

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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BEFORE THE HONORABLE MORRISON C. ENGLAND, JR., JUDGE

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

No. 2:06-cr-0035

ERIC McDAVID,

Defendant.

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REPORTER'S TRANSCRIPT

JUDGMENT AND SENTENCE

THURSDAY, MAY 8, 2008

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Reported by: DIANE J. SHEPARD, CSR #6331, RPR

APPEARANCES

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1 SACRAMENTO, CALIFORNIA

2 THURSDAY, MAY 8, 2008

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4 THE CLERK: Calling criminal case 06-00035, United
5 States v. Eric McDavid. On for Defendant's Motion For Downward
6 Departure and Sentencing, Your Honor.

7 THE COURT: Thank you.

8 MR. LAPHAM: Good afternoon, Your Honor. Steve
9 Lapham and Ellen Endrizzi for the United States.

10 THE COURT: Good afternoon.

11 MR. REICHEL: Good afternoon, Your Honor. Mark
12 Reichel with Mr. McDavid.

13 THE COURT: Good afternoon.

14 MR. REICHEL: He is present, in custody. We're ready
15 to proceed, Your Honor.

16 THE COURT: Thank you. This is the time and place
17 set for the pronouncement of judgment and sentence.

18 On February 4th, 2008 -- pardon me -- on
19 September 27, 2007, Mr. McDavid was convicted by a jury of a
20 violation of 18 United States Code, Section 844, subsection
21 (n), Conspiracy to Damage and Destroy Property By Fire and an
22 Explosive as alleged in the one count Indictment.

23 The Court ordered, after the return of the verdict, a
24 Presentence Evaluation and Report. The Court has received,
25 read and considered that Presentence Report, dated May 22,

1 2008.

2 Mr. Lapham, have you received a copy of that
3 Presentence Report?

4 MR. LAPHAM: I have, Your Honor.

5 THE COURT: Have you had sufficient time to review
6 it?

7 MR. LAPHAM: Yes, sir.

8 THE COURT: And Mr. Reichel, have you also received a
9 copy of that Presentence Report?

10 MR. REICHEL: Yes, I have, Your Honor.

11 THE COURT: And have you had sufficient time to
12 discuss it with Mr. McDavid?

13 MR. REICHEL: Yes, I have, Your Honor.

14 THE COURT: Mr. McDavid, have you also received and
15 read a copy of that Presentence Report?

16 THE DEFENDANT: Yes.

17 THE COURT: And have you had sufficient time to
18 discuss it with your attorney, Mr. Reichel?

19 THE DEFENDANT: Yes.

20 THE COURT: I will note for the record that there
21 were objections to that report which were filed. The Court has
22 reviewed the objections and also the responses that were
23 provided to those objections by the probation officer.

24 Is there anything further that you wish to add at
25 this point in time, Mr. Lapham?

1 MR. LAPHAM: To the guideline calculations?

2 THE COURT: Actually, just the objection issue at
3 this point.

4 MR. LAPHAM: No, Your Honor.

5 THE COURT: Mr. Reichel?

6 MR. REICHEL: I don't believe so, Your Honor.

7 THE COURT: All right. Having reviewed those
8 objections and also the responses to the objections from the
9 probation officer, I'm going to find the sentencing
10 classification, advisory sentencing guidelines and/or policy
11 statements, statements of material fact to be true and correct.

12 I will simply advise at this point in time that the
13 probation report has provided for advisory guideline range --
14 pardon me -- offense level of 33, with a criminal history
15 advisory range of VI.

16 The probation report refers to an advisory range of
17 234 to 240 months of imprisonment.

18 Did you wish to be heard on that particular issue at
19 this time, Mr. Lapham?

20 MR. LAPHAM: Unless I'm mistaken, I thought it was
21 235 to 240.

22 THE COURT: That's what I should have said, but I
23 misspoke. It's 235 to 240.

24 MR. LAPHAM: Then I have no further comment. I think
25 that's correct.

1 THE COURT: Mr. Reichel?

2 MR. REICHEL: Yes, Your Honor.

3 I would urge the Court to sustain the objections
4 filed by the defense in our Sentencing Memorandum for the
5 reasons set forth therein, including all the attachments, the
6 references to what I believe the testimony was at the trial
7 that the Court sat through.

8 Taking into consideration the Court's written order
9 following the post-trial motions and so forth, I believe that
10 the objections should be sustained to those calculations based
11 on my -- based on my objections.

12 THE COURT: All right. First of all, at the outset,
13 let me indicate for the record so that it's clear that in
14 determining what the proper sentence will be for Mr. McDavid at
15 this time, the Court will be utilizing the guidance provided by
16 the United States Supreme Court in the cases of United States
17 versus Booker and United States versus Fanfan.

18 In addition, the Court will also look to the advisory
19 sentencing guidelines. And the Court will note for the record
20 that it is well aware that these are advisory and not mandatory
21 guidelines that have been promulgated by the United States
22 Sentencing Commission.

23 In addition, the Court will also look to the guidance
24 provided in the statute of 18 United States Code, Section
25 3553(a). Section 3553(a) requires that the Court impose a

1 sentence which is sufficiently long enough to punish this
2 particular defendant, deter others from committing similar
3 types of criminal conduct, but also not be longer than
4 necessary to obtain those objectives. Furthermore, the Court
5 must fashion a sentence which will be fair, just and
6 reasonable.

7 In looking to the statutory guidance provided by 18
8 United States Code, Section 3553(a), the Court understands that
9 it has an obligation to look to the nature and circumstances of
10 the offense, and the history and characteristics of this
11 particular defendant, the need for the type of sentence to be
12 imposed, the kinds of sentences that are available to the
13 Court, the kinds of sentencing and the sentencing ranges that
14 are established for this offense, any and all policy statements
15 which have been issued by the United States Sentencing
16 Commission, and the need to avoid unwarranted sentencing
17 disparities among defendants with similar records who have been
18 found guilty of similar conduct, and the need to provide
19 restitution to any victims of the offense.

20 I will indicate that it is the recommendation of the
21 probation officer that Mr. McDavid be sentenced to a term of
22 156 months of imprisonment.

23 Is there any legal cause why judgment and sentencing
24 should not proceed at this time?

25 MR. LAPHAM: No, Your Honor.

1 THE COURT: Mr. Reichel?

2 MR. REICHEL: No, Your Honor.

3 THE COURT: Thank you. At this time, I would like to
4 address issues that were raised in the Sentencing Memoranda.
5 The first I would like to address would be the issue of the
6 statements or affidavits from the jurors, which were attached
7 to your memorandum, Mr. Reichel.

8 MR. REICHEL: Thank you, Your Honor.

9 THE COURT: My reading, first of all, Mr. Reichel, is
10 that statements of the jury in such a case are not appropriate
11 under Federal Rule of Evidence 606(b).

12 Is there any reason why you believe that is not an
13 accurate statement of the law?

14 MR. REICHEL: Yes, Your Honor, for the reasons set
15 forth in my pleading against the United States, that the
16 Evidence Code itself advises that the Evidence Code doesn't
17 apply at sentencing.

18 And throughout all sorts of reported opinions
19 throughout the appellate courts in the United States, the
20 Government has taken the position in that litigation that the
21 Evidence Code, in fact, does not apply at sentencing.

22 Specifically, this arises in issues regarding hearsay
23 and a multitude of other issues that are violative of the
24 Evidence Code that the Court can consider at sentencing.

25 As set forth in my memorandum, 606(b) is headed as

1 Impeaching a Verdict, Evidence to Impeach a Verdict. It's
2 clearly for and the legislative history of it shows it's for
3 new trial motions. It's to preclude that type of information
4 for new trial motions and motions to set aside a verdict;
5 whereas, the Federal Rules of Criminal Procedure that regard
6 sentencing, they are a different chapter, they are a different
7 act of Congress, and the United States seeks to apply the
8 Evidence Code at sentencing in the FRCPS without any authority
9 citing, finding any cases that say the Evidence Code does apply
10 at sentencing.

11 And the problem with that, Your Honor, is it's very
12 clear by statute that it does not apply at sentencing. We're
13 in a different world. There is no dispute it has been a sea of
14 change in federal sentencing since the Booker decision the
15 Court has referenced earlier. Especially in this case, in this
16 type of case, where there are guideline ranges that then jump
17 up exponentially based upon specific factors, I think it's
18 clearly admissible.

19 There is no rule that finds it to be inadmissible.
20 606(b) is clearly for one purpose and one purpose only.
21 Additionally, 606 contains exceptions when they are allowed,
22 when there is extraneous evidence introduced into the jury
23 deliberations or the jury room.

24 THE COURT: Or error in preparing the verdict. Are
25 you saying there's been such evidence presented?

1 MR. REICHEL: What I think there is -- I believe,
2 first of all, we are then debating whether or not 606(b) would
3 apply, and whether or not the exceptions of 606(b) would apply,
4 which is an evidentiary issue. And I think that just gets into
5 whether or not it's applicable at sentencing, which it clearly
6 is not, and I don't think the Government, which should speak
7 with one voice nationwide, it is one Government. They should
8 not be allowed to turn their position to gain an advantage in
9 litigation when it is to their benefit. They cannot argue at a
10 suppression motion that hearsay, which hurts their case, is not
11 allowed. They cannot argue at sentencing that hearsay that
12 helps their case should be allowed. And then take the Evidence
13 Code, 606(b), which prevents some evidence that I have and say
14 that does apply at sentencing. It's fundamentally unfair and
15 not accurate.

16 THE COURT: Mr. Lapham?

17 MR. LAPHAM: Your Honor, I'm not aware that the
18 Government has ever taken a position in any court that juror
19 declarations are admissible at sentencing.

20 The declarations clearly violate the spirit if not
21 the letter of 606(b). And I think the last thing that the
22 Supreme Court thought they were doing when they decided Booker
23 was opening up juries to being questioned by defense attorneys
24 to try and essentially impeach the verdict or to weigh in on
25 sentencing issues before the Court.

1 As we argued in our brief, sentencing is
2 quintessentially the role of the Court. You sit as the
3 thirteenth juror. You were as -- you are more capable, because
4 of your experience and your qualifications, to decide the
5 issues of punishment.

6 And they are simply irrelevant. Juror declarations
7 are simply irrelevant in this context.

8 MR. REICHEL: Your Honor, to reply. The Government
9 has not cited one case that states that juror information is
10 not allowed at sentencing. And yet 606(b) by its definition
11 does not apply at sentencing. So it is more of a stretch for
12 the Government to preclude. The Supreme Court has stated
13 repeatedly there are all sorts of relevant factors for the
14 Court to consider at sentencing.

15 These individuals have drafted this the same as a
16 letter from a family member, from a member of the public,
17 anyone. In fact, Ms. Runge has on her declaration -- I have a
18 copy of it here -- she writes at the bottom, the Court may
19 please consider this as a letter to the Court in the
20 alternative.

21 And I've got that to show to the Court, and I've got
22 it notarized as well. These are, in effect, at the very least
23 these are letters from individuals who know something about the
24 case, who want to have their voices heard at sentencing.

25 And for the reasons I set forth in my pleading,

1 Mr. McDavid has every right to put forth evidence and other
2 matters before this Court. The Court may not weigh them with
3 an evidentiary value to -- for whatever reason that the
4 Government is worried about; however, to strike them, I think,
5 denies Mr. McDavid due process and a fair sentencing hearing as
6 well.

7 THE COURT: Mr. Reichel, let me ask you a question.
8 And I'm going to use an example of a type of case that has
9 become fairly prevalent in the district courts.

10 I'm sure you are aware of the number of cases that
11 have been brought before courts involving the use of medical
12 marijuana and as used in the State of California. Those cases
13 have been brought in federal court, and juries have convicted
14 individuals for possession and/or sale of marijuana.

15 At the end of the trial, they have been informed that
16 the State of California allows that to happen. The jurors have
17 been upset or could be very upset that they were not given that
18 information.

19 Clearly, that jurors' decision or feeling that they
20 were not given all of the information, or that the law as
21 written and the Federal Government is not fair, may be their
22 personal viewpoints, but are you saying that the Court should
23 consider that in that particular situation when determining
24 what the sentence should be, when the violation is not of any
25 state law, but is a violation of the Controlled Substances Act

1 as promulgated by the United States Congress?

2 MR. REICHEL: Your Honor, my answer is I don't think
3 the Court should discount anything at sentencing that's
4 relevant, anything that is relevant for sentencing purposes.

5 The Court may weigh much differently what those
6 jurors wrote to the Court about the law in California with
7 medical marijuana.

8 THE COURT: Is it relevant though, Mr. Reichel, that
9 a juror disagrees with the law?

10 MR. REICHEL: I don't think that's the case in this
11 case, Your Honor. It's not that the juror disagrees with the
12 law in this case. The jurors are telling the Court what they
13 observed, what they saw, and what they know of the case, and
14 offering that to the Court for sentencing.

15 THE COURT: But it also appears that even -- without
16 getting -- I don't want to go too far into this area -- that
17 there may be jurors who disagreed with this Court's ruling on a
18 legal issue, which is not in the purview of a juror.

19 Their purview as a juror is to deal with the facts as
20 they see them and apply the law as the Court gives it to them.
21 Without regard to their personal likes or dislikes, we're here
22 to follow what the law is.

23 Just as I am required to apply the law as it is
24 written today, regardless of what my likes or dislikes are of
25 the law, the sentencing laws, whatever it is, I have to apply

1 the law. So I just want to try to make sure the record is
2 clear that although I am allowing this conversation to take
3 place, I don't believe that it is within a juror's purview to
4 comment under a declaration which is attached to a Sentencing
5 Memorandum, to -- for the Court to take that into or give it
6 any greater significance than, as you said, any other document
7 that may be filed by any other person with respect to the
8 sentencing of a particular individual.

9 In other words, if there are -- if the Court wishes
10 to consider them letters or correspondence or something else,
11 then anyone can file anything, and there have been a number of
12 character letters, reference letters filed on behalf of
13 Mr. McDavid. And to the extent they act as a character
14 reference, I think that that may have some relevance.

15 But to the extent that they are expressing
16 displeasure as to legal issues or facts contained within the
17 case or Court's ruling, they are irrelevant, and the Court will
18 not consider them. And I believe that Federal Rule of Evidence
19 606(b) requires that the Court do so absent any other evidence
20 of improper conduct or error as far as drafting of the actual
21 verdict form.

22 So to that extent, I will accept them, and, of
23 course, I've reviewed everything that's been filed at any rate,
24 but I want the record to reflect clearly the weight, if any,
25 that the Court will be giving to those particular pieces of

1 correspondence that have been filed with the memorandum.

2 MR. REICHEL: Thank you, Your Honor.

3 Just briefly for a housekeeping matter. Ms. Runge
4 handwrote: The Court can consider this declaration as a letter
5 for sentencing purposes.

6 I've got it notarized. I've given a copy to
7 Mr. Lapham. What I would like to do is just ECF after the
8 hearing today. Scan it and file it with the Court. Would the
9 Court care to review it?

10 THE COURT: Yes, I would like to see that, please.

11 MR. REICHEL: Permission to approach, Your Honor?

12 THE COURT: You may.

13 (Pause in proceedings.)

14 THE COURT: All right. I have reviewed the document,
15 and Mr. Reichel will be filing that document electronically
16 after this hearing.

17 THE CLERK: I'll file it for you.

18 MR. REICHEL: Thank you.

19 THE COURT: Mr. Reichel, I have reviewed, as I
20 believe I stated, your Sentencing Memorandum and all the other
21 documents that you have included.

22 Is there anything else that you wish to provide to
23 the Court at this time that has not been previously included,
24 or make your summation at this point in time, if you'd like?

25 MR. REICHEL: Your Honor, I'll just highlight again

1 -- you know, unfortunately for the Court, I'm just going to
2 highlight what's already in here.

3 And it's just briefly that I think it was clear that
4 in this case we probably needed a special verdict form.
5 Because I stated from the outset, the Indictment itself said
6 "to wit" colon, and it listed targets. The Government started
7 their opening statement with exhibits that were on the overhead
8 that were the targets. There was then a stipulation about the
9 Government funding of those specific targets. There was a
10 stipulation about the Commerce Clause connection with those
11 targets. And then the trial proceeded with evidence really
12 about those targets.

13 At the close, the jury was not given a special
14 verdict form to find would Mr. McDavid be found guilty of the
15 conspiracy as the statute set forth in the Indictment. But the
16 there was no special verdict form which said including the
17 specific targets.

18 And my concern is that I think the United States'
19 position in sentencing, and I believe the probation report, and
20 I think that the large enhancement in the guideline is driven
21 by a feeling that the specific targets in the Indictment were
22 proven beyond a reasonable doubt to the jury.

23 I think that's highly significant post-Booker,
24 including the cases I've cited, you know, Rita, Gall,
25 Kimbrough, Cunningham, that this Court is very familiar with.

1 I think that's significant when the individual has no prior
2 criminal history, but that one enhancement makes that
3 individual a Category VI. Our book doesn't go higher than a
4 Category VI.

5 And I think that's so significant an issue that in
6 light of the fact -- the way -- the manner -- the way the case
7 was prosecuted by the United States, required, at the end, a
8 special verdict form if we are to imply that type of an
9 enhancement, which is so large.

10 And I think we didn't have that in this case. And I
11 think as a result I believe the United States bears the burden
12 of proof with real evidence, at least by clear and convincing
13 evidence, of an enhancement. They bear that burden under the
14 guideline advisory calculations. And I don't think that has
15 been met in this case by the way the case was prosecuted.

16 That doesn't impeach the verdict itself, but what
17 that does do is limit the sentencing options available.

18 THE COURT: Mr. Lapham?

19 MR. LAPHAM: Well, it does impeach the verdict
20 because the only thing that he was charged with was violating
21 844(f), which targets federal property or federal buildings.

22 But, Your Honor, I'm comfortable. You sat through
23 all the evidence. The Government put on more than clear and
24 convincing evidence. We proved beyond a reasonable doubt that
25 the primary target here was the IFG, a federal facility. I

1 would submit it on that.

2 THE COURT: Mr. Reichel, I know you recall, as I did,
3 the testimony as well as the very detailed exhibits regarding
4 the Institute for Forest Genetics as far as the visits, the
5 maps, and the locations that were designated on the maps as to
6 where various parts of the buildings where, where people were
7 located.

8 Where does that fit in as far as your argument that
9 this is not involving federal lands or property, if you will?

10 MR. REICHEL: Thank you, Your Honor. That actually
11 does fit in. And that was the Government's theory, that these
12 individuals conspired, and those were the targets.

13 And my recollection, Your Honor, without the
14 transcript, because we haven't got it, but my recollection was
15 that we did approach the witnesses for the Government -- not my
16 witnesses -- to say who did he conspire with on that, who did
17 he conspire with on that, who did he conspire with on that.
18 And for the record, I'm sorry for pointing for three different
19 areas, but I mean the dam, the three factory, the cell phone
20 towers.

21 And my recollection is we have arrows going
22 everywhere, but we don't have Government evidence that
23 Mr. McDavid agreed with any one of the other two participants
24 -- not the informant -- but the other participants -- do one of
25 those specific targets listed in the Indictment.

1 And, in fact, I believe when examining Anna, the
2 informant for the Government, we were never able to get that
3 exact -- the combination of those two persons on one target.

4 THE COURT: Response.

5 MR. LAPHAM: Your Honor, these are not sentencing
6 issues. These were dealt within the post-trial motions that
7 the Court all denied.

8 The conviction is for conspiracy to damage or destroy
9 federal property. The jury found that this was a conspiracy
10 involving federal property. They obviously found that based on
11 the IFG because you heard the evidence and how -- you just
12 recounted how strong that evidence was.

13 MR. REICHEL: Just briefly, Your Honor, my opinion.
14 The guidelines have no larger -- there is no larger, I believe,
15 enhancement in that entire book for a situation like this.
16 Career offender, armed career criminal enhancement involves
17 prior convictions, so you have recidivism of someone.

18 This enhancement can apply to someone who has no
19 prior criminal history whatsoever, and can take them all the
20 way to a VI and boom them all the way up on the guideline point
21 level to where it becomes -- it is -- I believe it may be the
22 largest single enhancement in the guidelines.

23 And as a result of that, I think Mr. Lapham and I
24 differ on this that -- it is a sentencing matter. I think a
25 special verdict form would have been needed in this case, and I

1 think I've set that forth in my pleadings very clearly.

2 THE COURT: And the Court's responded to that
3 particular issue, and I'm very cognizant of the fact that the
4 -- this particular statute will cause for a person who has zero
5 criminal history to be raised to the highest level, a VI, for
6 sentencing purposes. That particular decision is one that is
7 not for the judicial branch to deal with. That was a decision
8 which was enacted by the legislative and confirmed by the
9 executive branches, which now causes this branch to have to
10 follow.

11 And upon conviction of the particular crime in
12 question, the law requires that the criminal history be raised,
13 as you say, from the -- probably the highest that it can be
14 based upon the terrorism acts, as you want Bush to call them,
15 from a zero or one -- no matter what it would be -- up to a VI,
16 and that is what the sentencing criteria is.

17 That having been said, I want to make sure that even
18 though the Court is indicating that this is the statute, the
19 Court still understands that there is the discretion that's
20 given within the advisory guidelines and the statute. So I
21 want to make it very clear that regardless of what's being said
22 about what requirements there are, the Court does not feel that
23 it is bound to follow any particular advisory guideline at this
24 point in time. The other factors will also be taken in
25 consideration.

1 Is there anything else that you have, Mr. Reichel,
2 with respect to the sentence?

3 MR. REICHEL: Oh, yes, Your Honor. Actually, if the
4 Court's -- if the Court has finished with some of my
5 objections, the Court knows that I've made a request for a
6 variance -- we're still within the guidelines, as I'm talking
7 to the Court, I hope, and that is I have extensive reasons for
8 a variance or departure. And we talked about that.

9 I talk about the boom to a VI. The Court still has
10 the discretion to move that down in criminal history if it
11 believes it's overstated. And if the Court can do it in ATCA
12 cases, in career offender -- and I've cited them there -- it
13 can do it in this instance and find that, yes, the points can
14 go up to who knows where, but the criminal history of VI can be
15 reduced down upon motion within the advisory guideline range as
16 a departure or variance by the defendant, which we do here in
17 our motion and we do here today with the Court.

18 It just seems to clearly overstate the likelihood to
19 re-offend. Clearly overstates his prior criminal history.
20 That's one of the matters that's in my motion, and I know the
21 Court has reviewed and will be considering today.

22 Would the Court like me to go through my request for
23 the departure and variance within the guidelines?

24 THE COURT: Why don't we go ahead and do that, so we
25 get that on the record, and keep it moving in an orderly

1 fashion.

2 MR. REICHEL: Thank you very much, Your Honor.

3 I emphasis to the Court the disparity with
4 similarly-situated co-defendants, those with the exact same
5 culpability, that I've cited, and why that Mr. McDavid, I
6 think, is -- would be sentenced much, much higher. And that
7 violates, I think, the spirit of the original guidelines. As
8 well, I believe this is a case that there was -- that the Court
9 can reduce the sentence based on sentencing entrapment.

10 Specifically, that if this informant was involved
11 with individuals that had a goal of doing vandalism on a
12 billboard, which is illegal, but instead in the old sentencing
13 entrapment cases before Booker, where the individual would sell
14 narcotics to an officer who would then say, we need to get a
15 pound for this guy for us to get the mandatory minimums and so
16 forth, so they keep sending the person back. And the sole
17 issue -- they send the person back to get more product, Your
18 Honor, so they can get higher guidelines.

19 And if the Court finds that at some point, you know,
20 you had the individual, they could prosecute him, but they kept
21 him going to increase his guidelines, it's not a defense to be
22 acquitted on, but it's sentencing entrapment, so to speak.

23 And as a result, the sentence should not be increased
24 solely because the agents had that sole discretion to increase
25 someone's sentence.

1 And in this case I believe that if the agent -- Anna
2 was with this group, and they desired to do certain things like
3 vandalize a billboard or so forth, but if it was her pushing
4 and prodding, not enough to acquit you, but her pushing and
5 prodding to get a certain target that is going to get you the
6 Domestic Terrorism Enhancement, then that does qualify under
7 the pre-Booker days, when the guidelines were so important, for
8 a sentencing entrapment, an entrapment for sentencing purpose
9 allowing you to have a reduction.

10 I think equitably, fairness, I think all of that
11 applies in this specific case. Because the evidence the Court
12 saw in this case was that I believe the informant and the FBI
13 kept rounding up the group and getting them back to their
14 ultimate goal. When I say "their," not necessarily this
15 group's all by themselves, but with prodding by law enforcement
16 to the goals of this IFG, to the goals of the dam, to the goals
17 of the cell phone tower. And that's why I believe he's
18 entitled to a reduction for sentencing entrapment.

19 THE COURT: Response.

20 MR. LAPHAM: Your Honor, on that particular issue,
21 sentencing entrapment, Your Honor, I would agree with
22 Mr. Reichel in principle that if there were sentencing
23 entrapment, that would be a basis for the Court to give lenient
24 treatment. That's not the case here.

25 The very first time the IFG was mentioned, it was

1 mentioned by Eric McDavid in that ride from Bloomington to
2 Chicago. It was his idea. When they discussed it in November,
3 they all went around the table and asked: What's your target?
4 What's your target? McDavid's target, which expressed before
5 Anna made any comment at all, was the IFG.

6 When they talked about doing actual surveillance of
7 the IFG, put that on the list of things to do in the burn book.
8 That was Eric McDavid's idea. When they went to the IFG to do
9 their surveillance, it was Eric McDavid who was carrying around
10 the book and created the map of the institution.

11 When they discussed the pros and cons of their
12 various targets, and Lauren Weiner expressed some kind of
13 confusion about why the IFG should be a target because she had
14 the misimpression that we were talking about burning down
15 trees, it was Eric McDavid who explained the rationale for why
16 the IFG was a legitimate eco-terrorist target.

17 None of this pushing that Mr. Reichel is talking
18 about was proved at trial. That was all Eric McDavid's idea.
19 So there simply is no evidence of sentencing entrapment here.
20 It was his idea from the start to the finish.

21 THE COURT: All right. Next issue?

22 MR. REICHEL: Thank you, Your Honor.

23 I speak to the Court in my memorandum about the fact
24 that he is going to be in isolation in prison based upon his
25 high notoriety, and that's just a reality of the Bureau of

1 Prisons. Reality of life. The high notoriety of these inmates
2 make them targets for other inmates.

3 And, you know, because he is getting painted with
4 this terrorism enhancement and terrorism label, there is
5 nothing they are going to do for him in the Bureau of Prisons
6 but isolate him from others.

7 I don't think, you know, anyone can dispute that
8 sensory deprivation, isolation of a human being to an extent
9 like this for an extensive period of time serves no
10 rehabilitative purpose. The rehabilitative purposes of
11 sentencing are not served by isolation, but instead you have
12 extreme punishment. I think that it's something that, you
13 know, no one should have to undergo.

14 The reality is courts have departed in the past under
15 the advisory guidelines, pre-Booker, and found valid departures
16 for the cases I cite in my pleadings for high notoriety inmates
17 who may be in isolation thereafter, and -- or who could be
18 subject to attacks by other inmates. It's not going to be a,
19 you know, a bowl of cherries, to simplify it, for someone doing
20 prison time with this type of a conviction.

21 And as a result, the Court can consider that. I
22 mean, we all remember Coon and Powell, when the case came down
23 from the Ninth Circuit. Those were individuals that were
24 police officers. Their guideline was a certain amount of time
25 clearly by the guidelines. They said our time is different.

1 We're former law enforcement. We're going to prison.

2 Mr. McDavid will suffer the same type of maltreatment
3 by other inmates. He will also suffer the same type of
4 maltreatment in isolation. And that is a factor. There is no
5 dispute, I mean, the Court can consider that. And in this case
6 it is a very valid factor.

7 MR. LAPHAM: Your Honor, sending a police officer to
8 prison to be surrounded by criminals is not a valid analogy to
9 Eric McDavid. I, frankly, don't know. This is entirely
10 speculative. I have sent prisoners away for terrorism offenses
11 in the propane tanks case. I frankly don't know what happens
12 to them. I've never heard that they were put in isolation as a
13 result of their being convicted for terrorism offenses. And I
14 don't think Mr. Reichel knows that either.

15 But we're not talking about John Gotti here. We're
16 not talking about police officers. We're talking about, in the
17 grand scheme of things, a fairly obscure case.

18 MR. REICHEL: Briefly, Your Honor. Unfortunately for
19 Mr. McDavid the reality is that I'm not speculating about
20 anything for the last two-and-a-half years. He has been in the
21 isolation ad seg at the Sacramento County Jail for the exact
22 reasons I announced on the record just now. Because he is
23 considered to be anti-American and because, number two, it's a
24 terrorism case. He is high risk for other inmates to attack.
25 As a result, he has been in isolation for two-and-a-half years.

1 THE COURT: Next issue.

2 MR. REICHEL: Thank you, Your Honor.

3 I talk about overstated criminal history again, and
4 the Court acknowledged that a moment ago. His overstated
5 criminal history -- it listed him as a VI. The factors for a
6 VI just aren't met in this case.

7 And I also talk about his health issues, Your Honor.
8 Unfortunately, as the Court knows, he developed pericarditis.
9 The record -- we have put on the record in the case about his
10 pericarditis shows that he is a different person. He contracted
11 it in the jail. He has it. It's life long. There have been
12 flare-ups since he first contracted it. I have personally seen
13 him on few occasions where it's been flared up, where he has
14 had a relapse of it.

15 As the Court knows from the pleadings that are in
16 this docket, that are on this docket, and the reason he was
17 taken to U.C. Davis Medical Center on emergency basis a year
18 ago and treated there was because he had pericarditis. And as
19 a result, this is a guy who couldn't lay down, couldn't sit up,
20 could barely breathe. He felt like there was a knot in his
21 chest.

22 And the problem with pericarditis which he has is
23 that the worst treatment for it is institution -- to be put in
24 an institution is the worst possible treatment for pericarditis.
25 As a result, he is going to suffer for that throughout his

1 prison term, and that's something that the Court really should
2 consider.

3 MR. LAPHAM: Your Honor, the only thing I can say to
4 the Court is the facts as I know them. And I contacted the
5 Marshal's office. I was provided with an e-mail response,
6 which I provided to Mr. Reichel. The Marshal advises me, after
7 contacting the jail doctor, that Mr. McDavid had an attack of
8 percarditis in April of 2007, and has had no recurrence. He
9 has had no other reason for medical treatment that they are
10 aware of.

11 If Mr. Reichel thought this was a legitimate issue, I
12 think he could have had his client seen by a physician. He
13 could have filed some kind of medical declaration. I'm just
14 saying it's speculative at this point. It's not a reason for
15 -- in any event for providing leniency because the Bureau of
16 Prisons is equal to the task of even more serious medical
17 conditions than this. But right now, as we sit here today it
18 is entirely speculative.

19 THE COURT: All right.

20 MR. REICHEL: Briefly, Your Honor, in November of '07
21 I filed a letter with this Court, which was to the Marshal
22 Service and the jail and announced that he was in a really bad
23 situation. That Mr. McDavid had a flare-up of percarditis.
24 That it was consistent with the diagnosis that he had gotten
25 from the jail.

1 Additionally, I know Mr. Lapham had the Marshal
2 Service contact a nurse at the jail who, I believe, spoke with
3 a doctor. I know that in my many dealings with the doctor
4 there, Peter Dietrich, who talked to me about Mr. McDavid's
5 case repeatedly -- and he is head of the jail medical there --
6 he's advised me that he does have pericarditis, and there have
7 been flare-ups.

8 And they certainly were the times I contacted. Since
9 April of '07 he has had a few. I've contacted the jail. We
10 tried to get his medical records, and we've had all sorts of
11 problems with H-I-P-P-A, HIPPA, and I see that the Government
12 had no problem accessing it.

13 But I can tell you the times we have called the jail
14 and spoken to nurses, they've given us incorrect information.
15 I've talked to the head, Dr. Peter Dietrich. He's advised me
16 that he does have it. He has had recurrences of it, and he
17 will have recurrences of it. And they were doing everything
18 they could to try to take care of it.

19 THE COURT: Next.

20 MR. REICHEL: Thank you, Your Honor.

21 His family ties, I believe, are extensive. They are
22 unique. And as we used to say, they are outside the heartland.
23 In this case, they compel the Court to consider it for a
24 reduction in his sentence from the advisory guideline range
25 that's been set forth in the probation report.

1 The Court heard from his sister, her wonderful
2 testimony. The Court has also all of the letters from his
3 family members and friends. The scenario that is set forth is
4 someone that is extremely tied to his family. Under a
5 different portion of today's proceedings, when it comes to the
6 analysis under 3553, I've got his entire family here, as well
7 as some friends who would speak to the Court.

8 I can just reference it now that there's no dispute,
9 this is an individual who has extremely unique family ties.
10 They did not miss one minute of this case. They have routinely
11 seen him at the jail. At the bail hearing before this Court
12 they offered everything they had on a Vaccaro Bond, which means
13 that any violation would have resulted in them losing all of
14 their property. They couldn't be more committed to their son.
15 You couldn't find a more committed family, and a family with
16 stronger family ties anywhere on the planet.

17 THE COURT: All right. Any response?

18 MR. LAPHAM: Your Honor, there is not a doubt in my
19 mind about that. It seems to be a very strong family
20 relationship. But as I stated in my Sentencing Memorandum, I'm
21 just not sure they know the person anymore that once existed.
22 I think Eric McDavid changed at some point in time and became a
23 different person, and it was the person we saw and heard on the
24 audio and video tapes in this case.

25 I won't repeat the arguments I made there, but I just

1 think that you have to take those statements with a grain of
2 salt.

3 THE COURT: Mr. Reichel, anything else?

4 MR. REICHEL: Those are the reasons I had asked the
5 Court in my Sentencing Memorandum to reduce the sentence from
6 the calculated guideline range by the probation department in
7 their advisory report. I'll submit.

8 THE COURT: Thank you. Mr. Lapham.

9 MR. LAPHAM: Your Honor, the only thing I would say,
10 I didn't get a chance to respond to the disparity argument, and
11 I would like to address that just briefly.

12 I don't want to repeat what I put in the Government's
13 Sentencing Memorandum, but I do want to talk about the case
14 that I think if we're going to start comparing cases, the
15 propane tanks case is actually the closest case.

16 That was a plot to destroy the propane tanks in Elk
17 Grove. It was -- it did not go to fruition. The case was
18 taken down before the defendants had a chance to carry out
19 their plan. They had assembled all the components, like they
20 had in this case. They had not actually gone so far as to
21 start mixing the components, as in this case, but the terrorism
22 enhancement applied, and Kevin Patterson received a 293 month
23 sentence.

24 I think that is the baseline -- or I think the
25 baseline in this case is the terrorism enhancement. That's

1 what Congress has directed, and that gives a low offense level
2 of 235 months.

3 It should come as no surprise that the Government is
4 recommending the bottom of the guidelines following a
5 full-blown trial in the case. In fact, I think it would be
6 surprising if we were not, given the facts that we have before
7 us.

8 There is no question that the defendant has a
9 Constitutional Right to choose not to testify at trial. There
10 is no doubt he has a Constitutional Right not to speak at
11 probation. Nobody quarrels with that. But what that does is
12 it deprives the Court and the Government of any facts that
13 might allow us to distinguish this individual from other
14 similarly-situated individuals and perhaps assign a more
15 lenient sentence to him.

16 As we sit here today, there is no reason to deviate
17 because this was a very serious offense, terrorism.
18 ELF-inspired terrorism is a serious problem around the country,
19 and it inspires others to commit offenses of a similar type,
20 and that calls for a very severe sentence.

21 Under the circumstances, bottom of the applicable
22 sentencing guidelines, given no other reasons to depart
23 downward is an appropriate sentence.

24 And I would submit it on that.

25 MR. REICHEL: Your Honor, I need to respond to

1 Mr. Lapham's comments.

2 We're going to get to some other 3553 factors in a
3 minute, as well as the ability to allocate and give summation
4 on the overall sentence. But as far as similarly-situated
5 defendants, it seems to be, unfortunately, that when Mr. Lapham
6 speaks about that, he then goes on to something that is highly
7 objectionable. And that is, give him the max, Your Honor, he
8 didn't testify at trial. Give him the max, Your Honor. He
9 lost at trial, and he is going on appeal, so he didn't tell the
10 probation officer something that could be used against him at a
11 trial later on, should he prevail on appeal.

12 The Court is very aware that we plan to appeal this
13 case. We fought about a lot of issues with Mr. Lapham in this
14 case. We do plan to appeal it. And you have an individual, on
15 the advice of counsel, who doesn't talk about the facts of the
16 offense. And then the Government says, we'll make an example
17 out of him, we'll show those people.

18 You know, Mr. McDavid did not testify at trial, so
19 we'll make an example of him, and we'll give him the max.
20 That's objectionable. I think it's inappropriate for the Court
21 to consider. We've done what every other defendant who does --
22 who loses at trial does. We've given you a snapshot of him
23 from everyone who knows him that we can think of. And we've
24 given those to the Court in every fashion possible. But he
25 can't talk to probation. Mr. Lapham knows that about the facts

1 of the offense.

2 If we prevail, Your Honor, on appeal about some
3 evidentiary matter that came on in this trial, or pretrial, and
4 we come back to a second trial, we have -- we can't. They will
5 just bring the probation officer in to say this is what he told
6 me during the probation interview. He's sorry. He's guilty.
7 And for today we would get -- Mr. Lapham alleges that we would
8 get a reduced sentence from his office, and I don't think that
9 would happen. I think it would be used against us in some
10 fashion.

11 So I would ask the Court not to give that too much
12 weight today because it's the standard procedure that someone
13 should do when their lawyer is advising them about a case.

14 THE COURT: Let me just make it clear for the record
15 that the Court will not hold that against Mr. McDavid. He has
16 the right to do so.

17 But I think, on the other hand, it does limit the
18 amount of information the Court can use to make its overall
19 decision when it comes to the nature and circumstances of the
20 offense, and the history and characteristics of the defendant.
21 I have to go with what I have. And that's simply the way it
22 is.

23 But that will not be used as a sword, if you will, to
24 try to use that against a person. But I very well understand
25 what you are referring to. That's simply the way it is at this

1 point in time. I think we've commented on that. Did you want
2 to go to the 3553 factors?

3 MR. REICHEL: I do, Your Honor.

4 THE COURT: Go ahead.

5 MR. REICHEL: Thank you. In that regard, the Court
6 has the letters from the family members?

7 THE COURT: Yes.

8 MR. REICHEL: The Court heard the testimony of his
9 sister, Sarah McDavid, and recalls that testimony?

10 THE COURT: Yes. Absolutely.

11 MR. REICHEL: Thank you, Your Honor. They are
12 present today. Mrs. McDavid is here. Mr. McDavid. His
13 sisters are here. I would like them, with the Court's
14 indulgence, to speak briefly here, maybe at sidebar, about
15 their thoughts about the appropriate sentence in this case for
16 Mr. McDavid.

17 THE COURT: From the Government?

18 MR. LAPHAM: Entirely up to the Court, Your Honor.

19 THE COURT: That's fine. Maybe at someplace close so
20 we can hear is the only question that I would have.

21 MR. REICHEL: Thank you, Your Honor.

22 Your Honor, thank you very much. I've got the
23 McDavid family assembled here. And we talked briefly before
24 court. They realize he has got an appeal coming, and so they
25 are going to make some comments about what they know about

1 Eric, the particular nature of Eric McDavid that they know and
2 they think is relevant for the Court.

3 THE COURT: Thank you. State your name, please?

4 MRS. EILEEN McDAVID: Eileen McDavid. I'm his
5 mother. Um, Eric is the same person that I've always known
6 Eric to be. He is not a violent person. He never has been.
7 And, you know, I hear that, you know, the Government says that
8 he has changed, and he hasn't. We visit him every week. Every
9 week that he has been in jail. He is the same Eric. He is
10 loving. He is kind. He takes care of us. I mean, you know,
11 we go in there crying, and he's, you know, telling us wisdom,
12 you know, to breathe, to get through it together. And we're
13 supporting him all the way, and we believe in him, and we love
14 him.

15 THE COURT: Thank you.

16 MR. GEORGE McDAVID: George McDavid. I'm Eric's
17 father. I would just like to reiterate what my wife said.
18 That there is no point in time that I felt like Eric changed,
19 and I didn't know him anymore. I've always known Eric. I've
20 always known him to be peaceful, kind, and caring. I
21 personally looked at the tapes. And my response to some of
22 what is in the tapes is talk is one thing, act is another. It
23 was very different when I was a child. And when I was a child,
24 the word was talk is cheap. The -- while Eric may have said
25 many things to maybe impress Anna, I know deep in his heart he

1 could never hurt anybody. I mean, Eric would catch spiders and
2 carry them out of the house because he didn't want us to kill
3 them.

4 He is a caring person. He wouldn't hurt anyone. And
5 I know that. I know that hasn't changed, and it never will
6 change. Thank you.

7 THE COURT: Thank you.

8 MS. RACHEL McDAVID: My name is Rachel McDavid. I'm
9 his younger sister.

10 I'd also like to reiterate what they've said already.
11 You know, my brother, he is so caring and so thoughtful, and he
12 has always been there for me. Always. No matter when, he is
13 always there for me. In his letters he has helped me out with
14 situations. He's always been supportive and caring. He never
15 did anything, and he never would have. I agree with my dad, it
16 is all talk. And he is caring, and he has taught me how to be
17 thoughtful of others.

18 Like I said, even the letters, he'll help me out with
19 situations to be caring -- excuse me -- and thoughtful of other
20 individuals. And so I appreciate him and always have, and I
21 always will, and I always will love him. Thank you.

22 MS. SARAH McDAVID: My name is Sarah McDavid. I'm
23 his sister. I'm probably going to say the same thing, but it's
24 really frustrating to hear the Government say that he's changed
25 into somebody that we don't know. I've known my brother for

1 28 years, almost 29 now, and he is the same man, same boy as he
2 was when we were growing up.

3 And he has always been one of my best friends,
4 somebody I've always been able to turn to. And he has never
5 agreed with -- you know, I have a complete fear of spiders, and
6 he's never let me kill 'em, or bugs, or any bugs in that sense.
7 You know, it's like we used to have pet snails, okay, like this
8 is the kind of person that is caring and loving.

9 And I really am offended by the Government's stance
10 that they know him better than I do. And I think that that's
11 so ludicrous. And just I really ask you to hear our words and
12 really hear where we're coming from and respect the family ties
13 that we do have to him. Thank you.

14 MR. REICHEL: Your Honor, just so the Court knows, at
15 the trial, only Sarah testified, and they can affirm this for
16 the Court.

17 As far as character witnesses at trial, they didn't
18 testify because they knew they had to make an election, which
19 was to not sit and watch and observe the entire trial. Sarah,
20 unfortunately was unhappy that if she was going to testify as a
21 defense witness, she couldn't watch the trial under the rule on
22 exclusion of witnesses. As a result, Sarah didn't get to watch
23 until she was done.

24 The mother and father didn't want to miss one in
25 limine ruling, one minute of the trial for their son. That's

1 why the Court didn't hear from them during the trial. And I
2 want the Court to know that, and I asked the McDavids to say
3 that was --

4 MRS. EILEEN McDAVID: Yes, that is the reason.

5 MR. REICHEL: Good. They made me out not to be a
6 liar. Thank you, Your Honor.

7 THE COURT: Thank you.

8 Mr. Reichel, did you have other factors?

9 MR. REICHEL: You know, just, Your Honor, they are
10 set forth in my pleading, and I would just advise the Court
11 that clearly, in my opinion, that the sentence I'm asking the
12 Court for in my pleadings is sufficient but not greater than
13 necessary, exactly under 3553.

14 And specifically if you take that phrase, "sufficient
15 but not greater than necessary," here's why: The Court heard
16 the trial. The Court watched the evidence. The Court actually
17 issued a post-trial ruling on my motions, an order, which was
18 significant, Your Honor, specifically in one area where the
19 Court said: There's not enough evidence here, Mr. Reichel,
20 despite your pleadings, that there was a withdrawal from the
21 conspiracy.

22 And here's why this is important, I believe, under
23 3553. In this case, Your Honor, there are unique factors.
24 Every case has its own unique factors. This one is interesting
25 because I believe in a conspiracy case 3553 -- the sentencing

1 factors are made more interesting and more unique in a
2 conspiracy case because all you need to convict in a conspiracy
3 case, like in this case, is an agreement to do something and
4 then an overt act. After that, the Government, under the law,
5 can convict.

6 Now, after that, there can be withdrawal or evidence
7 of withdrawal. Now, it may not be enough to vacate a verdict
8 as the Court has ruled. It may not be enough for a complete
9 defense to be somewhat reluctant at some point during it, but
10 it is absolutely relevant, it is absolutely right directly in
11 the middle of the street on 3553. And the theme that runs
12 through 3553 is sufficient but not greater than necessary.

13 In a conspiracy case, Your Honor, if there is a
14 completed act and strong evidence of a completed act or strong
15 evidence there was going to be a completed act, I think the
16 Court can sentence a certain way. But there's no dispute that
17 when, at best case for the Government in this case, there is
18 discussion, there is an overt act, and there is enough, as the
19 Court has ruled, and as the jury found, at the best for the
20 Government that's what you have.

21 But there is no dispute that I believe from the
22 family members, the prior life of this young man, what happened
23 with the informant in a case, with a young man who spoke, who
24 was involved in possibly in agreement and discussions, there
25 were also, Your Honor, there was nothing but discussion about

1 lesser involvement, about, well, maybe we should do nothing at
2 all.

3 The Court recalls there was one point in this big
4 conversation in the evening where Mr. McDavid says, perhaps we
5 do nothing for two years. That's relevant. It doesn't mean
6 that it could vacate the verdict, Your Honor. But it's highly
7 relevant at sentencing.

8 The Court should not convict someone -- excuse me --
9 the Court should not sentence someone, Your Honor, to this type
10 of sentence utilizing 3553 and the theme that runs through,
11 which is sufficient but not greater than necessary, when it's
12 clear there is an abundance of mitigating information, even at
13 best for the Government, that the individual would not have
14 gone through with the act.

15 You can be convicted of something you would not have
16 gone through with the act if you agree, if you take an overt
17 act, but there is no way -- or there is not strong evidence you
18 would have gone through with the final act, the Court does not
19 have to sentence that individual as if the act would have been
20 completed. The Court knows that. The guidelines account for
21 that. 3553 accounts for that.

22 So that's what I think is important about the Eric
23 McDavid case under the 3553 factors.

24 THE COURT: Mr. Lapham.

25 MR. LAPHAM: Your Honor, I think Mr. Reichel and I

1 simply disagree on this. There was not an abundance of
2 evidence of mitigating factors.

3 At the time this case was taken down, they had taken
4 all the steps to carry their plans out. They were, in fact, on
5 the way to the store to get more supplies to keep this thing
6 going on. And we have no evidence anywhere in the record that
7 Mr. McDavid ever renounced any of his, apparently, radical
8 views. In fact, we've just got the opposite.

9 And if I could just address one statement that the
10 family members made. I'm sorry that I've offended any family
11 members. I didn't mean to give the impression that I thought
12 that I knew Eric McDavid better than they do. I would never
13 claim that.

14 What I'm saying is I can't reconcile their current
15 statements about the kind, gentle man they know as their
16 brother or son with the testimony at trial, which was that this
17 is a man who was indifferent to the possibility that someone
18 could be killed by his violent acts, that this was a man who
19 could express the desire to, at one point, kill a potential
20 informant if he found out she were an informant, or to regret
21 the possibility that he was not involved in the death of a
22 policeman.

23 That is simply irreconcilable with the statements
24 that I'm hearing today, and I don't know what the answer to
25 that is. But the Court has heard all the evidence, and you can

1 draw your own conclusions from that.

2 THE COURT: Mr. Reichel, anything else?

3 MR. REICHEL: Just briefly, Your Honor. That just to
4 mention, the Court heard testimony of them talking in the
5 living room two nights before they were arrested, the night
6 before they were arrested as well, where they talked about
7 other targets, much lesser targets, not doing anything. There
8 was testimony, I believe, from the main witness and others that
9 Mr. McDavid talked about damaging and vandalizing small dams
10 near the ocean where rivers flow into, which jeopardize the
11 Salmon run. And they talked about things like that.

12 And I believe that that is something the Court needs
13 to fix on to understand and to see the real -- excuse me -- to
14 see what else was in this case besides the stuff the Government
15 focuses on. We can't discount that.

16 And, finally, Your Honor, Mr. McDavid has the right,
17 as this Court knows, of allocution. And I can just tell you
18 that because of his appeal -- and the Court knows this was a
19 hotly contested case. I filed as many in limine motions and
20 pretrial motions to dismiss. I found it to be -- the case
21 wrought with error by the Government's investigation and
22 prosecution.

23 At trial, I think we all agreed that there were some
24 areas we were treading on that were almost new areas about
25 entrapment instructions. And in that regard, Mr. McDavid and I

1 plan to pursue his appeal vigorously, and as a result, as to
2 right of allocution, after consulting with me, he is going to
3 just submit the matter on everything that's been said by the
4 family, the letters and so forth on his behalf, and leave it at
5 that.

6 And, finally, I have summation I'll just cite from
7 Justice Kennedy in 2007, which is featured on the ABA, American
8 Bar Association's website. And Justice Kennedy, when he
9 testified in Congress to the Senate, stated that the American
10 sentences are too harsh, too severe, and too long. And I think
11 that speaks like a megaphone in this case.

12 THE COURT: Go ahead.

13 MR. REICHEL: Finally, Mr. McDavid is someone who has
14 exhibited for the last two-and-a-half years to all of his
15 family and friends and my entire defense team as somebody
16 possessed with incredible dignity, with incredible humanity,
17 incredible humility.

18 At the return the verdict, when his family broke down
19 and cried, he turned around audibly to anyone around and said,
20 just remember to breathe. And he was then taken away from the
21 courtroom, and so everybody knows him, knows Eric McDavid.

22 THE COURT: You indicated and quoted from Justice
23 Kennedy about the harshness of the American sentencing laws.
24 Assume for the sake of argument that they are. Is it your
25 belief that it is this Court's obligation to change those laws

1 which have been enacted by the United States Congress on behalf
2 of the People of the United States and signed by the President
3 of the United States to determine that unilaterally on this
4 Court's behalf that they are inappropriate, too long, and
5 should be changed at the will of the trial court?

6 MR. REICHEL: No, Your Honor. I don't think this
7 Court has the authority to change the law.

8 THE COURT: Well, in essence, you're asking the Court
9 to vary from what the law would be and to a certain extent.

10 MR. REICHEL: I think the law, Your Honor, gives the
11 Court to vary the sentence under 3553. As the Court knows, I
12 believe it's in -- you know, I cited cases in here where there
13 was a life imprisonment under the guidelines, and the Court
14 gave a sentence of 42 months based on --

15 THE COURT: I'm referring, to be more specific, to
16 the issue of the criminal history. That's what I'm going to --
17 and Ms. Algiers, I'll just put you on notice. I'm going to come
18 to you in just a moment for the reasons for your decision to go
19 from a VI to a I. Take it to your recommended range.

20 But the law is that if you conspire to damage or
21 destroy a federal building, institution under certain
22 conditions, that that becomes an act of domestic terrorism, for
23 which your criminal history category will be put to the max at
24 VI. Whether you've ever been involved with the law or not.

25 And in this particular case, the jury has found that

1 there was a conspiracy to destroy a federal installation, one
2 of them, Nimbus Dam, IFG or the cell phone towers. And if that
3 is the case, why is it that the Court should not follow what
4 the apparent intent of Congress was both from a statute and
5 also from the advisory guideline range?

6 And I'm not trying to make this a rhetorical
7 question. I'm trying to hone in very specifically on one issue
8 that I would just like to have you address at this point in
9 time. Because this is a very, as you said, as the probation
10 officer recognized, you've recognized, I think everyone
11 recognized it's a very onerous provision in the law. That once
12 you are involving yourself with that, that this is where it
13 goes.

14 And there are many reasons for why this law has been
15 enacted. The world is different than it was 10 years ago.
16 We're in a different state at this point in time. So this is
17 the state of the law, and this is the state that the Court has
18 to deal with. So just give me a brief synopsis of why it
19 should go from VI --

20 MR. REICHEL: To I.

21 THE COURT: -- to I.

22 MR. REICHEL: Because it's, actually, Your Honor
23 because it's a guideline sentence. It's a guideline
24 enhancement, Chapter 3A1.4, and it has elements in there, and
25 it's simply a guideline enhancement. The Court can depart

1 downward from any guideline enhancement because, number one,
2 the guidelines are not mandatory. The guidelines are simply
3 advisory.

4 Additionally, there is no statute -- there is a
5 statute which defines the federal crime of terrorism and gives
6 the definition for the elements, Your Honor, but it doesn't
7 make it mandatory as an act of Congress that that guideline
8 section does not allow the Court to depart downward from it.

9 THE COURT: But, obviously, if Congress enacts a law,
10 it would be the general intent that the law be followed when it
11 comes to sentencing. I'm trying to ascertain from your
12 position today why this particular case involving Eric McDavid
13 is something that should not fall within what Congress has very
14 plainly intended by enacting this particular statute.

15 MR. REICHEL: Your Honor, the Court has the
16 authority. I cited cases about the career offender, which
17 takes -- a career offender enhancement, Your Honor, takes
18 someone to a Category VI also.

19 In a narcotics transaction -- excuse me -- narcotics
20 charge in federal court if you have the predicate prior
21 convictions, you become 360 months to life. The reason is
22 because it doesn't matter what your criminal history is, you
23 become a VI, so I cite cases in my memorandum -- I can repeat
24 them for the Court --

25 THE COURT: Well, does career offender really apply

1 to this case?

2 MR. REICHEL: Well, it's the same concept, Your
3 Honor. It is the same concept because it makes someone a VI
4 under their criminal history. It doesn't just add certain
5 points to their base offense level or their adjusted offense
6 level. It makes them a VI regardless. You go to VI. And as a
7 result, that overstates in some cases, and courts -- the
8 appellate courts teach that the Court can depart downward if it
9 overstates.

10 THE COURT: But in this particular case, the statute,
11 3553(a) requires that the Court avoid unwarranted sentencing
12 disparities between defendants convicted of similar conduct
13 with similar histories.

14 Clearly, Congress has determined that anyone who
15 attempts to destroy any type of a federal installation and
16 under certain circumstances falls into an entirely different
17 category. It doesn't take a series of acts to get you up to
18 that level, it only takes one time that you go there, and then
19 you are now in that category, and that's it.

20 So how do I -- you are asking me to look to the
21 career offender statute, which is a totally different issue
22 where it can be a series of relatively minor events that lead
23 you to that career category. Congress has made it very clear,
24 one time, it's a one-strike offense, if you will. If you
25 engage in this type of conduct, then that is the point of it,

1 you are a VI. Advisory, understood, but there seems to be a
2 serious -- a very serious intent here that any type of act at
3 this type of level deserves a very onerous or strict
4 repercussion.

5 MR. REICHEL: I think that there is no legislative
6 history that I'm aware of that shows Congress intended the
7 domestic terrorism enhancement to remain at a VI in all
8 circumstances, and not allow the Court to break free from that,
9 go down to a V, a IV, to a I. Because it's no different than
10 any of the other enhancements that make it from the Sentencing
11 Commission, through the Congress, back to the Sentencing
12 Commission, and into the book, which is then one of five
13 factors -- a minimum of five factors under 3553.

14 And I don't think that's the one they've selected out
15 and cast in stone as not to be broken away by the district
16 courts.

17 THE COURT: Mr. Lapham, the Government, any response?

18 MR. LAPHAM: Only this, Your Honor. I think there is
19 no question that you can depart downward. But it rather states
20 the obvious that the Criminal-History Category VI overstates
21 this defendant's criminal history. That doesn't get us
22 anywhere. The point is you have to have a basis for departing
23 downward, and it's the Government's position that the terrorism
24 enhancement applied to this offense gives the proper baseline
25 rationale for this judgment that Congress intended.

1 And absent any other reasons to depart, that's what
2 this Court should impose. And that doesn't constitute any
3 disparity with other sentences as we've already discussed.
4 That's, in fact, right in line with what we've seen with
5 terrorism offenses.

6 THE COURT: Ms. Algiers, you in your recommendation
7 came from a VI to a I from criminal history, and I've read what
8 I believe would be the explanation from probation's standpoint.
9 Is there anything that you elaborate on at this time which you
10 feel would be appropriate?

11 MS. ALGERS: I don't know that I can elaborate, but I
12 can explain my variance. It's -- my variance was based on what
13 I felt was disparity amongst other similarly-situated
14 defendants before this Court, before this district.

15 It just so happened that my recommendation fell
16 within a Criminal-History Category I, which is what I was
17 pointing out to Mr. Reichel in my response because he was
18 talking about the overstated criminal history. And in my
19 response I just pointed out that the range falls within
20 Category I. But my reason for variance is for the disparity --
21 what I saw as the disparity.

22 THE COURT: All right. Thank you. All right.
23 Anything else, Mr. Reichel?

24 MR. REICHEL: I want to ask the Court about a
25 recommendation for a specific facility for the service of his

1 sentence to be imposed. As the Court -- he is very close with
2 his family, and we looked at FCI Herlong. FCI Herlong,
3 H-e-r-l-o-n-g, I believe, which is one of newer facilities, in
4 the last five years or so, but it's about three or four hours,
5 I believe, from Sacramento. I think that would serve the
6 purposes of -- the rehabilitative purposes of sentencing and
7 also the 3553 factors to be not greater than necessary or
8 sufficient. I would ask the Court to make a recommendation
9 subject to space availability and security classification.

10 And, as well, I would ask the Court -- the final
11 matter would be that we plan to appeal. We plan to appeal,
12 expeditiously, the conviction. I would renew my motion for
13 bail at this time, making it bail pending appeal. We had a
14 bail hearing in this court over a year ago. I don't think the
15 situation or the circumstances have changed. We had offered
16 that the McDavid family would put up all the available equity
17 in their home. He would be on house arrest, 24 hours a day.
18 He would have no access to telephones, computers. He would
19 have an ankle monitor. He would have a third-party custodian.
20 And they would post all that as a Vaccaro Bond --
21 V-a-c-c-a-r-o, I believe is the spelling -- such that the
22 violation of any term of his release would result in forfeiture
23 of the entire collateral. And I would submit it on that, Your
24 Honor.

25 THE COURT: Mr. Lapham.

1 MR. LAPHAM: Your Honor, that's not the only issue
2 involved with bail pending appeal. One thing Mr. Reichel would
3 have to show is that there is an issue on appeal that is likely
4 to lead to reversal. He hasn't shown that. It should be
5 denied on that basis alone.

6 THE COURT: All right. There are other comments you
7 made. Do you have any other comments?

8 MR. LAPHAM: No, Your Honor.

9 THE COURT: All right. Mr. Reichel, do you wish to
10 -- I'm going to ask Mr. McDavid. I am obligated to give you,
11 Mr. McDavid, your right of allocution, meaning you have the
12 right to speak to the Court prior to your sentence being
13 imposed. Your attorney has indicated that you do not wish to
14 provide a statement. Is that correct?

15 THE DEFENDANT: Yes.

16 THE COURT: All right. Thank you. Matter submitted?

17 MR. REICHEL: Matter submitted, Your Honor.

18 MR. LAPHAM: Yes, Your Honor.

19 THE COURT: All right. I am hopeful that it's clear
20 from the Court's questions, comments, and the amount of time
21 that it's taken to listen to both sides of this argument, that
22 it's given a great deal of thought and consideration into what
23 the sentence should be in this particular case.

24 Once again, I want to reiterate the Court has
25 complete understanding of its ability to fashion a sentence

1 which may be outside of the advisory guideline range. Those
2 are simply advisory in nature.

3 But it will look also to the other factors contained
4 herein. I want to also point out that during the course of
5 this trial, the Court had the opportunity to listen to the
6 witnesses who testified, listen and observe audio recordings,
7 video recordings, and other photographic evidence that was
8 presented here in court.

9 The Court has already ruled on whether or not it
10 determined whether there was entrapment by Anna or not. I'm
11 not going to go back into that again. I believed at the time
12 that the Court issued its ruling, and believe it strongly
13 today, or even more so, that that ruling was accurate under the
14 circumstances. To go otherwise would turn the ability of law
15 enforcement on its head to investigate potential crimes or
16 criminal activity.

17 That having been said, the Court was in a position to
18 listen to testimony concerning the destruction of certain
19 property, which was owned by the or operated by the federal
20 Government.

21 In addition, there was also discussion regarding
22 destruction of or damage to property that was not federal
23 property, such as the highjacking trailers and putting some
24 type of honey or jam on the freeways to disrupt traffic,
25 putting sugar or other substances into gas station storage

1 tanks to ruin the fuel. And a number of different items that
2 were discussed by the group with respect to how to disrupt the
3 Government and the economy.

4 The one thing that I cannot get out of my mind at
5 this point in time from listening to the testimony, and this is
6 probably contrary to what I have heard today from the family,
7 and that was that what Mr. McDavid said with respect to what he
8 wanted to accomplish was all talk.

9 I don't find that it was all talk. It was very
10 serious. The very deliberate nature in which he referred to
11 what goals and objectives he had with respect to the disruption
12 of the Government were far more than just talk.

13 The comments of threatening the life of an individual
14 if one were to reveal the nature of the discussions was
15 definitely more than all talk. Going and purchasing the
16 different equipment that we saw photographs of, the bleach, the
17 jars, the different tubing, the containers was more than all
18 talk.

19 Maybe it would have been all talk had it stayed at
20 one location on the East Coast, but when that talk transferred
21 to the West Coast, and continued on to actual acquisition and
22 purchase of these items, it went beyond the point of all talk.

23 There was no question that this -- and the jury did
24 so find -- that there was a conspiracy, and the object of the
25 conspiracy were federal buildings or locations.

1 Accordingly, the Court would look to the statutes and
2 what the guidelines are. And the Court believes that under the
3 circumstances that the conspiracy, as shown, is a violation of
4 the laws as set forth in the -- the law as set forth in the
5 Indictment. And that the appropriate sentence would be what is
6 called for under the statute.

7 The Court has also considered a sentence here in this
8 particular case, which as required by the statute, be fair,
9 just and reasonable, and be sufficiently long enough to punish
10 this particular defendant and deter others from committing
11 similar types of criminal conduct, but not be longer than
12 necessary to reach that objective.

13 Mr. McDavid has no criminal history. Taking that
14 into consideration with the nature and circumstances of this
15 offense, which individuals engaging in acts to destroy or
16 otherwise disrupt the federal Government and the commerce of
17 the United States is an extremely serious act. One that cannot
18 be overlooked.

19 I find that to be an extremely serious offense, and
20 the circumstances and nature of that offense would override the
21 history and characteristics of this defendant for being a
22 peaceful individual.

23 The Court has considered the kinds of sentences
24 available, and the need for the type of sentence involved.
25 There have not been many cases that have involved domestic

1 terrorism. This is one of the newer cases. As indicated, this
2 is a new world after September 11, 2001. And, again, I cannot
3 help but recall the audio transcript or audio recording of
4 Mr. McDavid indicating that there will have to be collateral
5 damage at some point in time. And that's referring to human
6 lives, and IEDs, which is the talk that we listen to, we hear
7 of when referring to actions that are taking place 6,000 miles
8 away in Iraq, and what people are undergoing at that point in
9 time.

10 So when taking all of these factors into
11 consideration, it is the judgment and sentence of this Court
12 that in accordance with the Sentencing Reform Act of 1984, that
13 the defendant, Eric McDavid, will be sentenced to 235 months in
14 federal prison.

15 The Court finds that the appropriate Criminal-History
16 Category would be VI in light of the nature of this particular
17 offense, and looking at the Offense Level of 33, finds that 235
18 to 240 months is appropriate.

19 The defendant will also pay a special assessment of
20 \$100 immediately.

21 The Court finds that the defendant does not have the
22 ability to pay a fine. Imposition of a fine is waived.

23 And before I go on, I do also want to indicate that
24 the Court has considered the need to avoid any disparity of
25 defendants who have engaged in similar conduct. And Mr. Lapham

1 referred to the propane tank case, and I think that that's also
2 been considered and weighed by the Court as well. And there
3 were substantially longer sentences that were provided in that
4 particular case, but we are in a very similar situation.

5 The Court finds the defendant does not have the
6 ability to pay a fine. Imposition of a fine is waived.

7 Upon release from imprisonment, Mr. McDavid will be
8 placed on supervised release for a term of 36 months.

9 Within 72 hours of release from the custody of Bureau
10 of Prisons, the defendant will report in person to the
11 probation office where he is released in that district.

12 While on supervised release, Mr. McDavid will not
13 commit any other state, federal, or local crimes, nor possess a
14 firearm, nor illegally possess any controlled substances or use
15 any controlled substances.

16 He will submit to the collection of DNA and comply
17 with the standard conditions recommended by the U.S. Sentencing
18 Commission and adopted by this Court.

19 He will also submit to one drug test within 15 days
20 of release from imprisonment, and at least two periodic tests
21 thereafter not to exceed four per month.

22 While on supervised release, the defendant will
23 submit to the search of his person, property, home and vehicle
24 by a U.S. Probation Officer or any other authorized person
25 under the immediate and personal supervision of the Probation

1 Officer, based upon reasonable suspicion, with or without a
2 search warrant. Failure to submit to searches will be grounds
3 for revoking his supervised release.

4 Mr. McDavid will warn any other residents where he
5 resides that his premises will be subject to searches pursuant
6 to this condition.

7 As directed by the Probation Officer, the defendant
8 will participate in a correctional treatment program to obtain
9 assistance for drug or alcohol abuse. He will participate in a
10 program of testing to determine if he has reverted to the use
11 of drugs or alcohol, and participate in a program of mental
12 health treatment as directed by the Probation Officer. He will
13 also participate in a copayment plan for treatment and testing
14 up to \$25 per month.

15 The defendant will also consent to the Probation
16 Officer and probation service representative to conduct
17 unannounced, periodic examinations of any computer,
18 computer-related device, or equipment that has an
19 internal/external modem in the possession or control of the
20 defendant.

21 The defendant will consent to the retrieval and
22 copying of any and all data from such computer or
23 computer-related device or equipment, as well as any
24 internal/external peripherals to insure compliance with these
25 conditions.

1 The defendant will consent to the removal of such
2 computer, computer-related device, or equipment, for purposes
3 of conducting a more thorough inspection and analysis by the
4 Probation Officer.

5 The defendant will also consent to having installed
6 in a computer, computer-related device and equipment, at the
7 defendant's expense, any hardware or software systems to
8 monitor the use of such computer, computer-related device and
9 equipment at the direction of Probation Officer, and will agree
10 not to tamper with such hardware/software and not install or
11 use any software programs designed to hide, alter or delete his
12 or her computer activities.

13 The defendant will consent to not installing new
14 hardware without the prior approval of the Probation Officer.

15 The defendant will register in any jurisdiction where
16 he resides as an arson offender.

17 The Court will find that the guideline range,
18 advisory range here is a relatively short range of 235 to a
19 maximum statutory allowable of 240 months notwithstanding that
20 the actual advisory range would be 235 to 293 months.

21 That being said, the Court finds that a sentence at
22 the bottom of the advisory guideline range is sufficiently long
23 enough to satisfy the objectives as set forth in 18 United
24 States Code, Section 3553(a), and will in fact deter others
25 from committing similar types of conduct in the future.

1 Mr. McDavid, you have the right, as Mr. Reichel has
2 indicated several times here on the record, to appeal from the
3 sentence that this Court has just imposed on you.

4 Any appeal that you file must be made within 10 days
5 of Judgment being entered in this case. If you cannot afford
6 the cost of the appeal, the cost of the appellate attorney,
7 those costs can be waived.

8 If you request, the Clerk of the Court will file the
9 notice of your appeal on your behalf.

10 Do you understand your rights of appeal as I've
11 indicated today?

12 THE DEFENDANT: Yes.

13 THE COURT: All right. The request is that
14 Mr. McDavid be released on bail pending appeal.

15 First of all, I find there's been no change in
16 circumstances that have occurred since the last time the Court
17 has heard this motion.

18 Second of all, as indicated by Mr. Lapham, there's
19 been no direct indication of a substantial likelihood of
20 reversal on appeal on this Court's previous rulings.
21 Therefore, the request for bail pending appeal is denied.

22 Is there anything further from the Government?

23 MR. LAPHAM: No, Your Honor. Thank you.

24 THE COURT: Mr. Reichel, anything further?

25 MR. REICHEL: Nothing further for today, Your Honor.

1 I'm sorry, Your Honor. Recommendation?

2 THE COURT: Yes. And I will make a recommendation
3 that Mr. McDavid be housed at the Bureau of Prisons facility
4 located in Herlong. That recommendation would be based upon
5 space availability and also any security classifications
6 regarding Mr. McDavid.

7 The Court would strongly make that recommendation to
8 the Bureau of Prisons because I do believe it would be in all
9 best interest that he be as close as possible to his family.
10 Anything else?

11 MR. REICHEL: Nothing further for today, Your Honor.

12 THE COURT: All right. There being nothing else,
13 court is adjourned. Thank you.

14 (Court adjourned. 3:00 p.m.)

15
16 CERTIFICATION

17
18 I, Diane J. Shepard, certify that the foregoing is a
19 correct transcript from the record of proceedings in the
20 above-entitled matter.

21
22 /S/ DIANE J. SHEPARD
23 DIANE J. SHEPARD, CSR #6331, RPR
24 Official Court Reporter
25 United States District Court