

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

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

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

No. 2:06-cr-0035

VOLUME VIII

ERIC McDAVID,

Pages 1200 to 1355

Defendant.

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REPORTER'S TRANSCRIPT

COURT PROCEEDINGS

TUESDAY, SEPTEMBER 25, 2007

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

APPEARANCES

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1 SACRAMENTO, CALIFORNIA

2 TUESDAY, SEPTEMBER 25, 2007

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4 (Jury out.)

5 THE CLERK: Calling criminal case, 06-00035, United  
6 States v. Eric McDavid. On for jury trial, day eight, Your  
7 Honor.

8 MR. REICHEL: Thank you, Your Honor, for coming out  
9 on the record. We have some stipulations which I hope would  
10 expedite matters.

11 THE COURT: Also, I should say the jury is not in the  
12 courtroom at this time. All right. What are the stipulations?

13 MR. REICHEL: We're in the defense case-in-chief, and  
14 first I got some documents in discovery after the FBI agent,  
15 Mr. Torres, testified. These are the advisements that she was  
16 given. The written advisements that Mr. Torres testified to.  
17 And I believe she testified about. She did testify about. And  
18 they are going to be marked as defense exhibits. And  
19 Mr. Lapham does not oppose my request to admit them as  
20 evidence.

21 MR. LAPHAM: Correct.

22 THE COURT: So the stipulation would be to a list of  
23 exhibits?

24 MR. REICHEL: It is going to be D -- sorry, Your  
25 Honor. One second here -- D-2 -- one small problem is there is

1 coffee stains on the copy we have here in the Court, but we're  
2 going to clean it up before we give it to the jury.

3 THE COURT: All right.

4 MR. REICHEL: And we would have a stipulation that  
5 this is the advisement -- this was the advisement that she was  
6 given by the Philadelphia FBI agent as set forth in his  
7 testimony and her testimony.

8 THE COURT: All right.

9 MR. REICHEL: Additionally, Your Honor, I have the --  
10 I have the 240-page question -- 240 question, excuse me, the  
11 psychological assessment profile. Mr. Lapham provided it. He  
12 provided it in total last night, and we have an agreement on  
13 that, Your Honor, not for the admission of the document, but  
14 we've drafted something in handwriting here, which I'll reduce  
15 down better, but it would be that the Government witness,  
16 Anna -- it would be a stipulation of the parties that  
17 Government witness, Anna, testified that in November of 2005  
18 she filled out a multiple-choice answer sheet containing 240  
19 questions and -- whatever pages it is -- I believe it's only  
20 two pages or so -- regarding her assessment of his personality  
21 traits, and that it was a psychological assessment profile.

22 THE COURT: You said "his," does it refer to the  
23 defendant? Just make sure.

24 MR. REICHEL: Yes. Actually, she puts the initials  
25 of the individual and the age of the individual.

1 THE COURT: No. I mean as far as your stipulation, I  
2 just want to make sure it's clear to the jury that this is  
3 about Mr. McDavid.

4 MR. REICHEL: Okay.

5 THE COURT: I think you said "his," when I hear the  
6 word "his" it may not be clear.

7 MR. REICHEL: It's her assessment of his personality  
8 traits.

9 THE COURT: Correct. I just want to make sure.  
10 Sometimes juror will come back just to define who "his" is, so  
11 I want to make sure.

12 MR. REICHEL: Mr. McDavid's. Thank you, Your Honor.

13 THE COURT: If you could add that to that.

14 MR. LAPHAM: We'll have to firm up the language. She  
15 never testified about filling out a 240-question questionnaire,  
16 but we can stipulate that that's in fact what happened.

17 MR. REICHEL: Okay.

18 THE COURT: She testified she filled out a  
19 questionnaire. Maybe it wasn't 240.

20 MR. REICHEL: We have it now, though. No one asked  
21 her. She just said she filled it out.

22 THE COURT: I want to make sure that it's in  
23 reference to Mr. McDavid.

24 MR. LAPHAM: Yes.

25 THE COURT: All right. That will be the stipulation

1 that will be entered.

2 MR. REICHEL: Thank you, your honor.

3 Also we have a stipulation about Ryan Lewis. Ryan  
4 Lewis has been discussed quite a bit, in my opinion, in this  
5 case, and I believe there is a certain amount of prejudice  
6 there to Mr. McDavid. But, nevertheless, I was going to call  
7 that case agent in that case to talk about Mr. McDavid's lack  
8 of involvement in that case, but the Government and I have a  
9 stipulation to speed things along, which was that: You have  
10 heard evidence that Eric McDavid was a friend of Ryan Lewis.  
11 Ryan Lewis was prosecuted in early 2005 for arson. The FBI  
12 desired to question Mr. McDavid in 2005 regarding his  
13 friendship with Ryan Lewis. Mr. McDavid was not a target of  
14 that investigation.

15 MR. LAPHAM: That's fine, Your Honor.

16 THE COURT: That's your stipulation?

17 MR. LAPHAM: Yes.

18 THE COURT: That stipulation will be entered into the  
19 record.

20 MR. REICHEL: That's all we have right now.

21 And then, finally, Your Honor, there are defense  
22 exhibits that -- without witnesses. Specifically, it's  
23 e-mails, four or five e-mails that were provided by the  
24 Government in discovery, testified to by the witnesses. Those  
25 are going to be marked as A-5, 7, I think, 11 and 12. And I've

1 got copies for the Court and the Government here, and they are  
2 marked. And then there are two tapes to be played.

3 THE COURT: On the exhibits, 5 -- what you just  
4 mentioned.

5 MR. LAPHAM: Your Honor, I'll have to look at those.  
6 I know that they were previously referenced in the trial. They  
7 weren't moved into evidence at the time.

8 MR. REICHEL: That's correct, Your Honor.

9 MR. LAPHAM: I just need to look at them and make  
10 sure we don't have any foundational objections.

11 THE COURT: I want to make sure when we enter these  
12 stipulations that there's going to be no problems.

13 MR. REICHEL: We'll need time -- a moment, maybe,  
14 because, otherwise, I would call either Anna or Zach back on  
15 the defense case-in-chief, and say -- first of all, they've  
16 already testified to these e-mails, but to get the foundation  
17 in so that they are admissible.

18 MR. LAPHAM: Your Honor, if I could get a listing of  
19 the particular exhibits again, we'll just check our notes.

20 THE COURT: Do you want to do that now?

21 MR. REICHEL: We are going to be 5 -- it's going to  
22 be A-5, A-7.

23 MR. LAPHAM: A-5, A-7.

24 MR. REICHEL: A-11 and A-12.

25 And the main reason that they were not introduced,

1 Your Honor, during the questioning of the witnesses is because  
2 the Government did not want the informant's other name -- Anna  
3 Davies -- Anna Davies was her other name. And, anyway, there  
4 was an e-mail account that they wanted to black out, so that  
5 there would be -- her e-mail account wouldn't be seen in  
6 public.

7 And so that day, even though the e-mails have been  
8 provided by the Government in discovery, we didn't have time to  
9 black them out and to sanitize them prior to their  
10 introduction.

11 THE COURT: All right. So where are we now?

12 MR. REICHEL: Finally, Your Honor --

13 THE COURT: Wait.

14 MR. LAPHAM: We'll take a look at those exhibits  
15 right away.

16 THE COURT: All right.

17 MR. REICHEL: Thank you, Your Honor.

18 Then I'm going to play -- I've got two video  
19 cassettes to play, two to four, five minutes, maybe, at the  
20 most. We have our own transcripts that I prepared and made.  
21 And I've got the 18 -- 16 -- 14 -- 13 copies and one for the  
22 Court, one for the Government, and they are not evidence,  
23 again, but they are marked for identification purposes, to  
24 track the discussions on the video.

25 MR. LAPHAM: Well, Your Honor, may I have a moment?

1 THE COURT: Yes.

2 MR. LAPHAM: Well, Your Honor, I hate to slow things  
3 down. We haven't seen these transcripts yet. They are not the  
4 Government-prepared transcripts, so I don't know if they are  
5 accurate. Mr. Reichel, apparently tried to get them to us last  
6 night and was unable to.

7 MR. REICHEL: My fax machine and copier went last  
8 night at about 8:00. Nevertheless, they are not the evidence.  
9 The video tape is going to be the evidence, the audio they  
10 hear. And they can look at it, and if it doesn't accord, I  
11 think excellent for him, you know, in closing argument, or  
12 wherever, I mean -- or the Court can strike it. The Court can  
13 say it's not accurate.

14 THE COURT: Well, I have instructed them throughout  
15 this trial that whatever is on the document is not evidence,  
16 and it's simply designed to assist them in hearing what's on  
17 the tape or the digital reproduction.

18 I think that I'm going to simply reiterate that fact  
19 today, and that if there's a discrepancy or you think you heard  
20 something different in your own hearing as to what was played  
21 is what controls, and that's the evidence. And we are going to  
22 pick these all up again, so they are not going to be utilized  
23 for any other purpose.

24 MR. REICHEL: Thank you, Your Honor.

25 MR. LAPHAM: That's fine.

1 MR. REICHEL: And finally, I think that will be it.  
2 The defense will be closed with just the exhibits. We're not  
3 calling any further witnesses.

4 THE COURT: In that case, will you read the  
5 stipulation? I think some of these are handwritten.

6 MR. REICHEL: Yes. I'll redo them here in a moment  
7 and with Mr. Lapham's approval, we'll read it in. And then  
8 once we close, we can -- I'll give them the typed version.

9 THE COURT: All right.

10 MR. LAPHAM: Your Honor, we apparently haven't moved  
11 into evidence Exhibits 30 and 45, and I would do so at this  
12 point.

13 MR. REICHEL: I don't think he can, Your Honor. I  
14 think the Government's case is closed.

15 THE COURT: I don't know what 30 and 35 are.

16 MR. LAPHAM: 30 is the actual CD of all the audio  
17 excerpts.

18 THE COURT: I see.

19 MR. REICHEL: I don't think he can reopen the case,  
20 Your Honor.

21 MR. LAPHAM: Your Honor, I would move to reopen it.  
22 They've all been played for the jury. The foundation's all  
23 been laid.

24 THE COURT: I understand that he is closed. I can  
25 have discretion to allow it to be, and since we have 30-A, B,

1 C -- everything else has been admitted -- D, E, F have all been  
2 admitted into evidence, I'm going to grant the Government the  
3 request to reopen for the purpose of admitting 30 and 35.

4 MR. LAPHAM: 30 and 45, your Honor.

5 THE COURT: 45.

6 MR. REICHEL: My objection is clear for the record, I  
7 hope.

8 THE COURT: Yes, it is. And you are objecting -- to  
9 make sure you have the objection that it's to 30 and 45,  
10 correct?

11 MR. REICHEL: Yes, Your Honor.

12 THE COURT: Thank you. Objection is overruled. 30  
13 and 45 will be admitted into evidence. It is within the  
14 Court's discretion to reopen to allow that to occur.

15 MR. LAPHAM: Thank you, Your Honor.

16 (Government Exhibit 30, CD containing excerpts,  
17 admitted into evidence.)

18 (Government Exhibits 45, 10/26/2005 E-mail, admitted  
19 into evidence.)

20 MR. REICHEL: Finally, Your Honor, Mr. Lapham, I  
21 understand, is going to call Anna back in rebuttal, and I think  
22 that I would oppose that as -- for the following reasons: The  
23 defense case-in-chief, I believe, is the only reason that they  
24 can call rebuttal evidence. If there was something they left  
25 out of the Government's case, if it's not raised in the defense

1 case-in-chief, under the rules of rebuttal I think he is  
2 prevented from calling Anna.

3 And the reason is very clear. Rebuttal should be  
4 only for things the defense raises in their case-in-chief  
5 because I don't have surrebuttal, Your Honor, and I would love  
6 surrebuttal.

7 THE COURT: I understand. And I'm assuming that  
8 whenever rebuttal witnesses are called, that it is based  
9 entirely upon what was brought up in the defense case-in-chief.

10 MR. REICHEL: And I've had character witnesses and  
11 just these exhibits, Your Honor, so I think it's going to be  
12 something outside of that, and I don't have surrebuttal.

13 THE COURT: Are you planning on doing anything  
14 outside of his cross-examination?

15 MR. LAPHAM: Your Honor, I told Mr. Reichel what I  
16 planned.

17 MR. REICHEL: Case-in-chief. Thank you.

18 MR. LAPHAM: And I'll tell the Court. I'm going to  
19 ask Anna if she ever asked Mr. McDavid when the idea for the  
20 bombing campaign originated, and she's going to testify it was  
21 two months before biotech, and we're going to play an excerpt  
22 to that effect.

23 That goes directly to the predisposition argument  
24 that Mr. Reichel is raising through his character witnesses in  
25 his case-in-chief, as well as a lot of his cross-examination of

1 Government witnesses. This was two months before McDavid  
2 reunited with Anna at biotech.

3 MR. REICHEL: I think it can't be my  
4 cross-examination, Your Honor. My cross-examination is for his  
5 redirect, and it's not for the rebuttal testimony.

6 MR. LAPHAM: As I say, it goes directly to those  
7 character witnesses.

8 THE COURT: I'll wait to hear as it goes on. You'll  
9 object, and I will rule accordingly.

10 MR. REICHEL: Thank you, Your Honor. We'll need a  
11 minute to draft these handwritten stipulations.

12 THE COURT: Do you need a few minutes to prepare for  
13 the stipulations? What I want to do is bring the jury out and  
14 advise them that there have been a number of stipulations that  
15 have been reached between counsel to help expedite the  
16 remaining portion of the trial. I would like for those  
17 stipulations to be read into the record in front of the jury.  
18 I would then like to play the -- are they audio/visual or just  
19 audio?

20 MR. REICHEL: There's audio/visual. It's going to be  
21 the video tape with the transcript.

22 THE COURT: Make sure that everything is up to date,  
23 ready to roll. And you think this is going to take how long?

24 MR. REICHEL: After I read -- as long as it takes to  
25 read the stipulations, I think my tapes are about six minutes,

1 seven minutes, overall, total.

2 THE COURT: So maybe within a half an hour?

3 MR. REICHEL: The defense case will be closed within  
4 a half an hour.

5 THE COURT: Are you prepared?

6 MR. LAPHAM: Yes.

7 THE COURT: All right. Then we'll do that. We'll  
8 take ten minutes. Can we get together in ten minutes?

9 MR. LAPHAM: Yes.

10 THE COURT: Ten-minute recess. We'll return. Madam  
11 Clerk, will you please advise the jury of what we are doing at  
12 this time, please. Thank you.

13 THE CLERK: Yes, Your Honor.

14 (Break taken.)

15 (Jury in.)

16 THE COURT: Good morning, ladies and gentlemen. For  
17 the record, the jurors have returned to the courtroom.

18 We were a little delayed in bringing you in this  
19 morning, but in the interim period of time we were able to --  
20 or I was not able to -- but the attorneys were able to reach  
21 certain stipulations concerning certain facts, which will  
22 eliminate the need for bringing more witnesses in this morning.

23 So I think in the long run, the time that was spent  
24 this morning will be well spent in that it should shorten the  
25 overall time that we're going to have to be in court today.

1 First of all, Mr. Reichel, you're going to be reading  
2 some stipulations; is that correct?

3 MR. REICHEL: That is correct, Your Honor.

4 THE COURT: Ladies and gentlemen, as I've indicated  
5 to you previously, a stipulation is an agreement between the  
6 lawyers regarding the facts.

7 Once you hear a stipulation, you are to consider the  
8 facts as set forth in that stipulation as having been proven  
9 true during the course of the trial. No additional evidence  
10 need be given at that time.

11 Mr. Reichel, please give the first stipulation.

12 MR. REICHEL: Thank you, Your Honor. First I need to  
13 approach the Court and provide a copy of the exhibit.

14 THE COURT: Thank you.

15 MR. REICHEL: Ladies and gentlemen of the jury, you  
16 have what is marked as Defense Exhibit D-2.

17 The stipulation is: The Defense Exhibit D-2 is the  
18 written advisement provided to Anna by Philadelphia FBI Agent  
19 Richard Torres. The written advisement that Mr. Torres and  
20 Anna testified about. And that is marked as Defendant's  
21 Exhibit D-2.

22 At this time, Your Honor, I would move Defendant's  
23 Exhibit D-2 into evidence.

24 MR. LAPHAM: No objection, Your Honor. And it's  
25 actually Ricardo Torres.

1 THE COURT: Thank you.

2 MR. REICHEL: I'll reflect that in the stipulation.

3 THE COURT: Yes. Defendant's D-2 is admitted into  
4 evidence.

5 (Defendant's Exhibit D-2, Written advisement,  
6 admitted into evidence for all purposes.)

7 MR. REICHEL: Thank you, Your Honor. Now, I'm going  
8 to read a defense stipulation which is, Defense Stipulation  
9 D1-A, which will be reduced to typewritten and provided.

10 D1-A provides as follows: On November 17 of 2005,  
11 Government witness, Anna, filled out a 240-question,  
12 multiple-choice questionnaire regarding her advisement of  
13 Mr. McDavid's -- excuse me -- her assessment of Mr. McDavid's  
14 personality traits. The FBI Behavioral Unit analyzed her  
15 answers and provided a psychological assessment of Mr. McDavid.

16 And that is Defense Exhibit D1-A. When that  
17 stipulation is reduced to typewritten, it will be provided to  
18 the jury. I would move that stipulation, as typewritten, into  
19 evidence, Your Honor. D1-A.

20 THE COURT: And there would be no objection?

21 MR. LAPHAM: Correct.

22 THE COURT: That will be admitted into evidence.

23 (Defendant's Exhibit D1-A, Stipulation by Counsel,  
24 admitted into evidence.)

25 MR. REICHEL: Defendant's D1-B is as follows: You

1 have heard evidence that Mr. McDavid was a friend of Ryan  
2 Lewis. Mr. Lewis was prosecuted in early 2005 for arson. The  
3 FBI desired to question Mr. McDavid in 2005 regarding his  
4 friendship with Ryan Lewis. Mr. McDavid was not a target of  
5 that investigation.

6 That is Defendant's D1-B, again, to be reduced to  
7 typewritten and provided. I would move that stipulation into  
8 evidence, Your Honor, as Defendant's D1-B once reduced to  
9 typewriting.

10 MR. LAPHAM: No objection.

11 THE COURT: It will be admitted into evidence.

12 (Defendant's Exhibit D1-B, Stipulation by Counsel,  
13 admitted into evidence.)

14 MR. REICHEL: Thank you, Your Honor.

15 Additionally, the following defense exhibits will --  
16 I'm going to move into evidence at this time.

17 Defendant's Exhibit A-7, which is an e-mail between  
18 parties in this case. I would ask to move Defendant's Exhibit  
19 D-7 (sic) into evidence, Your Honor.

20 MR. LAPHAM: Your Honor, no objection. And in the  
21 interim, I've had a chance to look at all of these defense  
22 exhibits Mr. Reichel wants to move in. The Government has no  
23 objection.

24 THE COURT: Thank you, Mr. Lapham. D-7 will be  
25 admitted into evidence.

1 MR. REICHEL: Thank you, Your Honor. Also, I would  
2 like to move another e-mail which has been marked as  
3 defendant's -- I'm sorry -- that was A-7 not D-7. So A-7. And  
4 no objection? Properly marked it's A-7.

5 MR. LAPHAM: No objection to A-5, A-7, A-11.

6 THE COURT: And A-12?

7 MR. LAPHAM: And A-12.

8 MR. REICHEL: A-12. I would ask to move those into  
9 evidence.

10 THE COURT: Admitted.

11 MR. REICHEL: They are copies of e-mails between the  
12 parties.

13 THE COURT: Yes. Understood. They are admitted as  
14 numbered.

15 (Defendant's Exhibits A-5, A-7, A-11, A-12, E-mails  
16 between the parties, admitted into evidence.)

17 MR. REICHEL: Thank you very much, Your Honor. And I  
18 will provide the Court a copy.

19 I would like to now play what's been marked as  
20 Defendant's Exhibit D -- excuse me -- E-2 -- E-2, which is an  
21 excerpt of a video cassette from January 12 of 2006. Start  
22 time, 17 hours 10 minutes, 59 seconds, end time 17 hours,  
23 19 minutes and 48 seconds. And I've got 2T, a transcript  
24 prepared. For identification purposes only I've marked it as  
25 E-2T. And I would ask permission to provide that to the jury.

1 THE COURT: Yes. Ladies and gentlemen of the jury,  
2 as stated previously, the transcripts which you are being given  
3 are not evidence at all. What you actually hear or see during  
4 the course of the playing of the digital audio file is the  
5 actual evidence. This is one interpretation of what counsel  
6 believes it says. If you disagree with what you -- with what  
7 is said on the paper, your own decision as to what you hear is  
8 controlling.

9 Once again, we will pick up the transcripts at the  
10 end of the playing of the audio file, and you will not have  
11 these transcripts with you to deliberate. You will have to  
12 remember what you hear and any notes that you may take as to  
13 what you hear.

14 MR. REICHEL: It's on the monitors, I believe.  
15 That's fine with me, Your Honor.

16 THE COURT: Jury, you can all see it? All right.

17 MR. REICHEL: Thank you.

18 (Video tape playing. 9:57 a.m. to 10:06 a.m.)

19 MR. REICHEL: Your Honor, I would move into evidence  
20 the excerpt of -- the excerpt that was just played -- not the  
21 transcript but the excerpt -- as Defense Exhibit E-2.

22 MR. LAPHAM: No objection.

23 THE COURT: E-2 is admitted.

24 (Defendant's Exhibit E-2, Video tape excerpt  
25 1/12/2006, admitted into evidence for all purposes.)

1 MR. REICHEL: Thank you, Your Honor.

2 Now I'm going to play what's been previously marked  
3 as Defendant's Exhibit E-3, which is another excerpt. And I  
4 have transcripts that are marked for identification purposes  
5 only as Defendant's Exhibit E-3T. Permission to approach?

6 THE COURT: Thank you. Ladies and gentlemen, the  
7 admonition the Court provided you earlier regarding the  
8 previous audio/visual transmission and transcript will apply to  
9 this as well.

10 What you see and/or hear will constitute the  
11 evidence. The transcript that you are receiving is only an aid  
12 to assist you in viewing and listening to the digital  
13 recording.

14 MR. REICHEL: Your Honor, this is identified as  
15 excerpt of video cassette January 12, 2006, start at 17 hours  
16 32 minutes and 28 seconds to 17 hours 52 minutes and  
17 38 seconds.

18 (Video tape playing. 10:08 a.m. to 10:29 a.m.)

19 MR. REICHEL: Your Honor that -- I move the admission  
20 of Defense Exhibit E-3, which is the excerpt that was just  
21 played of the video tape.

22 MR. LAPHAM: No objection.

23 THE COURT: E-3 is admitted. And counsel just so we  
24 have the record clear, I was assuming that we followed our  
25 previous stipulation that during the playing of the audio and

1 video digital recordings that the court reporter was not  
2 required to take down the voices that were heard?

3 MR. REICHEL: That's fine.

4 MR. LAPHAM: Agreed.

5 THE COURT: Thank you.

6 (Defendant's Exhibit E3, Video tape excerpt  
7 1/12/2006, admitted into evidence.)

8 MR. REICHEL: And that, I believe, closes the defense  
9 case, Your Honor. We're at the 10:30 break.

10 THE COURT: Thank you.

11 MR. LAPHAM: Your Honor, I'm not sure Mr. Reichel  
12 indicated the dates of these recordings. I know he noted the  
13 time. We're willing to stipulate these both occurred on  
14 January.

15 MR. REICHEL: January 12, 2006.

16 MR. LAPHAM: Correct.

17 MR. REICHEL: I think we will stipulate that these  
18 were the undercover video tapes made at the Dutch Flats  
19 residence.

20 THE COURT: So stipulated?

21 MR. LAPHAM: Correct.

22 THE COURT: Thank you.

23 Ladies and gentlemen, once again, you will take that  
24 stipulation that's been entered into by the attorneys here in  
25 open court as having been proven true as to the facts.

1 MR. REICHEL: Your Honor, it's 10:30, so I think  
2 we're going to take a break. If there's some one defense  
3 exhibit or something that wasn't introduced, I would ask not to  
4 close the defendant's case. I don't think there's anything.  
5 When we come back --

6 THE COURT: Let me see you at sidebar first, counsel.

7 (Begin sidebar conference.)

8 MR. REICHEL: I don't think there's anything since  
9 we're breaking anyway.

10 THE COURT: Are we going to have rebuttal?

11 MR. LAPHAM: No.

12 MR. REICHEL: We're done.

13 THE COURT: We're done.

14 MR. REICHEL: Discuss instructions.

15 THE COURT: So why don't I have them come back at  
16 1:30 for closing.

17 MR. LAPHAM: Sounds good.

18 MR. REICHEL: I mean, since we're at the break, I was  
19 going to look --

20 THE COURT: We'll take a break. I don't think it's  
21 going to take more than an hour or that long to do the  
22 instructions.

23 MR. REICHEL: So if we come back at 1:30?

24 THE COURT: Be ready to go at 1:30, but we'll take a  
25 break for them. They are free until 1:30. For you, we'll come

1 back in 15 minutes.

2 Talk to your client also about whether he wants to be  
3 present during the informal settling of the jury instructions.  
4 Because if he doesn't, we send him back. But if he wants to,  
5 we'll do them right here. I don't think it's going to take  
6 that long, one or two entrapments.

7 MR. REICHEL: I e-mailed them last night.

8 THE COURT: But the other pattern instructions from  
9 the Circuit.

10 MS. ENDRIZZI: Yeah. There's one -- Ellen Endrizzi  
11 -- there's one that's been revised in 2006, .38, and then  
12 there's one, because the defense put on character witnesses,  
13 that we have to add.

14 THE COURT: But I imagine it's not a lot. It's not a  
15 multiple count case. Very well. Thank you.

16 (End sidebar conference.)

17 THE COURT: Ladies and gentlemen, at this time, I'm  
18 going to excuse you to return at 1:30 p.m.

19 You have heard all the evidence that you are going to  
20 hear in this case. The Government has elected not to present  
21 any rebuttal evidence at this point, so all the evidence is now  
22 in. I'm going to meet with counsel regarding the jury  
23 instructions. That will take me some time, and rather than  
24 have you waiting and not sure what's going to happen, you will  
25 just be released from now until 1:30 p.m.

1           When you return at 1:30 p.m., the Government will  
2 begin its closing argument. Defense will have its closing  
3 argument. There may be some rebuttal argument, we don't know  
4 at this time, by the Government. I will then instruct you on  
5 the law that you are to take, and you will be sent to  
6 deliberate. I'm 99 percent sure by this afternoon. Any  
7 questions at all?

8           Although we're very close to getting to where you're  
9 going to begin your deliberations, it's important that you not  
10 form any opinions as of yet. So we will see you back here at  
11 1:30 p.m.

12           (Jury out.)

13           (Break taken.)

14           THE COURT: All right. We're outside the presence of  
15 the jury.

16           Were there any matters that needed to be addressed as  
17 far as exhibits, Mr. Reichel?

18           MR. REICHEL: No, Your Honor.

19           THE COURT: Defense rests?

20           MR. REICHEL: Yes.

21           THE COURT: Officially.

22           MR. REICHEL: Thank you.

23           THE COURT: All right. Mr. Lapham, officially no  
24 rebuttal?

25           MR. LAPHAM: Correct.

1 THE COURT: All right.

2 With respect to the jury instructions, Mr. Reichel,  
3 does your client wish to be present during the settling of the  
4 jury instructions.

5 MR. REICHEL: Yes, he does, Your Honor. Thank you.  
6 We discussed it, and he would prefer to stay.

7 THE COURT: That would be no problem whatsoever.

8 My normal procedure is to go off record during this  
9 time so there can be discussion regarding proposed  
10 instructions. Once they have been settled, we will go back on  
11 the record and settle them as far as any objections or other  
12 issues that may be put forth.

13 MR. REICHEL: Thank you.

14 THE COURT: All right. We're off the record.

15 (Discussion off the record settlement of jury  
16 instructions.)

17 THE COURT: All right. We're on the record. We have  
18 informally settled the instructions. And at this time what I'm  
19 going to do is indicate for the record the instructions that  
20 will be given. We still have to go through the instructions  
21 from the defense standpoint, but rather than duplicate efforts,  
22 I'm going to go ahead and take that on the record as we get  
23 there.

24 As far as the instructions that will be given, I'm  
25 going to refer to them, if at all possible, through the numbers

1 used for the Ninth Circuit pattern instructions.

2 First instruction to be given will be instruction  
3 3.1. And these I should say are from the pattern instructions  
4 2003 except where indicated it should be indicated 2005.

5 3.1, 3.2, 3.3, 3.5, 3.6, 3.7, 3.8, 3.9 also 3.11.

6 4.1 has been modified so that "you have heard  
7 testimony that the defendant made statements. It is for you to  
8 decide, one, whether the defendant made the statements." And  
9 that's in the bracketed "s", plural, and, two, if so, how much  
10 weight to give to it, et cetera.

11 4.4 is character of the defendant. That is also a  
12 Ninth Circuit pattern instruction.

13 4.9, pattern instruction. This is the new version  
14 revised June of 2005. And the instruction will actually be put  
15 in the form of three separate instructions for three witnesses.

16 The first instruction will read: You have heard  
17 testimony from Anna, a witness who received reimbursement of  
18 her expenses and compensation from the Government in connection  
19 with this case. For these reasons, in evaluating Anna's  
20 testimony you should consider the extent to which or whether  
21 Anna's testimony may have been influenced by any of these  
22 factors. In addition, you should examine Anna's testimony with  
23 greater caution than that of other witnesses.

24 The next will be as to Lauren Weiner: You have heard  
25 testimony from Lauren Weiner, a witness who admitted to being

1 an accomplice to the crime charged. An accomplice is one who  
2 voluntarily and intentionally joins with another person  
3 committing a crime. By pleading guilty to a crime arising out  
4 of the same events for which the defendant is on trial --  
5 pardon me -- Lauren Weiner also pled guilty to a crime arising  
6 out of the same events for which the defendant is on trial.  
7 This guilty plea is not evidence against the defendant, and you  
8 may consider it only in determining the witness' believability.  
9 For this reason, in evaluating Lauren Weiner's testimony, et  
10 cetera. The final paragraph.

11 And that will be the same for Zachary Jensen as well.  
12 Any questions or objections?

13 MR. LAPHAM: No.

14 MR. REICHEL: No.

15 THE COURT: Thank you.

16 Instruction 4.13 has been modified. The pattern  
17 instructions refer to undercover cooperating -- pardon me --  
18 undercover agents and informants. It's been modified to be  
19 undercover cooperating witnesses.

20 Any objections?

21 MR. REICHEL: Well, you know, I don't know if it  
22 squares with the evidence. I thought there was another  
23 instruction that we can give about when someone is a Government  
24 agent or not.

25 I think they called her a cooperating witness a few

1 times, but I think she also acknowledged to being an undercover  
2 agent repeatedly in my cross-examination. She was -- you know,  
3 she worked as an undercover agent for the FBI. And if -- you  
4 know, to call someone a cooperating witness, like this, after  
5 this evidence, I think is an attempt to try to shield her from,  
6 you know, working for the FBI, and that's my concern is that --

7 THE COURT: But the distinction was made very clearly  
8 in the testimony by the other agents that Anna's never been to  
9 the FBI academy, Anna's not a sworn agent, Anna is not an  
10 agent, period.

11 I think if you're using the term "agent" in the loose  
12 form of maybe the agency theory, she was an agent working for  
13 someone under a theory of respondeat superior. To a certain  
14 extent, I can understand that. But the context to which I  
15 believe you're trying to bootstrap her into is that she is, in  
16 essence, an unsworn FBI agent and has been through the  
17 training, and will be held to the same standards as an FBI  
18 agent.

19 The fact of the matter is she was a cooperating  
20 witness who happened to work for the FBI. I think there is a  
21 difference between those two designations of Anna.

22 MR. LAPHAM: And, Your Honor, the jury did hear  
23 testimony that those are terms of art, and they were told the  
24 difference between a confidential informant and a cooperating  
25 witness.

1 THE COURT: Yes. That was very clearly made at  
2 points during the course of the trial. So if there is an  
3 objection, Mr. Reichel, I'm going to overrule the objection.

4 MR. REICHEL: It's that she should be a Government  
5 informant. I think she testified that's what she was.

6 First of all, she said she was a confidential  
7 informant for most of the time, and she became a cooperating  
8 witness at some point. And I just think calling her a  
9 cooperating witness is just not what happened.

10 THE COURT: Well, it's an undercover cooperating  
11 witness.

12 MS. ENDRIZZI: Your Honor, there was a clear  
13 distinction in the terms of the evidence that was presented in  
14 this case. Because until she became a cooperating witness, she  
15 could not record the conversations and such. So while she was  
16 as a confidential informant reporting, once she became a  
17 confidential witness, she recorded. And so confidential  
18 witness would probably be most accurate when we're looking at  
19 the evidence here.

20 MR. REICHEL: What is it, a confidential witness  
21 informant?

22 MS. ENDRIZZI: Cooperating witness.

23 THE COURT: Cooperating witness.

24 MS. ENDRIZZI: Right.

25 THE COURT: That's when she changed to actually

1 taking on, as you said, the wire. As an informant, she would  
2 simply be one who would give information to the agency, but  
3 would not sit here on the witness stand and actually testify.  
4 So she's a cooperating witness who was undercover.

5 So I'm going to leave -- make 4.13 modified so that  
6 she would be an undercover cooperating witness. I think that  
7 would be appropriate in the light of evidence as presented.

8 The next instruction would be pattern instruction  
9 8.16. It's modified only to the extent that 841(i) will be  
10 included in the charges. Everything else remains as the  
11 pattern instructions from 2003.

12 There is another instruction, specific instruction on  
13 the elements that the Government is requesting. I don't have  
14 that in front of me. It's being prepared by the Government at  
15 this moment. Mr. Reichel, I think you've seen that.

16 MR. REICHEL: I agree with it as amended.

17 THE COURT: You agree. That will be in the packet  
18 that will be hopefully provided here in a very short period of  
19 time.

20 That ends the Government's requested instructions.  
21 And I will be giving pattern instructions 7.1, 7.2, 7.3, 7.4,  
22 7.5 and 7.6.

23 All right. Now, we have not come to the defense  
24 requested instructions. Mr. Reichel, I know you're requesting  
25 entrapment.

1 MR. REICHEL: Prior to that, Your Honor, there is a  
2 lesser-included offense instruction. On page 22 of my chambers  
3 copy or the original filed jury instructions.

4 The pattern also from the Ninth Circuit, 3.15. I  
5 just added the elements of 371.

6 THE COURT: As to the lesser-included?

7 MR. LAPHAM: Your Honor, I don't believe that's a  
8 correct statement of the law. Congress has set forth a  
9 specific conspiracy statute in 844. And I think that reflects  
10 Congress' intention that that should be charged and not the  
11 371. I don't think Congress intended that 371 to be a  
12 lesser-included offense.

13 MR. REICHEL: It clearly is, Your Honor. It  
14 absolutely meets the definition of a lesser-included offense,  
15 and the Ninth Circuit directs not only in the jury instruction  
16 but in the cases I cited there. They direct that -- I think  
17 it's error to not include a lesser-included offense when  
18 requested by the defendant if it is, in fact, a lesser-included  
19 offense.

20 And in this case, specifically, the other two  
21 co-conspirators in the Indictment actually plead guilty to that  
22 exact charge. I think there's not a lot more -- you don't need  
23 better evidence than that that it's a lesser-included offense.  
24 And it's just that that's the definition of a lesser-included  
25 offense. It's the clear definition.

1 MR. LAPHAM: Well, those defendants pled guilty after  
2 a superseding information was filed. You wouldn't -- if  
3 somebody is allowed to plead to a phone count in a drug case,  
4 you wouldn't say that's a lesser-included offense for that fact  
5 alone.

6 MR. REICHEL: It's the defendant's gamble, Your  
7 Honor, is the point. And I think there is a lot of case law  
8 that it's error to not instruct upon the defendant's request  
9 because it is their gamble. They are offering the instruction.

10 THE COURT: Well, that's my question, Mr. Lapham. In  
11 this particular case, I understand your point. But is this a  
12 case where the rational jury could find the defendant guilty of  
13 the lesser offense of conspiracy as to the one charged here?  
14 Could they?

15 MR. LAPHAM: I'd have to say --

16 THE COURT: That's the comments in the Ninth Circuit  
17 instruction, could a rational jury find the defendant guilty of  
18 the lesser offense but not guilty of the greater one.

19 MR. LAPHAM: Your Honor, I'd have to say "yes" to  
20 that. I wonder if we could do this. I confess I didn't do a  
21 lot of research on this. We had a case that we thought stood  
22 for that proposition. I can't find the reference in the case.

23 THE COURT: For the proposition that?

24 MR. LAPHAM: That, well, it's a money laundering  
25 case, and it basically says that 371 is not a lesser-included

1 offense of the conspiracy to commit money laundering statute,  
2 which is a wholly different statute. If before we --

3 THE COURT: What I'm going to do is I'm going to  
4 include the instruction, and if you provide me authority, prior  
5 to me coming in, showing that this is not a lesser-included, or  
6 371 is not applicable here, then I'll deal with that at that  
7 time.

8 But as of right now, I find that a rational jury  
9 could find Mr. McDavid guilty of the lesser crime but not of  
10 the greater because the elements are: There was an agreement  
11 between two or more people to commit a federal crime; the  
12 defendant became a member of the conspiracy knowing of at least  
13 one of its objects and intending to accomplish it; and one of  
14 the members of the conspiracy performed at least one overt act.

15 And that seems to satisfy the three elements that I'm  
16 looking at. Because there were a number of things that were  
17 discussed and talked about. They weren't all about explosives  
18 and bombs, etcetera, that were in fact or could be considered  
19 illegal and could be federal crimes for which these 12 people  
20 may have all agreed upon one of those but not of the greater.

21 MR. LAPHAM: The problem we're going to get into is  
22 371 we're going to have to identify what the object of the  
23 conspiracy was, and it's going to be identical to the object of  
24 the greater conspiracy.

25 In other words, 371 requires that it be a conspiracy

1 to violate the law for laws of the United States. What laws  
2 would that be? 844(i), 844(f). So --

3 MR. REICHEL: That's probably correct, Your Honor,  
4 just except that for the objects of this conspiracy, as the  
5 Court just identified actually.

6 If they say, you know, the lesser-included here is if  
7 they are talking about blowing up the World Bank in New York, I  
8 think, or going to Los Angeles and knocking out power stations.

9 And if there was an agreement on November 18 or  
10 January 13th, that's 371. That's just not the charges in this  
11 Indictment. 371 and 844(i), but it's just not these 844(i)s as  
12 set forth in this Indictment.

13 THE COURT: Like I said, I'm going to give the  
14 instruction unless I hear something. Because I understand what  
15 you're saying, Mr. Lapham, but, again, the 844 is a specific  
16 statute. And it would appear that there is enough evidence  
17 that's been presented that a rational jury could find the  
18 defendant guilty of the lesser offense.

19 I'm going to look at this again, but it would be a  
20 greater error to not give a lesser-included than to give one.  
21 And I believe under the circumstances I'm going to give this --  
22 we'll call it your 315.

23 MR. LAPHAM: Your Honor, if I could take one more  
24 stab at it. The comment says, the instruction is appropriate  
25 where a lesser offense is identified within the charged

1 offense, and a rational jury could find the defendant guilty of  
2 the lesser offense but not guilty of the greater offense.

3 And my argument would be that there is no  
4 circumstance I can think of where that could apply. They could  
5 -- if they find him guilty of the lesser offense, it would be  
6 -- we would be instructing them that the elements are identical  
7 for the lesser offense and the greater offense. They would  
8 have to find him guilty of the greater offense as well.

9 MR. REICHEL: I just disagree, Your Honor. It  
10 doesn't have to be in the Indictment. If it's a  
11 lesser-included offense, and the defendant takes that gamble  
12 and asks for that, I think the case law in state court and  
13 federal court is very clear.

14 MR. LAPHAM: That's not my argument. My argument is  
15 if we instruct the jury on the lesser-included offense, the  
16 elements of that lesser-included offense would be identical to  
17 the greater offense. You'd basically be giving them the  
18 opportunity to --

19 THE COURT: That is a case. On 816 the elements are  
20 exactly the same as 315.

21 MR. LAPHAM: You'd basically be giving the jury an  
22 option that Congress did not intend.

23 MR. REICHEL: I have to object to that, Your Honor,  
24 about Congress not intending. The Indictment alleges three  
25 places: IFG and the cell phone towers and the Nimbus Dam.

1           There is nothing but evidence actually from the  
2 Government throughout the trial about the individuals sitting  
3 around, talking about a variety of different targets, goes on  
4 and on and on about that. Not defense evidence but --  
5 cross-examination -- but Government evidence about it.

6           Yes, they didn't put it in the Indictment. Then  
7 their two main witnesses pled guilty to general 371s, Your  
8 Honor, to the 371. It's clearly a lesser-included offense of  
9 the charge, and, you know, to take that away from the defendant  
10 I think is clear error.

11           THE COURT: But how do you address the issue that the  
12 elements of the two offenses cannot be the same?

13           MR. REICHEL: They are not the same. 371 doesn't  
14 require all that the 844(i) does.

15           MR. LAPHAM: It clearly does.

16           THE COURT: It looks pretty close. I'm looking at  
17 both of them right now.

18           371 says, at a time contained in the Indictment there  
19 was an agreement between two or more people to commit a federal  
20 crime.

21           Number one -- except for the fact you've given a date  
22 here -- there was an agreement between the defendant and at  
23 least one other person to commit the crime charged in the  
24 Indictment, a federal crime.

25           Two, the defendant in this case became a member of

1 the conspiracy knowing of at least one of its objects and  
2 intending to help accomplish it.

3 The defendant being a member of the conspiracy  
4 knowing of at least one of its objects and intending to help  
5 accomplish it. That's word for word.

6 Number three, one of the members of the conspiracy  
7 performed at least one overt act for the purpose of carrying  
8 out the conspiracy.

9 One of the members of the conspiracy performed at  
10 least one overt act for the purpose of carrying out the  
11 conspiracy with all of you agreeing on a particular overt act  
12 that you find was committed. That's the same.

13 MR. REICHEL: Well, Your Honor, it's still a  
14 lesser-included offense in this case.

15 THE COURT: Well, here's the thing. The verdict form  
16 should state what that overt act was, and that will clarify it.  
17 Because if you stop and think about this, if you're saying that  
18 it's the three things that you talked about, fish hatchery --

19 MR. REICHEL: The Dam.

20 THE COURT: -- the Dam and Institute for Forest  
21 Genetics, they are going to have to agree on one of those.

22 MR. LAPHAM: We disagree with that.

23 MR. REICHEL: Of course.

24 THE COURT: What is your position?

25 MR. LAPHAM: They have to agree to violate the law.

1 They have to agree to violate either 844(i) or 844(f). So they  
2 have to agree that they -- it was a conspiracy to attack  
3 federal buildings or structures in interstate commerce. They  
4 don't have to agree that there was any one specific target  
5 that they were discussing.

6 THE COURT: Correct. It's one of those items. In  
7 other words -- I guess let me clarify myself.

8 I don't mean that they were having a conspiracy to go  
9 beat up a federal officer. We don't have any evidence of that.  
10 We're talking about these three buildings or three places. So  
11 it has to be regarding that overt act, has to be applicable to  
12 one of those or to this conspiracy here, correct?

13 MR. LAPHAM: Well, we're not limited to the targets  
14 that are set forth in the Indictment is what I'm saying. Those  
15 are overt acts. We're not limited to the overt acts. We can  
16 go beyond and show that there were more overt acts, that they  
17 surveilled other targets, that they did research on other  
18 targets, provided those targets fall into either of those  
19 categories federal building or --

20 THE COURT: But whatever the overt act is, they all  
21 have to agree upon that.

22 MR. REICHEL: They have to agree on the conspiracy  
23 and the objects of the conspiracy.

24 THE COURT: They have to agree upon what overt act  
25 you're talking about.

1 MR. LAPHAM: Right. And that overt act would be  
2 mixing chemicals, purchasing ingredients, going out and getting  
3 the James Bond manual.

4 MR. REICHEL: That's a different crime.

5 MR. LAPHAM: That's different than the object of the  
6 conspiracy. The object of the conspiracy --

7 THE COURT: Because the instruction requires that  
8 there be an overt act upon which all 12 jurors unanimously  
9 agree.

10 MR. LAPHAM: Right.

11 MR. REICHEL: That's not the only thing they have to  
12 agree on. They have to agree on the targets and the object of  
13 the conspiracy.

14 MR. LAPHAM: No. They have to agree on the object of  
15 the conspiracy. Your Honor --

16 THE COURT: I understand what you're saying. You  
17 don't have to explain to me. I understand.

18 MR. LAPHAM: All right.

19 MR. REICHEL: Well, right now, obviously, it violates  
20 Rule 7. You're entitled to a Grand Jury Indictment under  
21 Federal Rule of Criminal Procedure, Rule 7, as well as the  
22 United States Constitution in felonies. And he was indicted on  
23 the IFG. He was indicted on the cell phone towers. And I  
24 think the phrase "to wit" is used in the Indictment, and that's  
25 what the trial was about that I watched.

1           Yeah. It's very specific in the Indictment. Page  
2 one, the bottom, to page two. It says, they conspired by means  
3 of fire and explosive the IFG, the Dam, and the cell phone  
4 towers.

5           THE COURT: Yours says what now?

6           MR. REICHEL: The Indictment.

7           THE COURT: The date is?

8           MR. REICHEL: January 25th, 2006. May I approach and  
9 provide the Court a copy?

10          THE COURT: I have it right here.

11          MR. REICHEL: Down at the bottom of the first page,  
12 it says they conspired with each other to maliciously damage  
13 and destroy.

14          THE COURT: But you said the IFG.

15          MR. REICHEL: Yeah, that's U.S. Forest Service --

16          THE COURT: Right. But I was thinking you're reading  
17 this literally.

18          MR. REICHEL: Number one is the building and personal  
19 or real property of the United States Forest Service, United  
20 States Department of Agriculture, which was the Institute of  
21 Forest Genetics. Building or real property of the Bureau of  
22 Reclamation, Department of the Interior, which was the Nimbus  
23 Dam.

24          THE COURT: Fish hatchery.

25          MR. REICHEL: Yes. Fish hatchery. And then the

1 others are the cell phone tower and electric power station.

2 I think it would be fatal variance from the  
3 Indictment for evidence to be used to try to convict the  
4 defendant for other actions that violate 844(n) and (i) other  
5 than these three that are set forth specifically in the  
6 Indictment.

7 THE COURT: All right. Having reviewed my previous  
8 decision on the lesser-included, I don't find it's appropriate,  
9 and I will not be giving 37 -- 3.15.

10 The next requested instruction -- and I believe for  
11 the reasons stated that it is the same elements or the same  
12 between the two and 8.16 is controlling.

13 MR. LAPHAM: Thank you, Your Honor.

14 MR. REICHEL: Your Honor, before we leave it, that's  
15 fine. I understand the Court's ruling. But my concern is what  
16 the Government's going to prove in this case. That we just  
17 started getting into the convicted defendant. They don't have  
18 to prove there was any agreement for the objects of this  
19 conspiracy. And right now it's a variance that violates Rule  
20 7, and it violates the Constitution. The Indictment clause.  
21 You go to trial on what you indicted on not what, you know, you  
22 proved at your trial.

23 THE COURT: I understand. Your objection has been  
24 noted, Mr. Reichel. What's the next instruction you are  
25 requesting?

1 MR. REICHEL: Well, I just need to know before we  
2 argue, if the Government's going to say we don't have to prove  
3 -- I mean, we are here for jury instructions. And if there is  
4 an instruction that I don't see here somewhere that's going to  
5 say that we don't have to prove there was an agreement upon the  
6 co-conspirators for a certain object or target, then I don't  
7 know, you know, I don't know what to say at this point.

8 THE COURT: No. That's your instruction that you are  
9 preparing at this point. Do you have that instruction here?  
10 It's gone.

11 MS. ENDRIZZI: They took it down to type it.

12 MR. REICHEL: Which one is that?

13 THE COURT: The one that you agreed upon earlier  
14 that's being redone.

15 MR. REICHEL: 8.16, is that what we call it?

16 THE COURT: No. It's actually the one that follows  
17 8.16. It's not an actual pattern.

18 MS. ENDRIZZI: The one with the language of 844(f)  
19 and (i).

20 MR. REICHEL: I have it.

21 THE COURT: Specifically referred to the acts that  
22 we're talking about. That's what we're talking about. It's  
23 not in the packet right now. It's being typed.

24 MR. REICHEL: I'm at a loss of where that leaves us.

25 THE COURT: Well, you agreed to that particular

1 instruction, and that instruction is what --

2 MR. REICHEL: Yeah, well --

3 THE COURT: Hold on. I think we may be able to --

4 MR. REICHEL: I've got it in front of me. Those are  
5 the elements of the crime? But that doesn't mean that's the  
6 charges in this case. The crime of 844(n) and (i) and (h),  
7 those are -- you know, that's what's set forth in the U.S.  
8 code, but you don't get to convict the defendant unless they  
9 are actual objects of a conspiracy. Especially when they are  
10 alleged in the Indictment.

11 THE COURT: All right. Response?

12 MR. LAPHAM: Your Honor, I'm not quite sure what I'm  
13 responding to. The charge here, the single charge in this case  
14 is conspiracy to violate 844(f) and (i). The charge is 844(n).  
15 That's the conspiracy component of 844. The Indictment alleges  
16 that there was a conspiracy to violate 844(n) to attack federal  
17 buildings and interstate installations, and three such targets  
18 are mentioned in the Indictment.

19 That's sufficient notice to the defendant of what he  
20 is being charged with. But the Government is not limited to  
21 the overt acts set forth in the Indictment. We can prove  
22 additional overt acts, and we have in this case.

23 MR. REICHEL: Your Honor, it's not that we didn't  
24 have notice of the Indictment. We didn't have notice of what  
25 the attempt at conviction was going to be. And that's illegal.

1 They have -- the conspirators have to agree as to the objects  
2 of this conspiracy as set forth in the Indictment. That's what  
3 the trial was about.

4 MS. ENDRIZZI: I think the problem is is we're  
5 equating object with target, and that's not the case. What you  
6 have here, your object is either to blow up or damage or  
7 destroy by fire, Government property or real property. In the  
8 alternate, that affects interstate commerce. So that's your  
9 object. It's a totally separate thing to say your targets are  
10 the IFG or the Nimbus Dam or the cell phone towers.

11 So you have your object, and then what you'll have to  
12 identify is the overt act.

13 MR. REICHEL: It is a separate thing to say those  
14 three things. That's the point. That's specifically set in  
15 the Indictment. I mean there's not even a break. It says, the  
16 conspiracy was to buildings -- you know IFG, Nimbus Dam.

17 THE COURT: But it doesn't say IFG. You're adding  
18 the specifics of a particular location in the Indictment. It  
19 doesn't say that.

20 MR. REICHEL: It says a building and personal  
21 property. Then they have to prove to the jury that it was a  
22 building and personal, real property of the Forest Service,  
23 Department of Agriculture, the real property of a place  
24 receiving assistance from the Bureau of Reclamation, Department  
25 of the Interior. And there are stipulations of both of those,

1 the Nimbus Dam and the Institute of Forest Service Genetics  
2 were in interstate commerce and received federal funding.  
3 That's our stipulation that the commerce clause element is met  
4 because that's what they were going to prove in this case is  
5 this building with the U.S. Forest Service and the other  
6 buildings from the Bureau of Reclamation.

7 THE COURT: I have made my decision on this,  
8 Mr. Reichel. I think I've given you ample opportunity to make  
9 your record.

10 MR. REICHEL: Okay.

11 THE COURT: And I believe that the Indictment is very  
12 clear, the nature of the conspiracy, what the object of the  
13 conspiracy was versus the targets of the conspiracy have been  
14 laid on very clearly here.

15 Now, the elements of conspiracy are set forth in  
16 8.16, and with the follow-up instruction after 8.16, that is  
17 what needs to be proven beyond a reasonable doubt, that is what  
18 complies with what the Indictment said originally that was  
19 filed on January of 25th of 2006.

20 So I don't believe that your position that you are  
21 taking -- I understand what you're taking -- but it's not  
22 appropriate here in this case. So in light of the time that  
23 we're dealing with now, to get this moving, we're going to move  
24 on. I'm not going to continue on with 3.15 as being the  
25 lesser-included.

1 MR. REICHEL: Thank you, Your Honor.

2 THE COURT: Thank you. I appreciate it. And we are  
3 to --

4 MR. REICHEL: As far as the elements of 844, the  
5 explosives, comes directly from the statute. I think it would  
6 be --

7 THE COURT: What number is this one for you?

8 MR. REICHEL: That is one of the defense special jury  
9 instructions.

10 THE COURT: Page?

11 MR. REICHEL: Yes. As soon as I find it.

12 MR. LAPHAM: Your Honor, these were the instructions  
13 that were filed today. They differ from the other instructions  
14 the defendant filed because they are dated with today's date.

15 THE COURT: I see.

16 MR. REICHEL: I have a copy in front of me. It is  
17 page four.

18 THE COURT: I have it now.

19 MR. REICHEL: That's directly from relevant statutes.

20 THE COURT: Response from the Government?

21 MR. LAPHAM: Your Honor, we object to the  
22 instruction. This is in the co-op crime. They are not charged  
23 with possessing an explosive. They are not charged with using  
24 an explosive. The Government has to prove that there was an  
25 agreement to bomb certain things. And there's been plenty of

1 evidence of that. There's also been evidence that they never  
2 would have gotten close to building a bomb if the Government  
3 had anything to say about it because we never let them have  
4 anything that approached that.

5 The jury doesn't have to find that they actually, in  
6 fact, could have created an explosive, and that's why this  
7 instruction --

8 THE COURT: Why do we need to have this instruction,  
9 Mr. Reichel?

10 MR. REICHEL: Because it's one of the elements.  
11 Because the crime they've charged him with has that the -- they  
12 are going to instruct the jury that he had to maliciously  
13 destroy, damage, attempt to damage by means of fire or an  
14 explosive. And then -- by means of fire or an explosive. And  
15 then in the statute itself, the next paragraph, paragraph J, it  
16 again defines explosives.

17 Clearly, for any prosecution under 844, there would  
18 never be a case where they didn't have to define explosive or  
19 incendiary device as defined in its own statute. All of the  
20 cases on prosecutions under 844(i) the Court instructs the jury  
21 on what explosive or incendiary device means. Because,  
22 specifically, there are variety of cases that say gasoline,  
23 just simply lit gasoline is not -- is not sufficient under 844.

24 I'm sure Mr. Lapham probably knows that from his  
25 arson cases. But that's not an explosive device unfortunately.

1 If it's in a container and compressed and it can become an  
2 explosive device, but actually several case in this circuit and  
3 elsewhere go through and talk about that exact language and  
4 discuss why the jury has to be advised --

5 THE COURT: If the terms of a conspiracy? Because --

6 MR. REICHEL: Yes.

7 THE COURT: -- that's what I'm looking at. Because  
8 if a person is charged with attempting to use explosives or  
9 possession of explosives or something to that effect, then I  
10 would see where explosive would need to be defined.

11 But if I am in a position with another person or  
12 persons, and we are merely discussing the use of an explosive  
13 to blow up the federal building and doing things toward that  
14 with an overt act, I don't have to actually have the explosive.

15 MR. REICHEL: Your Honor, you have to at least  
16 understand what the term would be. Explosives are actually  
17 specifically defined in the statute in 844, and some things are  
18 not explosives and you can't be convicted. Like in this case,  
19 you cannot be convicted -- I'm sure Mr. Lapham knows this --  
20 for just gasoline, pouring gasoline and lighting it is not an  
21 explosive device pursuant to the Ninth Circuit.

22 MR. LAPHAM: Actually, those are obsolete cases.

23 MR. REICHEL: But that means -- what his point is  
24 that that issue was addressed and discussed as to what  
25 explosives mean, and the point is there is a definition for

1           them.

2                   MR. LAPHAM:  Those are all arson cases.  Not  
3           conspiracy.

4                   MR. REICHEL:  He is a charged with arson.

5                   MR. LAPHAM:  He's charged with conspiracy.

6                   THE COURT:  No.  He is charged with conspiracy.  Not  
7           charged with arson.

8                   MR. REICHEL:  To commit arson.

9                   THE COURT:  He's not charged with arson.

10                   MR. REICHEL:  But you can't take away the elements of  
11           the underlying crime and say, once you enter into the agreement  
12           of the conspiracy, no further proof of the underlying elements  
13           need to be shown by the Government.  They have to know what the  
14           crime is.  The jury does, let alone the defendant who is  
15           charged with it.  You have to instruct, I believe, as to what  
16           explosives and incendiary device -- it's from 844(j), which is  
17           the paragraph above (n) and below (i).

18                   MR. LAPHAM:  Your Honor, if there were never any  
19           chemicals in this case, if all we had was going out and  
20           purchasing The Poor Man's James Bond or surveilling the IFG,  
21           that would be sufficient, and there would be no basis for any  
22           instruction at all.

23                   MR. REICHEL:  As long as they agreed on explosive  
24           device, and that meant if it was to pour gasoline, Your Honor,  
25           that's not an explosive device.  That's why it defines it for

1 the jury. That's why it defines it in the case law.

2 THE COURT: I don't find that that instruction is  
3 required. Your request is denied. This is again a conspiracy  
4 case, and it's not taking it to the level that you're wanting  
5 to take it.

6 I understand what you're saying Mr. Reichel, but this  
7 is a conspiracy case. And I think Mr. Lapham has clearly  
8 pointed out that you don't have to have the actual explosive.  
9 It's the agreement, the working together, the overt act of some  
10 place. Maybe they were on the way to get something, but they  
11 didn't get there. That's the overt act. So the use of the  
12 word "explosives" does not need to be defined, and that will be  
13 denied.

14 Is there another one? We're going to go to the  
15 entrapment I know. You're going to want to have --

16 MR. REICHEL: That's fine, Your Honor.

17 THE COURT: -- the pattern instructions 6.2 and 6.3.

18 MR. REICHEL: I submitted those, yes.

19 THE COURT: First of all, Government, are you going  
20 to argue that there is not sufficient evidence that's been  
21 presented for an entrapment defense?

22 MR. LAPHAM: Your Honor, that's my belief, but I  
23 think to avoid the issue on appeal, we're going to let it go to  
24 the jury.

25 THE COURT: Only slight evidence need be raised for

1        entrapment. I think the case law is very clear in the Ninth  
2        Circuit. And from the evidence that I've heard presented, it's  
3        possible that a jury could look to see whether or not there was  
4        predisposition or inducement. I mean, there is some -- it can  
5        go. I think that a rational trier of fact could see things in  
6        a very interesting way, and so I don't believe that -- I think  
7        it would be clear error for this Court, under the facts  
8        presented during the course of this trial, to not give the  
9        entrapment defense instruction.

10                MR. REICHEL: And the Court got my briefing last  
11        night on Jacobson and Poehlman?

12                THE COURT: Yes.

13                MR. REICHEL: In it I talked about predisposition  
14        being -- I think clearly in Jacobson they explain that it's  
15        prior.

16                And Jacobson -- just briefly -- it was in February of  
17        1984 that Mr. Jacobson got some pornography, whatever it was,  
18        and then it was January of '85, which is eleven months later,  
19        the Government then began a postal service campaign  
20        investigation of him -- a postal service campaign investigation  
21        of him.

22                And the Supreme Court rejected the Government's  
23        argument, which they are making, I think, in this case. And  
24        they rejected very clearly, the majority opinion in Jacobson,  
25        the Government's position in this case, and stated that you

1 must look at the predisposition of the individual prior to that  
2 postal campaign, mailing campaign, which began eleven months  
3 later.

4 So I think that that's analogous here, and this  
5 undercover informant, who was working for the Government, we  
6 would have to look at August of 2004.

7 THE COURT: But I went through this yesterday. The  
8 simple fact that there was contact with Anna at some point in  
9 time prior to June of 2005 does not automatically put this into  
10 a situation where the Government was having any influence,  
11 whatsoever, on the defendant.

12 The cases that you refer to -- and I've read the  
13 cases and looked at them -- were entirely different. And the  
14 case you just referred to, the child pornography, the defendant  
15 in that case had ordered some materials prior to the law being  
16 enacted which made it illegal.

17 It was after it became illegal -- I think it's the  
18 Child Protection Act, that the Government then went through the  
19 mailing lists and then contacted him directly. And when there  
20 was no other contact and then kept going, kept going, kept  
21 going. And it was after these repeated attempts that he  
22 finally went in and decided that he was going to purchase.

23 Now, the Court found appropriately that that's not  
24 appropriate. And in this case, Anna was there at various  
25 conventions with a number of other people. My recollection of

1 the evidence was that Anna was simply there, and there may have  
2 been contact. The first time there was even any real  
3 inclination that something was going on was when they were on  
4 the balcony at one of the conventions, and Mr. McDavid said,  
5 I've got something big going on in California.

6 Even at that point you can't say that Anna induced  
7 him to make that comment to get something going on in  
8 California. If anything, that's starting to show that he may  
9 have a predisposition at that time to even make that statement.

10 MR. REICHEL: The Court's correct.

11 THE COURT: But even still, I don't see where Anna  
12 now is forcing him to do anything at this time. There's  
13 nothing going on.

14 MR. REICHEL: It's not --

15 THE COURT: And still at this point it's not  
16 happening.

17 MR. REICHEL: It's not the timing of any inducement,  
18 Your Honor. It's before. You look at the individual prior to.  
19 If this began in June of 2005, as set forth in the Indictment,  
20 Jacobson clearly states -- for example, they talk in Jacobson  
21 -- they said that his ordering the magazines in '84, eleven  
22 months before he meets the Government in any fashion, is  
23 something that they had to look at. They said that's the  
24 relevant area for predisposition.

25 In this case, if it began in June of 2005, then you

1 have to look at the defendant prior, prior. In Jacobson, it's  
2 January of '85. In here, it's June of 2005. In Jacobson, they  
3 said you have to go back to February of '84. In this case, you  
4 have to go back to August of 2004. It's the defendant prior to  
5 any Government inducement whatsoever. That's the definition of  
6 predisposition.

7 Like they say in Jacobson and they say in Poehlman,  
8 by the time an individual is involved in the commission of the  
9 crime, he or she is obviously disposed at that time. It's  
10 called predisposition for a reason because we look prior to the  
11 disposition. Mr. Lapham has alleged that it began in June of  
12 2005. We have to look at --

13 THE COURT: But the factors we look at, some of the  
14 factors that we looked at, the character and reputation of the  
15 defendant, including any prior criminal history. I have no  
16 prior criminal history that we're looking at.

17 What if the Government initially made the suggestion  
18 of criminal activity, I don't think that the evidence was clear  
19 that the Government's the one that suggested the criminal  
20 activity. If anything, it was your client and the people he  
21 was involved with who were suggesting criminal activity.

22 Whether or not the defendant engaged in criminal  
23 activity for profit. There's been no evidence presented as far  
24 as that's concerned.

25 Whether the defendant evidenced reluctance to commit

1 the offense and was overcome by repeated Government inducement  
2 or persuasion. I have not heard evidence of any reluctance to  
3 commit the offense. If not outright approval, there was  
4 certainly not reluctance to committing the offenses.

5 And the nature or the inducement or persuasion  
6 supplied by the Government.

7 None of those factors are controlling, but those are  
8 some of the factors that the Circuit has looked to in the past  
9 to consider whether or not there has been entrapment.

10 The reluctance to engage in criminal activity is  
11 probably the most important factor considered.

12 MR. REICHEL: Your Honor --

13 THE COURT: And that's the Smith case that has held  
14 that.

15 MR. REICHEL: But if one of the elements is a prior  
16 criminal conviction of the defendant, predisposition, a prior  
17 criminal conviction, then we're looking for predisposition  
18 prior to Government contact.

19 THE COURT: He doesn't have any.

20 MR. REICHEL: Yes. But that's means that they're  
21 looking at the record of the defendant prior. The slate of the  
22 defendant prior to contact.

23 THE COURT: Which would have been relevant had he  
24 been convicted of conspiracy to fire bomb other things in the  
25 past. That would have been very relevant. And he hasn't been.

1 He has nothing.

2 MR. REICHEL: His absence, his clean record is  
3 therefore relevant. His clean record is relevant.

4 THE COURT: It may have some relevance. It's a  
5 factor to be considered. And you put on yesterday he was  
6 peaceful, he's never done anything. All that evidence came in.

7 But the other one you're having to deal with is  
8 what's his reluctance? And as I said in the case law, that is  
9 one of the major factors that has to be overcome, where was his  
10 reluctance? Where did he say: Absolutely not, Anna go away?  
11 Zachary, no, I'm not going to do this. This is crazy. This is  
12 not going to happen.

13 Where is that factor?

14 MR. REICHEL: One of the factors, Your Honor, I  
15 acknowledge that.

16 THE COURT: And the one that the Ninth Circuit has  
17 said that may be one of the most important factors to be  
18 considered. Again, Smith, 802 F.2d at 1125.

19 MR. REICHEL: I understand.

20 THE COURT: All right. We're going to give the  
21 entrapment instructions which I indicated previously.

22 MR. REICHEL: Which --

23 THE COURT: That's 6.2 and 6.3.

24 6.3 is whether a witness acted as a Government agent.  
25 Did you provide -- see those? I'm sorry. Rather than provide.

1 MR. LAPHAM: I thought 6.2 was the only one that  
2 was --

3 MR. LAPHAM: I don't think we need 6.3.

4 MR. REICHEL: Yeah.

5 THE COURT: I'm just looking at those were the two  
6 entrapment instructions. The pattern.

7 MR. REICHEL: We don't need 6.3.

8 THE COURT: All right. No 6.3.

9 6.2, which is entrapment: The Government has the  
10 burden of proving beyond a reasonable doubt that the defendant  
11 was not entrapped. The Government must prove the following.

12 That's appropriate instructions under the  
13 circumstances. There is slight evidence, at least, which would  
14 follow the United States versus Kessey, Ninth Circuit 1993  
15 case, and so that would be appropriate.

16 MR. REICHEL: And, Your Honor, the defense special  
17 instruction on predisposition pulled right out of the language  
18 of Poehlman. Willingness to commit the offense prior to being  
19 contacted coupled with the wherewithal to do so.

20 THE COURT: All right. Government?

21 MR. LAPHAM: Your Honor, I don't think that's a  
22 correct statement of the law, "coupled with the wherewithal to  
23 do so," that's not part of the entrapment.

24 MR. REICHEL: That's exactly out of -- that cites  
25 Jacobson, Shepherd, Sorrells. I think it's Harrington. And

1 it's directly out of Poehlman.

2 THE COURT: Did you have any other defense  
3 instructions, Mr. Reichel?

4 MR. REICHEL: No, Your Honor.

5 Yeah. There was one following that, but it's about  
6 predisposition as well, and it's from Jacobson. And it's the  
7 timing part of Jacobson about when they first met, but if I'm  
8 going to get the one on Poehlman, then I don't think I need  
9 that.

10 THE COURT: I'm going to find that the Ninth Circuit  
11 pattern instruction 6.2 is sufficient as far as the defense of  
12 entrapment, and I'm rejecting any additional instructions as to  
13 entrapment that are not from the Ninth Circuit pattern. Those  
14 will be added. That will be added, rather. Is there another  
15 instruction?

16 MR. REICHEL: For the record, it's clear my case was  
17 on P-o-e-h-l-m-a-n, Poehlman.

18 THE COURT: 217 F.3d 692, Ninth Circuit 2000.

19 MR. REICHEL: There's a good record.

20 THE COURT: There you go. Anything else?

21 MR. LAPHAM: No, Your Honor.

22 MR. REICHEL: No further jury instructions, but the  
23 evidence is closed, and I'll just renew -- the Government's  
24 evidence is closed. I would make a renewed motion for Rule 29,  
25 Motion for Judgment of Acquittal at the close of Government's

1 case, and assert they haven't proven all the elements of the  
2 crimes beyond a reasonable doubt and including venue in the  
3 Eastern District.

4 THE COURT: For the reasons previously stated by this  
5 Court, yesterday, today, the motions in limine, during the  
6 course of the trial, I find that the Government has presented  
7 sufficient evidence that a reasonable jury could find, in fact,  
8 that the defendant is, in fact, guilty of the crime as charged,  
9 which is conspiracy. Motion is denied.

10 Let me put these together now for the instructions.  
11 They will be in booklet form for each of you. We'll try to get  
12 them here before we actually start close. An hour?

13 MS. ENDRIZZI: Little bit more, but that's about what  
14 I'm aiming for.

15 MR. REICHEL: We wouldn't be able to start a little  
16 bit later, would we? I had no idea we were going to be here  
17 until 1:00. First of all, I have to type those exhibits up,  
18 the stipulations, and get those prepared for admission. I mean  
19 -- and I've got a few things to get together here.

20 THE COURT: Well, it's actually just almost quarter  
21 to, so I didn't expect it either. I'm going to be here. I  
22 think we're going to start at 1:30 because we're expecting the  
23 jury to come back. Otherwise, I don't know if we're going to  
24 be able to get this accomplished. So we're going to start at  
25 1:30. All right. Sorry, Mr. Reichel.

1 (Lunch break taken.)

2 (Jury in.)

3 THE COURT: Counsel, are you ready to proceed with  
4 your closing argument?

5 MS. ENDRIZZI: Yes, Your Honor.

6 THE COURT: Thank you. Please do.

7 MS. ENDRIZZI: Good afternoon, ladies and gentlemen.

8 When you heard the opening a few weeks ago, you were  
9 given the images of a puzzle or a roadmap, so that you could  
10 focus on the evidence and see the big picture.

11 Well, sometimes puzzles and roadmaps are a little bit  
12 overwhelming. What I view closing argument as is Mapquest.  
13 You can zoom in on what you need. You can zoom in on what's  
14 important and what the key elements are, and that's what  
15 closing argument is for. It's to help you focus and integrate  
16 all the facts and all the evidence that you've received during  
17 trial.

18 Now, closing argument will help you sweep away the  
19 distractions. You've heard a lot of distractions throughout  
20 the course of the trial. What we have to focus on is that the  
21 charge is conspiracy. So commentary about romance, commentary  
22 about leadership, commentary about money and particular  
23 targets, that, you'll see, becomes less important as we go  
24 through what the elements of conspiracy are.

25 Now, what closing argument isn't is evidence.

1 Anything that I say up here is not evidence. Okay. It's  
2 argument. You, the jury, decide the facts, and from those  
3 facts you will determine whether or not to come back with a  
4 verdict of guilty.

5 Now, the Government has a burden to prove all the  
6 elements of the crime beyond a reasonable doubt. That's our  
7 burden. The defense has no burden. Okay.

8 Now, part of what you can do when you're evaluating  
9 the facts and the evidence is use your common sense. Now, for  
10 instance, you just heard the term reasonable doubt. Reasonable  
11 doubt is not doubt, you know, having erased all doubt. Okay.  
12 It's your common sense interpretation that this is -- this is  
13 what happened. Okay. You don't have to be 100 percent  
14 certain.

15 Now, what you don't have to do is determine the law.  
16 The Judge has determined the law. He will instruct you on it  
17 at the end of the case, and throughout the course of this  
18 closing I will give you snippets of the law, so that you can  
19 help yourselves organize for when you go back to deliberate.

20 Now, the Judge's law controls. The instructions that  
21 you receive at the end of the case are what you follow. But  
22 the instructions that you get here, during closing, will help  
23 you understand and apply that law.

24 The first thing that we'll go into is conspiracy  
25 generally. It's an agreement between the defendant and at

1 least one other person to commit the crimes charged in the  
2 Indictment.

3 What you need to remember about the first prong is  
4 agreement. You need to find an agreement.

5 Second, the defendant became a member of the  
6 conspiracy knowing at least one of its objects and intending to  
7 help accomplish it.

8 So part of what you're going to have to find, as  
9 well, is the object of the conspiracy. What was the purpose?  
10 And did the defendant join in that to further?

11 Finally, one of the members of the conspiracy has to  
12 have performed at least one overt act in furtherance of the  
13 conspiracy for the purpose of carrying out the conspiracy.

14 Now, it's important to note here is all of you have  
15 to agree on one overt act. You'll find that there are many  
16 overt acts, but what you'll have to do back in the jury room is  
17 just all agree on one of them.

18 Now, conspiracy isn't just talking about a crime.  
19 The purpose of conspiracy is that there is an agreement, there  
20 is a plan, and then there is a step. That is what you have to  
21 remember.

22 Now, important acts of -- important things to note  
23 about conspiracy, all right, it's the agreement. It doesn't  
24 matter if the agreed upon crime occurred. Here, the charges  
25 are arson, essentially, to damage or destroy property by fire

1 or explosive.

2 Now, it's either Government property or property  
3 affecting interstate commerce. Those are the charges. We  
4 didn't have any arsons here. But that doesn't matter for  
5 conspiracy.

6 The agreement doesn't have to be formal. When you  
7 hear evidence about how Eric McDavid invited Zach Jenson and  
8 Lauren Weiner into the conspiracy at Pointless Fest in  
9 August 2005, you don't have to have, "okay, I agree with you,"  
10 or "I'm in," or "I'm joining." There doesn't have to be a  
11 formal agreement. It can be inferred.

12 And the conspirators don't have to agree on every  
13 single detail. This is the big picture that you are looking  
14 for. The object of the conspiracy.

15 Now, as I said earlier, you'll find a lot of overt  
16 acts. They don't have to be illegal. For instance, Lauren  
17 Weiner buying The Poor Man's James Bond, perfectly legal. But  
18 it is an act in furtherance of that conspiracy.

19 Now, as I said before, it isn't just talking about  
20 the crime. You have to find that there is an agreement, an  
21 object and an overt act.

22 This conspiracy in this case could have been brought  
23 down after the first overt act was accomplished, but it wasn't.  
24 You'll see that there are overt act after overt act after overt  
25 act, you know, including the bowl breaking, including the day

1 of the arrest going shopping for more supplies. Those are all  
2 overt acts.

3 Now, what I'd like you to do at this time, most of  
4 you are taking notes. And I used to be a teacher, so I have  
5 you captive here.

6 What I would like you to do is answer the following  
7 questions to yourself: Was there an agreement? And if so, who  
8 was part of that agreement? Just jot down who were the parties  
9 to the agreement. And then try and say in your own words what  
10 the object of the conspiracy was.

11 And then finally, list at least one overt act --  
12 there are many -- that you can find in furtherance of the  
13 object of the conspiracy.

14 I would bet that when you go back to the jury room  
15 and you compare your answers, you will find great amount of  
16 overlap.

17 Now, here's the official charge. Conspiracy to  
18 commit arson, the 18 U.S.C. 844(n). Here are the elements:  
19 The defendant conspired or agreed with at least one other  
20 person to maliciously damage or destroy or attempt to damage or  
21 destroy by means of fire or explosive any building, vehicle, or  
22 other personal or real property in whole or in part owned or  
23 possessed by the United States or any department or agency  
24 thereof, or, any building, vehicle, or other personal or real  
25 property used in or affecting interstate commerce.

1           And then the third part, at least one person, not  
2 necessarily the defendant, doesn't have to be the defendant,  
3 committed an overt act in furtherance of the conspiracy.

4           Now, you'll see in that second line where it says to  
5 maliciously damage or destroy. Maliciously. Malintent. This  
6 wasn't an accident. It was with the intent to do harm.

7           And then you will choose between 844(f) and 844(i) as  
8 your underlying crime. So you'll see either federal property  
9 or property affecting interstate commerce, and then you've got  
10 your overt act.

11           Now, there are two types of evidence. Direct  
12 evidence and circumstantial evidence. They both carry the same  
13 weight.

14           Direct evidence are facts that you learn from  
15 testimony, such as a witness on the stand or a document. It  
16 speaks for itself.

17           Circumstantial evidence is when you derive proof of  
18 one or more facts from which you could find another fact.

19           The typical example of circumstantial evidence is you  
20 go to sleep and everything's dry. You wake up the next  
21 morning, your lawn is wet, your car is wet, the street is wet,  
22 there are puddles everywhere. That is circumstantial evidence  
23 of what? That it rained last night. Not that your sprinklers  
24 went off, but that it rained because everything is drenched.

25           Circumstantial evidence carries the same weight as

1 direct evidence. But as with all evidence, you decide what to  
2 believe.

3 Every witness who gets up in that stand -- who got up  
4 on that stand, you can believe all, some, or none of what they  
5 said. That's for you to decide.

6 Now, there are different types of evidence here.  
7 We've got testimonial. Got all of your witnesses who came  
8 before you. Documentary evidence. You have photographs. You  
9 have all of the Internet history reports. You have pamphlets  
10 like the Animal Liberation Front primer that you heard  
11 testimony about and its contents. You can take a look at all  
12 of it.

13 We have maps. The IFG. We have the Internet  
14 research that was done on power stations, addresses, where to  
15 find them, how many there are in the local area.

16 You have research, the pamphlets that they picked up  
17 at the Nimbus Dam and the Fish Hatchery, and the Internet  
18 research they did on this topic as well.

19 You have e-mails to look at. You have the Derrick  
20 Jensen interview that the defendant had given to other members  
21 of the conspiracy.

22 You have a CD of excerpts. This evidence you heard  
23 throughout the course of the week. You can play this for  
24 yourselves back in the room. You don't get the transcripts,  
25 but Government's Exhibit 30 has all of those recordings that

1 you heard in court here.

2 You have the receipts, Kmart, Walmart. Within those  
3 pictures, you'll remember, there was a newspaper article that  
4 was cut out. There is a different type of evidence called  
5 judicial notice, and if you remember, Judge England instructed  
6 you on the date of this article as February 11th, 2005.

7 You have The Survival Chemist, which was brought up,  
8 The Poor Man's James Bond, all of the recipes Lauren Weiner  
9 brought to the group. You have the Visitor's Log at the IFG  
10 where you heard testimony about how Mr. Meyer highlighted it  
11 because these folks caused him such concern. And you also  
12 heard testimony that they signed in under fake names.

13 And then, finally, you have the Burn Book. And when  
14 you go through this, you'll see lists, maps, plans, concerns.  
15 One of the things that the defendant brought out was on the  
16 "concerns" page -- you saw that, that was "O" and then "A" and  
17 then "O" and slash "R," what their concerns were. There was no  
18 "D." He didn't have any concerns. He was ready to go. And  
19 Eric McDavid held onto this book, and he was the keeper of the  
20 book.

21 The audio and video recordings. We won't play them.  
22 I'll give you summaries of the excerpts. Judicial notice of  
23 the date. And them stipulations. You heard read into the  
24 record a number of stipulations as to who owns the Nimbus Dam,  
25 whether it's federal property or not, whether or not cell phone

1 towers affect interstate commerce.

2 Now, the defendant's going to put on an entrapment  
3 defense. The entrapment defense is one of those popular  
4 defenses that you hear on TV.

5 MR. REICHEL: Objection, Your Honor. I think that's  
6 prejudicial to the defense.

7 THE COURT: Overruled.

8 MS. ENDRIZZI: It's got an "ooh" factor, right? The  
9 Government did something wrong. They trapped you.

10 Well, it's not as simple as it sounds, as TV would  
11 make it seem. It's a narrow defense. And the law states that.

12 Now, one thing that you should remember is that the  
13 defendant does not have to put on a defense at all.

14 Now, the Supreme Court teaches that what we are  
15 looking for here in entrapment is to determine whether -- to  
16 determine whether entrapment has been established, a line must  
17 be drawn between the trap for the unwary innocent and the trap  
18 for the unwary criminal.

19 MR. REICHEL: Objection, Your Honor. I don't think  
20 this is an instruction that I'm aware of, and it's the  
21 Government attorney instructing on the law.

22 MS. ENDRIZZI: Summary, Your Honor.

23 THE COURT: It's summary.

24 MR. REICHEL: Of the Supreme Court?

25 THE COURT: Hold on, Mr. Reichel. Counsel approach.

1 (Begin sidebar conference.)

2 THE COURT: I don't have a problem with you using the  
3 information, but when you're looking at the Supreme Court  
4 teaching --

5 MS. ENDRIZZI: Okay.

6 THE COURT: -- that is almost as if that's an  
7 instruction I'm going to be reading, and I think that by doing  
8 that, you're taking over from my instructions so you can make  
9 the argument.

10 MR. REICHEL: Can I put up the Poehlman --

11 THE COURT: No. What I'm going to say is that this  
12 Supreme Court should be stricken and is not to be utilized  
13 because it's not part of the instructions.

14 MR. REICHEL: Can we take it down?

15 THE COURT: Take it down.

16 (End sidebar discussion.)

17 THE COURT: Ladies and gentlemen, the argument that's  
18 being made at this time is appropriate. However, I want to  
19 point out to you that when the line says "the Supreme Court  
20 teaches," you are to disregard that line because the  
21 instructions on the law that you are going to hear are the ones  
22 that I am going to give you, not any that are going to be given  
23 by the attorneys. This is their argument at this time. I will  
24 give you the instructions on the law.

25 So as to the extent that that appears to be an

1 instruction that you are to follow on the law during your  
2 deliberations, I am instructing you to disregard it and to not  
3 let it enter into your deliberations in any way. Thank you.  
4 Will you take it down, please.

5 MS. ENDRIZZI: Sure.

6 Once the defendant raised the entrapment defense, the  
7 Government again bears the burden of proving beyond a  
8 reasonable doubt that the defendant was not entrapped.

9 The Government has to prove the following: The  
10 defendant was predisposed to commit the crime before being  
11 contacted by the Government agent, or that the defendant was  
12 not induced by the Government agent to commit the crime.

13 So predisposition and inducement, those are the two  
14 categories that you have to look for in an entrapment defense.

15 And what the Government will argue and we're arguing  
16 now is that he was not entrapped.

17 Important aspects of the entrapment defense you  
18 should consider: If you find that the defendant was  
19 predisposed to commit the crime, then the defense automatically  
20 fails. We do not have to prove inducement. If the defendant  
21 is predisposed to commit the crime, game over. Defense is  
22 gone.

23 Where a person, independent of and before Government  
24 contact, is predisposed to commit the crime, it's not  
25 entrapment if the Government agents merely provide an

1 opportunity to commit the crime. Means and opportunity do not  
2 necessarily lead to entrapment.

3 Now, you have to understand what inducement is.

4 MR. REICHEL: Objection, Your Honor. Do we have an  
5 instruction on inducement? I thought 6.2 --

6 THE COURT: Overruled.

7 MS. ENDRIZZI: The Government induces a crime when it  
8 creates a special incentive for the defendant to commit the  
9 crime.

10 Special incentive. Inducement is any Government  
11 conduct creating a substantial risk that an otherwise  
12 law-abiding citizen would commit an offense. What we want to  
13 protect with the entrapment defense is that unwary innocent.  
14 The entrapment defense is not for the unwary criminal. That's  
15 why it's very narrow.

16 THE COURT: Let me just make it clear that these are  
17 not instructions that you are receiving. This is argument,  
18 ladies and gentlemen. It's only argument that is being made by  
19 the Government's attorney.

20 The instructions, once again, that you are going to  
21 receive will be those which I will give you at the conclusion  
22 of all of the argument. I caution you about using the word  
23 "instruct."

24 MS. ENDRIZZI: Sorry.

25 THE COURT: Because you are bordering on the area

1 that the Court should be into, so make sure this is argument  
2 only.

3 MS. ENDRIZZI: Nothing I say is evidence. Nothing I  
4 say, do up here are instructions. The Judge will instruct you  
5 on the law. Pay attention to what's provided to you.

6 The Government must prove that the defendant was  
7 disposed to commit the crime prior to being approached by the  
8 Government. That's going to be a point of contention here.  
9 When was the defendant approached by the Government?

10 Minimal contact is not being approached. For  
11 instance, you'll remember that Anna first met Mr. McDavid back  
12 in Iowa in 2004. And she testified that he was an irrelevant.  
13 He wasn't important at that point. That's not your initial  
14 Government contact.

15 Your initial Government contact for this purpose is  
16 in June 2005, when the defendant tells Anna that he has planned  
17 something big out in California.

18 Now, if you listen to that, the defendant tells Anna.  
19 That shows that he is predisposed. He already has a plan if he  
20 is telling Anna what the action is going to be.

21 Now, predisposition. Five factors can be considered  
22 for predisposition. The defendant's character and reputation.  
23 You heard some evidence about the defendant's character from  
24 his high school friend, from his sister, from his high school  
25 friend's wife.

1           Whether the Government initially suggested the  
2 criminal activity. Think to yourself, did the Government  
3 suggest this?

4           And whether the defendant engaged in the activity for  
5 profit, and whether the defendant showed any reluctance.

6           Now, taking a look at the character and reputation of  
7 Mr. McDavid. Not one of his character witnesses had any idea  
8 about his political beliefs, his radical environmentalism, ELF,  
9 ALF. They believed he was a nice guy. But they didn't see  
10 this side of Mr. McDavid that we saw.

11           Now, instead, Mr. McDavid was held in such high  
12 esteem amongst the protest community, that you heard testimony  
13 from Mr. Jenson that he was actually a mediator at a Spokes  
14 Council. He was running the meeting, telling people when they  
15 could speak, what questions, what's going on.

16           Now, the second part, whether the Government  
17 initially suggested the criminal activity. No, it didn't.  
18 Eric McDavid brought it up in June 2005. "I have something big  
19 that's going to happen in California."

20           Then in July 2005, the CrimethInc convergence in  
21 Indiana, he tells Anna his plan. But you'll also remember that  
22 it is during that drive that he threatens Anna. He says, I'll  
23 cut your neck, and I'll cut you in your thigh. Now, that's a  
24 pretty specific threat. And that's a pretty drastic threat in  
25 the sense of cutting your carotid artery and your femoral

1 artery.

2           During the course of this trial, you also heard quite  
3 a bit of testimony about Ryan Lewis and McDavid's statements  
4 about Ryan Lewis. That Ryan Lewis made a mistake. Essentially  
5 that he was sloppy. He did it too close to home. And that he  
6 would be better. Ryan Lewis was the defendant's inspiration.

7           Now, you saw the photograph, which is the evidence  
8 that had this newspaper article. The date was February 11th,  
9 2005. That cabin was searched on January 14th, 2006. He  
10 carried that article with him for almost a year.

11           Now, there was also evidence about the Derrick Jensen  
12 article that he is passing around to the different  
13 conspirators. And in that article, the defendant is talking  
14 about fence sitters, targets, and he passes that out as one of  
15 the things that he believes in.

16           More importantly, without Anna even there during  
17 Pointless Fest in August 2005, Eric McDavid invited Lauren and  
18 Zach to join him, and told Lauren keep in contact with Anna.

19           And now remember, also, at this time period Lauren  
20 and Zach are approximately 19 and 20 years old. Eric McDavid,  
21 about 27, 28.

22           The next factor you could consider was whether the  
23 defendant engaged in the activity for profit. Profit doesn't  
24 apply here. But this was a strongly held belief by the  
25 defendant. He was into the environmental radical movement,

1 ELF, ALF. It's a core belief.

2 Now, the last part, whether the defendant showed any  
3 reluctance is the most important. And we'll save that for  
4 last.

5 The final category there is the nature of the  
6 Government's inducement. The Government didn't induce Eric  
7 McDavid. You've heard, yes, that Anna provided some money.  
8 She practically bought all of it. That's not inducement.

9 You also heard testimony that if they needed  
10 supplies, they would steal them. They dumpster dove. They  
11 shoplifted. They got things for free.

12 You heard Zachary Jenson up on the stand saying,  
13 yeah, it would have taken us a little bit longer, but we could  
14 have gotten it all.

15 Romance? A bit of a red herring. There are  
16 supposedly love letters. We've got evidence of one.  
17 Supposedly Mr. McDavid is falling all over himself for Anna.  
18 But you have testimony that Anna rebuffed him. You'll hear it  
19 in the recordings. You have testimony that Anna in no way  
20 encouraged him physically. You remember she had to go to the  
21 Behavioral Analysis Unit to get instructions as to how to let  
22 him down.

23 There's no evidence that there was sex. There's no  
24 evidence that there was kissing. There was nothing that's  
25 inducement. Remember, that's special incentive. That's over

1 the top. Romance? It just doesn't carry it.

2 Now, the last part, whether the defendant showed any  
3 reluctance. Although none of the factors is conclusive, the  
4 defendant's lack -- or the defendant's reluctance is most  
5 important. And here you have a lack of reluctance.

6 Every single witness -- sorry -- Anna, Zachary,  
7 Lauren, not one of them testified that Eric was reluctant.  
8 Instead, they were going forward.

9 And you heard today the tapes -- the recordings that  
10 the defense played. They were going forward, and Eric McDavid  
11 was right in that conversation. They may have been going  
12 forward a little bit more slowly, but they were going. And  
13 they agreed. They have an agreement.

14 Now, part of the lack of reluctance is what Eric  
15 McDavid said in November 2005: We're at the home of a known  
16 anarchist and just us meeting is conspiracy. It's illegal, and  
17 I'm willing to go to jail for my beliefs.

18 He knows. He is not reluctant at all. McDavid never  
19 wavered. Now, part of what you should look for, too, is the  
20 propensity for violence in the direct action. Okay. Look at  
21 the character of the defendant here. And that's part of what  
22 you are going to be analyzing to see if he was actually  
23 entrapped.

24 I have my own plan. He threatens the source. Ryan  
25 Lewis didn't quite know how to do it. He attended CrimethInc

1 skill shares. You had testimony that he attended the urban  
2 guerilla warfare. You had testified from Agent Torres about  
3 how he was waving the knife over Anna's face as she slept. You  
4 have testimony from Mr. Jenson about the travels from Kansas --  
5 through Kansas to Denver after Pointless Fest, where Eric  
6 McDavid is talking about damaging gas station reservoirs or  
7 tankers by putting sugar in, or by putting small explosives.

8 Doesn't matter if he could do it or not. It's his  
9 idea. It's a plan. It's something to strive for.

10 Now, one of the most disturbing pieces of evidence  
11 was that discussion in section five -- selection five -- about  
12 murder and the death of civilians. When you listen to that  
13 tape, listen for his tone. It's flat.

14 Zachary Jenson got up on the stand and said, I am not  
15 a part of this. I don't want anybody to die.

16 Eric McDavid: I don't want anybody to die, but if  
17 somebody happens to die, we'll deal with it on a case-by-case  
18 basis.

19 No emotion. It's just a fact. And, as you hear in  
20 that recording, it's murder, and the Government will call it  
21 murder. He is aware of that.

22 Now, part of inducement, we talked about money, we  
23 talked about romance, the cabin, and the car. Not  
24 extraordinary. Remember, you've all -- give you an example  
25 from the drug world. You have Government informants,

1 Government agents participating in drug transactions. You know  
2 they are buying or they are providing drugs. That's okay. The  
3 fact that they provided a cabin, it's not an overarching  
4 incentive.

5 Now, even if you compile these things together, the  
6 defendant still agreed. They still were going forward. Nobody  
7 backed out. Nobody said, oh, I can't really do this.

8 Now, you heard a lot of testimony about how they were  
9 homeless and paupers. Eric McDavid could go home. Eric  
10 McDavid had a nice home. Outdoor patio, fire pit, stream  
11 running through the property.

12 Derrick Jensen (sic), his mom was in Tennessee. You  
13 heard testimony that he stopped there on his way for Christmas  
14 to connect with his family. You heard testimony about Lauren  
15 Weiner, and how she wanted to go up to her family's house in  
16 Vermont. Her family didn't throw her out. Her dad gave her an  
17 allowance. It's not as if they were homeless and paupers  
18 because of their circumstances. They chose to travel and live  
19 the way they did. It was a choice. So it can't be counted  
20 towards the Government's inducement.

21 Remember, you've heard testimony from Lauren that  
22 they thought this was going to take a month, and she was going  
23 to go teach snowboarding up at Tahoe to make money. It's not a  
24 situation where the Government is providing the sole resources.  
25 These defendants could have gone forward.

1           The other part that the defense will raise and that  
2           you should consider is that we had cooperating defendants.  
3           Now, you'll hear an instruction from the Judge, and follow that  
4           instruction. You can weigh that testimony based on bias. You  
5           heard Mr. Reichel and the Government go through their plea  
6           agreements. Yes, they pled guilty to conspiracy. Yes, their  
7           sentence could be a maximum of five years. Yes, they committed  
8           a crime. Yes, they are willing to cooperate, and because of  
9           that cooperation they have to testify.

10           But all bets are off if they lie. The Government  
11           would not have to make any sort of recommendation if they did  
12           not tell the truth on the stand. You heard what Zach Jenson  
13           said about doing what was best for him. He reviewed the  
14           evidence. He talked with his lawyer, and he talked about Eric  
15           McDavid. You have to do what's best for you. Zachary Jenson  
16           made a choice. Lauren Weiner made a choice.

17           Now, you also heard a lot of questioning about, well,  
18           zero is better than five years, five years is better than  
19           20 years, etcetera, etcetera, etcetera, at sentencing. You  
20           heard testimony that the Judge handles the sentencing. You  
21           shouldn't consider it.

22           Now, another distraction that will be thrown at you,  
23           the tumbleweeds. I would think that the tumbleweed theory is  
24           all of the red herrings that are being thrown out at you.

25           Who is the leader? We heard a lot of information and

1 testimony about McDavid is the leader. Zach said McDavid was  
2 the leader. Then he said Anna was a leader. Then he said  
3 McDavid was the leader. It doesn't matter. There doesn't have  
4 to be a leader for the conspiracy. It's an agreement among a  
5 group for an object, and there has to be an overt act.

6 So don't be thrown off by the fact that Anna could  
7 have led, David could have led. Okay. You heard testimony  
8 that Anna mostly asked questions. And when you review  
9 Exhibit 30 and you listen to the recordings, listen for those  
10 questions. She's not giving directions. If she is, it's rare.  
11 Mostly, she gives -- she asks questions.

12 Testimonial evidence. Bruce Naliboff. ELF, ALF  
13 anarchism, the radical environmental movement. That's the  
14 background. What are these folks trying to do?

15 Anna, the undercover cooperating witness. Anna's  
16 important. She's undercover. You heard testimony that she was  
17 paid. She was 17 at the time when she started. She was  
18 reimbursed for expenses, and she received compensation for her  
19 time.

20 She started January 2004. She ended January 2006.  
21 That's \$31,000, approximately, for compensation spread out over  
22 that entire period of time. It's not a yearly salary. That  
23 \$35,000 in travel expenses and just general expenses over that  
24 entire period of time. Hotels, planes, cars, gas. It's not  
25 hard to eat up \$35,000 over the course of two years.

1           Anna lets us see Eric McDavid for who he is. And  
2 that conversation, I would present to you, in the car on the  
3 way to Chicago from the Bloomington CrimethInc demonstrates  
4 that Eric McDavid has his plan already set.

5           Now, prior to that, Iowa 2004, Anna had said he is  
6 nothing. But over the course of Iowa, then the RNC, and the  
7 bio 2005, Eric McDavid is changing. He is becoming more  
8 radical. Protests aren't working. I have a plan. Something  
9 big in California.

10           Special Agent Torres, you heard about what he saw,  
11 heard about Anna's background, and her coming into the program,  
12 based on an extra-credit project.

13           You heard from Task Force Officer St. Amant, who  
14 seized the knife off McDavid's person. That knife that he  
15 waved over Anna's face while she was sleeping.

16           Heard from Special Agent Krause in the search of the  
17 Dutch Flat cabin. You have your pictures. You have your  
18 gasoline cans. You have your bleach. You have your salt  
19 substitute. You have the bowls that they were mixing, the  
20 heating element. You have all of the books.

21           Lauren Weiner, cooperating co-defendant. Again, you  
22 will determine whether you believe her or not. She backs up  
23 quite a bit of what was not recorded. There was no recordings  
24 when Anna wasn't present. So that meeting at Pointless Fest  
25 when they meet at the cafe because they think Lauren's

1 apartment is bugged, okay, Lauren Weiner says, in explaining  
2 McDavid's plan, he said "boom." And she was supposed to take  
3 that in and make her own understanding of that. And she told  
4 you she thought that was an explosive.

5 Task Force Officer Fowler. You had the Internet  
6 history reports. One of those Internet history reports, if you  
7 remember, was the VWR chemicals, looking up addresses and phone  
8 numbers.

9 In the back of the Burn Book, addresses and telephone  
10 numbers. VWR Scientific Products, 3745 Bay Shore Boulevard --  
11 and I can't read the -- but it's here. It's in the Burn Book.  
12 And it's in the Internet history.

13 You don't have a situation where you have just one  
14 piece of evidence. You have multiple layers of evidence.

15 Zachary Jenson, cooperating co-defendant. Again, he  
16 is receiving a benefit, that's true. He has agreed to testify.  
17 He is also responding to questions, you heard him tell you,  
18 that the FBI has about other people. He is working in the  
19 sense of he is following his agreement. If he didn't follow  
20 the agreement, the agreement's off.

21 And then Randy Meyer, the Forest Service employee who  
22 describes how the group went across the property there. He  
23 described -- shown the map, it was very close. You'll be able  
24 to compare the two maps together. And then you heard testimony  
25 about that chemical shed. And if that property had been

1 damaged or destroyed by arson, by fire or explosives, the fire  
2 department, depending on how that shed was lit up, may have had  
3 to let everything burn to the ground because it would have been  
4 so toxic.

5 You have your documentary evidence. Your audio and  
6 video recordings.

7 We played a number of recordings for you. And in  
8 those recordings you'll hear Anna ask questions. You heard  
9 Anna have a mini breakdown this morning when she was upset  
10 before she left the cabin, that argument. That's the best they  
11 have. That's the best there is.

12 If there had been a recording where Anna is pushing  
13 and pushing and pushing and inducing and creating that special  
14 circumstance, you would have heard it. You would have heard it  
15 from us. We would have fronted it.

16 Now, summary of your excerpts for Exhibit 30. You  
17 heard testimony about Eric saying: Come on Ollie, what's your  
18 plan? Are you in this? I'm nervous.

19 McDavid talks about restricting contacts. Let's go  
20 home, have holidays with your family, and then we'll disappear.  
21 And he responds to discussion of items needed for the campaign.

22 Exhibit 12. Just professional. No romance. FBI  
23 involvement. Accidental death of civilians. The fence sitters  
24 will be scared away.

25 Now, IFG is the first target. Talks about Molotov

1 Cocktails. And you'll remember that Eric McDavid, or whomever,  
2 created that drawing in the Burn Book. You heard testimony  
3 from Zach Jenson that it was Eric who drew that map, noting the  
4 cameras. You saw Eric holding onto the Burn Book, and then you  
5 saw the directions. Just take a right. Just take a right.  
6 Just take a right. I'm not going to tell you where we're  
7 going. Just take a right.

8 Okay. You heard, I believe it was this morning, or  
9 it was during Zachary Jenson's testimony, that the defendant  
10 wanted still to take out a whole sector of cell phone towers.  
11 The plan wasn't over. The object of the conspiracy was to  
12 damage or destroy property by fire or explosives.

13 Now, you have to determine whether that property was  
14 Government property or property affecting interstate commerce.  
15 But the object was damaging or destroying property.

16 Okay. Again, this morning you heard, reviews items  
17 to be purchased.

18 Conspiracy. Defendant conspired or agreed with at  
19 least one other person -- Zachary Jenson, Lauren Weiner -- to  
20 maliciously damage or destroy or attempt to damage or destroy  
21 by means of fire either Government property or property  
22 affecting interstate commerce. And at least one person, not  
23 necessarily the defendant, committed an overt act.

24 Bought the book, picked up the pamphlets, went to  
25 Kmart, went to Walmart. They're all overt acts.

1           Thank you for your time this afternoon. And the  
2 Government would ask that you render a verdict of guilty on the  
3 sole count of the Indictment. There was a conspiracy here, and  
4 Eric McDavid was a part of it. The Government didn't entrap  
5 Eric McDavid. He was not reluctant. He was going forward. He  
6 is guilty. Thank you.

7           THE COURT: Thank you. Mr. Reichel?

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

9           THE COURT: Counsel before you begin, can I see you  
10 at sidebar? Off the record.

11           (Off-the-record sidebar discussion.)

12           (Begin sidebar discussion.)

13           THE COURT: Go on the record. Make your request  
14 again.

15           MR. REICHEL: The Zachary Jenson instruction, which  
16 was in my original -- not my specials -- but my original jury  
17 instructions that were submitted September 10th. And  
18 specifically it's the Ninth Circuit pattern one. I don't  
19 remember which one it was, but it references the Sears case and  
20 just black letter law across the nation that a defendant cannot  
21 conspire with an undercover informant who has no intention of  
22 going through with it but would frustrate. You can't conspire  
23 with an informant.

24           THE COURT: Right. But you have to have facts that  
25 support that instruction. The facts that are listed at trial

1 are that Lauren and Zachary were also a part of this alleged  
2 conspiracy, who testified that they were a part of the alleged  
3 conspiracy. So there are no facts to show that it was just  
4 Anna and your client, which if that were the case, then I think  
5 your instruction would be well taken.

6 MR. REICHEL: Zach Jenson testified as to one of the  
7 objects of the conspiracy and who agreed with them on that, and  
8 he said Anna.

9 MS. ENDRIZZI: I'm sorry?

10 MR. REICHEL: Zach Jenson testified -- when I said  
11 who agreed with Mr. McDavid on that object, and he said Anna.

12 THE COURT: I didn't give you a chance to respond.

13 MR. LAPHAM: No. You stated our position.

14 THE COURT: That's there has to be facts to support.  
15 Given the instruction, I don't find that the facts given would  
16 support that.

17 MR. REICHEL: They have to understand, though, that  
18 that can't be his conspiracy with Anna, though. I think she  
19 said it just now, that he conspired. I mean, your very closing  
20 showed your instruction, and it said Lauren and Zach.

21 THE COURT: That's it. That's what I see. And Anna.

22 MR. REICHEL: No, you can't conspire with Anna.

23 THE COURT: Let's go back. I need to get --

24 MR. REICHEL: Verdict form.

25 THE COURT: Do you have that? Thank you.

1 (End sidebar discussion.)

2 MR. REICHEL: Ladies and gentlemen, I'm going to do  
3 you a giant favor. We're going to be out of here soon.  
4 There's a 3:00 break. I believe I'll be done before 3:00, and  
5 I think we're going to instruct after that.

6 And, quite frankly, I'm going to be brief with you  
7 because I think you paid attention to the evidence, and I think  
8 it was a very clear trial. And I think there is no doubt that  
9 you are smart enough that I don't have to go through theatrics,  
10 and I don't have to go through any kind of sleight of hand, or  
11 go through anything that leads you to think something that you  
12 don't already know from watching.

13 Two things. One, there is more than one reason that  
14 Eric McDavid is not guilty in this case. First of all, there  
15 has to be a conspiracy where he agrees with others to do  
16 certain things. Specifically, the things that are alleged  
17 here. And you saw the evidence.

18 Additionally, the Government has to prove beyond a  
19 reasonable doubt that Mr. McDavid was not entrapped. We  
20 believe the evidence is very clear, very clear that Mr. McDavid  
21 was entrapped.

22 But just to explore a few introductory comments about  
23 the nature of trials, and to tell you that you I think you  
24 understand -- I think even Ms. Endrizzi touched on the nature  
25 of the trial.

1           What happened in this case is that none of us were  
2 really there when this happened, when all of this took place.

3           There are months and months of Government undercover  
4 tapes and undercover recordings. And then there's transcripts  
5 made. This investigation that's done.

6           And during that phase, there is the investigation.  
7 And in an entrapment case, an attorney, like me, will say,  
8 well, that's a manufactured crime, or that's the Government  
9 creating crime.

10           Nevertheless, you know, if you call that my defense  
11 attorney hyperbole, that's fine. But, you know, it is my  
12 summary of what goes on with an undercover informant in a case  
13 where they do an investigation for a long period of time with  
14 people like this is that I call it the manufactured crime or  
15 the creation of something.

16           Well, what's significant in that symbolism is that  
17 when we come here before you, the Government does the same  
18 thing as far as creation or manufacture. I talked about how  
19 much they had prior to, how much evidence they had prior to the  
20 start of the trial. And there could be no mistake. I know  
21 you're smart enough to realize this. That when they put it on,  
22 it's the creation -- it's the creation of a case for you here.

23           And when you create something, you're going to take  
24 the best that you can and put it out there. The stuff that's  
25 not as good, you're not going to use. And this is something

1 that I would -- that I think is kind of like the sieve for you  
2 to filter the evidence through.

3 Often I ask the jury to do that through the sieve of  
4 reasonable doubt, but I don't think you need to do that in this  
5 case. I'd ask instead that you look at the creation of a case  
6 and the manufacture of a case, the making of a case.

7 And that will help you. Those are my introductory  
8 thoughts, and I think they are very important. And they're  
9 very important for the following reason. This is a trial --  
10 this is the tale of two people. It is the tale of the  
11 informant, Anna, who we fortunately got to hear a lot about. I  
12 think there is no dispute. You know, you as the jury, can  
13 evaluate everything about Anna that you probably need to know  
14 in this case.

15 And, you know, I hope that you got enough to know  
16 about Eric McDavid. Because I don't use graphics or charts  
17 right now, but I'm going to say they're parallel lines. And  
18 it's the tale of, you know, two people is what this trial is  
19 about.

20 And I'm sorry to stop, but I want you to know that  
21 it's not about some things. This trial is not Mr. Zachary  
22 Jenson, and it's not about Lauren Weiner. It's not.

23 As a result, because it's the creation, this is not  
24 necessarily theater for you, but it is an attempt to prove or  
25 persuade of you something. So we use all of our persuasive

1 talents, including the Government does that. So when Zachary  
2 Jenson and Lauren Weiner in this case -- the case is not about  
3 them, and that's why you didn't hear a smear of Zachary Jenson  
4 and Lauren Weiner by the Government. You didn't hear any  
5 smearing about the things they said and they did in this case.

6 We tried to show you just snippets. We questioned  
7 them and cross-examined them. But we didn't necessarily get  
8 into, you know, how many times Ms. Weiner, how many times  
9 Mr. Jenson did you say, you know, appalling things, did you say  
10 these horrendously stupid things.

11 We did show you a little snippet this morning.  
12 Because here's the significance of what you saw this morning  
13 from us. You saw -- You saw the real deal. No more talking  
14 about it. Okay. You saw Anna in her environment. You saw  
15 Zach, Eric and Lauren in their environment.

16 Now, what's significant about that is I think you can  
17 observe that -- I hope you watch it again -- I hope you think  
18 about it -- there's no dispute that Lauren Weiner was very, you  
19 know, very motivated and very energetic. As well as Anna was  
20 very alive and energetic. And Zach was participating pretty  
21 well also.

22 Now, what I want you to remember is that they both  
23 testified, Zach and Lauren Weiner testified, very honestly, I  
24 believe, for the Government, under oath, that they were acting.  
25 I mean, if -- it's in the transcript. And whenever I refer to

1 someone's testimony, it's not -- you know, my recollection  
2 doesn't control. You know that. It's if you heard, you found  
3 it significant, you recall it -- you know, the Judge will  
4 instruct you that, you know, you can call for a read back of  
5 something if you need to.

6 But, nevertheless, here's my point. They testified  
7 very clearly that -- this is late in the game, this is January  
8 12th -- but even before then, they were acting. And they were  
9 acting because they didn't want to let Anna down. Both of them  
10 said that.

11 And every time -- I'm confident about the evidence  
12 again. That's just my recollection. And if it's not there,  
13 then when you deliberate, you know, remember to say Mr. Reichel  
14 was wrong on that point. And, you know, I do this without  
15 notes quite often. I don't bring the transcript up and read  
16 from it.

17 But they were acting because they didn't want to let  
18 her down. They weren't in love with her, though.

19 Now, we could go there, and Ms. Endrizzi makes very  
20 valid points. You know, there's only so much that romance will  
21 get you, and that's true. But it's also relevant, ladies and  
22 gentlemen. And what it's relevant about is that these two were  
23 willing to continue to do things which they said was not in  
24 their heart of hearts. It wasn't what they wanted to say.

25 But instead it's what they were acting they wanted to

1 do. They didn't want to let Anna down. And they weren't in  
2 love with her. And that's really important.

3 Now, both of them gave us very interesting  
4 information which makes Mr. McDavid not guilty for many  
5 reasons. But if I can just stick on that thread for a moment.  
6 Try to stick to my timeframe.

7 It's the romance issue. They said, I recall -- as I  
8 recall, they testified that they thought that -- most people  
9 thought they were a couple of their own. Ren -- excuse me --  
10 Lauren Weiner testified, I believe, that, yes, you know, he was  
11 in love with her, and said he was in love with her. That's,  
12 you know, her recollection. That they had -- that people  
13 thought -- mistook them for a couple for a while.

14 And Zach Jenson said, yes. Zach Jenson said that as  
15 well. He said many people thought they were a couple. And I  
16 said what were the outward signs. He said the cuddling and  
17 stuff, and the way they interacted and the cuddling and stuff.

18 Well, there's Anna, who also makes Mr. McDavid not  
19 guilty. And I'm going to try not to summarize all of the  
20 evidence for you because you heard it. It's a pretty clear  
21 case. It was pronounced when we were asked if -- you know,  
22 there were verbal asterisks, I think, on some of this stuff.

23 But Anna stated, yes, and I think she said -- and  
24 this is after the Republican National Convention, which is late  
25 of '04 -- that Mr. McDavid wrote her love letters. This is

1 prior to Philadelphia in June of 2005. Okay. He wrote her  
2 love letters, handwritten love letters.

3 And at first she didn't want to admit it, and she  
4 grudgingly came to the point, and said, yes, those are gone.  
5 And that's not the defendant's burden. That's the problem if  
6 you mail something out to a Government agent, and if they don't  
7 have it when you're charged, it's kind of a tough situation to  
8 introduce it to the jury. And that's why often you'll see that  
9 Government agents and law enforcement are trained in certain  
10 ways. That when important evidence -- and Anna talked about  
11 it, and Mr. Torres talked about it -- when important evidence  
12 comes in, that may exonerate someone, that has significance,  
13 you don't throw that away. She testified you don't throw it  
14 away. She acknowledged that. So did Mr. Torres.

15 So as far as romance goes, you know, it's the  
16 creation of a case. It's their witness. I mean, Anna is doing  
17 her thing. And she's got her biases. She's got her motive.  
18 She's their witness. And I did drag it out of her. She was  
19 honest and said -- she at first didn't agree that he was in  
20 love with her, but I think she says -- when she looks at the  
21 October 2005 e-mails, she takes my definition of being in love  
22 and says, in fact, he was in love with her. And she makes that  
23 statement.

24 So what happens? That's the latter part of October.  
25 Well, here's what happens. The FBI has told her -- and this is

1 what she told us -- the FBI says you've got to corral these  
2 people and get this thing going. First of all, you got to get  
3 to the West Coast. You got to get it in a timeframe.

4 MR. LAPHAM: Your Honor, I object. That misstates  
5 the evidence.

6 MR. REICHEL: Your Honor, it's not evidence. What  
7 I'm saying. The Government --

8 THE COURT: I understand. Don't argue with me in  
9 front of the jury, please. Objection is overruled.

10 MR. REICHEL: Thank you, Your Honor.

11 And Mr. Lapham is correct. I'm not trying to  
12 introduce evidence or misstate it. I'm telling you my  
13 recollection and its significance to you.

14 And that is that what happened after Mr. McDavid --  
15 she acknowledged that in October of 2005 it was clear he is in  
16 love with her because of the love e-mail he sent her about the  
17 chills he got on the balcony scene in Philadelphia. She then  
18 went and was assisted in filling out a 240-question  
19 multiple-choice questionnaire of her assessment of his  
20 psychological traits, personality traits.

21 And, you know, a bank of FBI experts or the FBI  
22 behavioral unit then talks -- or communicates to Anna. And it  
23 is not on -- as, you know, Ms. Endrizzi believes or told you --  
24 it's not on how to let him down at all. It was how to keep him  
25 on the hook but not scare him away. You know, trying to catch

1 a little bird you don't want to make big movements, so to  
2 speak. And it was not in any way consistent with what they  
3 wanted to do, for her to let him down, and she said that.

4 It wasn't to let him down and to make sure he  
5 understood there was no romance. It was to simultaneously --  
6 she testified for me. One of the last questions I asked her, I  
7 believe, on my cross, was it was to let him down easy but still  
8 keep him on the hook. That was the purpose of that. That's a  
9 significant event. A significant factor.

10 Now, the real evidence and what happens in the  
11 creation of a case is they put forth their best part, and it  
12 has some compelling issues. And then it's kind of like --  
13 well, it's just basically, the short story is there is a  
14 separate side to that. There is a different side to that.

15 The Super Bowl last year, the opening kickoff, Devin  
16 Hester for the Chicago Bears runs it back, I think, 100 yards  
17 on the opening kickoff in the Super Bowl. The Colts on paper  
18 were supposed to do harm to the Bears. So everyone said, oh,  
19 my gosh, the Bears are going to win. But what happened is the  
20 Colts came back to win that game by a large, large majority.  
21 So it's not the opening kick off. You've got to wait to see  
22 the rest.

23 And in the creation of a case, the Government goes  
24 first. And then we get up, and we cross-examine the witnesses.  
25 And we asked you at the outset to realize that what is

1 essential can be invisible to the eye. So we wanted to pull  
2 out the rest of the story, the rest of what took place in the  
3 investigation phase that you're not going to see from the  
4 Government.

5 And specifically, I will review the evidence just  
6 briefly about what makes Mr. McDavid not guilty, and it's the  
7 real evidence here. It's the tale of the two people. Of  
8 Mr. McDavid with -- we believe the evidence is strong -- no  
9 predisposition to be involved in this type of a crime. No  
10 predisposition to be involved in the crime that's charged in  
11 the Indictment that you are to deliberate on. No  
12 predisposition.

13 And maybe it's interesting. He leaves to go a  
14 wandering. And goes a wandering. And, sure, his parents might  
15 have a nice home for him. He is 26 at the time. I could be  
16 wrong. And I'll take what the evidence is. But, you know,  
17 that doesn't mean he wasn't homeless and penniless.

18 Because when you're eating out of a dumpster, and  
19 your two co-defendants, under penalty of perjury, as witnesses  
20 for the United States to tell the truth, describe him as  
21 homeless and penniless, I think, you know, we have to accept  
22 that they are homeless and penniless at that point.

23 Now, he goes a wandering homeless and penniless, and  
24 who does he run into? He runs into somebody who said, for me,  
25 in my questioning, that they were very, very, very good,

1 excellent at lying, at fooling people, at deceiving people, at  
2 deception. And they were involved -- they were involved in  
3 investigating individuals and different groups and political  
4 protests, people at the CrimethInc, and doing all these things  
5 and a lot of time contacting the FBI.

6 Now, this person runs into Eric McDavid. That's our  
7 intersection. That's our intersection. These two parallel  
8 lines bump into each other. And this person is on a mission.  
9 And there is no evidence Mr. McDavid was on any mission at that  
10 time.

11 This person is on a mission. And the mission is to  
12 explore brave, new areas of crime. And like Star Trek  
13 Enterprise, so to speak, and this person is going to report  
14 back to the FBI, and this person is going to do everything they  
15 can to find out everything they can, to do the job the very  
16 best they can. If she is one thing, she is earnest.

17 So when Anna is in these groups, she's fooling every  
18 single one of them. Zach Jenson early on. She fools everybody  
19 until the very end. And she testifies she did a lot of work,  
20 and she was never found out.

21 So it's fair to say when these two first meet and  
22 hookup, you have -- I would analogize it to the career card  
23 shark -- the career card shark. And, you know, somebody that I  
24 think that can build a table and have coffee on it with a deck  
25 of cards, compared to somebody who doesn't even know the rules

1 of the game.

2 And if they are going to get together, the guy that  
3 doesn't know the rules doesn't have a chance. And that's my  
4 point is that I think Eric McDavid never had a chance in this  
5 case. He never had a chance.

6 Now, shortly after they intersect where there is the  
7 meeting where they meet, they travel again. I think they end  
8 up -- not together -- but they are together at the RNC and so  
9 forth, the Republican National Convention. And after that  
10 Mr. McDavid and Mr. Jenson come back out to California.

11 And I believe that's the time period, again, where  
12 she says he is writing the love letters to her. But what's  
13 significant is she says, very plainly, the next time I hooked  
14 up with him he was radicalized. And these are her statements.  
15 And she's the Government witness who -- I mean, if we don't  
16 think that they -- that she was well-prepared and practiced and  
17 rehearsed and got her testimony together for the Government,  
18 then I don't know what to say. But it's not, you know, a dress  
19 rehearsal when you do it. It's the real thing. And you  
20 prepare witnesses. And Anna gives them what they really need.

21 And, unfortunately, we're left in a position where  
22 she has just told us, before she testifies to some things, that  
23 she is an excellent liar, a natural born, had no schooling or  
24 training on it, but is just really, really good at it. And I'm  
25 not badgering her for that. It's just a point to make that,

1 you know -- I mean, I'm sure she can carry a story pretty well,  
2 and do it, and especially if she thinks in her heart it's okay  
3 to do.

4 So she says that he, when she meets him, became so  
5 radicalized. But what makes Mr. McDavid not guilty, folks, is  
6 that she tells Lauren Weiner -- and she acknowledged this --  
7 that when she queried him on how did you get so radicalized,  
8 and he said influences. And she says, oh, yeah. And she  
9 testifies to this. And Lauren said, what did he say? She said  
10 that I was one of his biggest influences. Like me, I'm his  
11 biggest influence. That's why he became radicalized.

12 Well, Anna acknowledged that. She didn't lie about  
13 that when she testified. And, you know, she's met him. She's  
14 on the mission. She's the career card shark, like I said.  
15 He's homeless, penniless and clueless. And he writes her the  
16 love letters. And she says, next thing I meet him he's  
17 radicalized. Well, it's fair to say, you know, what's going on  
18 there.

19 Additionally, she says that she contacted the FBI  
20 when she first meets him and says he's not a person of  
21 interest. There's no concern to the FBI. Something along  
22 those lines. I think Ms. Endrizzi talked to you about that.

23 Well, these are the parallel lines, and we get to see  
24 where they start touching each other and what's the effect on  
25 this case, and what does that speak about this case.

1           So after they separate, and he's writing her these  
2 letters, which she apparently loses, what happens is she sends  
3 out e-mails trying to find him. So we talked about that. She  
4 said, yeah, I did sent out e-mails and said, has anybody seen D  
5 and Ollie. I'm trying to get them down here. Trying to get  
6 them down to -- it was either Fort Lauderdale or Philadelphia,  
7 something along those lines.

8           So this is someone who's not done with this  
9 individual. This is someone who is still taking the grab at  
10 the coat strings of this individual. And that's the real, you  
11 know, that's the real story of Anna and Eric originally.

12           And I do submit to you that at that time, when they  
13 get together in Philadelphia, you know, the Government doesn't  
14 like my characterization that they were tumbleweeds. Well, you  
15 know, Zach and Eric are tumbleweeds. And it may be a bad  
16 thing. It may be a good thing. Regardless, it's a thing.

17           They're tumbleweeds. But Anna is not a tumbleweed.  
18 It's not a fair fight. She's on a mission. She's the  
19 Government's informant.

20           And I'd like to talk about that specifically. She  
21 has a job to do. And that job -- well, we all know what it is.  
22 And I'm not even saying that she's overreaching in it, or,  
23 she's, you know, like an overly aggressive one. I don't have  
24 to make that claim to say she does her job.

25           Here's the problem for you, folks, is that she

1 received some training, she believes. And she testified to the  
2 training she got. And then they put on Mr. Torres, who was the  
3 person who gave her all this specialized training. So Agent  
4 Torres said it was the standard that he does all the time for  
5 individuals.

6 Well, we finally got that. And Defense Exhibit D-2,  
7 you know, I'm not going to do this for you because you owe it  
8 to yourselves, just when you get in the jury room, to see  
9 exactly what Ricardo Torres trained Anna, the informant, on.

10 She admitted it was very important to her. She  
11 admitted that that training was what was going to tell her  
12 whether she could induce somebody, entrap somebody, push  
13 somebody, what she could do.

14 She's not trained. No one is going to assert she's  
15 highly-trained law enforcement, okay. This is the training.  
16 I'm going to give you a tip on what you're going to read.

17 It has absolutely nothing whatsoever, unfortunately,  
18 to do with entrapment, to do with pushing, to do with  
19 inducement. It is actually about whether you have to pay taxes  
20 when they pay you, whether or not they will dismiss your  
21 charges should you have a charge pending. It's basically the  
22 wrong form. I mean, Mr. Torres, if this is what he did with  
23 Anna, it's the wrong form. It is the wrong form.

24 So, but it is hers, and this is what you need to look  
25 at. Because, like I said, when I'm talking about our version,

1 this is the real evidence. It's not her testifying, yes, he  
2 told me that I could not push people, he told me I could do  
3 this and I could do that. And she did a great job of saying  
4 that. Unfortunately, according to Mr. Torres and her, it was  
5 based on this written contract, D-2. Take a good look at it.  
6 Hurry. It's running out. Offer expires.

7 Now, what else makes Eric McDavid very, very, very  
8 not guilty here? The Government witnesses here took the stand  
9 and testified, and they are the strong ones for the Government.  
10 They are going to be the knock out, and, you know, I submit to  
11 you that they are. They are the knock-out punch for the  
12 Government unfortunately.

13 For the Government to prevail beyond a reasonable  
14 doubt, especially in an entrapment case, the Government  
15 witnesses have to have knocked me backwards. They have to --  
16 their facts, their truths have to have knocked the defense  
17 down.

18 And, unfortunately, you could see that they were  
19 malleable. And I hope I know what malleable means. But I  
20 think it means that they are pliable. And their motive is the  
21 75-percent-off sale that I talked about. That, you know, these  
22 are individuals that thought -- and this is my recollection of  
23 their testimony, and I apologize to the Government in advance,  
24 no hard feelings here -- but I believe they said they were  
25 worried, yeah, they were going to get 20 years. They felt they

1 could get 20 years for, you know, this charge.

2 And so as a result, they agreed 20 was worse than  
3 five, zero was better than five, and the max they could get was  
4 five, and they hope to get zero.

5 And then Ms. Endrizzi just now told us, yeah, but  
6 they have to tell the truth. That is the creation of a case  
7 for you, ladies and gentlemen, because that sounds -- at first  
8 blush we all agree that sounds exactly alike.

9 Folks, it ain't my version of the truth. Okay? For  
10 them to be in accord with their plea agreement, it is not my  
11 version. It is Ms. Endrizzi's version of the truth. Okay?  
12 It's not my version. And Zach knows it. And Lauren knows it.  
13 Okay?

14 Now, despite that, these two Government -- I will try  
15 to do this by 3:00 so we can do this -- the Government  
16 witnesses, these two individuals, working on the 75-percent-off  
17 sale are in a tough position because the Government, in  
18 creating a case for you, to create an intelligent case for you,  
19 to make the strong points, they are going to give them strong  
20 points.

21 And remember that if we get to the point of Pointless  
22 Fest, he said X. If we get to the point in Bloomington, he  
23 said Y. Okay? Now, the problem is is that when you get up  
24 here and, you know, you stand in front of the Government, so  
25 they can't see the witness, and the witness can't see them, and

1 you ask them these questions, they collapse from these things.  
2 And the reason is because they are trying to please everybody.

3 And that is what acquits Eric McDavid. Those  
4 witnesses did not want to convict Eric McDavid if you listen to  
5 them. They talked about his predisposition prior to the  
6 Government conduct -- they -- contact -- excuse me -- the  
7 Government contact. Because the Judge is going to instruct you  
8 on the law later. I'm not going to. But he is going to talk  
9 about entrapment, and look at the individual prior to the  
10 Government contact.

11 Now, Lauren and Zachary acquit Mr. McDavid because  
12 they say he was peaceful, easygoing, gentle. I believe it was  
13 Ren that seemed to have the most glowing statements about him.  
14 She said that he would give out to the poor. He felt for the  
15 poor. He felt for the dispossessed. He felt for the  
16 underprivileged. And he was for the little guy, so to speak,  
17 the underdog. And that he would give you the shirt off his  
18 back, something along that line, was Ren's position. As well  
19 as Zach Jenson's. That was relatively his characterization of  
20 Eric McDavid. His was almost as good as Eric Gonzalez, the  
21 character witness, about being his best friend.

22 And folks, what I mean by that is these are the  
23 strong Government weapons that come up. And when you talk  
24 about Eric prior to Government contact, they say basically --  
25 and I'm paraphrasing -- they didn't say he was not predisposed.

1 I don't want to get them upset, but they talked about the  
2 elements of predisposition.

3 And then, importantly, Anna testifies about  
4 predisposition for us in many ways. We talked about, and the  
5 Government talked about she contacted the FBI after she first  
6 met him and said not a person of interest. And, look, if  
7 anyone would know, I mean, it would be Anna. She's very good  
8 at it. As earnest as it gets. She meets him. I think that's  
9 almost like expert testimony on predisposition. Anna.

10 Now, this is what's interesting, and this is why,  
11 like I said, the trial was about Eric. It's not about the  
12 others. Then we get into the red hearings, which I'm accused  
13 of. But that's the smear campaign. That's the knife. That's  
14 the Bloomington car ride. And that's Ryan Lewis. That's all  
15 part of the smear campaign.

16 If you were at Zach Jenson's trial or Lauren Weiner's  
17 trial, you'd hear stuff about them. You know, but when we put  
18 a criminal defendant on trial, part of it is, you know, it is  
19 the creation of a case. So you're going to take the ugly  
20 evidence and put it in there. If any of it doesn't relate to  
21 whether or not he agreed with the others and conspired with the  
22 others to commit the crime charged in the Indictment you have  
23 to deliberate on, if there's evidence that doesn't relate to  
24 that, it's smear. That's the red herring.

25 The red herring was the king's men would go hunting

1 in the forest. The peasants were tired of the forest being  
2 depleted, so as a result they'd take the smelly fish across the  
3 track, and the hounds couldn't follow the track.

4 So you talk about a red herring, if there's something  
5 ugly or stupid about Eric McDavid's conduct, it doesn't relate  
6 to whether or not he conspired with the others to do this  
7 crime. It's a red herring.

8 But Anna says, on Ryan Lewis, that Mr. McDavid -- she  
9 doesn't say he was not predisposed. She doesn't say that for  
10 me, but, in essence, she does. She acknowledges that he said  
11 something very significant. I'm out here because I'm not out  
12 there. I'm out here in Philadelphia, Georgia, wherever,  
13 because I don't want to be out there, which is Sacramento area.  
14 And the reason I don't want to be in the Sacramento area is  
15 because of Ryan Lewis. And if I were ever to do anything, it  
16 certainly wouldn't be like Ryan Lewis did it. Because he did  
17 it close to home. The guy was arrested.

18 This guy, Eric McDavid, I think 40 miles from his  
19 home or so. So Anna says, Eric McDavid told me, when I first  
20 meet him, whatever she wants to say as the Government witness  
21 about his, you know, wanting to do a bombing campaign or  
22 something. She acknowledges, she says, but, you know, he said  
23 that he didn't want to do it like Ryan Lewis, and absolutely  
24 was adamant about that. That, you know, Ryan Lewis couldn't be  
25 dumber.

1           And that's interesting because that's a theme that  
2 carried throughout. We showed you this morning how they were  
3 talking about flash, about firefly. That's six months later.  
4 Six months later, and they're still talking about flash and  
5 firefly, which, you know, Mr. Jenson admitted, Ren admitted,  
6 Anna admitted. To go overboard, we played the tape about it,  
7 which was you don't do what Ryan Lewis did.

8           So what does that do? Does that support the belief  
9 that he was not predisposed at the time of Government contact?  
10 Yes, it does.

11           Now, the three witnesses for the Government -- the  
12 three pillars of the Government's case, obviously, are the two  
13 co-defendants and Anna. And, you know, I zeroed in on  
14 November, got, you know, walked around, and walked around, kind  
15 of got to the point and said, you know, is there any big  
16 agreement or goals or object of the conspiracy, you know, in  
17 November? And the answer was -- I believe the answer was "no."  
18 I don't want the Government to get upset and say I'm putting in  
19 facts that aren't in evidence. But there was nothing by that  
20 November meeting. There was nothing.

21           Now, I asked her the same question about January 12.  
22 I said to Zach and to Lauren -- and I believe to Anna -- and  
23 that was, you know, who agreed with Eric on what? And they  
24 basically said, you know, I don't think any of us agreed with  
25 Eric on that. And who agreed with you on this? I don't think

1 anybody agreed with me on that.

2           There was no way to connect the three of them into  
3 their minds meeting, or two of the three of them on a  
4 conspiracy to do anything identifiable, okay, other than  
5 something general. These people were sitting around talking  
6 about general conspiracy. But as far as objects or where they  
7 were going to go, what they were going to use, they didn't have  
8 the foggiest idea.

9           The fair summary of the evidence is this is a  
10 conspiracy of knuckleheads, a conspiracy of dunces. It really  
11 is. Because, you know, look at the recipes. They had been  
12 dealing with the recipe for six months. And, you know, they --  
13 the Government witnesses told me, yeah -- I mean, it took a  
14 while -- I think all three said, yeah, wasn't very  
15 sophisticated in the ways of explosive devices.

16           Fair to say, I don't think Zach Jenson nor Lauren  
17 Weiner nor Eric McDavid knew what they were playing with. And  
18 I think if you asked Lauren Weiner: What's the fuse for?  
19 Would the fuse go with what you were making? I have no idea.

20           Zach, is the fuse for what you were piddling around  
21 with the bleach and everything? I have no idea.

22           And my recollection is earlier that Anna had said --  
23 or testified that this bleach was going to be used with an  
24 electrical device of some type or garage door opener or  
25 something.

1           And my point is, you know, when seven, eight months  
2 later you're still -- you're given a recipe by the federal  
3 Government that is a big dud, and you haven't a clue. That's  
4 true, you don't have a clue as to what you're doing.

5           Zach -- we played it this morning where he said, I  
6 think we're all just real amateurs.

7           Yeah, that's a very, very, very fair statement.  
8 There was one professional who told us she was a professional,  
9 and I was talking to her about it. She said I'm a  
10 professional, something along those lines. When Anna  
11 testified.

12           Your Honor, I have about ten more minutes so maybe we  
13 should take a break.

14           THE COURT: Take a break. Return in -- make it  
15 15 minutes, ladies and gentlemen. Please don't discuss the  
16 case or form any opinions. See you at 3:15 p.m.

17           (Break taken.)

18           (Jury in.)

19           THE COURT: Mr. Reichel.

20           MR. REICHEL: Thank you.

21           Again, ladies and gentlemen of the jury, there's  
22 Defense Exhibits A-5, 7, 11 and 12. They're e-mails that --  
23 I'm not going to put them on the board, but I ask that you  
24 please take a look at those when you deliberate.

25           The reason we're introducing them, we think it gives

1 you a better picture of the real facts that I was talking  
2 about.

3 Let me just tell you what I think. First of all, I  
4 have to rebut some of what the Government said in their closing  
5 here. And Ms. Endrizzi made mention about Mr. McDavid's  
6 statements in November of '05 at his parents' house. He was  
7 high on marijuana. I'm a firm believer that you cannot enter  
8 into a conspiracy knowingly, voluntarily if you're on  
9 marijuana. Tried to get -- I think Zach Jenson would agree  
10 with me on that. Certainly would be the person to ask.

11 And that's the problem in this case. There's several  
12 times where I think the Government's main point is what was  
13 said and done, and these were people that were smoking  
14 marijuana, that were on marijuana when they did that. And that  
15 was probably something out of the Government's control.  
16 There's no one who is going to tell me that the FBI said that,  
17 oh, yeah, if they start the smoking marijuana, that's okay,  
18 we'll still take the tape from that. I don't think so. I  
19 think the goal would be let's -- you know, let's have them  
20 sober.

21 And the reason is that anybody could infer that maybe  
22 if they are high on marijuana with the blurred reality, with  
23 the psycho-effective, you know, problems with marijuana, who  
24 knows what they were really thinking or saying.

25 And, you know, if you say it while you're high, it

1 might be a lie. And I think that's just the bottom line. And  
2 one of the big nights is also January 12, after Anna leaves.  
3 And anything that was said in that Burn Book or about that Burn  
4 Book, that was Mr. McDavid high on marijuana.

5 Now, my point is also that the Government's strong  
6 argument, their strengths that they came up in closing with was  
7 a couple things that we need to talk about.

8 Mr. McDavid was some type of a leader or whatever  
9 because he was at a Spokes Council, and that's their big point.  
10 He was a mediator at Spokes Council. Anna, in '03, when she  
11 was 17-years-old, made it to the Spokes Council. She testified  
12 to that in Miami. She was 17-years-old. And, you know, making  
13 it to a Spokes Council doesn't mean anything. It doesn't mean  
14 anything.

15 And if the Government comes up here in their closing  
16 argument, at the end of this trial, and says, here's what hurts  
17 Mr. McDavid, is that Mr. Jenson said McDavid actually made it  
18 as a speaker at a Spokes Council at one of these things.

19 Additionally, Ms. Endrizzi's other item that she came  
20 up here with was that he was the keeper of the book, and he had  
21 this little book his hand.

22 Well, that's why we played this morning's tape.  
23 Because they are having their discussion, their argument. And  
24 near the end, Anna says: Where's the book? Where's the book?  
25 Let's write it down in the book.

1 This is the end of my tape. I think it's E-2.

2 Where's the book?

3 And McDavid says, the book's all right. It will be  
4 okay. Something along these lines like the book's the book.  
5 And then they say, where's it at? Out in the car. And Anna  
6 says: I got to go get it. We've got to write this stuff in  
7 it.

8 And McDavid says, and you can hear it on the end of  
9 the tape, he says: The book is the book. The book will be all  
10 right. You know, the book will be all right. Leave the book  
11 alone. It will be all right.

12 And, you know, I think it's, you know, come on, Anna  
13 brings the book there. And she brings it, she fills it out.  
14 So, yeah, Mr. McDavid kept it, but everybody agrees that, you  
15 know, he didn't bring it there. And it was at her urging  
16 constantly to write these things down and so forth.

17 Now, the creation of -- I'm sorry -- let me just ask  
18 you about some of these things, and ask you to think about it.

19 Ms. Endrizzi says that Anna's not an important player  
20 here because they could have stolen these things, and they  
21 could have stolen these things. Enough to do this. And, you  
22 know, that's, you know, that's a fair comment, but it's just  
23 not like -- their burden is to prove beyond a reasonable doubt,  
24 and the instruction say, you know, that there is no inducement  
25 or this defendant was predisposed.

1           And if you say, well, I think these people could have  
2 stolen enough, you know, my response is, I don't think you can  
3 steal a cabin in Dutch Flat. But, you know, nevertheless, I  
4 mean, that's just not that powerful of evidence beyond a  
5 reasonable doubt.

6           Then, the -- I think the case develops along the  
7 lines of the creation in the courtroom here and also the  
8 creation of a case out in the field. And it's not perfect  
9 science is the problem. You can't make a perfect case when  
10 you're the Government. You can't make a perfect case when  
11 you're investigating as the informant.

12           And for those examples of the problem the informant  
13 had, she's going to come in and testify that, yes, under my  
14 cross that she's a liar, absolutely, you know, that she does it  
15 a lot. She fools a lot of people.

16           Then I'm going to say, well, wait a minute, when you  
17 first met, it's your word as to what he said that day that, you  
18 know, he wanted to start this bombing campaign at this certain  
19 time in June, July, August, whenever. It's your word because  
20 it's not on tape. Correct.

21           Then we go to a tape, which she acknowledges here,  
22 and acknowledges is true. This is late in January where she  
23 says two separate times -- I call them the "huh." I call them  
24 the verbal, "what," the shrug of the shoulders, "I did."

25           He is on tape. She assumes he is going to -- hopes

1 he is going to reaffirm. She tries to put it on tape:  
2 Remember when you first told me you wanted to do this? And he  
3 says, no. And she says something to the effect of, yeah, you  
4 said your first goal was the IFG. And he says, I did? And she  
5 says, yeah. And he goes, oh, I thought it was the cell phone  
6 towers. Well, no.

7 Now, there's another time where she says: Remember  
8 the federal buildings, you wanted to do the federal buildings  
9 when we were in Bloomington? And he says, I didn't go to that  
10 workshop in Bloomington.

11 And she says -- she acknowledges that that happened.  
12 So twice, twice she tried to catch him on tape with something  
13 that they wanted for the creation of their case, for their  
14 mission, and she didn't get it from him. Those are very, very,  
15 very important things to understand.

16 So I draw your attention now to October of 2005. And  
17 that's when Anna is leaving the FBI, and they are going to  
18 create the crime. They are going to create this. And that is  
19 that you got to get these people on board. I believe these are  
20 her words.

21 Again, when I say this here for the next couple of  
22 minutes, it's not -- you know, I'm not trying to introduce any  
23 evidence, tell you what the evidence was. And I apologize in  
24 advance. And I'm just summarizing what I believe the -- you  
25 know, the theme that ran through Zach, Lauren and Anna's

1 testimony. Specifically Anna's.

2 The FBI is coordinating it at this point. They are  
3 now in the process of creating, okay. And they are not there  
4 as amateurs, the FBI. They are not there as amateurs. You  
5 know, they are there to do what they believe is, you know,  
6 their job. And they are going to get down. And, I mean, if  
7 any one of us were doing it, we'd do the same thing. We'd get  
8 an outline of what we need to do, how we need to accomplish  
9 this, and put it all together.

10 What's missing from that, kind of like the recipe  
11 that the group did, what's missing from that is determining  
12 whether or not we want to remove predisposition and remove  
13 inducement and not entrap somebody. What's missing from the  
14 planning session is, we're worried about these people, we need  
15 to corral them, to fix them together, to get them to  
16 concentrate, to do this, to keep an eye on them, and then we  
17 can wrap this up and see what we have.

18 So as a result, you have early November 2005 or late  
19 October, Lauren getting the phone calls and e-mails from Anna.  
20 I'll fly you out to California. I'll fly you out to  
21 California. A woman who testified that she has the worst  
22 anxiety attacks to fly, doesn't want to fly, doesn't have the  
23 money. She has zero wherewithal to get from -- I think it was  
24 New York or Philadelphia, one of the two, out to California for  
25 that available weekend that meshed nicely with the FBI mission.

1 There is no way that Lauren Weiner -- Weiner gets out there.  
2 Okay? Just so wherewithal to do it whatsoever.

3 Now, the next person is Eric McDavid, who also has  
4 problems. He has serious familiar crap, so to speak -- because  
5 I don't want to say shit on the record -- nevertheless, so Eric  
6 McDavid says I've got this family thing, so I can't do it.

7 And Anna testifies and Lauren testifies that they are  
8 in Philadelphia together when the phone rings, and it's Eric.  
9 And he says, yeah, I can't make it. I got this family stuff.  
10 I can't do it. Well, you know, she told us this -- this is  
11 early November -- she's been given the direction of the FBI,  
12 you got to do your job, you got to get these people together,  
13 you got to get them in one area, we're worried, you've got to  
14 do all these things. She's going to give her a plane ticket,  
15 blah, blah, blah.

16 Eric McDavid, she says I can't believe how selfish he  
17 is being. He wants to deal with his family. Not even one day.  
18 Not even for one day. This is a very goal-oriented, directed  
19 approach to this. And this is, like I said, a person who  
20 doesn't even have a chance. Is this inducement? Yes, it is.  
21 Is it inducement? Yes, it is. Is it lack of predisposition?  
22 Yes, it is.

23 Eventually, they decide and agree that, you know,  
24 they are going to meet out here. And when they meet out here,  
25 it's her flying Lauren, her talking about paying for cab fare,

1 her driving in her car, her bringing them up there. And then  
2 they come to the house. He's high. She records it. And she's  
3 there for one reason, and that is to get them to say things on  
4 the tape recording now.

5 She testified the reason she went there was to get  
6 them to fix on a target, to fix on an object, to fix their  
7 goals, and get things coordinated, and get things going, get  
8 things finalized, and get things more on board with the FBI's  
9 mission or whatever.

10 But she also testifies, and so does Lauren, and so  
11 does Zach, that, unfortunately, at the end of, the conspiracy  
12 of dunces has made a "giant" step forward still. And that's  
13 the frustrating part. And I believe she testified that it was  
14 frustrating that there was no further way. They've really not  
15 gone much farther. They made some general movement, but it  
16 wasn't what the goal was. The tumbleweeds blow away at that  
17 point.

18 Now, is it inducement of what goes on afterwards?  
19 What goes on afterwards is the woman who has paid for  
20 everything in their travels that summer, the woman who  
21 Mr. McDavid is in love with -- and the list would go on and on  
22 and on. I would do those for you, but I think you're smart  
23 enough to understand.

24 The woman who is on a mission, who is very earnest  
25 and hardworking and good at fooling people, undercover

1 informant in these operations, who has now got one fixed target  
2 like a heat-seeking missile, and that's this group, she has  
3 directives on what to do with them, and she has been stepped up  
4 now to cooperating witness, and all these other things. And  
5 she also got this advisement on what to do, which, again, you  
6 got to look at it because it's not much.

7 But nevertheless, so we're to November 2005 at that  
8 point, and the corralling really begins on the tumbleweeds.  
9 Fair to say, if you removed Anna from that equation in November  
10 of 2005, the tumbleweeds don't get back together. The  
11 tumbleweeds go their separate way.

12 Lauren goes out to New York. In fact, Zach, when he  
13 shows up back in this on January 2nd -- this is one of  
14 tumbleweeds -- he says that's actually when he started his  
15 fake. That's when he started his acting. And he was thinking,  
16 you know, I don't want to be in this, mumble, mumble. And in  
17 fact that's when he acknowledges having a conversation in the  
18 car back to the effect of -- he had a conversation with Anna  
19 about her leading them into all this trouble and leading them  
20 down the road and so forth and so on. He acknowledges  
21 something along those lines.

22 Now, is it inducement, is it the creation of a crime  
23 if at that point you provide the place to homeless, penniless  
24 -- their witnesses' words -- their witnesses' words --  
25 homeless, penniless individuals. You provide the place. You

1 provide everything else. You provide the chemistry set. You  
2 have been providing the recipe for six months. You provide the  
3 heart strings. You provide the glue. You provide the wine.  
4 You provide the hot, crisp \$100 bills out of your pocket to  
5 others. You clearly provide the advisement, the instruction.

6 Why say I'm teaching chemistry this summer? Why end  
7 some e-mails with, "got to get back to the chemistry lab"? Why  
8 tell them all that if you're really going to be in the  
9 conspiracy as someone standing there. I don't know. You  
10 don't. Okay?

11 The creation was, here's your role, being a stripper,  
12 so that's why you got the money. Now you're no longer a  
13 stripper. You're teaching chemistry this summer, and that's  
14 why you can tell them what to do and direct them on all the  
15 chemistry stuff. Okay, that's your role.

16 Now, you put that all together, the chemistry lab,  
17 the place, the money, the recipe, the Burn Book, the tape  
18 recordings, the video cameras, the \$100 bills, the heart  
19 strings, the FBI bank of behavioral psychologists, you've got a  
20 pretty good, focused -- you know, you have pretty good focus on  
21 your mission. And that's inducement.

22 And when you're dealing with tumbleweeds, it's  
23 different, okay. When you're dealing with different people,  
24 different things. But when you're dealing with people that are  
25 not predisposed, that's inducement. That is the creation of a

1 crime. That's something that we don't want as much as we don't  
2 want the creation of a case in a courtroom.

3 So if we have strong evidence and we have some other  
4 evidence that's strong evidence, or we don't use it, you know,  
5 we don't want that either because it's not fair. Because  
6 fairness is the heart of justice. Fairness is actually the  
7 heart of life.

8 That, you know, if the heart of life is fairness, and  
9 you want a fair investigation, you don't want rules broken, you  
10 don't want, you know, corners cut, you want to turn very square  
11 corners. If fairness is the heart of life, and the heart of  
12 justice, you want a fair trial.

13 And in a fair trial, things like smearing someone  
14 and, you know, leaving what's probably the most relevant  
15 portion and going in those areas so somebody would dislike the  
16 defendant cuts a little bit into the fairness of it.

17 But there is a variety of things that go on in this  
18 case -- like my closing. I tried to just talk to you about the  
19 evidence here, and I don't get to come back to you. This is  
20 it. This is your -- this is your lucky day. The last couple  
21 of minutes you're going to have with me, so buy the lottery  
22 today.

23 Now, my closing was about a comment on the evidence.  
24 The Government went first. They are going to come up again  
25 because they bear the burden. They bear the burden beyond a

1 reasonable doubt.

2           When they come up, you know, the question of fairness  
3 is: Are they going to come up with new things that they didn't  
4 address the first time through, so old Markie-boy can't come up  
5 here after that and talk about it. That's what you have to ask  
6 yourselves.

7           And those are kind of some of the things that trial  
8 lawyers know about, want you to know about, hope if you realize  
9 that, again, you're seeing the creation of a case by the  
10 Government and for the creation of a case in the field. It's  
11 not everything that happened, but it's what they are trying to  
12 give you to convict somebody.

13           The Court is going to instruct you on the law. There  
14 are two instructions I want you -- I ask that you pay  
15 significant attention to. And that is the legal instruction  
16 about when a witness who testified, what you can do with that  
17 testimony. And like Anna, it says that you can -- she's gotten  
18 paid. She's a Government witness. She's a Government  
19 informant.

20           The Judge will give you an instruction, and it is  
21 that you are entitled to disfavor that testimony. Something  
22 along those lines. You are entitled to weigh it less. I don't  
23 have it at my grasp. But that applies.

24           And the Judge is going to instruct you specifically  
25 as to Zachary Jenson, and he is going to instruct you as to

1 Lauren Weiner. And you've heard evidence that they received a  
2 benefit in exchange for their testimony.

3 I'm sorry. It may not be a benefit. The language  
4 may be that they pled guilty to the case. And there's two  
5 instructions in that part. One is the fact that they pled  
6 guilty cannot in any way be used to prove the guilt of Eric  
7 McDavid. You see, those are two separate individuals that pled  
8 guilty. You may weigh on it. You may talk about insofar as it  
9 affects their credibility. That's what the Judge is going to  
10 instruct you.

11 And I'm getting close here because I want you to pay  
12 attention to that. I had two co-defendants plead guilty in a  
13 case, and the concern could be that, well, they pled guilty,  
14 this poor guy must be guilty over here.

15 The Judge will instruct you as to the law. The law  
16 is, no. The law is you use that as their credibility. Are  
17 they truthful individuals.

18 And it will also instruct you that they received --  
19 they, you know, they pled guilty pursuant to an agreement. You  
20 can disfavor that testimony if you choose.

21 And I ask you to because it's purchased testimony,  
22 and it's -- you know, I think it's purchased at a very good  
23 price. I think they hope to get their money's worth because  
24 they gave these guys a pretty good deal to do this, and they  
25 worked real hard with them.

1           And Zach testified about, I believe, four sessions,  
2 three hours each, with Ms. Endrizzi going through his  
3 testimony.

4           Now, the other instruction is obviously, as we used  
5 to say where I'm from -- is the big end of the cow. The big  
6 end of the cow is the entrapment instruction.

7           And the entrapment instruction the Judge is going to  
8 instruct you reads something like this -- well, actually she  
9 went through it pretty well. The Government has the burden of  
10 proving beyond a reasonable doubt that the defendant was not  
11 entrapped. The Government must prove beyond a reasonable  
12 doubt, one, the defendant was predisposed to commit this crime  
13 before being contacted by Government agents. My view is that  
14 Anna said that.

15           Now, for a variety of reasons, other than she called  
16 the FBI and said that, hi, this is Anna, he is not predisposed,  
17 talk to you later. Or, that she called basically when she said  
18 he said I do not want to go to California and, you know,  
19 imitate the Ryan Lewis stuff because -- and then later on  
20 talking about flash and firefly. I think that's significant.

21           And then the defendant was not induced by the  
22 Government agents to commit the crime. They have to prove  
23 beyond a reasonable doubt that the defendant was not induced by  
24 the Government agents to commit the crime.

25           I submit to you that the wherewithal of Eric McDavid

1 was not sufficient that he could have done this without Anna.

2 I mean, in closing I think -- I would say in best  
3 summary that without Anna, you have nothing. I mean, without  
4 Anna, I believe you have nothing in this case. That's  
5 entrapment.

6 If they did it without her, or with a small amount of  
7 help from Anna, or if she provided incidentals, then maybe you  
8 have something. But when in this case you have everything,  
9 with a mission behind it, with someone who has really good  
10 powers of wind to keep the tumbleweeds on the same road, that's  
11 inducement, that's entrapment. That means he is not guilty.

12 And just as much, that entrapment gets you to whether  
13 or not this individual made an agreement with the others to  
14 commit the crime charged here. Even if you should find  
15 evidence that there was some agreement in some way, you have to  
16 understand, well, was he entrapped to that point, did he come  
17 to that freely, which comes to something probably rather  
18 important, Eric McDavid, everyone agreed, that was in this  
19 case, that's Anna, that's Zach, and that's Lauren -- maybe not  
20 the Government -- but everyone else agreed that he was in love  
21 with her.

22 And, you know, Winston Churchill said, when you put  
23 something down and publish it, you've pulled your pants down  
24 and mooned the world.

25 Eric McDavid wrote a love e-mail to Anna, which made

1 it into this criminal case. He mooned the world with his love  
2 for Anna. She acknowledged that in her testimony.

3 So we have him in love with her, and we have two  
4 others that didn't want to let her down, so they were acting to  
5 go along with her. Acting.

6 And if you see these tapes that we played at the end,  
7 Anna can be very, very pushy. She's very insistent. She's  
8 dynamic. She's a very good witness. She is compelling. She  
9 is intriguing. He didn't have a chance. Mr. McDavid didn't  
10 have a chance.

11 He has a chance now because the Government, in the  
12 creation of this case -- not out in the field but in this  
13 courtroom -- has to have convinced you beyond a reasonable  
14 doubt that he had a chance. They have to convince you beyond a  
15 reasonable doubt that he was predisposed, or that she did not  
16 induce him.

17 I strongly urge you, finally, that he was -- he was  
18 not predisposed. They can't prove he was predisposed beyond a  
19 reasonable doubt. They cannot prove that this was not  
20 inducement beyond a reasonable doubt. He had no wherewithal to  
21 do this.

22 One moment, and you're done with me. Hold on.

23 Again, I urge you to look at our exhibits. And my  
24 closing comments to you are: It has to be something more than  
25 the fact that without Anna there is nothing. There has to be

1 something more to convict Eric McDavid. Thank you very much.

2 THE COURT: Rebuttal.

3 MR. LAPHAM: Good afternoon, ladies and gentlemen,  
4 for the final time. I'll try to be similarly brief, but you  
5 know how that goes.

6 We made promises before that we weren't able to keep.  
7 I'm going to try and confine my remarks to two topics, and  
8 those are the two topics that Mr. Reichel talked about.

9 He said in the outset of his speech to you what he  
10 was going to talk about, and that is the existence of a  
11 conspiracy and entrapment.

12 And those two are interconnected, at least in the  
13 early going on. I want to show you how that works.

14 I've been accused of not listening very well from  
15 time to time, but I listened very attentively to Mr. Reichel's  
16 closing argument. And I did not hear any discussion of the  
17 evidence with respect to the conspiracy. And that's what I  
18 want to talk about now.

19 We start the conversation in April of 2005. Now,  
20 that may sound incorrect to you. The first time that Anna  
21 meets up with Eric McDavid, after her initial meeting with him  
22 the previous summer, is in June of 2005 at the Biotech  
23 Conference in Philadelphia.

24 And that's where, on the balcony at Lauren Weiner's  
25 apartment, she first hears Eric McDavid voice some thoughts

1 about doing something big in California. But, actually, if you  
2 look carefully at the evidence, the germination of that idea  
3 occurred a little earlier than that.

4 But let's move forward in time for a second. So she  
5 hears this comment that there's something big that he is  
6 planning in California, and she's tasked by the FBI to find out  
7 what that is.

8 Now, remember, the FBI has other information on  
9 Mr. McDavid at this point about his radical tendencies, and she  
10 finds out about that. She has a drive from the CrimethInc  
11 conference in Bloomington, Indiana, to Chicago, and during that  
12 ride he reveals what those plans are.

13 He talks about a bombing campaign in California. And  
14 Mr. Reichel talks about the Government's smear campaign. He  
15 says we bring in evidence just to smear his client.

16 Well, let me tell you something, here's how that  
17 conversation developed. Eric McDavid told Anna about his plans  
18 to do the bombing. And then what did she testify to? She said  
19 there was silence, and finally he took a deep breath, and he  
20 said, there's something I got to get off my chest. If you're a  
21 cop, I'll kill you.

22 You have to link those two statements together. The  
23 bombing campaign and "if you are a cop, I'll kill you." You  
24 can't take them out of context, as Mr. Reichel would like you  
25 to do, like they have nothing to do with each other. This is

1 the same conversation.

2 Was Mr. McDavid serious about the bombing campaign?  
3 Doesn't that comment tell you that he was dead serious about  
4 it? That it's something he intended to do. And so much so  
5 that if she reported it to the cops, or if she was a cop, he  
6 would carry out some pretty violent acts. It shows that he is  
7 serious.

8 It also shows something else. It shows that however  
9 much he may be sexually attracted to this woman, he is not  
10 beneath threatening her in a very graphic fashion.

11 Okay. So we're in July of 2005 now. But, actually,  
12 the germination of that idea occurred back in April. And the  
13 way we know that is you have an excerpt that we played for you  
14 a couple weeks ago at this point. And you probably didn't  
15 catch this in the excerpt, which you can listen to it again to  
16 make sure it's there.

17 But it takes place in that November weekend when they  
18 meet at McDavid's parents' place at Foresthill. And he talks  
19 about when he came up with the idea to start this bombing  
20 campaign. And it's in conjunction with the discussion about  
21 this kid in West Virginia that told him about the explosive  
22 mixture. You know, the one where you mix the bleach and the  
23 ammonia and you get the crystals. He is talking about that.

24 And he says, in the course of that discussion:

25 Because I had been thinking about it for three months before

1 that, and I didn't know how to go about, like, getting the  
2 information.

3 Three or four months prior to that is prior to the  
4 Biotech conference. He is talking about this kid that he met  
5 in West Virginia at this Mountaintop Justice demonstration.  
6 And he is saying that's where he got it, and that was three or  
7 four months before Biotech, before Anna even makes her  
8 reappearance onto the scene.

9 I mean, that all goes to predisposition. But it also  
10 goes to the advent of this conspiracy. Whose idea was it? It  
11 was Eric McDavid's idea. He is the one that recruited Anna,  
12 asked her if she would be available during the Fall or during  
13 the Winter of 2005. And you know that's true because just a  
14 few weeks later, after that drive to Chicago, Eric McDavid  
15 meets up with Zachary Jenson and Lauren Weiner, totally apart  
16 from any knowledge that Anna has about this meeting. She  
17 doesn't know that this is going on.

18 And they both testify that at this meeting at the  
19 cafe in Philadelphia, Eric McDavid broaches the idea with them  
20 about direct actions. Lauren Weiner talks about the "boom"  
21 that he wants to learn how to make a bomb. That he had some  
22 knowledge about how to make a bomb. And he talks about doing  
23 direct actions.

24 And that's undisputed. There is no evidence to the  
25 contrary. Zach Jenson testified to that, and Lauren Weiner

1 testified to that. But the genesis of that idea was three to  
2 four months before that.

3 We move forward in time. We have a meeting at  
4 Foresthill in November, November 18th through the 20th of 2005.  
5 And where does that meeting occur? It occurs at Eric McDavid's  
6 parents' house. They are gone for the weekend, and the four  
7 co-conspirators bring themselves together there.

8 And, yes, it's true that Anna did some things at the  
9 FBI direction to facilitate that meeting. But look at the jury  
10 instruction you're going to get. Because the Judge will  
11 instruct you that where a person, independent of and before  
12 Government contact, is predisposed to commit a crime, it is not  
13 entrapment if Government agents merely provide an opportunity  
14 to commit the crime.

15 All the FBI did was bring these four co-conspirators  
16 together in one location to find out if they were serious about  
17 what Eric McDavid had talked about.

18 And Special Agent Torres testified on the stand about  
19 that, and he said that if they had gotten together that  
20 weekend, and if they had gone hiking, and there had been no  
21 discussion of any conspiracy or any bombing campaign, game  
22 over. The FBI would have breathed a sigh of relief, and the  
23 investigation would have shut down at that point.

24 But that's not what happened. And fortunately, you  
25 have that on tape. You can hear the defendants talking.

1           Now, one thing you don't have on tape but has been  
2 corroborated by three witnesses is that at the very outset of  
3 that meeting, Eric McDavid looked everybody in the face and  
4 said: Just by talking here, it's conspiracy. It's a violation  
5 of law, and we could all go to prison.

6           Again, you assess that comment in terms of how  
7 serious is he about committing this crime. It was his idea.  
8 He is now telling the people that he is gathered with that,  
9 folks, we could all go to jail.

10           Why does he do that? To test their resolve. To find  
11 out if they are committed to what he wants to do.

12           Proof of that? You got a tape recording, an excerpt,  
13 where he is concerned that one of his compatriots is not  
14 expressing enough interest. Zach Jenson, remember, is the  
15 quiet one. He is not talking very much at this November  
16 meeting. And so McDavid gets on him and he says: Man, you got  
17 to tell me what you're thinking here because you're making me  
18 nervous.

19           Is Eric McDavid committed to going forward with this  
20 conspiracy? Is he the one who is expressing any reluctance?  
21 Zach may have some reluctance, but not Eric McDavid.

22           So we move forward in time. You heard some of those  
23 other excerpts from the November meeting. They talk about  
24 targets. And at the very first meeting you hear cell phone  
25 towers and the Institute of Forest Genetics, the tree factory,

1 you hear about gas stations.

2           Where do those ideas come from? It's undisputed. I  
3 think it's Exhibit 20 or 21 -- in fact, it's right here,  
4 Exhibit 21 -- the Derrick Jensen interview. Who brings that to  
5 the meeting? Who is the one that talks about that interview  
6 and encourages his fellow co-conspirators to read it? It's  
7 Eric McDavid.

8           It's Eric McDavid who says, this is the guy that  
9 pumped me up and got me to believe that harsher tactics are  
10 necessary. And it's right here in the article, but it's also  
11 on tape where he talks about fence sitting. Derrick Jensen  
12 talks about fence sitters in here.

13           The discussion is whether these harsher tactics,  
14 these more violent tactics will upset the fence sitters, the  
15 ones who might be convinced to come over to our side or maybe  
16 not.

17           And Eric McDavid says in the tape recording, as well  
18 as repeating it in -- or reading it in here in the Jensen  
19 interview, that: Screw the fence sitters, they won't be swayed  
20 anyway, they won't get off the fence, so we don't care what  
21 affect violent tactics are going to have on the fence sitters.

22           And I think it's Derrick -- it is Derrick Jensen in  
23 this article that says: You know, I can't decide if I want to  
24 write or blow up a dam. That's his philosophy, and that's Eric  
25 McDavid's philosophy.

1           So who is it that's pounding the drum at every step  
2 of the way? Who has got the predisposition to commit this  
3 crime at every step of the way?

4           But we move on down the road. And here's -- before  
5 we do, though, I should point out one of the things you have to  
6 determine in this case, one of the elements of the conspiracy,  
7 is whether there's an agreement. That weekend, November 18th  
8 through the 20th, is the agreement. You've got people invited  
9 into a conspiracy. Now they're together. They are talking  
10 about it. And they are saying, yeah, this is what we want to  
11 do. We want to start blowing things up. We want to take  
12 responsibility on behalf of ELF because that's talked about in  
13 that November meeting also.

14           You'll hear the instruction. The parties to the  
15 conspiracy don't have to agree on every aspect for it to be a  
16 fully-formed agreement.

17           They agree in principle, and then we move on down the  
18 road. We're not done yet by any means. This is just the very  
19 first meeting.

20           And Mr. Reichel would like to take bits and pieces of  
21 the evidence without attributing a date to it, but it's  
22 important to put all the pieces together.

23           There's an agreement. Now, we're looking for an  
24 overt act. We're looking to see if these people are really  
25 serious about what they are doing about putting this agreement

1 into effect. Because, as Ms. Endrizzi told you at the  
2 beginning of her opening, it's not good enough just to get  
3 together and talk about something, not good enough just to get  
4 together and even agree on something. You have to take an  
5 overt step. And they took an overt step. Almost instantly.

6 Lauren Weiner volunteers, I'm going to go get The  
7 Poor Man's James Bond. It's got some chemical recipes in it  
8 for explosives. That was something that Eric McDavid  
9 specifically said please do. And that's what she did.

10 The minute that she placed that purchase, that's an  
11 overt act. The conspiracy at that point is fully formed. That  
12 is everything the Government needs to show to convict this  
13 defendant of conspiracy under 844(n).

14 Because the overt act doesn't have to be committed by  
15 the defendant himself. It can be committed by any one of the  
16 co-conspirators.

17 But we move on down the line, and Eric McDavid in  
18 that interim period -- they decide to get back together in  
19 January -- but in that interim period Eric McDavid is sending  
20 e-mails to Anna. He is asking: Did you find the recipe? Or  
21 are you looking for the recipe?

22 They are going back and forth. Overt acts. He is  
23 trying to locate a recipe.

24 We go down the line a little further. Get back  
25 together again in January. And I won't go over it in detail.

1 I know you know the schedule of events contained in the Burn  
2 Book. Monday, they talk about their list of concerns. Eric  
3 McDavid has none. He is ready to go forward with this  
4 conspiracy.

5 Other members of the conspiracy have concerns. They  
6 talk them out, talk about them. They decide accidental death  
7 is acceptable -- or at least McDavid does. They talk about,  
8 once again, which targets they all want to go for. They talk  
9 about how to take responsibility on behalf of ELF and ALF.

10 And the mere fact of coming together again at that  
11 cabin is another overt act. They travelled to a specific  
12 location for the purpose of advancing this conspiracy.

13 They move on. On Tuesday, they do reconnaissance.  
14 They go to the Nimbus Dam and Fish Hatchery. They go to the  
15 Institute of Forest Genetics. A little earlier the day before  
16 that, they do Internet research on dams and power stations.  
17 Each one of those is an overt act.

18 When they hit the "start" button on that computer and  
19 start doing that Internet research, searching for targets,  
20 that's an overt act in the conspiracy.

21 When they travel to the Nimbus Dam, there's another  
22 overt act.

23 When they travel to the IFG, that's another overt  
24 act.

25 Wednesday, they go to San Francisco. Another overt

1 act. They go specifically to research chemical houses where  
2 they can buy supplies. They do research at the library, and  
3 they make phone calls. Each one of those, overt acts.

4 Most of these are committed by Mr. McDavid. But they  
5 don't have to be. It could be any one of the group.

6 On the way back, they go -- they stop at the Walmart,  
7 and they buy the materials. Overt act. The materials to  
8 fabricate the bomb.

9 And the next morning, Thursday, they get up, and they  
10 start mixing those chemicals -- actually, they first go into  
11 Auburn, and they buy more chemicals and more equipment.

12 Eric McDavid buys the gunpowder to form the fuse and  
13 the trick candles to form the fuse.

14 When they get back, Eric McDavid is the one who is  
15 out there mixing the chemicals, boiling the bleach and  
16 measuring the salt. Each one of those, overt acts.

17 And we know about the bowl breaking, and that's  
18 troubling to all of the defendants. It, together with being  
19 stopped by the CHP earlier in the day, and the bowl breaking,  
20 is frustrating and tempers are high.

21 But you heard all the tapes at this point, and there  
22 is no question that this conspiracy was going forward. Perhaps  
23 at a slower pace, but there is no question this conspiracy was  
24 going forward.

25 And Mr. Reichel said one thing that caught my

1 attention. He said it's going forward by centimeters. Well,  
2 he didn't use that word, but very small steps.

3 First of all, whether it's going forward by inches or  
4 miles is not the point. If the conspiracy is still active, if  
5 it's going forward at all, it's a conspiracy.

6 And the conspiracy train has already left. As I  
7 said, these defendants were guilty of conspiracy the moment  
8 Lauren Weiner bought that The Poor Man's James Bond. There is  
9 no indication that this conspiracy was abandoned.

10 But, I do want to address that statement because it  
11 comes under the category of: Are you kidding me? This  
12 conspiracy is moving forward by inches?

13 In the space of four days, these people have come  
14 together, they've done research on chemical formulas, they've  
15 talked about issues pertaining to the conspiracy and resolved  
16 those, so now the conspiracy is a little tighter. They  
17 purchased chemicals, and they've started to manufacture their  
18 first bomb. All in four days.

19 And you can refer to them as a conspiracy of dunces  
20 if you want, but when they missed making the formula on that  
21 first day, that Thursday when the bowl broke, what was their  
22 attitude? Lauren Weiner said it just this morning in the tape  
23 recording you heard just this morning: We learned from that.  
24 We learn what to do better next time. We slow down. We get a  
25 double-boiler type situation, metal pot. We get -- take other

1 precautions to make sure the bowl doesn't crack next time.

2 But the main thing is she said, "we learn." And  
3 that's just the problem with a conspiracy.

4 Since before this country was founded, conspiracy has  
5 been viewed as a more serious crime because it involves not one  
6 person but more people coming together. People who can all  
7 contribute their own knowledge to the issue at hand. People  
8 who, when other conspirator's attention is lagging, or their  
9 enthusiasm is waning, they can say, no, we got to keep moving.

10 That's exactly what Lauren Weiner did that morning.  
11 That's exactly what Eric McDavid did that morning when he said:  
12 Yeah, we can take it slower if you want, if you feel more  
13 comfortable with that.

14 But the IFG is not off the table. Cell phone towers  
15 were not off the table. They were still going forward with  
16 this conspiracy.

17 And there's another thing that Mr. Reichel said that  
18 I just can't let go. Eric McDavid was high on marijuana. I  
19 don't know. Pick your point in time. Whether it was in  
20 November or January or on any particular date -- well, I'm not  
21 even going to address factually whether that's true because I  
22 don't think that there's any evidence that he was high in  
23 November.

24 But it doesn't matter because that argument only goes  
25 so far. You can't be high 100 percent of the time. You can't

1 be high in Philadelphia when you raise this idea, the entire  
2 weekend of November, and all of those four or five days in  
3 January. There is no evidence of that.

4 And you've heard all the tapes. You know that Eric  
5 McDavid in all of those conversations was functioning very  
6 clearly. He had a clear goal in mind and a clear thought  
7 process.

8 I want to talk about inducement because that goes  
9 hand-in-hand with predisposition. First of all, there is no  
10 inducement here. None whatsoever. Anna was working for the  
11 FBI in June of 2005, doing work to help law enforcement spot,  
12 you know, on a real-time basis, criminal activity, so that that  
13 activity could hopefully be prevented.

14 Totally out of the blue, she runs into -- well, she  
15 hears comments by Mr. McDavid that he is interested in doing  
16 something big. She brings that to the attention of the FBI,  
17 and there we go. No inducement. She's merely reporting things  
18 she's heard, as she did in July. No inducement there. Nothing  
19 she offered McDavid.

20 Now, inducement can't be a one-sided or a one-way  
21 street. McDavid can't induce himself because of some romantic  
22 thoughts he has for Anna. I mean, really, what Mr. Reichel is  
23 talking about there is motive. He is saying -- he is trying to  
24 infer with you that he committed this crime because he wanted  
25 to impress Anna. That's a motive.

1           The Government is not required to prove motive. And  
2 even if we were required to prove motive, the law doesn't care  
3 why you committed the crime. If you did it for love or money  
4 or for political protest purposes, the fact is you formed a  
5 conspiracy to do something that the law forbids.

6           If you find that -- and there is another thing about  
7 inducement and predisposition. Entrapment is the intentional  
8 planting in the mind of an otherwise innocent person the idea  
9 to commit a crime.

10           If you believe that that's what happened here, then  
11 go ahead and acquit the defendant. If you think that the idea  
12 to commit this crime came from the Government, that the  
13 Government took some step to induce the defendant to commit  
14 this crime, then you should acquit.

15           But there is no evidence of that. There is no  
16 evidence that the Government or Anna did anything to encourage,  
17 to induce, to cajole this defendant to commit this crime.  
18 There is no payment of money. There is no offer of any kind of  
19 reward. And it's clear that you don't even get to the  
20 inducement argument if the defendant was predisposed to commit  
21 the crime.

22           And merely providing the opportunity -- it's in the  
23 jury instruction -- merely providing the opportunity to the  
24 defendant to act upon his own predisposition is not inducement.  
25 It's simply not.

1           I want to talk briefly about a few other points. I  
2 had trouble following some of Mr. Reichel's arguments. I'm not  
3 criticizing Mr. Reichel for it. I'm just -- I'm not sure where  
4 he intended them to fit into the analysis because he talks  
5 about evidence that the defendant is not guilty. And the  
6 arguments he raised to me don't match up with that overarching  
7 statement.

8           He talks about these people being penniless,  
9 homeless. Well, you know, the facts there. They are penniless  
10 and homeless in a much different sense than the homeless people  
11 that we're all familiar with. These people had homes. They  
12 just simply chose not to go to them.

13           But that's not really the point here. The point is  
14 that -- and you'll get this jury instruction also -- with  
15 conspiracy, the crime is the agreement. The crime is the  
16 agreement. It doesn't have to be successful. That crime  
17 doesn't have to come to fruition. It just has to be the  
18 agreement plus an overt act.

19           Mr. Reichel spent a lot of time talking about this  
20 conspiracy of dunces, that they never would have been able to  
21 pull this off.

22           Well, we know that because the FBI was on it from the  
23 word go. We never would have let them pull it off. But it was  
24 important to know whether they were serious about this, and the  
25 reason is simple. What is the FBI to do if they determine that

1 these people are serious about committing this crime, but never  
2 in a million years do they have the brain wattage to pull this  
3 thing off? Does the FBI pack up their gear and go home at that  
4 point? These are people who would easily disappear into the  
5 woodwork. You know that. They ride the rails. They  
6 dumpster-dive. They can get lost faster than anybody.

7 So is the FBI at that point supposed to make the risk  
8 assessment that, well, there's a completed conspiracy here,  
9 they've done all the recon, they are trying like heck to build  
10 a bomb, but they will never be able to do it. Is that what the  
11 conspiracy law requires the FBI to do, to go through that risk  
12 analysis?

13 Mr. Reichel tries to make something of the fact that  
14 on the last day of this conspiracy, before the arrest occurred,  
15 that they were still talking about different targets. You  
16 know, this is a very utilitarian group. That's probably the  
17 wrong word. This is a very anarchist group. They don't  
18 believe in leaders. They want to give everybody the chance to  
19 voice their thoughts, and so they all take turns talking about  
20 which targets they want.

21 The fact that they may not have settled on one target  
22 at the end of the day, at the end of this four-day week, does  
23 not at all mean that there wasn't a fully-completed conspiracy.  
24 Again, the conspiracy was complete when Lauren Weiner purchased  
25 that book.

1           But does the FBI make the risk assessment at that  
2 point that, well, these people, they are talking about the  
3 White House, and they are talking about the Pentagon, and they  
4 are talking about the World Trade Center, but they haven't  
5 decided on which one they are going to go after, so I guess we  
6 don't have a conspiracy.

7           That's not what the conspiracy law requires. The  
8 conspiracy law requires a formed agreement and an overt act.

9           We don't have to wait until the conspirators are  
10 crawling under the fence with bomb in hand or taking any closer  
11 steps, lighting the match. We just have to make sure we have a  
12 fully-formed conspiracy.

13           Mr. Reichel talked about how to view the various  
14 witnesses. I'm just going to spend a brief amount of time on  
15 that. Anna. If you believe Anna got any benefit out of this,  
16 maybe you should talk to Anna again. Because her testimony was  
17 that she was reimbursed for expenses that she paid out of her  
18 own pocket, or had to be paid on her behalf, airfare, hotel  
19 rooms and so forth, and then she got about \$31,000 on top of  
20 that which --

21           MR. REICHEL: Your Honor, I object simply because  
22 that was in their original closing, I mean --

23           THE COURT: I will give him a little leeway on this.  
24 Rebut. Overruled.

25           MR. LAPHAM: Understand I'm addressing a point that

1 Mr. Reichel made in his closing.

2 Anna got no benefit out of this. She got reimbursed  
3 for her expenses. She got no reward for any of the activities  
4 she did. She spent a considerable amount of time, over a  
5 year-and-a-half period, because that's what that \$31,000 is  
6 for, a year-and-a-half period, a considerable amount of her  
7 life going to demonstrations, going to the meetings that  
8 occurred in this case. And \$31,000 is hardly a large amount of  
9 money, given the services that she performed and the risks that  
10 she took.

11 But even that is beside the point because your  
12 mission is to decide if Anna is telling the truth. And that's  
13 not something that Mr. Reichel really addressed head-on. He  
14 suggested that you can view her testimony with some caution,  
15 and that's certainly true. If you think she got a benefit from  
16 this, you should rightly view her testimony with caution. But  
17 the question, the reason you are here in the first place is to  
18 decide whether or not she's telling the truth.

19 I don't know if you noticed this, you probably  
20 noticed that when you come into the room at the start of every  
21 court session, we all stand for you. And that's not simply to  
22 show sign of respect. It's to show recognition that you are,  
23 in addition to the judge up on the bench here, you are now the  
24 judges of the facts. And it's up to you to judge whether or  
25 not Anna and those two cooperating co-defendants were telling

1 the truth, and whether they had any motive whatsoever to tell  
2 you other than 100 percent truth.

3 Zachary Jenson and Lauren Weiner, yes, they are  
4 getting a benefit. They were allowed to plead guilty and with  
5 the hope of getting a lesser amount of time, with actually a  
6 guarantee that they are going to get a lesser statutory  
7 maximum. But the bottom line is: Are they telling the truth?  
8 Do you believe them?

9 Mr. Reichel says it's 75-percent-off sale. Well,  
10 let's not forget that they paid a price as well because they  
11 pled guilty to their charges. They looked at the evidence, and  
12 they determined, upon advice of counsel, that that was in their  
13 interest to do that. They are not getting a pass here. They  
14 pled guilty, and they are going to pay the price for it. And  
15 you have to throw that into the mix as well.

16 But the real way you tell if somebody is telling the  
17 truth is to balance it against what other information you know  
18 in the case. Is there anything that Lauren Weiner or Zachary  
19 Jenson or Anna testified to that doesn't ring true based on the  
20 other evidence in the case? We have a lot of documentary  
21 evidence in the case that corroborates almost everything that  
22 these witnesses talked about.

23 And let's not forget -- or let's leave the  
24 documentary evidence out of it for a minute. We've got all of  
25 those audio recordings. And Mr. Reichel indicated to you at

1 the outset of his closing, he said -- he didn't use the word  
2 cherry-pick, but he suggested that the Government would pick  
3 out the best excerpts and play them to you.

4 Absolutely right. That's our job. I don't know how  
5 many hundreds of hours of tape recordings we have. But you  
6 would not have wanted the Government to play those hundreds of  
7 hours. It's our job to pick out the most relevant excerpts to  
8 play for you.

9 But it's a level playing field. Because the  
10 defendant has all those transcripts and all those recordings as  
11 well.

12 MR. REICHEL: Objection, Your Honor. If it's  
13 shifting the burden, we didn't -- we got our recordings from  
14 Mr. Lapham. If there were things that were recorded but not  
15 given to us, we don't have that. We only get it from the  
16 Government. And I believe this is shifting the burden.

17 THE COURT: Mr. Reichel, thank you. I understand the  
18 situation. Objection is overruled.

19 MR. LAPHAM: And Mr. Reichel could have gone through  
20 those very same tape recordings, very same excerpts, as he did.  
21 He pulled some that he thought were favorable to him, and you  
22 heard those this morning. And that's where we are. You have  
23 the Government recordings, and you have Mr. Reichel's  
24 recordings.

25 MR. REICHEL: Your Honor, I think he is impermissibly

1 shifting the burden to the defense to produce evidence.

2 THE COURT: Objection is overruled. I don't find  
3 there has been any shifting the burden of proof in this case.

4 MR. LAPHAM: I'm almost done.

5 Mr. Reichel, again on the subject of Zachary Jenson  
6 and Lauren Weiner, he suggested that -- I don't remember the  
7 precise phrase, you may -- in their heart of hearts they really  
8 didn't think they were going through with this conspiracy, but  
9 that they were -- I think he said they were acting for the  
10 benefit of -- I'm not sure of whom.

11 Well, you can assess that not simply by listening to  
12 their testimony on the stand, not simply by assessing their  
13 guilty pleas in which they thoroughly rejected that  
14 implication. They're not acting. They knew they were guilty  
15 of planning this crime.

16 But listen to the tapes. And if you think those  
17 tapes show that they are acting, then you can accept  
18 Mr. Reichel's comment there.

19 I think there's only one other point, and it's a  
20 minor one. And that is leadership. There is another red  
21 herring in the case. The Government doesn't have to prove who  
22 the leader of this conspiracy was. It could be a conspiracy  
23 that has no leaders. It could be four people who come together  
24 and talk about their plans. There is no requirement in the law  
25 that you are going to be given that we prove who the leader

1 was. But we made the representation -- I made that  
2 representation in my opening statement, and we talked about it  
3 to some extent throughout the trial.

4 Eric McDavid was the driving force behind this  
5 conspiracy. Whether you call that a leader or facilitator or  
6 whatever label you want to give it, that's not anything we have  
7 to prove. But the point is, and it's an important one, that  
8 throughout the life of this conspiracy, there was absolutely no  
9 hesitation on Eric McDavid's part.

10 Now, it is true what Mr. Reichel said that because  
11 Lauren Weiner and Zach Jenson were not defendants in this trial  
12 that we focused the evidence on Mr. McDavid. And that's as you  
13 would want it. Zach Jenson and Lauren Weiner admitted their  
14 guilt, and they subjected themselves to cross-examination, and  
15 they could be asked any questions regarding their culpability,  
16 and they've admitted their culpability.

17 We're not about trying to convict Zachary Jenson and  
18 Lauren Weiner. We're here because of Mr. McDavid's  
19 responsibility, and that's why the evidence in this case has  
20 focused on Mr. McDavid.

21 The fact is, the evidence shows it was his idea. He  
22 was the driving force throughout. And he was ready to go on  
23 that morning that these defendants were all arrested. And  
24 that's where I want to conclude.

25 Because, again, this conspiracy doesn't have to be

1 successful for you to convict. But these defendants had picked  
2 themselves up off the floor, after their trying Thursday, and  
3 they went out Friday morning. And the first thing they did is  
4 they went to the store to buy more supplies, and that's when  
5 they were arrested, after they had made those final purchases  
6 and they were about to go back to the drawing board. Nothing  
7 to indicate that this conspiracy was at all coming to an end.

8 You have all the evidence in front of you. It hasn't  
9 been that lengthy of a trial. You'll be able to review  
10 anything that you want or listen to the tapes again if you  
11 want.

12 The Government is going to -- I'm going to close now  
13 with the recommendation that you return the only verdict  
14 possible, which is guilty as to the single count of the  
15 Indictment, conspiracy to violate Section 844(n). Thank you.

16 THE COURT: All right. Ladies and gentlemen, that  
17 will be all the argument that you will hear at this time.

18 It is 4:27, it appears, according to the clock. I  
19 have told you that we would end every day at 4:30, and the  
20 instructions that I have to read to you may take 15 minutes, 20  
21 maybe at the outside. I don't want to create a problem for  
22 transportation or other issues. I see some of you are biting  
23 your lip and looking at me as if it is going to. Is that  
24 correct?

25 JUROR 8: I have a seven-year old in day care that I

1 have to --

2 THE COURT: I understand. That's why I wanted to ask  
3 first. What we'll do then is we'll come in tomorrow morning at  
4 9:00, and I will instruct you. It will take 15, 20 minutes  
5 probably at the most. And as soon as that is done, you will go  
6 right in to begin your deliberations. So you can expect to  
7 begin your deliberations by 9:20, 9:25 tomorrow morning.

8 All right? If there's nothing else, please, you're  
9 getting very, very close, but you're not there yet. Wait until  
10 I instruct you and until you begin your deliberations. And we  
11 will see you back here at 9:00 a.m.

12 Please remember your admonitions regarding discussing  
13 the case, reading any newspaper articles or listening to  
14 television or radio reports. Thank you. Court is adjourned.

15 (Jury out.)

16 THE COURT: The jury has left the courtroom. I'm  
17 assuming you have something to put on the record?

18 MR. REICHEL: Just briefly, Your Honor, on the  
19 conspiracy, the Sears charge. The Ninth Circuit is 8.21. And  
20 I have a concern that the jury may convict this individual of  
21 conspiracy thinking that his conspiracy with Anna is  
22 sufficient, and, you know, it's just like -- it's black letter  
23 law that there can be no conspiracy with the Government  
24 informant, so it has to be with one of the other individuals.

25 Perhaps I could do a special verdict form then, which

1 would say, you know, the jury finds as follows and who there  
2 was a conspiracy between with Mr. McDavid. Because I think  
3 when you have three others, especially one being the Government  
4 informant, and they are not given a Sears charge, they convict  
5 the guy, and you interview them, and they say, yeah, well, he  
6 conspired with Anna.

7 THE COURT: We've already addressed this at sidebar,  
8 but you're obviously trying at it again. But go ahead.

9 MR. LAPHAM: Your Honor, I'll look at it tonight just  
10 to be sure, but I don't think there's any evidence in the  
11 record that even supports that instruction.

12 MR. REICHEL: Maybe I sat through a different trial.  
13 The trial was that they were all talking the whole time. I  
14 think in closing you said, a conspiracy can be these four  
15 people getting, you know, getting together talking doing this  
16 and so forth.

17 You know they heard that he was with her the entire  
18 time and doing this. They could conceivably go back, look at  
19 the instruction you are giving them, and say he conspired with  
20 Anna. Of course.

21 In fact, Zach said that in his testimony. I said,  
22 well, no one agreed with anybody on a target. He said, yes,  
23 that's correct. But Anna did. Anna and Eric agreed on IFG, I  
24 think. It's Zach Jenson's testimony in my cross-examination.  
25 He said Anna and Eric McDavid on the IFG.

1 THE COURT: I think the point is that in every  
2 instruction, and even the ones we talked about earlier, you  
3 have to have a rational jury. And there have been two people  
4 who have testified that were a part of the conspiracy, have  
5 testified under oath that they were a part of agreements toward  
6 that conspiracy, and have entered guilty pleas as to that.

7 And so what you would have to do is completely  
8 discount anything that they said and, in essence, say that  
9 their testimony is not available. And we're not going to look  
10 at it and discount it 100 percent.

11 MR. REICHEL: You know, that's not --

12 THE COURT: I mean, you can give almost every  
13 instruction almost when you're dealing with a jury trial, but  
14 the law requires that there be some nexus of the instruction  
15 given as to the facts that were adduced during the trial.

16 I hate to do things in as far as an abundance of  
17 caution, which is what you're trying to push this into is that  
18 let's have a special verdict and say if you find there was a  
19 conspiracy, who was the conspiracy with. That's what it sounds  
20 like you're trying to get to.

21 MR. REICHEL: I understand. I'll go with the special  
22 verdict if I can't get the Sears instruction. They have to  
23 understand that they have to convict him of a conspiracy with  
24 the other two defendants, not the Government agent.

25 And Zach didn't know that. I said, what object did

1 they agree on? Who agreed on anything? And he said, Anna and  
2 Eric did. What was that? The tree factory. It's in his  
3 testimony. He is a defendant that pled guilty, Your Honor,  
4 like you're referring to him, and he says those two conspired.

5 There is a -- why wouldn't the jury think that he  
6 could be guilty of conspiring with Anna. The Sears  
7 instruction, you know, is there for that obvious reason. It  
8 doesn't go --

9 THE COURT: Go ahead.

10 MR. LAPHAM: Well, Ms. Endrizzi just reminded me that  
11 Mr. Reichel himself called it a conspiracy of dunces, which  
12 indicates that even he thinks there is a rational basis for  
13 thinking there was a conspiracy here.

14 THE COURT: But getting to the point, this is --

15 MR. REICHEL: Please.

16 THE COURT: Mr. Reichel, I'm giving you every -- I  
17 mean, I'm listening to everything you're saying and trying to  
18 let you make your record as cleanly as possible.

19 But there has to be -- when you're saying the Sears  
20 instruction, you're talking about a completely different set of  
21 facts where you've got an informant and a defendant.

22 MR. REICHEL: And other conspirators, Your Honor.  
23 And, you know, we asked him -- I asked a million times what did  
24 you agree with, who agreed with who on what.

25 THE COURT: You're asking who.

1 MR. REICHEL: The witnesses Zach and Ren, you know.

2 THE COURT: And who?

3 MR. REICHEL: Zach and Lauren Weiner. Who agreed  
4 about cell phone towers? I don't think anyone did. Who agreed  
5 about this? I don't know if anyone did.

6 It's in their testimony several times. These were  
7 big goals for the defense that we got from them, which was they  
8 said, you know, no one -- there was no agreement at the end.  
9 We had -- nobody agreed.

10 I said, it's fair to say there was no agreement,  
11 this, that, and the other thing. They agreed with me  
12 repeatedly. And at one point, Zach said Anna and Eric did.  
13 And that's in his testimony. And he pled guilty. And he said  
14 Anna and Eric did. They agreed on the tree factory.

15 And the -- you know, if the jury knows they can't  
16 convict him because he conspired with Anna, you know, that's  
17 all I'm asking. I think it's so mandatory under this case.  
18 You know -- you know, it's just for the Government to not want  
19 to have it I think just flies in the face of --

20 THE COURT: Well, the evidence has to point to it,  
21 though. There is no evidence to say that that's the case.

22 MR. REICHEL: Well, the evidence is they were all  
23 four together, and that's what the Government repeatedly  
24 referred to actually. They said they were all four together,  
25 doing these things together, agreeing together.

1           And if the jury has any belief that they can convict  
2 him of conspiring with Anna, which I guarantee if you interview  
3 them right now, they'd say yeah. I mean, yeah.

4           There's nothing but evidence that he conspired with  
5 Anna. There is nothing but evidence whatsoever that they all  
6 conspired with Anna. And, you know, just the black letter law  
7 is you can't conspire with a Government informant. It has to  
8 be one of the other two co-defendants.

9           THE COURT: Well, at this point, I will review 8.21.  
10 Let me look at it.

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

12          THE COURT: I'm looking at it now. It's the Ninth  
13 Circuit case of U.S. versus Montgomery is what I want to read  
14 since the Sears is Fifth Circuit.

15          MR. REICHEL: Right.

16          MR. LAPHAM: And we'll look at it, too, Your Honor.

17          THE COURT: In the meantime, do you have a verdict  
18 form?

19          MR. LAPHAM: Yes, we do.

20          MR. REICHEL: Okay. Yeah. That looks fine.

21          THE COURT: So far? I'm assuming nothing else.

22          MR. REICHEL: Yeah. If there's a Sears instruction,  
23 I think then they understand. But otherwise, if they don't get  
24 it, then we have to be certain from the jury as to what -- who  
25 they thought he conspired with beyond a reasonable doubt. It's

1 the Government's burden to prove, you know, the elements.

2 THE COURT: All right. Anything else?

3 MR. REICHEL: Nothing further.

4 MR. LAPHAM: No, Your Honor.

5 THE COURT: All right. Be here at 8:45 please, so we  
6 can deal with this. 8:45. Thank you. Court's adjourned.

7 (Court adjourned. 4:35 p.m.)

8  
9 CERTIFICATION

10  
11 I, Diane J. Shepard, certify that the foregoing is a  
12 correct transcript from the record of proceedings in the  
13 above-entitled matter.

14  
15  
16 /S/ DIANE J. SHEPARD  
17 DIANE J. SHEPARD, CSR #6331, RPR  
18 Official Court Reporter  
19 United States District Court  
20  
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24  
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