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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

UNITED STATES, Plaintiff, v. ERIC McDAVID, Defendant.	No. CR 06-035-MCE AMENDED MEMORANDUM IN SUPPORT OF MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255

Eric McDavid, through his undersigned counsel, submits this amended memorandum of law in support of his previously-filed Motion Under 28 U.S.C. § 2255 (Dkt.Entry 398-406).[1]

[1] A stipulation by the parties permitting defendant to file this amended memorandum is submitted herewith, in accordance with F.R.Civ.P. 15(a)(2). Defendant also wishes to clarify: In his Motion Under 28 USC § 2255 filed on May 15, 2012, defendant refers the reader to the facts in the "attached petition." That terminology may have been confusing. By "petition," defendant meant to refer to the memorandum filed with the motion, i.e. now to this amended memorandum.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

Eric McDavid was convicted on September 27, 2007 for conspiring to damage or destroy property by fire or explosive under 18 U.S.C. §844(n). He was sentenced on May 8, 2008 to nearly 20 years (235 months) in prison – 6.5 years more than the Probation Department's 13 year recommendation, vastly more than the mean federal sentence for actual commission of arson or use of explosives (6.8 years) which did not occur in this case, and a term comparable to sentences for ADW, rape, and some murders, despite his total lack of criminal history. In contrast, McDavid's codefendants, whom the evidence showed played no lesser role in any conspiracy than McDavid, were allowed to plead to general conspiracy under 18 U.S.C. § 371 in exchange for cooperating, and were released with time served (six months in one case and two weeks in the other). The evidence overwhelmingly showed that the only ringleader in the case was the FBI's young plant, "Anna," whom the FBI repeatedly directed to act in violation of the Attorney General's Guidelines on the use of undercover informants.

Codefendant Zachary Jenson, who was incarcerated for only six months compared to McDavid's 20 year sentence, has just admitted that he testified falsely at trial under coercion from the government. (See Decl. of Zachary Jenson submitted herewith, Exhibit 1, Bates No. 1-3). According to Jenson now,

> In my first meeting, one of the prosecuting attorneys, after hearing my truthful reciting of the events which formed the charges, became very angry and showed that they were physically very upset, in fact, walked out of the meeting. There was a lot of tension in this first meeting. By the end of the meeting, it became very apparent that they did not "like" my version of the events. ...
>
> In my subsequent meetings before the trial, the same dynamic was present. I would tell the prosecutor what happened, in my view, and in my recollection, and they would be unhappy. ...
>
> I became very aware that if I did not testify to the facts that the government felt occurred, which I did not believe occurred, that my plea bargain would be taken away and I would be charged with the major federal charge and would very likely receive a 20 year sentence. This was a lot of pressure for me to handle.

(Jenson Decl., Ex. 1, Bates Nos. 1-3).

In the Summer of 2004, Eric McDavid was a 24-year old college student with no criminal history when he left his Northern California home to travel by backpack across the country, periodically attending conferences and protests. It was in this scene that he would intersect with 18-year old Anna, whom the FBI had inserted into the anarchist-inflected protest movement as a phony street medic, for the purpose of spying on lawful protest activities and anarchists writ large. McDavid first met Anna in August 2004. She originally reported to her FBI handlers that McDavid was not a person of interest, and reaffirmed that assessment during her testimony at trial when described him as "non-threatening" and a person she perceived as "gentler." Nevertheless, the FBI instructed Anna to stay after McDavid and his codefendants because they fit the FBI's vague "profile."[2] Over the next 18 months, Anna relentlessly pressured McDavid and his friends to plan "an action," literally herding them together for this purpose. She implanted ideas, hounded them, and plied them with money, food, and shelter. When the group showed a lack of enthusiasm for her schemes, she would hound them to stay focused, and pout, sulk, belittle and berate them, calling them names like "dilly-dallyers."

Most significantly, the FBI exploited the fact that McDavid was in love with Anna. She testified that the FBI's behavioral analysis unit trained her to make Eric "wait" until "after the mission," before she would consummate their love in reward for his faithfulness to her plan. She did not entirely keep him waiting, though. Throughout, she stoked his love for her, received love letters from him, and cuddled and otherwise got physically involved with him. The trial made it shockingly clear that the FBI manufactured the conspiracy, such as it was, including by working assiduously to provide the logistical means and encouragement for the group to meet, and reuniting them when they drifted. The FBI/Anna purchased plane tickets, arranged car trips, rented the cabin where the group lived before their arrest, bought food, provided all necessary living supplies, and ultimately provided the recipe and the chemistry set they used to try to mix

[2] Not only did the government not dispute that it had engaged in such political profiling, its complaint, motions, and trial brief were rife with broad political categorizations. The 15-page complaint, for example, referenced "anarchist," "anarchism," or "anarchy" approximately 25 times, and showed perverse interest in the defendants' lifestyle habits, like "dumpster diving." Other criminal complaints from this era follow the same pattern; further examples can be

an explosive (unsuccessfully as it turned out), along with the money to purchase the materials for a device (which was never built).

According to codefendant Zachary Jenson, had the government not coerced him to testify falsely, he would have testified:

> If it had not been for the persuasive powers and financial resources of the government informant Anna there would have been no conspiracy. Eric was extremely reluctant to meet with us in November of 2005 for what became the first meeting to plan the conspiracy. If it had been left to Eric, that meeting would have never occurred. It took Anna's logistical panning [sic], interpersonal manipulation and financial assistance to make that meeting happen. In fact she brought [codefendant] Lauren and I to Eric's parents' house because he would not meet with us about the conspiracy. ...
>
> If it had not been for Anna we would have not gotten together to plan the conspiracy in January of 2006. Eric and I had previously made plans to travel together and would have done so if it were not for the persuasive powers and financial resources of Anna. We agreed to stay with Anna in the Dutch Flat cabin because Eric was interested in pursuing a romantic relationship with her and because we had no money and it was a free place to stay. Neither of us had a job or any source of income, so we welcomed a place to stay for a while. Anna was very pushy about her radical agenda and I believed I needed to play along in order to continue getting free food and lodging. Anna was aware that Eric had a romantic interest in her and led him to believe that the relationship could happen one day, after he proved that he was radical enough. If not for these factors Eric and I would have been traveling and not engaged in a conspiracy.

(5/13/12 Decl. Jenson, Ex. 1, Bates Nos. 1-3).

Without the benefit of Jenson's truthful testimony, Eric McDavid presented an entrapment defense at trial. Despite the government's subornation of perjury, he might yet have prevailed but for two judicial errors which devastated his defense. (1) the District Court misinstructed the jury that Anna was *not* a government agent, even though all parties, including the Court, agreed that she was one. (The Court had at first instructed the jury orally, in response to a question, that she was a government agent, but told the jury not to bother writing his answers down as he would provide them written answers; the Court's written answer to this question contradicted its oral answer.) (2) Equally prejudicial, the Court misinstructed the jury

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provided if the Court so requests.

that the government's "first contact" with the defendant, for purposes of entrapment, was when the informant and defendant first discussed the crime charged in the indictment. According to the government and the Court, this occurred in July 2005, even though Anna the informant began exerting criminal influence over McDavid from the time they first met in August of 2004. As a result, the jury was forbidden from considering Anna's romantic inducement of McDavid for a period of nearly a year. . This eviscerated McDavid's entrapment defense by robbing him of the opportunity to argue that he was not predisposed to the charged offense before he met Anna.[3]

McDavid assigns additional error and misconduct herein, based on matters not confined to the record and thus relevant to this 2255 Motion, including IAC claims; *Napue* violations, based on the government's failure to correct its witnesses' false and misleading testimony; and ineffective assistance of counsel; and flagrant *Brady* violations by the prosecutor which have recently come to light through documents received pursuant to FOIA.

After trial, the defense submitted declarations in mitigation of sentencing by two jurors, who advised the District Court that they believed McDavid had "a very good case for an entrapment defense," that they were astonished to discover the true facts after trial, and that they were "embarrassed" by the FBI's actions in the case. Even if the Court's faulty instructions were not grounds for reversal per se (which they should be), the jurors have made it clear that the instructions were prejudicial and indeed determinative, as the jurors would have voted to acquit but for these errors. These jurors have emphatically and repeatedly stated that they feel McDavid should get a new trial.

It has become increasingly clear to civil rights monitors that the FBI's domestic security

[3] The government contended that McDavid first suggested the group commit a crime together in July 2005. However, the government's only source for this contention was Anna's testimony, as the government could not present any recording of this alleged conversation – one of the few times the government lacked a recording. As discussed below, the cooperating codefendants' testimony undermined and contradicted Anna's claim. Regardless, there was no dispute that McDavid first met and stayed with Anna long before that time, beginning in August 2004, and interacted with her over the course of the next year. For this reason, McDavid always claimed that the jury should have been instructed that first contact occurred in August 2004.

work post 9-11 often involves fomenting and "foiling" its own terrorism plots.[4] Eric McDavid's case is a stark example of such behavior. In 2005, the FBI began identifying animal rights and environmental activists as "one of today's most serious domestic terrorism threats,"[5] and expending major resources "to disrupt and dismantle these movements."[6] It is abundantly clear from the record in this case that Eric McDavid presented no cause for concern to law enforcement whatsoever until the government set its sights on him and quite literally sought to romance him into becoming a criminal. Even so, the evidence at trial showed that there was never a clearly identified - let alone unified - conspiracy among the actors. McDavid is no more culpable than his codefendants and is guilty at worst of the same general conspiracy offense to which they pled under 18 U.S.C. § 371 and received far less than the maximum five year sentence it carries.

In short, the McDavid case presents a gross miscarriage of justice, from the very inception of the investigation through sentencing. His draconian sentence, following the District Court's plain and material error, however inadvertent, undermine confidence in the prosecution, the trial, the verdict, the sentence, and the very fairness of the federal court system. Beyond the obvious horror and disillusionment of the jurors, this view is reflected in extensive, media

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[4] See, e.g., "Terrorist Plots, Helped Along by the F.B.I.," *New York Times* (April 29, 2012); "Targeted and Entrapped: Manufacturing the 'Homegrown' Threat in the United States," report by NYU Law School (May 18, 2011); and "The FBI successfully thwarts its own terrorist plot," *Salon* (November 28, 2010).

[5] On May 18, 2005, FBI Deputy Assistant Director for Counterterrorism John Lewis told a Senate panel: "One of today's most serious domestic terrorism threats come from special interest extremist movements such as the Animal Liberation Front (ALF), the Earth Liberation Front (ELF), and Stop Huntingdon Animal Cruelty (SHAC) campaign. Adherents to these movements aim to resolve specific issues by using criminal "direct action" against individuals or companies believed to be abusing or exploiting animals or the environment."

[6] In a press release announcing the first arrests in Operation Backfire, the Oregon-based investigation into a series of eco-arsons committed in the names of the ELF and ALF, FBI Director Robert Mueller states: "Investigating and preventing animal rights and environmental extremism is one of the FBI's highest domestic terrorism priorities." And, "We are committed to working with our partners to disrupt and dismantle these movements, to protect our fellow citizens, and to bring to justice those who commit crime and terrorism in the name of animal rights or environmental issues." See http://www.atf.gov/press/releases/2006/01/012006-doj-eleven-domestic-terrorists-charged.html.

coverage and public denunciation of the McDavid trial. See, e.g., "The Believers," *Elle Magazine* (May 2008). Eric McDavid, who is confined at FCI Terminal Island in San Pedro, California, just six years into his 20 year sentence, prays for review by this Honorable Court.

STATEMENT OF FACTS

A. "Anna" the Informant

Anna the informant was the government's principal witness.[7] In Fall 2003, 17-year old Anna was enrolled at a Miami area community college. For a class project, she went "undercover" into the FTAA (Free Trade Area of the Americas) protest in Miami and wrote about it in a report. This impressed a police officer in her class who showed her report to his superiors, who then summoned her to meet with Miami police officers and an FBI agent. The FBI began grooming her to infiltrate protests, including protests against the G-8 Summit in Georgia in 2004, and against the Republican and Democratic National Conventions in New York and Boston, respectively, that same year.

According to Anna, her assignment was to "...go undercover and report on any potential illegal activity that was taking place. I was asked to keep eyes and ears open for anyone that would *possibly get ready* to commit vandalism, property destruction, or harm to another individual." (Emphasis added.) She was to "observe everything" and report back by cell phone and text message. The FBI disguised her as a street medic, and she presented herself as able to render aid, though she admitted she had no medical training.

B. Anna's First Contact with Eric McDavid

Anna first met Eric McDavid in August 2004 at a gathering called the "CrimethInc Convergence" (name taken from George Orwell's *1984*) in Des Moines, IA, which the FBI had also asked her to attend undercover. They stayed together a week at the gathering, sleeping next to each other and "cuddling" in the attic of a farm house. (RT 09/24/2007 at 1083). There, McDavid also met his future codefendant, Zachary Jenson. Jenson testified that McDavid was

[7] Although the government did not reveal Anna's real name, she gave an extensive interview to *Elle* magazine, along with color photographs of herself in fashion outfits, in May 2008. See, "The Believers," *Elle* (May 2008).

having a "physical relationship" with Anna in Des Moines which he described as "cuddling and sleeping together."

Anna stood out from most of those gathered because she had cash and resources. McDavid was homeless and scrounging. Jenson described McDavid as a "pauper" (RT 09/24/2007 at 996), and he remained a pauper from then until his arrest in 2006. Jenson's financial situation was the same. They survived on food stamps and "dumpster diving."

While in Des Moines, Anna reported to the FBI on her contact with McDavid, but informed them that he was not a person of interest; not someone the FBI should be concerned about. She described him as just a "college student," gentle, nonthreatening, and unlikely to do anything illegal. A week after they met, McDavid and Anna exchanged contact information and parted ways.[8]

Anna re-met McDavid and Jenson at the Republican National Convention protest in New York City in late August 2004. McDavid and Jenson had traveled to the Convention together. Anna was there to "spy" on protesters for the FBI and report back. Afterward, McDavid traveled west with Jenson, stopping with him in Seattle for a couple weeks before returning to Northern California. They agreed to travel together again in the Spring and Summer of 2005. Jenson testified that throughout their travels together, McDavid never talked of any "direct action" at all.[9] Their plans were simply to travel together up through the summer of 2005.

C. Anna Continues to Seek Out McDavid

Anna attended the January 2005 Presidential Inauguration in Washington D.C. for the FBI. After the inauguration detail, she sent out a series of unsolicited "blast emails" to the

[8] Anna's main handler, FBI Agent Ricardo Torres, testified that it was not "illegal" in his view for Anna to report back on anyone and everyone she encountered at protests, even those who were not doing anything unlawful, so long as he did not "record it as such." In Torres' view, it was the act of recording such information which might exceed DOJ Guidelines. Anna, however, would later send "blast" emails out to people she met at protests and gatherings while she was undercover, showing that she at least was storing information.

[9] "Direct action" to Jenson meant anything from a "sit in," to a "break away march," to gluing doors together, spray painting, riding bicycles together in a city to cause traffic problems, up to "violent stuff."

"contacts" she had gained over the last year. She did so at the behest of the FBI, who asked her to look up old contacts and see "what they were planning."[10] She had maintained email contact with McDavid after they parted ways in Des Moines, IA. But around March 2005, according to Anna, McDavid told both Jenson and Anna that he "had to leave town, he needed to go away" from his home in Northern California under the "direction of someone." (RT 09/11/2007 at 214). He said he would be traveling the country again in the Spring of 2005. Anna made inquiries of others into McDavid's whereabouts.[11] They re-met in June 2005 in Philadelphia during a BioTech protest, at the apartment of 20-year old Lauren Weiner, who would become the third codefendant. The three of them (Anna, Weiner, and McDavid) stayed at Weiner's apartment, which her father rented for her, for about a week. Weiner testified that Anna bought all the food, as the others had no money.

D. Anna's Continuing Influence and Inducement

At the time, Weiner assumed from their interaction together that McDavid and Anna were dating, and asked others about it. Jenson testified that it was obvious to everyone McDavid was smitten by Anna. He testified further that he never saw Anna push McDavid away. Some time in mid-June 2005, McDavid and Anna spent some intense time together on Weiner's balcony during which McDavid poured his heart out to Anna. Their time on the balcony led their host, Lauren Weiner, to believe they were having sex in Weiner's bedroom. McDavid also

[10] In one email written in May 2005, Anna sent a "Cal Brower" from Texas a list of the upcoming political protests nationwide for the rest of the year, and asked him if any "fun" was planned, as she would "love to have a party." She said she had "disposable income" so he should "ask around, all your contacts" if she could "bring anything in from the outside, it'd be safer." She could bring "paint, chains, nails, pipe, anything, tar and feathers." Cal told her that a "die in" was planned for in front of the Halliburton Building, in which protesters would lay down and pretend they were dead at the hands of Halliburton. Anna described this during her testimony as a "symbolic" and "economic protest" which she did not regard as "political." (RT 09/12/2007 at 423).

[11] Anna testified that McDavid was leaving town at the request and advice of an attorney because the FBI and the U.S. Attorney's Office were seeking to question him as a "person of interest" in the pending investigation of Ryan Lewis from Auburn, California, next to Eric's hometown). Mr. Lewis was later convicted in the Eastern District of environmentally motivated arson.

referenced it in one of his love letters to Anna, sent on October 26, 2005.[12]

Later, on the group's fateful car ride together from Washington, D.C. to California in January 2006, Anna observed to Weiner that McDavid had become increasingly radicalized during the previous year. Anna confided to Weiner that while they were on Weiner's balcony, McDavid had told her that she, Anna, was the major reason for this change. Weiner later told Anna, "he loves you," to which Anna replied: "[I]t is a love slash hate. He hates everything I stand for, but every time he sees me, he goes nuts."

According to Weiner, the group had vaguely discussed "direct action" while they were together in Philadelphia in June 2005, but they did not discuss any actual target or plan. (RT 09/17/2007 at 721). Contrary to the allegations in the indictment, Jenson testified that McDavid did not express any desire to engage in direct action for the entire summer of 2005, not least because he seemed spooked by the arson investigation of a man named Ryan Lewis in Auburn, California, next to McDavid's hometown. After their stay together in Philadelphia, Anna's FBI handlers instructed Anna to follow McDavid closely, as they had discovered by that point that McDavid was wanted for questioning related to the Auburn investigation, possibly because investigators believed he knew Mr. Lewis.

McDavid, Jenson, and Weiner traveled together during the summer of 2005 after their stay at Weiner's apartment in Philadelphia, often but not always with Anna. When they traveled without Anna, they hitchhiked, ate in soup kitchens, and rolled out their sleeping bags along

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[12] McDavid wrote in his love letter to Anna:

> Hey...Feeling...nostalgic, I guess. Totally miss you...never far from my thoughts or heart...fighting that part...a lot...I do not know why but shortness of breath always follows the...remembering you or the excitement knowing I'll see you again soon. I can still remember your voice, the smile and that last embrace in Philly. Giggly chills....feels good to get it out...it would feel better to be with you face to face and tell you straight out...just wanted to say hi and that I've been thinking of you. Much love, me.

(RT 09/12/2007 at 428). Anna admitted that she received at least three "love letters" from McDavid, but neither she nor the government could lay their hands on the other two missing love letters.

highways. When they traveled with Anna, the only one among them with means, they traveled in Anna's car, never paying for gas. Anna bought the food, bought them tents and swimming goggles, and gave them spending money on top of it.[13] Anna told the group she had saved up her cash from her job as a "stripper" in Florida. Near the end of the summer, in August 2005, the group ended up back at Weiner's apartment in Philadelphia, which her father maintained for her, and reverted to dumpster diving after Anna departed from their company.

After the summer together, McDavid and Jenson returned to the West Coast but parted ways. From August until November 2005, McDavid rarely contacted his future codefendants or Anna. He was spending time with his family. The FBI, meanwhile, was determined to get the group back together for a meeting "all in one place" on the West Coast, and Anna went to work on this task for them.

McDavid, however, was not falling into line. He emailed Jenson in late October 2005 that he would have to miss any Fall 2005 meetings for family reasons. The group began making plans to meet without him in a hotel room somewhere. But this did not sit well with Anna or the FBI. She acted very upset that McDavid was going to miss the meeting and pressured him to come, calling him selfish. Eventually, Anna convinced McDavid to attend. She also bought Weiner a plane ticket out from the East Coast, even though Weiner abhorred plane travel, due to a painful inner ear condition and because she was deathly afraid of flying. At that time in her life, she was also experiencing "really bad" panic attacks which airports also brought on. On a layover, Weiner called Anna "freaking out." She called Anna in the same anxious state on the way home.

E. The November 2005 Meeting

To help overcome McDavid's reluctance, Anna got the group together at McDavid's parents' house in mid-November 2005, actually driving Jenson and Weiner there, where McDavid was housesitting for his parents who were away. McDavid had no money, save for what his parents had left him for groceries. Anna again made most of the purchases, including

[13] It is unknown whether the tents were wired for audio or video.

wine.[14] In his declaration herewith, Jenson reveals that he testified falsely under coercion by the government, stating:

> If it had not been for the persuasive powers and financial resources of the government informant Anna there would have been no conspiracy. Eric was extremely reluctant to meet with us in November of 2005 for what became the first meeting to plan the conspiracy. If it had been left to Eric, that meeting would have never occurred. It took Anna's logistical panning [sic], interpersonal manipulation and financial assistance to make that meeting happen. In fact she brought [codefendant] Lauren and I to Eric's parents' house because he would not meet with us about the conspiracy.

(5/13/12 Decl. Jenson, Ex. 1, Bates Nos. 1-3).

Everyone but Anna smoked marijuana at the house. Jenson testified that smoking marijuana blurred their reality and caused them to act, communicate, and write things down in ways that they would not have done if they were not high, and which sometimes did not even make sense.

Weiner testified that at this meeting, "We had just talked about different ideas. We didn't have any set targets, like nothing was defined." (RT 09/17/2007 at 824). They did discuss Weiner's "firefly" concept. To her, a "firefly" approach involved different types of direct actions, separated by time, geography, and the nature of the action/target. She explained, "...when you're like looking out at night and there are fireflies, you see like a green light, green light, green light, and if they are all over, and there are a lot of fireflies all over, you can't really tell which one there is...." (RT 09/17/2007 at 825). To her, a "firefly" could involve vandalism of billboards to something more serious. The group pondered potential actions and targets around the country. McDavid abjured any action near his home in Northern California. The group emerged from their November meeting with no plan except to meet again some time in the future.

F. January 2006 – Dutch Flat Cabin

The FBI and Anna made sure that the group reassembled. Despite Weiner's fear of flying, Anna badgered her to fly out again in January 2006. Eventually, however, because

[14] Anna apparently had a fake ID which helped her buy liquor for the group, even though she was only 19 at the time.

Weiner refused, Anna went to the lengths of driving out to Washington D.C. to pick Weiner and Jenson up and drive them all the way back out to California in order to join them with McDavid, whom she picked up in her car in Sacramento. She drove them all to a cabin in Dutch Flat, California, not far from McDavid's parents' home in Foresthill, which she told them she had rented. The FBI had extensively wired the large, two-bedroom cabin, for audio and video surveillance, and agents were apparently encamped at a command post down the road.

By January of 2006, Jenson was also "acting" just to please Anna. He testified that he was "saying things to make them think that I was 100 percent good to go for it" (RT 09/24/2007 at 1025) even though he was not. Nevertheless, homeless and penniless, he rode with Anna to Dutch Flat. During the ride, Jenson told Anna that he felt she was leading them all into "a trap," because "something bad had happened to her in the past." (RT 09/25/2007 at 1028). He observed that it seemed like she was "leading everybody on everything." (RT 09/17/2007 at 853). In his declaration attached hereto, Jenson states that had he felt free to testify truthfully, he would have explained:

> If it had not been for Anna we would have not gotten together to plan the conspiracy in January of 2006. Eric and I had previously made plans to travel together and would have done so if it were not for the persuasive powers and financial resources of Anna. We agreed to stay with Anna in the Dutch Flat cabin because Eric was interested in pursuing a romantic relationship with her and because we had no money and it was a free place to stay. Neither of us had a job or any source of income, so we welcomed a place to stay for a while. Anna was very pushy about her radical agenda and I believed I needed to play along in order to continue getting free food and lodging. Anna was aware that Eric had a romantic interest in her and led him to believe that the relationship could happen one day, after he proved that he was radical enough. If not for these factors Eric and I would have been traveling and not engaged in a conspiracy.

(5/13/12 Decl. Jenson, Ex. 1, Bates Nos. 1-3).

Prior to gathering at Dutch Flat, Weiner was living in the apartment in Philadelphia her father rented for her, but without disposable income. Jenson was living on food stamps. And McDavid, according to Weiner, was begging change on the street and eating out of dumpsters. Once again, when they were with Anna, she paid for everything, often with hundred dollar bills. Sometimes she flipped hundreds to McDavid to shop, too. She claimed to have saved this

money from stripping and from her job over the summer working in a college chemistry lab, thereby also arrogating to herself chemistry expertise which would help advance a conspiracy. Anna surprised the group by bringing a chemistry set – unsolicited – to the Dutch Flat cabin.

G. No Agreement on "Targets" Before the Arrest

Despite all of Anna's efforts to make the group agree on targets and timeframes, they never selected an agreed upon target. They considered direct actions on dams, involving, according to Weiner, "...you know, the possibility of even just hitting them with a sledgehammer. Like, not big dams....little dams that created ponds, and just were, you know, more than like 3 feet high, that kept Salmon from being able to jump up and go upstream to do their Salmon thing." (RT 09/17/2007). They visited the Nimbus Dam in Sacramento, but they all agreed it was *not* a target. (RT 09/17/2007 at 857).

The group discussed, but contrary to the government's case never agreed, on other potential targets, including the Institute of Forest Genetics ("IFG") and cell phone towers. Weiner testified, however, that as of January 12, 2006, the night before the arrest, that although Anna wanted to target the IFG, there was no agreement among the codefendants to do so. (RT 09/17/2007 at 857). Nor by that time had they agreed to target any particular cell phone tower or even area where there were cell phone towers.

Instead, on January 12, 2006, at Anna's behest, the group set out to mix chemicals utilizing the chemistry set Anna brought and following a recipe she provided. Jenson affirmed during his testimony that Anna was the brains of the operation when it came to chemistry, having spent the summer teaching chemistry, or so she said. (RT 09/24/2007 at 1043). McDavid, by contrast, knew nothing about chemistry and had trouble following Anna's directions. Similarly, Jenson had no idea what type of explosive they were supposedly mixing or whether it required a fuse. Anna led this group of amateurs. Of course, she had also paid for all of the materials.

The mixing was for a test, not for an action. The idea was to create something small and test it in a deserted area. Before they began following Anna's recipe, they had not so much as agreed on what form their explosive would take. She could have directed them to make a Molotov cocktail for aught they knew or cared. In the end, their unsophisticated attempt even at

following Anna's recipe was completely unsuccessful and did not yield any working explosive, only a broken bowl, before they gave up.

For her part, Weiner did not even want to come outside during the mixing. The idea scared her. Anna pestered her to come outside and participate. Weiner testified:

> She [Anna] really wanted everyone to be a part of it. And that we all needed to do something, and we all needed to be a part of it, whether it was okay you measure the salt, or you stir the bowl. I mean, I was freaked out to even go out there. I mean, we didn't know what we were really making. We had a recipe but we didn't know what it was going to do. And you know kind of getting in the middle like she wanted me to go out and stir it, she wanted me to go out and get closer to it. I didn't want to go outside. I remember Zach [Jenson] having a panic attack through it all. It was kind of a little fight there.... she kept saying everyone needs to be a part of this, we met, we all need to be a part of this.

(RT 09/17/2007 at 846-847).

Surveillance tapes show that McDavid stuck up for Weiner. He told Anna she was being too pushy and needed to leave Lauren alone.

During their stay at the cabin, the group discussed their feelings about "direct action." Anna encouraged them to write their ideas down in a "burn book," which she had brought with her to the cabin and pre-filled herself with several incriminating pages of recipes and radical writings.

On January 12, 2006, the only thing close to an explosion among the group occurred when Anna stormed out of the cabin after a fight. She manufactured her ire, or perhaps it resulted from real frustration, over the fact that she could not get the group to agree on targets and timeframes. She lambasted them for their lack of goals and direction. Jenson was getting cold feet and wanted to slow down, a position which McDavid echoed in the face of Anna's ranting and screaming. Weiner also wanted to "pull the throttle back." Weiner testified that there certainly was no meeting of the minds between her, McDavid, and Jenson. This infuriated Anna, or so she made it appear. According to Weiner, Anna "asked multiple times" for the group to identify targets.. (RT 09/17/2007 at 844).

During the government's examination of Weiner on the stand about the argument that night, she testified, "Well, I felt that it was too big, too much, too fast, like in all the ways it

could be." (RT 09/17/2007 at 869).

Q: So, at that point, is the conspiracy getting more narrowly focused?
A: Well, we never picked one.
Q: Right.
A: We couldn't decide.
Q: Right.
A: So that turned into conflict as well.
Q: You each had proposals?
A: Right.

(RT 09/17/2007 at 870).

Anna pouted that the group was excluding her and she no longer felt part of them. After this fight, she stormed out, crying, and marched down the road to the command post where her FBI handlers were holed up. They told her not to worry, that the group would be arrested the next day. After Anna left, McDavid and Weiner smoked marijuana, but Jenson did not. Reacting to the effects of the drug, Weiner and McDavid wrote in the "burn book" some plans for the following day in an effort to mollify Anna.

Weiner testified that by that point she was "acting" to fool Anna. She looked up to Anna like a big sister, wanted to impress and please her, and therefore acted contrary to her real feelings. This, it would appear, was the real motivation for all three of the defendants.

The group planned to stay at the cabin throughout the month of January, possibly longer, but they had been there for only six days before the FBI swooped in and arrested them in the parking lot of a store in Auburn on January 13, 2006, where they had gone to purchase supplies for a second attempt at following Anna's recipe.

H. Anna's Handler, FBI Special Agent Ricardo Torres

Philadelphia FBI Special Agent Ricardo Torres testified that he became an agent in 2003, just before Anna began as an informant. Under the FBI's rules, before an agent can work undercover, s/he must receive additional training beyond the four-month academy training at

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Quantico, Virginia. Agent Torres received no such specialized training, and neither did Anna.[15] Agent Torres testified that Anna received "on-the-job training." He saw to her training, such as it was, and Anna answered to him.

On cross-examination, Agent Torres testified he was aware that Attorney General guidelines governed the FBI's use of undercover informants ("A.G. Guidelines"), and that the FBI has parallel guidelines in its Special Agents Handbook. Shockingly, however, Torres testified that the A.G. Guidelines did not contain any instructions against entrapment, so he did not read any such admonition to Anna as part of her training. In fact, the Guidelines do provide such instruction. Further trial examination revealed, however, that Agent Torres thought the A.G. Guidelines were comprised of no more than a two-page "advisement" to cooperating witnesses. The defense made this exhibit D-2.[16]

Flummoxed during his direct examination, Agent Torres contacted the Philadelphia FBI office during the lunch hour, after an emergency pow wow with the FBI case agent who sat at AUSA counsel table, and asked them to fax over a copy of the actual written instructions Anna had been given. They faxed the simple, two-page "advisement," which Torres revealed was the extent of any written instruction he had read to Anna, and which also served as his guidance in training and fielding her between June 2005 and January 2006. Agent Torres clearly believed that the two-page advisement *was* the A.G. Guidelines, and referred to it throughout his testimony as "the Attorney General's Guidelines" on informants, and he repeatedly told the jury

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[15] Agent Torres admitted on cross-examination:

> Q. Now the use of undercover informants by the FBI...there is a lot of literature from the FBI on how to do that, right?
> A. I would assume so, yes, sir.
> Q. Well, do you know if there is?
> A. I personally have not read all of it, no, sir.

[16] D-2 is simply an advisement for people arrested and seeking to trade forgiveness or leniency for informant work. It is a far cry from the detailed Attorney General Guidelines on informants which regulate the sensitive work Agent Torres and Anna were doing.

that he had read these "guidelines" regarding informants to Anna in June 2005.[17] Apparently, Torres was thus wholly unfamiliar with the actual, detailed A.G. Guidelines which he should have been following in his handling of Anna.

As a result, this short, and mostly inapplicable advisement, developed for those who were "working off a beef" with the government, served as the blueprint for Torres' training and supervision of Anna and was, in his view, the equivalent of the "extra training" agents are required to receive before they go undercover. In light of the extensive evidence of entrapment in this case, the Court should examine D-2, the advisement, side by side with the actual A.G. Guidelines on undercover informants. Agent Torres' disregard of the Guidelines in part is what prompted jurors to remark that they were "embarrassed" by the FBI's conduct in this case.[18]

When Agent Torres asked Anna to question McDavid about Ryan Lewis (the subject the FBI was investigating in an arson near Sacramento), Torres was aware, at least through Anna, that McDavid had consulted with an attorney who was advising him not to cooperate if the FBI came around inquiring. Agent Torres testified that he believed this was perfectly reasonable. He further testified that it would have been equally reasonable for him to question McDavid, notwithstanding the fact that he knew McDavid was represented. (RT 09/12/2007 at 661).

With respect to Anna's infiltration of protests writ large and reporting on lawful protest activities, Agent Torres testified that this did not raise any concerns provided the FBI did not "record" it:

> Q. Okay. So if an informant was contacting people solely about political matters and reporting back to the FBI, that would violate the guidelines, right?

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[17] This prompted the Court to note that the Agent was unfamiliar with the A.G. Guidelines.

[18] Nor was Agent Torres aware, he said, that a September 2005 Inspector General report faulted the FBI for frequent mishandling of informants and failure to conform to the A.G. Guidelines. In a review of 120 FBI confidential informant matters, the I.G. found violations in 104 cases, or 87 percent of the time. The 301 page I.G. report was widely circulated and publicized, led to congressional committee oversight hearings, and spurred clarion calls for reform. The defense had raised early concerns about the FBI's apparent gross mishandling of Anna in this case, in pretrial motions, in motions in limine, and during the trial. The District Court declined to fashion any relief. See Report, http://www.usdoj.gov/oig/special/0509/final.pdf

A. No, sir. Only if I recorded it as such.

(RT 09/12/2007 at 651).

I. McDavid's Entrapment Defense and the Restrictions on his Ability to Put on this Defense

McDavid's defense centered on entrapment, arguing that he was not predisposed to commit the crime charged in the indictment before the government agent induced him to do so. Five factors are used to analyze a defendant's predisposition: (1) defendant's character or reputation; (2) whether the government suggested the crime; (3) whether defendant had a profit motive; (4) whether defendant showed reluctance; and (5) government inducement. All of these factors, militated in favor of McDavid's lack of predisposition, including those which McDavid was stymied in presenting evidence on.

1) *Defendant's good character/reputation:* Anna testified that when she met McDavid in August 2004, she "thought he was a college student and not of interest to the FBI." (RT 09/11/2007 at 208). She found him to be "non-threatening" and "gentler" than others at the gathering. (RT 09/12/2007 at 405). She reported to her handlers at the FBI that he was "inconsequential" (RT 09/12/2007 at 405). Codefendants and government witnesses Jenson and Weiner similarly described McDavid as "kind," "generous," "gentle," "pleasant," "honest," "trustworthy," and "peaceful." (RT 09/17/2007 at 788; 09/24/2007 at 1001). Three character witnesses testified to McDavid's compassionate and peaceful nature. However, the Court, having decided as a matter of law that McDavid's "first contact" with Anna occurred in July 2005, barred the character witnesses from testifying to McDavid's good character before this date, thereby further undermining his non-predisposition defense.

2) *Government suggestion of crime:* Although Anna testified that McDavid first suggested the group commit a crime, this conversation, conveniently, was one of the few the government states it did not record, so Anna's testimony could not be corroborated. Jensen's 5/13/12 declaration, in which he admits his trial testimony was coerced, calls into question Anna's credibility as a witness. He contradicts her testimony about McDavid's involvement in

the alleged conspiracy in major ways, and he makes clear that Anna was the driving force behind the alleged conspiracy. Had Jenson not found himself coerced by the government to testify falsely, as his declaration reveals, he would have contradicted Anna's claims about McDavid's leadership and indifference to human casualties. To prove beyond a reasonable doubt that McDavid was predisposed to commit the crime charged in the indictment the government had to offer more than the uncorroborated testimony of a paid informant that McDavid suggested the crime nearly a year after first contact. (See 5/13/12 Decl. Jenson, Ex. 1, Bates Nos. 1-3).

3) *Lack of profit motive:* It is undisputed that McDavid did not have any profit motive.

4) *Defendant's reluctance:* As discussed thoroughly above, McDavid demonstrated repeated reluctance throughout the long period of Anna's recruitment. He periodically dropped out of contact with Anna and his codefendants; initially opted out of the November 2005 meeting Anna organized (before succumbing to pressure from her, and only then after she physically delivered the other two to McDavid's parents' house where he was staying); traveled extensively with Jenson without discussing any criminal direct action at all; and had to be delivered by Anna to a cabin which the FBI rented for Anna, in another meeting which she arranged, before discussing potential criminal activity further. In the final meeting at the Dutch Flat cabin, McDavid stood up to Anna on behalf of both Jenson and Weiner, echoing the sentiment that Anna was going too fast, and telling her to take it easy on Weiner when Anna was pressuring her to participate in mixing chemicals. Throughout, McDavid, together with his codefendants, showed disinterest in selecting any actual target or timeframe — a reticence and reluctance which caused Anna to blow up at them, berate them for their lack of focus and commitment, and tell them manipulatively that she felt like they were excluding her from the group, before she stormed out and reported to her handlers down the road what was true: that the design—*her design*—just wasn't taking root in the others.

Despite Anna's histrionics, the group never actually agreed on a target, reached a meeting of the minds, or formed up around any specific conspiracy. In the end, McDavid like the others took steps well shy of any actual substantive crime, and he did so only to appease Anna, with whom he was in love. McDavid thus was guilty at worst of the same nebulous, general

conspiracy offense as his codefendants—plainly a lesser included offense in this case, which he was deprived of having the jury decide when the Court refused to give the lesser-included offense instruction he requested.

5) *Government inducement:* The District Court's instructions to the Jury prevented them from considering evidence of government inducement during the critical period from August 2004, when he first met Anna, until June 2005, when the government contends McDavid suggested the group commit a crime. Had McDavid been allowed to present his full inducement case, the jury could have considered substantial further evidence of Anna's romantic manipulations, pressure campaigns, financial assistance, and logistical efforts in tracking the group down and herding them all together on occasions when they drifted apart.

Most significantly, Anna lured McDavid by stoking his romantic attraction to her and encouraging him to believe he had to prove his worth and commitment to her through criminal action before they could be together. Anna even filled out an extensive questionnaire under the tutelage of an FBI psychologist so the FBI could help maximize her romantic influence over McDavid. In the 18 months between when McDavid first met Anna, and when the government swooped in and arrested the group the day after Anna complained to her handlers that their whole investigation (*viz*., entrapment scheme) was falling apart, Anna provided three penniless vagabonds with shelter, food, alcohol, and spending cash. She cajoled, hounded, taunted, herded, and manipulated them around issues of friendship, loyalty, trust and love to get them to make a single plan. Still, they never did.

The jury signaled its concern over whether McDavid was predisposed or entrapped, asking a number of questions during deliberations about the time frame they were supposed to consider, when McDavid's first contact with Anna occurred, and whether Anna was a government agent for purposes of considering McDavid's entrapment defense.

In each of these areas, the District Court limited the jury's consideration of arguments and evidence which McDavid was entitled to present under the facts of this case. Most significantly, as discussed above, the Court plainly misinstructed the Jury that Anna was not a government agent, after first informing the jury orally, in response to their question on this

subject, that she was a government agent. It was in fact acknowledged and undisputed by all parties, including the Court, that Anna *was* a government agent.[19] The jury was dissuaded from following up on the contradictory answer, despite their confusion (see jurors' declarations submitted at sentencing and reattached hereto), because the Court told them not to worry about trying to remember its verbal answers to their questions, as the Court would provide written answers. The jury was thus led to believe that the written answers it received – including the Court's erroneous statement that Anna was not an informant – superseded the Court's verbal answers.

Similarly, over McDavid's objections, the Court decided as a matter of law that Anna's first contact with him occurred when they first discussed a crime (in July 2005 according to Anna's uncorroborated testimony), thereby severely compressing the period in which the jury could consider McDavid's lack of predisposition — notwithstanding the fact that he actually met and fell prey to Anna's manipulations starting a year earlier, in August 2004. For example, three character witnesses, Eric Gonzales, Sarah Gonzales and Sarah McDavid, testified on Eric McDavid's behalf. The three witnesses were prepared to testify that they knew McDavid prior to first contact with the government agent and that he was a kind, compassionate, and peaceful person, and not predisposed to commit the charged offense. However, the District Court restricted their testimony to the time period from June 2005 onward. This and other such decisions limiting the jury's ability to evaluate McDavid's lack of predisposition eviscerated his entrapment defense.

As one of the two jurors who submitted declarations in mitigation of sentencing put it:

> Eric's entrapment claim was 7-5 [in favor of acquittal] until the court gave the final instructions on entrapment, including the instruction on the "relevant time period of evidence" and the written response of whether Anna was a government agent and when. The jury was confused about what evidence we were allowed to consider for entrapment and what the legal instructions were.

(Decl. Juror Bennett, Ex. 2, Bates No. 7-8).

[19] The Court's error did not make itself known to the Defense until the Court later caused its further written instructions to the jury to be electronically filed, after the verdict.

J. Sentencing

McDavid was sentenced on May 8, 2008. He submitted an extensive Sentencing Memorandum objecting to enhancements and arguing that the 18 U.S.C. § 3553 factors, including the disparity of sentences between similarly situated defendants, compelled a far lower sentence than the 13 years recommended by the probation department. McDavid submitted the declarations of two jurors, one of whom had contacted the defense on her own initiative. These are attached here, at Exhibits 2 and 3, Bates Nos. 4-13. The jurors urged the Court to sentence the defendant lightly, listing several reasons and emphasizing that they had been misled and confused by the Court's written answer to their question to the effect that Anna was not a government agent, despite first telling them verbally that Anna was a government agent. The jurors explained that this was dispositive for them, and foreclosed their further consideration of McDavid's entrapment defense, which had at first been persuasive to a majority, i.e. seven of the twelve jurors. The jury voted to convict McDavid soon after receiving the Court's erroneous instruction.

The two jurors who submitted declarations also expressed their opinion that "Eric was not more culpable and not the leader among the others; he was equal with the other 2 and Anna was the leader." (Ex's 2 and 3, Bates Nos. 8, 12). For these reasons, the jurors both stated that if the charge of general conspiracy had been available, they "would have voted for that only, and not the more serious charge." (Ex's 2 and 3, Bates Nos. 7, 11-12). The jurors both expressed strong criticism of the FBI's handling of the case, remarking on the agents' failure to know and follow their own procedures. One juror called this an "embarrassment" and described the FBI's behavior in the case as "out of control." (Decl. Juror Runge, Ex. 3, Bates No. 11). Both jurors said that Anna appeared to act with impunity and without proper oversight, and agreed she had manipulated McDavid and induced him with romance and money. (Ex's 2 and 3, Bates Nos. 6, 8, 12-13).

The District Court rejected the probation department's recommended 13 year sentence and sentenced McDavid to 235 months (almost 20 years) in prison. McDavid had no prior criminal history, no history of violence, and had never even been arrested before. His sentence

for conspiracy far exceeds that of most federally convicted arsonists (with a mean sentence of 6.8 years), including those who commit multiple arsons and do not assert a compelling entrapment defense, as McDavid did. By contrast, McDavid's codefendants Zachary Jenson and Lauren Weiner were allowed to plead to general conspiracy under 18 U.S.C. § 371 (a lesser-included offense which the Court declined to instruct the jury on in McDavid's case) and received credit for time served. This amounted to six months in Jenson's case, and two weeks in Weiner's.

ARGUMENT

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Counsel for McDavid provided ineffective assistance in the trial court proceedings and the appellate proceedings, and McDavid was prejudiced by counsel's actions and failings. Counsel's ineffective assistance included, individually and cumulatively, the following:

- Counsel failed to argue effectively for a jury instruction for the lesser-included offense of a violation of 18 U.S.C. § 371 (conspiracy to commit an offense against the United States).
- Counsel failed to read an erroneous jury instruction before it was given to the jury, and counsel failed to argue case law relevant to this issue in the motion for new trial and on appeal.
- Counsel failed to cite appropriate case law in support of his requested jury instructions on "first contact" and predisposition.
- Counsel failed to cite any relevant case law in opposition to the government's efforts to restrict the testimony of character witnesses proffered by the defense.
- Counsel failed to raise and argue that the sentence violated McDavid's Sixth Amendment right to a jury trial because he was subjected to more severe punishment because he exercised his right to stand trial.

By virtue of defense counsel's failures, McDavid was denied the effective assistance of counsel and a fair and reliable determination of guilt to which he was entitled. Trial counsel's failings, individually and cumulatively, had a substantial and injurious influence and effect on the determination of the jury's verdict at McDavid's trial and unfairly deprived him of a rational and reliable determination of guilt. But for any or all of counsel's failings, the jury would have reached a more favorable result.

To be effective, an attorney must not merely object or make claims, but must also support those positions with factual evidence and applicable case law. "Counsel also has a duty to bring

to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland v. Washington*, 466 U.S. 668, 687-90 (1984). There can be no reasonable expectation that jurors or a judge will reach conclusions favorable to the defendant without arguments supported by both law and fact.

> That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

Id.

Counsel failed to support many key arguments with law at trial and again failed to support these arguments on appeal. "Claims of ineffective assistance of appellate counsel are reviewed according to the standard announced in *Strickland v. Washington*." *Turner v. Calderon*, 281 F.3d 851, 864 (9th Cir. 2002).

The cumulative failures of McDavid's counsel rendered him ineffective to the point that he longer played his role necessary to ensure a fair trial. By merely objecting and failing to cite appropriate case law, or in some instances any case law, counsel became ineffective at his role in the adversarial system required by the Sixth Amendment. The failure of counsel to support his objections with case law, at trial and on appeal, fails to meet the standard of "reasonable professional judgment" under *Strickland*.

There is no tactical reason for an attorney to leave his arguments unsupported by law. Characterizing counsel's actions as trial strategy does not automatically immunize an attorney's performance from Sixth Amendment challenges. *United States v. Span*, 75 F.3d 1383, 1389 (9th Cir. 1996). If this was in fact part of the strategy of counsel then it clearly falls below the "objective standard of reasonableness" because it would not be reasonable to expect a trial court or appellate court to accept arguments unsupported by law.

Counsel's deficient performance prejudiced the defendant because his attorney's arguments lacked the requisite synthesis of law and facts on issues critical to his acquittal. This substantial failing was apparent throughout McDavid's trial and appeal. Because of counsel's

deficient performance, McDavid was unable to get the lesser-included offense instruction to which he was entitled. Defense counsel's ineffectiveness on key issues of jury instructional error and the exclusion of important character evidence prevented the jury from hearing or properly weighing evidence paramount to establishing McDavid's innocence. The ineffectiveness of McDavid's counsel "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 687-690.

A. Counsel Failed To Argue Effectively For A Jury Instruction On The Lesser-Included Offense Of A Violation Of 18 U.S.C. § 371 (General Conspiracy To Commit An Offense Against The United States)

McDavid was charged with two counts of 18 U.S.C. § 844(n) (conspiracy to damage or destroy property by fire or explosive). At trial the defense requested that the Court instruct the jury on the lesser-included offense of 18 U.S.C. § 371 (conspiracy to commit an offense against the United States). The Court initially agreed:

> THE COURT: That's the comments in the Ninth Circuit instruction, could a rational jury find the defendant guilty of the lesser offense but not guilty of the greater one.
>
> [AUSA] MR. LAPHAM: Your Honor, I'd have to say "yes" to that. I wonder if we could do this. I confess I didn't do a lot of research on this. We had a case that we thought stood for that proposition. I can't find the reference in the case.
>
> THE COURT: For the proposition that?
>
> MR. LAPHAM: That, well, it's a money laundering case, and it basically says that 371 is not a lesser-included offense of the conspiracy to commit money laundering statute, which is a wholly different statute. If before we –
>
> THE COURT: What I'm going to do is I'm going to include the instruction, and if you provide me authority, prior to me coming in, showing that this is not a lesser-included, or 371 is not applicable here, then I'll deal with that at that time. But as of right now, I find that a rational jury could find Mr. McDavid guilty of the lesser crime but not of the greater because the elements are: There was an agreement between two or more people to commit a federal crime; the defendant became a member of the conspiracy knowing of at least one of its objects and intending to accomplish it; and one of the members of the conspiracy performed at least one overt act. And that seems to satisfy the three elements that I'm looking at. Because there were a number of things that

> were discussed and talked about. They weren't all about explosives and bombs, etcetera, that were in fact or could be considered illegal and could be federal crimes for which these 12 people may have all agreed upon one of those but not of the greater.

(RT 09/25/2007 at 1231-1232).

Despite finding that there was evidence to support giving the lesser-included offense instruction, the Court ultimately accepted the government's argument that § 371 was not a lesser-included offense of § 844(n). Defense counsel offered no case law in support of his argument for the instruction, despite the fact that there is abundant case law supporting McDavid's right to the instruction.

"A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense." *Sansone v. United States*, 380 U.S. 343 (1965). In McDavid's case, the "disputed factual element" was whether or not the conspiracy involved "fire or an explosive." To find McDavid guilty of violating the lesser offense (§ 371), the jury would need to agree that McDavid engaged in the following actions: "(1) an agreement to engage in criminal activity, (2) one or more overt acts taken to implement the agreement, and (3) the requisite intent to commit a substantive crime." *United States v. Johnson*, 297 F.3d 845, 868 (9th Cir. 2002). To find McDavid guilty of violating the greater offense (§ 844(n)), a jury would need to find all the elements of the lesser offense as well as the additional element that the object of the conspiracy was to "damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce."

McDavid was entitled to a lesser-included offense instruction under 18 U.S.C. § 371 because (1) the elements of § 371 are a subset of the elements of the charged offense, and (2) the evidence presented at trial permitted a rational jury to find him guilty of the lesser offense and

acquit him of the greater offense. *United States v. Arnt*, 474 F.3d 1159 (9th Cir. 2007). In reviewing this question, the District Court was not permitted to weigh the evidence, which was solely the province of the jury. *United States v. Hernandez*, 476 F.3d 791 (9th Cir. 2007).

On appeal, the Ninth Circuit recognized that McDavid was entitled to such an instruction if the evidence would permit a rational jury to find him guilty of the lesser-included offense, § 371, and acquit him of the greater, § 844(n). *Memorandum* opinion, filed in *United States v. McDavid*, No. 08-10250 (9th Cir. Sept. 21, 2010) at 8-9. The record on appeal amply demonstrates that evidence was introduced at trial that would have permitted a rational jury to find McDavid guilty of the lesser but not the greater offense. However, counsel was also ineffective, on appeal, by failing to provide the Circuit with citations to evidence in the record that supported the District Court's initial finding that the defendant was entitled to the instruction. Given the state of the law on this issue and the nature of the evidence in this case, it is clear that with proper representation, McDavid would have received this crucial instruction.

At trial, while McDavid's codefendants testified that they engaged in a conspiracy with him, significant conflicting testimony emerged about the nature of the conspiracy, including about whether the conspiracy involved fire or an explosive. The very night before their arrest, the government agent lectured McDavid and his codefendants about not picking a target or having a plan.

> D17 – evid #E2
> Jan 12, 2006
> 17:10:59
>
> Anna: and I don't like how I always have to change to your guys stuff. I don't like that. I wish one day we could keep the damned plan. I wish one day you guys could stick to a list. I don't like how I have to bend to fit your schedules.

Codefendant Lauren Weiner verified this in her testimony:

> Q. Okay. And is it your recollection that throughout that whole argument, that the final result was you had you, Zach, and Mr. McDavid not agreeing on one fixed target, right?
>
> A. Correct.

> Q. Okay. So at the end of that, Anna stomps out. Of the three of you, Zach, Lauren and Eric, there's not one fixed target you have agreed on?
>
> A. Correct.
>
> Q. No meeting of the minds as to one fixed target, right?
>
> A. Correct.

(RT 09/17/2007 at 836.)

While many potential crimes were discussed, none were agreed upon, including any crime involving the targets charged in the indictment. Many of the crimes that were discussed did not involve the disputed element ("fire or an explosive"). For example, former codefendant Zachary Jenson[20] testified that McDavid had proposed that they alter only billboards:

> Q. Now, do you remember Mr. McDavid saying, maybe we could just do billboards?
>
> A. Yes, I do.

(RT 09/24/2007 at 1050.)

Codefendant Weiner also testified that various ideas had been discussed that did not involve fire or an explosive. These ideas included blocking traffic, gluing the locks of banks, and stealing a truck of jam to spill on the road to create a "traffic jam." Weiner also testified that the three agreed not to target Nimbus Dam and planned to target smaller dams without using explosives:

> Q. But when you first talked about dams, the concept of the dams were the small dams by the ocean?
>
> A. Yeah. My whole view, whenever we talked about dams, were like, you know, the possibility of even just hitting them with a sledgehammer. Like, not big dams. That was my understanding.

(RT 09/17/2007 at 855.)

The codefendants testified at trial about various proposals that were made in the context of the alleged conspiracy, several of which involved crimes that would affect interstate commerce but did not involve the use of fire or an explosive. The Court made note of this during the sentencing phase of McDavid's case:

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[20] McDavid's codefendants, Lauren Weiner and Zachary Jenson, pleaded guilty before trial. They were later sentenced to time served after the government filed a superseding information charging them with the lesser-included offense of 18 U.S.C. § 371.

> The Court: In addition, there was also discussion regarding destruction of or damage to property that was not federal property, such as the highjacking trailers and putting some type of honey or jam on the freeways to disrupt traffic, putting sugar or other substances into gas station storage tanks to ruin the fuel. And a number of different items that were discussed by the group with respect to how to disrupt the Government and the economy.

(RT 05/08/2008 at 53-54.)

Based on the law and the state of the evidence, a rational jury could have convicted McDavid of the lesser offense under § 371 rather than the greater offense involving "fire or an explosive" under § 844(n). Defense counsel's representation regarding this issue fell below an objective standard of reasonableness when he failed to support his argument for the instruction with law before the trial court and with citations to the evidence before the appellate court.

McDavid was prejudiced by counsel's deficient performance in several ways, individually and cumulatively. First, the Court had indicated that it was going to give the instruction and the Court would have given the instruction if counsel had supported his arguments with law. Second, in light of the Court's finding that evidence of conspiracy existed in the record that did not involve the disputed factual element, the jury could have found that, as well, and convicted McDavid of the lesser offense. A sentence to this lesser offense would have been significantly less severe than the sentence he received upon being convicted of the greater offense; even if he was sentenced to the statutory maximum on the lesser offense, he would have been released from prison by January 2011. Third, the Ninth Circuit found in McDavid's favor on the disputed issue of law, but because defense counsel failed to cite to evidence to support his argument, the Circuit essentially found that no evidence existed to justify the instruction. Had the arguments and evidence been presented effectively to the Ninth Circuit, the Circuit would have found that McDavid was entitled to the lesser-included instruction, which would have warranted reversal. If counsel had supported his arguments with evidence it is extremely likely that the appellate court would have reversed the decision and remanded it to the District Court for a new trial. *Arnt*, *supra*, 474 F.3d 1159.

Counsel's ineffective assistance denied McDavid his right to a fair trial. McDavid was

entitled to the instruction, but counsel's failings kept this issue from going to the jury. These failings at trial could have been remedied on appeal, but counsel once again failed to properly support his position with the necessary arguments and citations to evidence from the record. These errors, individual and cumulatively, fall below an objective standard of reasonableness and were highly prejudicial to McDavid.

B. Counsel Failed To Read An Erroneous Written Jury Instruction Before It Was Given To The Jury, And Counsel Failed To Argue Case Law Relevant To This Issue In The Motion For New Trial And On Appeal.

In *Morris v. Woodford*, 273 F.3d 826 (9th Cir. 2001), the Ninth Circuit held that a typographical error in an instruction to the jury constitutes grounds to reverse the ruling of the lower court and remand it to the state court for a new penalty phase trial. There are striking similarities between *Morris* and the case at hand.

In both *Morris* and the present case, the trial judge gave correct instructions verbally and provided erroneous written instructions. In both cases the confused jury asked questions of the Court, but did not point out the erroneous instruction, and in *Morris* the Court rejected the erroneous assumption that if the jury were confused, they would have pointed out the error in the instructions to the trial court.

There also are significant differences between *Morris* and the present case which inure to the benefit of McDavid. While Morris's counsel reviewed the written instruction before it was given to the jury and missed the mistake, McDavid's counsel wholly failed to review the written instruction. Additionally, in *Morris*, the jury already had convicted the defendant and was deliberating on what penalty to impose, while in McDavid's case, the jury was at a pivotal point in their deliberations concerning whether the prosecution had proved his guilt. They had not yet reached a verdict and if they had been instructed properly, they might well have returned a verdict of acquittal.

During deliberations, the jury asked the following question: "Was Anna a government agent in August 2004? If not, when did she become one?" Outside the presence of the jury, the parties agreed that the answer to the first part of the question was "yes," and that therefore the

second part didn't need to be answered:

> THE COURT: Was Anna considered a Government agent in August of '04? If not, when did she become one? Your response?
>
> MR. LAPHAM: Well, Your Honor, off the top of my head, I think we'd have to say she was a Government agent. She was working for the Government in August of '04. We would define contact, though, differently.
>
> [Defense counsel] MR. REICHEL: That's fine.
>
> THE COURT: But the question is, was Anna considered a Government agent in August of '04? The answer is "yes"?
>
> MR. LAPHAM: Yes.

(RT 09/26/2007 at 1400.)

The next morning, the jury was brought in to be given this answer and further instructions, including answers to a number of other questions, such as requested read backs of the cross-examination of Anna and the cross-examination of Agent Torres regarding training informants, and definitions for "predisposition" and "first contact" in the context of their deliberations regarding entrapment. The Court began by reading aloud answers to their various questions, in the middle of this reading stating "yes" in reply to the question regarding Anna being a government agent, and then continuing on with further definitions and instructions. The instructions and answers were extensive, as noted by Juror 11 at the conclusion of the Court's instructions:

> JUROR 11: Your honor that was a whole lot of information for us to write down in that big of a hurry.
>
> THE COURT: I will prepare the instruction and the responses and provide that to you in writing, but I wanted to get those to you now.

(RT 09/27/2007 at 1467.)

The jury resumed deliberations at approximately 10:45 a.m., and the Court thereafter had the written responses (including the incorrect "No" instruction) typed up and delivered to the jury room. At 3:08 p.m., the jury had reached a verdict of guilty.

Defense counsel failed to request the opportunity to review the final written response that was sent in to the jury room and failed to review it. The Court's written responses were filed with the court's electronic docket the next day, September 28, 2009. Defense counsel saw it for

the first time at that point, noting that the Court had written "No" in response to the question of whether Anna was a government agent for purposes of the entrapment instruction. A week later, defense counsel filed a motion for new trial and a motion for judgment of acquittal on this ground. The Court ruled that the erroneous instruction was harmless error and denied the motion.

There are three possible ways the jury could have understood the erroneous instruction:

1. The jury could have understood that the written instruction was incorrect and disregarded it. There is no evidence to support this interpretation, and such an interpretation would directly contradict and conflict with the jury's duty to follow the Court's instructions.

2. The jury could have understood the incorrect instruction to mean merely that Anna was not a government agent in 2004, but that she became one later. This is implausible because the jury asked a two-part question: "Was Anna a government agent in August 2004? If not, when did she become one?" If she had become one later, the Court's response would have been something like, "No. She became a government agent in September of 2004." Nevertheless, if the jury did interpret the answer this way it still would not be harmless error. If the jury correctly understood that Anna was a government agent in August of 2004 then they also could have correctly recognized that as the first contact and they would have considered McDavid's predisposition before meeting Anna in August of 2004. There was no evidence presented at trial that McDavid was predisposed to commit the crime he was charged with before his first contact with the agent in August of 2004.

3. The jury could have understood the one word response "No" to mean that Anna was not a government agent. This is the most plausible, straightforward reading of that response, and it is highly likely that the jury interpreted the response this way, given the confusing testimony and terminology used at trial. Without a government agent, there can be no entrapment, and the erroneous instruction therefore effectively precluded any finding of entrapment by the jury.

The jury asked this critical question of the Court because they were confused about Anna's status as a government agent. This may well be understandable, as many people outside

the legal profession would consider someone an "agent" only if that was the person's professional title. For example, a Special Agent of the FBI is a sworn employee of the Justice Department who has received specialized training; to most lay people, this combination of professional title and qualifications is what makes someone a government agent.

Throughout the trial the jury heard Anna referred to variously as an informant, a confidential witness, and a confidential informant, rather than as an "agent." In the government's opening statement, AUSA Lapham described Anna in the following way:

> And you are also going to hear from a fourth -- the fourth member of this conspiracy. Her name is Anna. We refer to her simply as Anna because she was acting in an undercover capacity on behalf of the FBI. She was not an FBI agent or an employee.

(RT 09/10/2007 at 113). During the trial, the jury heard Anna give the following testimony while being cross-examined by the defense:

> Q. And you agree with me that there were going to be political protestors there, correct?
>
> A. Correct.
>
> Q. And you were going to be an undercover FBI agent at those events, right?
>
> A. No. I was not going to be an undercover FBI agent.
>
> Q. Okay. The FBI asked you to go there at their behest, right?
>
> A. Yes.
>
> Q. Okay. And you went, right?
>
> A. Yes.
>
> Q. Okay. And you know "at their behest" means they wanted you to do something there that benefits them and Anna, correct?
>
> A. I understand what "at your behest" means. My concern was with your word "agent." I was not an agent.
>
> Q. Okay. That's fine. I'm not going to say you were an undercover agent at that time. Now, you weren't an FBI agent either, though?
>
> A. No. I was not an FBI agent.

(RT 09/12/2007 at 393-394).

The jury also heard Anna testify about her lack of training:

> Q. And had you had any law enforcement training at that time?

A. I did not.

Q. And as you sit here today, have you been to the FBI Academy in Quantico, Virginia or anything?

A. No.

Q. Would you like to go?

A. To the FBI Academy in Quantico?

Q. Yes.

A. Probably not.

Q. As you sit here today, have you had any formal law enforcement training with just local police forces?

A. No.

Q. Any state agencies that do law enforcement, have you gotten any training from them?

A. No.

Q. So it's fair to say you are self-taught, so to speak?

A. Correct.

(RT 09/12/2007 at 392).

The jury later received the Ninth Circuit's model instruction on entrapment, which reads, in pertinent part:

> The defendant contends that he was entrapped by a government agent. The government has the burden of proving beyond a reasonable doubt that the defendant was not entrapped. The government must prove either:
>
> > 1. the defendant was predisposed to commit the crime before being contacted by government agents, or
> >
> > 2. the defendant was not induced by the government agents to commit the crime.
>
> When a person, independent of and before government contact, is predisposed to commit the crime, it is not entrapment if government agents merely provide an opportunity to commit the crime.

Ninth Circuit Model Criminal Jury Instructions, Instruction 6.2 (Entrapment).

From this instruction, any rational jury would understand that an entrapment defense could not be considered if a government agent was not involved. However, the modification of model instruction 4.13 that was provided to the jury obscured and compounded the problem. As drafted, that instruction reads:

> You have heard testimony from [an undercover agent] [an informant] who was involved in the government's investigation in this case.

Over defense objection, the Court modified the instruction to eliminate the reference to "agent," such that it read:

> You have heard testimony from 'Anna,' an undercover cooperating witness, who was involved in the government's investigation in this case.

Instructing the jury that Anna was a cooperating witness further obscured her status as a government agent for purposes of the jury's determination regarding entrapment.

The jury was presented with evidence that Anna worked under the direction of the FBI and was paid for it. Yet they also heard testimony that she was not an agent. The jury was clearly confused about Anna's status as a government agent, leaving the jury with the difficult task of determining the legal definition of "government agent" for purposes of entrapment. The jury rightly turned to the court for clarification, in the end receiving an instruction directly opposite to the law.

Given that the jury was already in a state of confusion, it is implausible that a correct answer provided verbally by the Court and an incorrect answer provided in writing by the Court would clear up the confusion. The jurors clearly articulated their confusion and then clearly articulated that they had been verbally presented with too much information to fully comprehend. The Court rightly told them that they should not be concerned because they would be provided with the written answer, and they were. The written answer was, however, flatly incorrect, and the jurors reached a verdict of guilty shortly thereafter. Under these circumstances, "[i]t certainly is too much to expect a lay jury to sort out which was a misstatement and which was a correct statement -- especially in the absence of a clear explanation from the trial court." *Morris*, 273 F.3d at 842.

The Court found that this error was harmless because given "the conscientiousness and frequency with which this jury asked questions of the Court, it cannot be said the jury mistook the written answer after the Court had orally advised the jury Anna was a government agent in August of 2004." (Dkt.Entry 306 - Order on Mot. For New Trial at 25). However, it is fair to conclude that if the jury consistently asked questions of the Court when the jury was confused,

then surely the jury would have asked for clarification if they thought that they had been given the wrong answer in writing. *Francis v. Franklin*, 471 U.S. 307, 324 n. 9 (1985) ("The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them.") If, on the other hand, the jury believed that the Court had given them, in the written instructions, the final word on this matter of law, then there would be no reason for the jury to ask the Court any further question concerning this issue. *See Zafiro v. United States*, 506 U.S. 534, 540 (1993) ("It is well-settled that 'juries are presumed to follow their instructions.'").

While the Court may be unable to consider declarations from the jurors as evidence of their confusion, the Court might consider the declaration of juror Bennet as a hypothetical example of how a rational juror could react to this erroneous instruction:

> Specifically, I would like the court to know that the jury, including myself, was very confused about the jury instructions, especially regarding whether Anna was a government agent or not. During deliberations, we asked the court to please clarify for the jury the issue of whether Anna was a government agent, and if so, when did she become one. We were deliberating about the issue for the defense of entrapment. We asked the court in writing if Anna was a government agent in August of 2004, and if not, when did she become one? We were told orally by the court that she was one in August of 2004; we were also told to await the written answers to our questions when we deliberated. We then got the court's written answers, and that answer was that Anna was not a government agent. At that point we were then all very confused and did not know what the correct answer to that question was. The written answer was from the court and stated "no" that she was not a government agent, yet we were told orally that she was. With the written response of "no," and after reading the other written responses from the court, we ended our consideration of the issue of entrapment and soon thereafter voted to convict. Originally, on the issue of entrapment, the vote was 7-5 to consider the entrapment issue as a defense. Once the written response advised Anna was not a government agent, we then changed to a guilty verdict soon thereafter.
> …
> The jury was confused about what evidence we were allowed to consider for entrapment and what the legal instructions were.

(Juror Bennett Decl., Bates No. 5-6, 7.)

This provides insight into how a rational jury would react when presented with important

but incorrect information at a crucial point in their deliberations. The inaccuracy of the instruction is not in dispute and the importance of the information is undeniable. This error prevented the jury from considering constitutionally relevant evidence on an issue of considerable importance. *See Boyde v. California*, 494 U.S. 370, 380 (1990). The Court rightly ruled early on that there was enough evidence to allow the defendant to present an entrapment defense, and without a government agent there could be no entrapment. Yet the erroneous instruction prevented the jury from considering that defense. "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Kotteakos v. United States*, 328 U.S. 750 (1946). Given the legally specific nature of the term "government agent," the conflicting testimony about the informant's status as a government agent, and the importance of that status for evaluating the defense of entrapment, it cannot be said that the error did not have substantial influence. As stated by the Circuit in *Ho v. Carey*, 332 F.3d 587 (9th Cir. 2003), and equally applicable to the present case, "[a]ccordingly, we are left with a grave doubt as to whether [he] was convicted on an unconstitutional theory. We conclude, therefore, that the court's error was prejudicial." *Id.* at 593.

Defense counsel was ineffective when he failed to request to see the written instructions before they were given to the jury. Had he requested to see the instructions he would have caught this glaring error and requested a correction before it was sent to the jury. Counsel's failure to ask to review the jury instructions "fell below an objective standard of reasonableness" and denied the defendant "a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687-90.

Defense counsel's ineffectiveness concerning this issue continued with the post-trial motion for new trial and the motion for judgment of acquittal. In those filings, defense counsel cited no case law in support of his argument that the erroneous jury instruction was not harmless error. Counsel failed to cite *Morris v. Woodford* or *Ho v. Carey*, despite the fact that both these cases bear a striking resemblance to the present case. In the appellate brief, counsel merely

remarked, "There do not appear to be many cases on "all fours" with the case at bar." Appellant's Opening Brief at 39. This would later come back to haunt him during oral argument before the Circuit. Judge Graber, author of *Morris v. Woodford* and a member of the panel considering McDavid's appeal, repeatedly asked defense counsel about the similarities between McDavid's case and *Morris*. Due to counsel's unfamiliarity with the case, counsel was unable to respond.

Counsel provided constitutionally ineffective assistance in failing to review the patently erroneous instruction and in failing to argue the issue effectively thereafter.

C. Defense Counsel Was Ineffective When He Failed to Cite Appropriate Case Law in Support of His Requested Instructions on "First Contact" and Predisposition

The defense of entrapment was critical. In connection with this defense, the definition of "first contact" provided to the jury was incorrect and fundamentally affected the deliberations and the verdict. The Court defined "first contact" as the first time the defendant and the government agent discussed the crime, rather than the first time they came in to contact with each other. For McDavid, this meant that "first contact" was July 2005, rather than August 2004. This was crucially significant because the government presented no evidence at trial that McDavid was predisposed to commit the crime charged in the indictment before August 2004. This fundamental error led to a series of constitutional errors and violations. This incorrect understanding of first contact caused the Court to incorrectly instruct the jury, aggravated other erroneous jury instructions, and led the Court to unfairly restrict the testimony of character witnesses.

When asked by the jury, "What does contact mean?," the Court responded by instructing the jury, "Contact as used in the instructions is the time that you determine was the first time that there was some communication between the defendant and a government agent *about the crime charged in the indictment*." (RT 09/27/2007 at 1468 - emphasis added). This was erroneous.

In *Jacobson v. United States*, 503 U.S. 540 (1992), the Supreme Court defined "first contact" as the first time the defendant has any contact with a government agent. *Id.* at 553. In viewing the period before the defendant had any contact with a government agent for evidence of

predisposition, and after first contact for evidence of government inducement, the *Jacobson* court found:

> By the time petitioner finally placed his order, he had already been the target of 26 months of repeated mailings and communications from Government agents and fictitious organizations. Therefore, although he had become predisposed to break the law by May, 1987, it is our view that the Government did not prove that this predisposition was independent, and not the product of the attention that the Government had directed at petitioner since January, 1985.

Id. at 550 (internal citations omitted).

Justice O'Connor's dissent in *Jacobson* makes clear that post-*Jacobson*, "first contact" means the first contact of a defendant by a government agent, without regard to whether that contact involves the crime charged in the indictment:

> In my view, this holding changes entrapment doctrine. Generally, the inquiry is whether a suspect is predisposed [internal citations omitted] before the Government induces the commission of the crime, not before the Government makes initial contact with him.

Id. at 556-57. Despite vigorously arguing for her position, Justice O'Connor recognizes that this was not the position that the majority had taken:

> Yet the Court holds that the Government must prove not only that a suspect was predisposed to commit the crime before the opportunity to commit it arose, but also before the Government came on the scene. *Ante*, at 548-549.

Id. at 557. Justice O'Connor makes it clear that despite her protest, the definition that the District Court employed in the present case is not the law of the land. The Ninth Circuit is in accord:

> Quite obviously, by the time a defendant actually commits the crime, he will have become disposed to do so. However, the relevant time frame for assessing a defendant's disposition comes before he has any contact with government agents, which is doubtless why it's called *pre*disposition.

United States v. Poehlman, 217 F.3d 692 (9th Cir. 2000) (emphasis in original) (citing *Jacobson*, 503 U.S. at 549); *see also United States v. Kim*, 176 F.3d 1126, 1128 n.1 (9th Cir. 1993) (when a defendant is asserting an entrapment defense, "the jury must examine the defendant's criminal disposition prior to any contact with government agents").

In the present case, the jury was instructed contrary to *Jacobson* and *Poehlman*:

> JUROR 2: The timeframe. When does the evidence start? June 2005 or prior to that?
>
> THE COURT: Can you be more specific than when does the evidence start. There's been evidence of a lot of things that have occurred during the course of the trial.
>
> JUROR 2: It's one of our biggest questions is where we start looking at it.
>
> JUROR 12: In the entrapment portion, do we consider entrapment from June of '05 or back to August of '04?
>
> THE COURT: You don't have this in front of you, but, again, the instruction that I've given today regarding contact, I think will give you the answer if you reread when you receive it.
>
> JUROR 12: Can you read that again?
>
> THE COURT: Yes. Again, not putting any undue influence on it, but if you'll listen to what the instruction is, I think it may help you answer the question. "Contact as used in the instruction is the time that you determine was the first time that there was some communication between the defendant and a Government agent about the crime charged in the Indictment." Hopefully, that will help define what you are asking.

(RT 09/27/2007 at 1468.)

In light of the fact that the government's actual first contact with McDavid was in August 2004, it is undisputed that the government presented no evidence at trial that McDavid was predisposed to commit the crime charged in the indictment prior to first contact. Additionally, considerable evidence was presented that McDavid was not predisposed to commit the crime and that he was induced by the government agent. Even accepting, for argument's sake, the government's contention that first contact was in June or July 2005, the evidence presented at trial shows that McDavid was not predisposed. Therefore, not surprisingly, a majority of jurors (7-5) were favorably disposed toward McDavid's entrapment defense, prior to the Court's devastating error in misinstructing the jury that Anna was not a government agent.

In *United States v. Jones*, 231 F.3d 508, 518 (9th Cir. 2000), the Circuit set forth five factors to consider when evaluating a defendant's predisposition. The first factor is the defendant's character and reputation. In this regard, three character witnesses testified that McDavid was kind, compassionate and peaceful. While they were prevented by the District Court from testifying to their knowledge and experiences with McDavid before June 2005, it is

clear from the record that their testimony would have been the same for this earlier time period. Even the informant, Anna, testified that she had made clear to the FBI in 2004 that McDavid was not a danger or person of interest.

The second factor is whether the government suggested the crime. According to Anna, McDavid suggested the crime. Tellingly, this is one of the few conversations with him that she did not record, so her testimony is uncorroborated. Further, much of her other testimony was contradicted by the other two government witnesses at trial, and even more forcefully in Jenson's 5/13/12 declaration. (Ex. 1, Bates 1-3).

The third factor is whether there was a profit motive. It is undisputed that McDavid had no profit motive in this case and there is no evidence to the contrary.

The fourth and most important factor is whether the defendant showed any reluctance. McDavid showed considerable reluctance. After first discussing ideas with the informant and two codefendants, McDavid alternately dropped out of contact with his alleged co-conspirators and refused to meet with them. Recorded conversations indicate that the informant was furious about this and began working on McDavid's friends to convince him to meet. She ultimately solved this problem by collecting his two friends from different parts of the country and driving them to rural California where McDavid was staying. If McDavid's reluctance had been the decisive factor about whether or not to continue the sting, there would have been no conspiracy.

The final factor for predisposition is the nature of the inducement. The inducement in the present case was both material and romantic. Anna provided a house, food and alcohol for McDavid and his friends. She was well aware that McDavid had a romantic interest in her and she told him they could figure out their relationship when they completed their mission. She even filled out an extensive questionnaire with an FBI psychologist to figure out how to keep him on the hook.

Given these factors, there is ample reason to conclude that a rational jury would have found the defendant not guilty absent the erroneous instructions regarding "first contact" and predisposition. The erroneous instructions prevented the jury from properly considering whether or not the defendant was predisposed to commit the crime charged in the indictment. Trial

counsel failed to effectively argue this issue. While he cited *Jacobson* and *Poehlman*, counsel failed to respond to the Court's request to support his proposed definition of "first contact" with entrapment cases that involved conspiracy, despite clear Ninth Circuit authority on this issue. *See, e.g.*, *United States v. Montero-Morlotti*, 141 F.3d 1182 (9th Cir. 1998) ("The government must show evidence of predisposition before any contact with the law enforcement."); *United States v. Thickstun*, 110 F.3d 1394, 1396 (9th Cir.), *cert. denied*, 522 U.S. 917 (1997) ("At trial, the government bore the burden of proving beyond a reasonable doubt that Thickstun [the defendant] was predisposed before Hysom [the informant] met her."); *United States v. Davis*, 36 F.3d 1424, 1430 (9th Cir.1994) ("The prosecution must prove beyond a reasonable doubt that the defendant was predisposed to commit the crime prior to first being approached by government agents."); *United States v. Sbrocca*, 996 F.2d 1229 (9th Cir. 1993) ("Regarding predisposition, the government must prove that the defendant was disposed to commit the crime before the government agent approached him.") Had counsel followed the Court's request and supported his arguments with entrapment cases that involved conspiracy, the Court would have seen that they rely on a definition identical to that in *Poehlman*.

D. Defense Counsel Was Ineffective When He Failed to Cite Any Case Law in Opposition to the Government's Efforts to Restrict Testimony of Character Witnesses

The erroneous time period deemed relevant to the issue of "first contact" also prejudicially affected the defense's ability to present other aspects of its case, and trial counsel failed to provide the Court with relevant legal authority that supported his position.

For the defense case-in-chief, defense counsel called only three witnesses. These witnesses were called to testify about McDavid's character, which the jury could have used to assess McDavid's predisposition in relation to the entrapment defense. The testimony of these character witnesses was crucial because unlike the government witness, the character witnesses knew McDavid before he met the informant. The prosecution objected to witnesses testifying about McDavid's character before June 2005:

> Q. Okay. And did you find him at that time -- why don't you describe him for us, what characteristics he had when you knew him in high school?

> MR. LAPHAM: Objection. Relevance as to time period.
>
> THE COURT: Sustained.
>
> MR. REICHEL: Your Honor, I think as a character witness he is allowed to explain how long he has known him and what he knew of him in that time period.
>
> THE COURT: No.

(RT 09/24/2007 at 1126-1127.)

The government maintained that June 2005 was the date of first contact between the defendant and the informant and argued that defense witnesses should be able to testify only about the time period after first contact:

> Q. Okay. Did you know his characteristics, his, let's say, nature for violence in the Summer of 2004?
>
> MR. LAPHAM: Your Honor, the objection is to the time
>
> period.
>
> THE COURT: 2004.
>
> MR. REICHEL: August of 2004 he met --
>
> MR. LAPHAM: Prior to the conspiracy.
>
> MR. REICHEL: He met the informant in August of 2004.
>
> Zach Jenson in August of 2004, Your Honor.
>
> THE COURT: Isn't that the same time?
>
> MR. LAPHAM: The start of the conspiracy is in June of 2005.
>
> MR. REICHEL: Your Honor, he met the informant in August of 2004, stayed with the informant in August of 2004.
>
> THE COURT: The objection is sustained.
>
> MR. REICHEL: That's when he first met the Government agent, Your Honor.
>
> THE COURT: Objection sustained.
>
> Q. BY MR. REICHEL: Thank you.

(RT 09/24/2007 at 1130.)

The idea that a defendant's predisposition can be determined only after first contact flatly contradicts the well-settled concept of predisposition. *See Poehlman*, 217 F.3d 692 ("The relevant time frame for assessing a defendant's disposition comes before he has any contact with government agents, which is doubtless why it's called *pre*disposition.") (Emphasis in original.);

see also authority cited in the immediately preceding section of this motion. Defense counsel argued that as a factual matter, the testimony of character witnesses was important defense evidence to establish the lack of predisposition.

> MR. REICHEL: The Government has alleged that in June of 2005 the defendant actually committed the crime. That's the start they say. That's the start, they say, of this conspiracy.
>
> THE COURT: Correct.
>
> MR. REICHEL: And the Ninth Circuit, quoting Jacobson: Obviously, the time the defendant actually commits the crime he will have become disposed to do so. However, the relevant timeframe for assessing a disposition of a defendant comes before he has any contact with Government agents, which is that was why it's called predisposition. So, therefore, if Mr. Lapham says the crime begins on June of 2005, if we're going to look at predisposition, we have to look prior to June of 2005.
>
> The ruling that Mr. Lapham would like you to make is that we look at June of 2005 that day and nothing prior.
>
> THE COURT: No. What it would seem to me to be is that you would look to prior to June 2005 to see if Mr. McDavid were discussing with anyone else the concept of engaging allegedly in these three acts.
>
> MR. REICHEL: Your Honor, you would look at prior to 2005 to see if -- June of 2005 to see if Mr. McDavid was predisposed to commit these types of acts. In that line, you can call character witnesses. There's a lot of entrapment cases that rely on character witnesses to talk about a relevant trait of character of the defendant prior to the time he met Government agents.

(RT 09/24/2007 at 1155-1156). But based on the authority (or lack of authority) presented by the defense, the Court flatly rejected this argument, ruling that character witnesses called by the defense would be allowed to testify only to McDavid's character from June 2005 forward:

> THE COURT: June 2005. That's my ruling.
>
> MR. REICHEL: And backward at all or just from that day on?
>
> THE COURT: From that day.

(RT 09/24/2007 at 1162.)

Counsel failed to point out that this ruling was made despite the fact that government witnesses had no time limits placed on their testimony and that they did, in fact, testify about their experiences with McDavid before June 2005. This violated McDavid's rights to compulsory process under the Sixth Amendment and to due process and equal protection under

the Fifth Amendment. *See United States v. James*, 169 F.3d 1210 (9th Cir. 1999) (*en banc*) ("We should not have one rule for the prosecution and another rule for the defense."); *see also United States v. Thomas*, 134 F.3d 975, 980 (9th Cir. 1998) (when considering the defense of entrapment, "the well-settled rule that character must be considered is tantamount to a holding that it is an 'essential element' of the defense, and we explicitly recognize it as such here"); *Rock v. Arkansas*, 483 U.S. 44 (1987) ("Just as a State may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand, it also may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony."); *Wardius v. Oregon*, 412 U.S. 470 (1973); *Washington v. Texas*, 388 U.S. 14 (1967) ("the Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use").

Defense counsel offered virtually no arguments supported by law in opposition to the government's request that character witness testimony be restricted and in response to the restrictions ordered by the Court. The character witnesses were the only witnesses called by the defense to testify to an element essential to the defense: the defendant's character. By failing to undertake a reasonable effort to demonstrate to the Court that preventing McDavid's witnesses from testifying about his character before June 2005 was a clear violation of his rights, McDavid was deprived of his right to have evidence of an essential element of his defense presented to the jury. These errors were further aggravated by counsel mentioning the character witness issue on appeal but failing to cite any case law in support of his argument. These failures fell below an objective standard of reasonableness and denied the defendant a fair trial, a trial whose result is reliable.

E. Counsel Was Ineffective In Failing To Raise And Effectively Argue That McDavid Was Unconstitutionally Penalized For His Assertion Of His Sixth Amendment Right To Trial By Jury

An accused may not be subjected to more severe punishment simply because he exercised his right to stand trial. *United States v. Medina-Cervantes*, 690 F.2d 715, 716 (9th Cir. 1982); *United States v. Capriola*, 537 F.2d 319, 321 (9th Cir. 1976); *United States v. Stockwell*, 472 F.2d 1186, 1187 (9th Cir.), *cert. denied*, 411 U.S. 948, 36 L.Ed.2d 409, 93 S.Ct. 1924

(1973). This occurred in the present case. While defense counsel raised a number of other sentencing issues, he was ineffective in failing to raise and effectively argue this issue in the trial court and on appeal.

II. MCDAVID'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE PROSECUTION'S PROCURING AND INTRODUCING THE FALSE TESTIMONY OF CODEFENDANT JENSON AT MCDAVID'S TRIAL; THE CONVICTION AND JUDGMENT MUST BE SET ASIDE

> The ultimate mission of the system upon which we rely to protect the liberty of the accused as well as the welfare of society is to ascertain the factual truth, and to do so in a manner that comports with due process of law as defined by our Constitution. This important mission is utterly derailed by unchecked lying witnesses, and by any law enforcement officer or prosecutor who finds it tactically advantageous to turn a blind eye to the manifest potential for malevolent disinformation.

Commonwealth of the Northern Mariana Islands v. Bowie, 243 F.3d 1109, 1114 (9th Cir. 2001).

The testimony of a key prosecution witness – former codefendant Zachary Jenson – was false and resulted from coercion by the prosecution. His testimony was involuntary and unreliable and the introduction of this testimony against McDavid at trial violated his rights to due process and a fair trial, his right to counsel, his right to confront witnesses, his right to compulsory process, and his right to present a defense.

At trial, former codefendant Jenson provided key testimony against McDavid, at the government's behest. More recently, however, this witness has shed significant light on how the testimony was false and how the testimony came about. Attached is the Declaration of Zachary Jenson (Exhibit 1, Bates Nos. 1-3). Jenson admits that he lied in his testimony at trial at the behest of the government. He goes into detail regarding meetings with the prosecution leading up to the testimony and regarding the pressure that was exerted on him to testify as the prosecution desired.[21] He sets out how the testimony was false and how it was procured. He also relates what actually was true regarding McDavid's actions (and inactions), and regarding

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[21] If the prosecution failed to fully disclose the nature and context of the plea agreements and benefits provided to Jenson and any other witness, that would constitute a separate violation under *Brady/Giglio*.

informant Anna's actions and the effect her actions had on McDavid and other government witnesses.[22]

The presentation of false testimony at trial can provide the basis for a number of constitutional claims in addition to claims of due process violations, including violations of the Sixth Amendment right to counsel and the right to confront witnesses, *Davis v. Alaska*, 415 U.S. 308 (1974), the right to compulsory process, *Rock v. Arkansas*, *supra*, 483 U.S. 44 (1987), and the right to present a defense. *Crane v. Kentucky*, 476 U.S. 683 (1986).

A prosecutor commits misconduct by knowingly using perjured or false testimony to seek a conviction, or by failing to correct false testimony – either by suppressing evidence that would correct the testimony, failing to investigate whether the testimony might be false, or otherwise. *United States v. Agurs*, 427 U.S. 97, 112-13 (1976); *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Mooney v. Holohan*, 294 U.S. 103 (1935) (per curiam). This right extends to situations in which the prosecution allows a witness to give a false impression of the evidence, *Alcorta v. Texas*, 355 U.S. 28, 31 (1957), as well as those in which the statements are outright false. *United States v. Blueford*, 312 F.3d 962 (9th Cir. 2002). It applies to instances where the false testimony is unsolicited by the state, *Giglio v. United States*, 405 U.S. 150, 154 (1972), as well as those in which the presentation is knowingly made. *Napue*, 360 U.S. 264. Any such conduct is "inconsistent with the rudimentary demands of justice" and violates the due process clause, requiring a reversal of the conviction. See *Mooney*, 294 U.S. at 112; *Pyle*, 317 U.S. at 216. The duty of the prosecution to take action to prevent the use of false testimony is commensurate with its "unique power[] to assure that defendants receive fair trials."

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[22] The revelations regarding the government's tactics in connection with government witness Jenson also calls into question whether the government undertook similar actions regarding other witnesses, and whether the government concealed other information provided to it that was favorable to the defense. In addition to violating McDavid's rights as discussed in this section, any such actions by the prosecution would constitute a *Brady* violation, and trial counsel's failure to learn of the inaccuracy of the transcripts would constitute ineffective assistance of counsel. *See, e.g., Jackson v. Brown*, 513 F.3d 1057, 1076 n.12 (9th Cir. 2008) (discussing the distinction between *Brady* materiality and *Napue* materiality, and noting that "every *Napue* claim has an implicit accompanying *Brady* claim: Whenever the prosecution knowingly uses false testimony, it has a *Brady* obligation to disclose that witness's perjury to the defense.")

United States v. LaPage, 231 F.3d 488, 492 (9th Cir. 2000).

"To prevail on a claim based on *Mooney-Napue*, the petitioner must show that (1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) . . . the false testimony was material." *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003) (citations omitted). In *Hayes v. Brown*, 399 F.3d 972 (9th Cir. 2005) (en banc), the Ninth Circuit set forth the procedural framework for analyzing this issue:

> In assessing materiality under *Napue*, we determine whether there is "'any reasonable likelihood that the false testimony could have affected the judgment of the jury;'" if so, then "the conviction must be set aside." *Belmontes v. Woodford*, 350 F.3d 861, 881 (9th Cir. 2003) (quoting *United States v. Agurs*, 427 U.S. 97, 103, 49 L.Ed.2d 342, 96 S.Ct. 2392 (1976)). Under this materiality standard, "'the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.'" *Hall v. Director of Corrections*, 343 F.3d 976, 983-84 (9th Cir. 2003) (per curiam) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434, 131 L.Ed.2d 490, 115 S.Ct. 1555 (1995)).

Hayes, 399 F.3d at 984; *see also Jackson v. Brown*, 513 F.3d at 1076 (while *Napue* does not create a per se rule of reversal, "We have gone so far as to say that if it is established that the government knowingly permitted the introduction of false testimony reversal is virtually automatic." (Citations and quotation marks omitted)).

The prosecution knowingly procured and presented the false testimony of Jenson. It is highly likely that if the jury had heard Jenson's candid and honest testimony, they would have reached a different verdict because Jenson's true account contradicts the informant's testimony and supports McDavid's entrapment defense. (5/13/12 Jenson Declaration, Exhibit 1, Bates 1-3). The conviction must be set aside.

III. THE GOVERNMENT VIOLATED DUE PROCESS BY FAILING TO OBTAIN AND PROVIDE ALL MATERIALS AND INFORMATION REQUIRED BY *BRADY* AND ITS PROGENY

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that under the due process clause of the Fourteenth Amendment, the prosecution has a constitutional duty to

disclose to the defense all favorable evidence material to guilt or punishment. *Id*. at 87. Nondisclosure of exculpatory or impeaching evidence under *Brady* violates due process by "depriving a defendant of liberty through a deliberate deception of court and jury . . . [which is] as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." *Id*. at 86 (citation omitted). This duty includes the requirement that the prosecution take steps to learn of and disclose favorable evidence known to others acting on the prosecution's behalf, including the police. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *Jackson v. Brown*, 513 F.3d at 1068-69 ("The Supreme Court has made abundantly clear, however, that the prosecutor's duty to disclose evidence favorable to the accused extends to information known only to the police.").

Brady material includes both direct and impeachment evidence, *United States v. Bagley*, 473 U.S. 667, 682 (1985), and may relate either to guilt or to punishment. *See*, *e.g*., *Giglio v. United States*, 405 U.S. at 154 ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of events affecting credibility falls within th[e] general rule [of *Brady*].").

Brady information is not limited to information admissible at trial, particularly where that information may be used on cross-examination to impeach a witness. *See Wood v. Bartholomew*, 516 U.S. 1 (1995) (suggesting otherwise inadmissible polygraph results could be subject to *Brady* if they met prejudice standard); *United States v. Park*, 2004 WL 1196091 (N.D.Cal. May 26, 2004) (noting that government may not avoid disclosing actual notes of government witness interviews, as opposed to interview summaries, on the theory that *Brady* demands only disclosure of "information" and not actual documents and/or notes).

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

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

Strickler v. Greene, 527 U.S. 263, 281-82 (1999); *Anderson v. Calderon*, 232 F.3d 1053, 1062, (9th Cir. 2000), *cert. denied*, 534 U.S. 1036 (2002). Prejudice is established if there is a reasonable probability of a different result; a "reasonable probability" is a probability "sufficient to undermine confidence in the outcome." *Kyles*, 514 U.S. at 433-34.

In the present case, McDavid made a pretrial request under the Freedom of Information Act ("FOIA") for all files the FBI maintained on him. The FBI responded, stating that there were none. Several years later McDavid made a similar request and extensive documents were produced. While the FBI refused to turn over 868 pages, they did produce approximately 2,449 pages, most of which appear to be documents never seen by the defense in connection with McDavid's trial. All these documents appear to have been generated before McDavid's trial began. Numerous pages of these records are material to the defense in that they appear to be exculpatory and/or they provide impeachment material regarding government witnesses. The records also paint a broader and more detailed picture of the informant, Anna, and her work in this case. The documents also include information regarding other informants working on McDavid's case who were previously unknown to the defense.

The recently disclosed records also reference recorded jailhouse conversations, including conversations that appear to be between McDavid and Zachary Jenson, the former codefendant who testified for the government at McDavid's trial. Of note, both McDavid and Jenson were in "total separation" status while in pretrial custody (equivalent to solitary confinement) and were not allowed to meet with each other, nor with any inmates in the general population. The only times that they could speak to each other were when they had joint meetings with their attorneys. It therefore is reasonable to interpret these recordings as either unconstitutional intrusions into McDavid's communications with his attorney, or recordings that violate *Massiah v. United States*, 377 U.S. 201 (1964) and related authority.

Also among the documents produced recently is a document dated 11/03/2005 that details the FBI's urgent request to administer a polygraph exam on their confidential witness within the two weeks following the request. The document notes that the AUSA concurred with the urgent request to give the person a polygraph exam by 11/17/2005 and reads, in part, "The purpose of

the request polygraph examination is to confirm the veracity of CW reporting prior to expenditure of substantial efforts and money based on source's reporting. To facilitate investigation it is requested that the polygraph be administered by 11/17/2005." The CW clearly is Anna, the government's informant in McDavid's case. The government never produced this document to the defense, nor did the government disclose the need for Anna's polygraph examination, nor any questions asked, nor any answers given, nor any results. Denying McDavid access to the government's inquiries and actions in this regard and the information that flowed therefrom violates *Brady* and its progeny. Anna was the government's most important witness and her traits and veracity were important to McDavid's entrapment defense. This evidence that could have affected the jury's determination and there is a reasonably probability of a different result in this case.

A further example is provided by the government indicating, in connection with one of the FOIA requests, that they received fifty-one (51) documents from the Miami FBI office (the office that originally groomed and supervised Anna) in preparation for trial; in contrast, the defense received only two (2) documents from the Miami office.

Further, a separate FOIA request was made to the FBI regarding the "Crimethinc" gathering in Des Moines, Iowa in August 2004, at which McDavid first met Anna and codefendant Jenson. The FBI recently produced documents responsive to this request that clearly are about McDavid, as well as documents containing reporting from Anna. While these documents often are heavily redacted, the vast majority nevertheless bear no resemblance to documents that were turned over by the government in discovery, nor to documents that were turned over by the FBI through McDavid's earlier FOIA request. The documents are material because, *inter alia*, they reveal the FBI's and the informant's first impressions of McDavid, which is important predisposition evidence. The reports also constitute impeachment material relevant to challenging the veracity of Anna's testimony regarding McDavid.

Records produced via the recent FOIA requests indicate that the majority of documents that the FBI possessed regarding McDavid and Anna were not turned over during the discovery process. The government's failure to obtain and disclose these materials was prejudicial. These

documents would have provided crucial evidence relevant to the defense of entrapment. This, combined with the fact that McDavid's character witnesses were prohibited from testifying about McDavid's character during this time period (before June 2005), exacerbated the prejudice. The combination of these factors makes it clear that in the context of McDavid's trial, the suppression of these materials undermines confidence in the outcome of McDavid's trial.

PRAYER FOR RELIEF

For the foregoing reasons, and based on any further evidence adduced in these proceedings, Defendant Eric McDavid prays that this Honorable Court vacate, set aside or correct his conviction and sentence, and order that he be given a new trial.

Alternatively, Defendant requests that the Court order the government to show cause why he should not be granted such relief, permit discovery and expansion of the record, and set an evidentiary hearing so that he may prove up his claims. He also requests that the Court take judicial notice of the record from the trial court proceedings and the appellate court proceedings, and he incorporates that record by reference.

Defendant also prays that the Court grant such further relief as the Court deems just and proper.

Finally, Defendant was indigent before his incarceration and he remains indigent, incarcerated in prison. He further prays that the Court appoint counsel to represent him in this matter. He was found to be in *forma pauperis* when the Court appointed counsel to represent him in the trial court and on appeal, and his financial circumstances have not changed since that time.

Dated: July 2, 2012

Respectfully submitted,

/s/ *Mark R. Vermeulen*
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ERIC McDAVID