules, the United States Attorney should consult with  
24 the Professional Responsibility Advisory Office."

1        The California Rules of Professional Responsibility

2 provide as follows: California Rule<sup>4</sup> 2-100 provides:

3        while representing a client, a member shall not  
4        communicate directly or indirectly about the subject  
5        matter of the representation with a party the member  
6        knows to be represented by another lawyer in the matter,  
7        unless the member has the consent of the other lawyer.

8        Notwithstanding this provision, however, "communications  
9        otherwise authorized by law" are permitted. Rule  
10        2-100(C) (3).

11        This Circuit holds that

12        Because an attorney (such as the AUSA) generally may not  
13        permit his agents (such as the FBI agents) to perform  
14        acts that the attorney could not perform himself, see  
15        Cal. R. Prof. Cond. 1-120 (West 1996), the AUSA may have  
16        violated his ethical obligations by permitting the  
17        Florida interrogations to go forward. See United States  
18        v. Ortega, 203 F.3d 675, 680-81 (9th Cir. 2000)  
19        (deploring, on ethical grounds, the fact that the  
20        government, via INS agents, routinely questions  
21        represented clients after indictment outside the  
22        presence and without the consent of counsel).

23        United States v. Harrison 213 F.3d 1206, 1210 (9<sup>th</sup> Cir. 2000).<sup>5</sup>

24        \_\_\_\_\_  
25        <sup>4</sup> Federal prosecutors are bound by local ethical rules because of the "McDade Amendment,"  
26        codified at 28 USCS § 530B Ethical standards for attorneys for the Government

27        (a) An attorney for the Government shall be subject to State laws and rules, and local Federal court  
28        rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the  
29        same extent and in the same manner as other attorneys in that State.

30        (b) The Attorney General shall make and amend rules of the Department of Justice to assure  
31        compliance with this section.

32        (c) As used in this section, the term attorney for the Government' includes any attorney described  
33        in section 77.2(a) of part 77 of title 28 of the Code of Federal Regulations and also includes any  
34        independent counsel, or employee of such a counsel, appointed under chapter 40 [28 USCS §§ 591  
35        et seq.].

36        <sup>5</sup> The court also instructed that

37        We conclude that, when there is a close nexus between the focus of a pre-indictment investigation  
38        and the ultimate charges brought in the indictment, a defendant's ongoing relationship with counsel  
39        that is known (or should be known) by the government invokes the Sixth Amendment right to  
40        counsel once that right attaches. Phrased differently, a defendant invokes the Sixth Amendment  
41        right to counsel as a matter of law when (1) the defendant retains counsel on an ongoing basis to  
42        assist with a pending criminal investigation, (2) the government knows, or should know, that the  
43        defendant has ongoing legal representation relating to the subject of that investigation, and (3) the  
44        eventual indictment brings charges precisely anticipated by the scope of the pre-indictment

1 The Ninth Circuit also teaches that "The Sixth Amendment  
 2 can apply when the government's conduct occurs  
 3 pre-indictment." In Re Grand Jury Proceedings v. United  
 4 States of America, 33 F.3d 1060 (9<sup>th</sup> Cir. 1994).<sup>6</sup>

5 The United States Attorney's Manual provides in 3 areas  
 6 for our purposes. First, on the issue of the informants  
 7 contact with McDavid as:

8 Communications With Represented Persons by Agents Acting  
 9 as the "Alter Ego" of a Department Attorney: Department  
 10 attorneys should be aware that agents and informants who  
 11 communicate with represented persons as part of a law  
 12 enforcement investigation may be deemed, for the purpose of  
 13 the relevant professional responsibility rule, to be acting  
 14 as the "alter ego" of the Department attorney supervising the  
 15 investigation. In such a circumstance, the attorney's  
 16 professional conduct rules may be imputed to the law  
 17 enforcement agents or informants. In determining whether

18 \_\_\_\_\_  
 19 investigation.

20 <sup>6</sup>

21 "The district court rejected Goodman's arguments because it concluded that Natale  
 22 Richichi's Sixth Amendment right to counsel had not yet 'attached' with respect to matters under  
 23 investigation, as to which no indictment had been returned, citing Kirby v. Illinois, 406 U.S. 682,  
 24 688, 32 L. Ed. 2d 411, S.Ct. 1877 (1972). By so concluding, the district court *incorrectly implied*  
 25 that the government can interfere with impunity in the attorney-client relationship before the right  
 26 to counsel 'attaches' under the Kirby test. Supreme Court cases regarding timing of a criminal  
 27 defendant's confession and attachment of the right to counsel, see, e.g., *id.*; Moran v. Burbine, 475  
 28 U.S. 412, 429-30, 89 L. Ed. 2d 410, 106 S. Ct. 1135 (1986), are inapposite and misleading in the  
 context of this case. The Sixth Amendment can apply when the government's conduct occurs  
 pre-indictment. Therefore, the problem with Goodman's challenge is not the applicability of the  
 Sixth Amendment. Rather, the problem with Goodman's challenge is that it is premature and  
 speculative. See Tornay v. United States, 840 F.2d 1424, 1429-30 (9th Cir. 1988) (noting that the  
 government might not indict or use the requested information, or might present it without counsel's  
 testimony, and finding no evidence that the government was attempting to disqualify counsel). 'It  
 is clear that government interference with a defendant's relationship with his attorney may render  
 counsel's assistance so ineffective as to violate his Sixth Amendment right to counsel . . . .' United  
States v. Irwin, 612 F.2d 1182, 1185 (9th Cir. 1980)."

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1 Department attorneys may be held responsible when an agent or  
2 informant communicates with a represented person, it is  
3 necessary to consider the principles reflected in ABA Model  
4 Rules 5.3 and 8.4. These rules embody the general proposition  
5 that a lawyer should be held responsible for the conduct and  
6 activities of agents acting on the lawyer's behalf or who are  
7 associated with the lawyer. Department attorneys should not  
8 be responsible for the misconduct of an agent working under  
9 their supervision unless the Department attorneys orders the  
10 conduct or, after becoming aware of the misconduct, approves  
11 or ratifies it." U.S. Attorney's Manual Title 9 Criminal  
12 Resources May 2005 Section 298.

13 Secondly, the Manual also provides on the matter of the  
14 prosecutors knowledge of the contact in that "Department  
15 attorneys should be aware that Comment 5 to Model Rule 4.2  
16 provides that "[t]he fact that a communication does not  
17 violate a state or federal constitutional right is  
18 insufficient to establish that the communication is  
19 permissible under this Rule." Although the rule may vary from  
20 state to state, each state has adopted a rule of professional  
21 conduct that governs communications with represented persons.  
22 Department attorneys should be guided by the relevant state's  
23 or federal district court's rule and interpretations of that  
24 rule and should not rely exclusively on the ABA Model Rule  
25 and its interpretation in determining what is appropriate  
26 conduct, unless directed to do so by the relevant rules of  
27 professional conduct. Nonetheless, as a general matter, it  
28 may be useful to review ABA Committee on Ethics and

1 Professional Responsibility Formal Opinion 95-396,  
2 "Communications with Represented Persons" (July 24, 1995),  
3 and the Annotated Model Rules of Professional Conduct  
4 published by the ABA Center for Professional Responsibility.  
5 U.S Attorney's Manual Criminal Resources May 2005 Section  
6 296.

7 Finally, in that same section, 296, the Manual dictates  
8 that "Whether the contact rule requires that a formal  
9 proceeding be pending or whether it applies before the  
10 initiation of a formal proceeding. Most states apply the  
11 contact rule to a represented person whether or not a  
12 complaint, indictment, or other charging instrument has been  
13 filed."

14 **CONCLUSION**

15 For the above reasons, the defendant respectfully  
16 requests that the court dismiss with prejudice the indictment  
17 in this case and/or at the minimum bar the use of all  
18 evidence obtained after contact was made with McDavid in June  
19 of 2005, and require the government to satisfy a "taint"  
20 hearing to provide that the evidence they obtained after that  
21 point in time was independent of, and not derived from, their  
22 illegality.

23 Respectfully submitted

24 DATED: December 19, 2006.

26 MARK J. REICHEL  
27 ATTORNEY AT LAW  
Attorney for defendant

28 /S/ Mark Reichel

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