

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 IX

ERIC McDAVID,

Pages 1356 to 1431

Defendant.

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REPORTER'S TRANSCRIPT

COURT PROCEEDINGS

WEDNESDAY, SEPTEMBER 26, 2007

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

## APPEARANCES

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1 SACRAMENTO, CALIFORNIA

2 WEDNESDAY, SEPTEMBER 26, 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 nine, Your  
7 Honor.

8 THE COURT: All right. For the record, the jury is  
9 not present in the courtroom. Counsel, we are here for the  
10 sole reason of looking at the instruction which was requested  
11 yesterday by the defense. That would be the Sears instruction  
12 or pattern instruction 8.21.

13 And I have reviewed the cases that are relevant to  
14 that particular instruction and the law in this particular  
15 case, and I will just say up front, so that you can know where  
16 to -- which side wants to go where -- that my reading of the  
17 cases in this area would indicate that the Court is required to  
18 give the instruction.

19 And also I think even furthermore that the Court  
20 should have a special verdict, so that there could be no  
21 question that the conspiracy that is being charged here is  
22 between Mr. McDavid and other persons, which may include Anna,  
23 but not simply Anna alone.

24 Looking at the cases, I think that it could present  
25 -- it would be reversible error not to give the instruction

1 once it has been requested. And also, thinking back on just  
2 simply providing a special verdict form that would ask the  
3 questions, as I worked my way through this question-type of a  
4 form for a verdict, it is possible that without giving the  
5 instruction that an inconsistent verdict could apply. Because  
6 if you ask the jury if they found the conspiracy between the  
7 defendant and A, Anna - B, Zachary - C, Lauren, it's possible  
8 without the instruction that they could come back and say the  
9 conspiracy was with Anna only, and not Lauren and/or Zachary.

10 It could come back Lauren, Zachary and Anna or it  
11 could come Zachary and Anna, and not Lauren. But the bottom  
12 line is we can't have a situation where the jury finds that the  
13 conspiracy was between Mr. McDavid and Anna and not the other  
14 two, and then find him guilty at the same time. That's  
15 inconsistent, and it would be an improper verdict.

16 So the only way that I can see to make certain that  
17 the jury is directed to what they need to do is to give the  
18 instruction, the Sears charge, and also the special verdict to  
19 make certain that they have found beyond a reasonable doubt,  
20 and unanimously, that the conspiracy was between Mr. McDavid  
21 and one of the other two people, at least. Anna may be a part  
22 of it, but there has to be at least another one in there as  
23 well.

24 MR. REICHEL: I agree with almost everything the  
25 Court said. My concern is Anna as well. I think that makes it

1 a little confusing. I think that it -- the final charge should  
2 be that at least one of the other, you know, co-conspirators or  
3 co-defendants, but not including Anna because I don't think the  
4 Government agent can ever be part of a conspiracy.

5 The defendant can't, you know -- you know, like I put  
6 in my jury instruction, there has to be a meeting of two minds.  
7 There have to be two minds who agree on one thing. And a  
8 Government informant can never be a party to that agreement,  
9 specifically because they are acting as well. They are acting.  
10 It says in cases that I cited to the Court.

11 And as a result, you know, I want the Sears  
12 instruction. I thank the Court for its time and consideration  
13 on that. And the verdict form would be that Mr. McDavid --  
14 beyond a reasonable doubt the Government has proven that  
15 Mr. McDavid conspired with at least one other person.

16 THE COURT: But that's not what the instruction says.  
17 The instruction says there can be no conspiracy when the only  
18 person with whom the defendant allegedly conspired. It doesn't  
19 say that it must be a person other than the informer. It  
20 simply says that the only person can't be the informer or  
21 agent.

22 So that would tend to be inclusive as to all parties  
23 not exclusive. So the reading of the instruction, I think, is  
24 clear. That it just cannot be the only person. There can be  
25 that informer and another person, and that would satisfy the

1 requirements of the instruction.

2 Mr. Lapham, Mr. Endrizzi your comment?

3 MR. LAPHAM: Your Honor, I understand the Court's  
4 thinking on this. I'll just make a few points and then submit  
5 it.

6 Your Honor, I don't think an instruction is  
7 necessary. If you look at the Sears case, that was a case  
8 where there was -- the defendant only had contact with the  
9 Government informant. He was led to believe by the informant  
10 that there were others involved, but he was unaware of who  
11 those people were, and he never had any contact with any of  
12 those individuals, and it was under those circumstances that  
13 the Court gave the instruction.

14 The general rule is that you don't have to instruct  
15 on a theory of the defense unless there is a rational basis in  
16 the record for supporting that theory.

17 And, actually, I jumped ahead there. I don't  
18 remember Mr. Reichel ever talking about this in his closing  
19 argument as being a theory of the defense. In fact, just the  
20 opposite. He never argued to the jury that his client only  
21 conspired with Anna, or that the evidence only went in that  
22 direction.

23 He talked about it as a conspiracy of dunces. And in  
24 truth that's the only thing he could argue because two  
25 co-defendants pled guilty and admitted they conspired with this

1 defendant, and all of the evidence in the tape recordings would  
2 seem to point in that direction.

3 I think there's some prejudice to the Government here  
4 because Mr. Reichel didn't argue that in closing argument. We  
5 could have addressed the issue had we known that the  
6 instruction was being given.

7 And I think the way this developed, this instruction  
8 was in his original packet. It was not in his latest packet  
9 submitted to the Court. And when we settled up jury  
10 instructions, he didn't raise it, as I recall, as an  
11 instruction that was being offered. He only raised it after  
12 argument. And so there is some prejudice to the jury (sic).

13 I think that there is potential that because we  
14 weren't allowed to argue it, the jury might be confused by this  
15 instruction. And, Your Honor, I would submit it on that.

16 THE COURT: All right. I appreciate what you're  
17 saying. As a part of the case-in-chief, I think that's an  
18 issue that wasn't necessarily brought up clearly by the  
19 defense, but we're still in the trial at this point in time.  
20 We have not concluded. The jury has not been charged with  
21 their instructions yet.

22 And the problem is, though, if there's some evidence  
23 -- and I think that Zachary Jenson's testimony that said, well,  
24 it wasn't me, it was Mr. McDavid and Anna that were doing  
25 things, and you listen to the tapes that are being played, it

1 is possible that the jury could look at it and say that the  
2 conspiracy was between Anna and Mr. McDavid alone. And that  
3 the other two, although they were involved in conspiracy to the  
4 extent that they pled guilty, it's not the one that's here at  
5 this case.

6 And I understand the Government's position about not  
7 wanting to be prejudiced, but, on the other hand, it has been  
8 requested, and it can be a theory. There is some evidence to  
9 support this theory. And we do have an issue of a person's  
10 liberty being at stake here. And I do not want to have a  
11 situation where a jury returns a verdict of guilty on an  
12 improper basis, which, without giving the special verdict, we  
13 would never know.

14 We would never know what and who they thought were  
15 the conspirators by simply saying guilty or not guilty. And if  
16 you simply say, I want to know who they were, if they come in  
17 and say it was an conspiracy between Mr. McDavid and Anna  
18 alone, and then find him guilty, we have a faulty verdict.

19 MR. REICHEL: Your Honor, just briefly, because I  
20 didn't think -- I thought the Court had like an intended  
21 ruling, and -- an intended ruling. Mr. Lapham spoke. I didn't  
22 respond.

23 I do not want the record for some reason, let's say  
24 I'm on appeal for some unfortunate reason in this case, to be  
25 that I sat there after he said what he just said to the Court.

1 I disagree with everything he had to say, and I want  
2 that to be very clear. At the outset, there are a multitude of  
3 cases, multitude of cases. And I cited them to the Court.  
4 I've got them here. I can read them into the record from the  
5 Ninth Circuit, where they're not like the facts that he talked  
6 about about a defendant who didn't know of other  
7 co-conspirators.

8 The law is very settled. If there are multiple  
9 co-conspirators, and if -- many cases where the defendant knew  
10 the multiple co-conspirators, was involved with that, and there  
11 was a Government agent, and this instruction was given. That's  
12 number one. He is wrong on the law, and I need to correct that  
13 immediately.

14 Factually, you know, there is a lot of stuff that he  
15 believes didn't go on in the trial that clearly went on in the  
16 trial. The record is the record. I asked the -- I asked the  
17 defendants many times: Who did you agree with? What kind of  
18 agreement did you have? Who agreed on --

19 THE COURT: I understand. And that's why I said  
20 there is some evidence. I used the terminology very carefully.  
21 There's some evidence to support the theory.

22 And if there is some evidence, and it's requested --  
23 although it wasn't the case-in-chief is arguable. But you did  
24 not raise that as your case-in-chief. You didn't argue it at  
25 the end.

1           But there is still some evidence, and I still am  
2 trying to have a fundamentally fair trial. And I do not want  
3 to have a situation where an individual is convicted, deprived  
4 of his liberty based upon a situation where we're not sure how  
5 the jury reached their verdict. And that's not going to be  
6 justice either.

7           It's very simple to ask. But without giving the  
8 Sears charge, the jury may be confused as to what they are  
9 going to do. Because my thoughts were: How do you create a  
10 verdict form? Do you put all three names down? Check the box  
11 that you find? Do you let them write it in? Do you put three  
12 lines? Two lines? One line? How do you do that from a  
13 logistical standpoint to make certain that the jury, on its  
14 own, unanimously agreed that the conspirators were Mr. McDavid  
15 and X and/or Y, Z?

16           MR. REICHEL: But not the Government informant. But  
17 nevertheless, Your Honor --

18           THE COURT: Government informant could be.

19           MR. REICHEL: I don't think.

20           THE COURT: It just says it's not the only person.  
21 So if he conspires with Anna and Zachary, it's conspiracy  
22 because the instruction is very clear.

23           MR. REICHEL: I believe that the law is that he can  
24 never conspire. It's not just only, but the law is that he can  
25 never conspire with a Government informant.

1           THE COURT: Solely. But the instruction says that --  
2           it simply says there can be no conspiracy when the only person  
3           with whom the defendant allegedly conspired. Only person.  
4           That's so it's -- I'm going to have in the verdict form --  
5           Anna's name will be present.

6           MR. REICHEL: And let me just state, everything else  
7           he said, I don't want to be heard on appeal to have waived it.  
8           If it wasn't in my closing argument, that doesn't mean that I  
9           have to tell them this is my theory of defense. There is no  
10          rule that says in your closing argument you have to say, this  
11          is my theory of the defense. You can waive a closing argument.  
12          You can get up and say my client is not guilty, which is what  
13          I, in essence, said.

14          THE COURT: That's why I'm saying there is some  
15          evidence to support it, which is why I believe it should be  
16          given.

17          I believe that the weighing of the potential  
18          consequences, the prejudice to the Government, the prejudice to  
19          the defendant, the scale tips in favor of the defendant on this  
20          in giving the instruction and having the special verdict form.

21          MR. REICHEL: It was in my original packet. And when  
22          we were settling instructions, frankly, we were really jammed  
23          for time. Completely running out of time. The record will  
24          show I actually said "as to the Sears," and then we said let's  
25          do the entrapment. We did the entrapment. We realized we had

1 to get out of here.

2 THE COURT: I've decided, Mr. Reichel, so you don't  
3 have to pad anymore.

4 MR. REICHEL: Thank you very much.

5 THE COURT: Anything else?

6 MR. LAPHAM: Your Honor, I'm uncertain as to why we  
7 need a special verdict form if we're going to instruct on  
8 unanimity.

9 If the jury is instructed that they have to find that  
10 one other person other than Anna conspired, why do we have to  
11 go through the additional step of a special verdict form.  
12 That's not typical in conspiracy cases.

13 THE COURT: Well, it's not necessary. It makes for a  
14 cleaner record. With just seeing, in my view, that if you are  
15 wanting to make certain that there is no question that the jury  
16 did find that it's Mr. McDavid and someone else -- I don't make  
17 decisions based upon what might happen on appeal, but it would  
18 seem to me it would be a much cleaner verdict to simply have  
19 the jury say: We unanimously agree it was between Mr. McDavid  
20 and X.

21 MR. LAPHAM: You're right.

22 THE COURT: This whole Sears issue is now taken off  
23 the table. To use the term, a stitch in time saves nine. So  
24 may as well do it now and not have to argue it on appeal.

25 Now, as far as what the verdict form is going to be,

1 I have proposed a verdict form, which it's in my mind, which  
2 would be if there was a conspiracy -- if you find that there  
3 was a conspiracy, please answer the following questions. The  
4 conspiracy was between the defendant and - and please fill in  
5 who the parties were. And if they come back with a verdict  
6 that says it's simply Anna alone, and guilty, then there's a  
7 problem.

8 MR. REICHEL: I believe they wouldn't, Your Honor, if  
9 they got the Sears charge.

10 THE COURT: The Sears instruction should clear it up,  
11 and it shouldn't happen.

12 I think what I'm going to do is put down two blanks,  
13 so they can fill in the blanks, and/or -- put an "and/or," and  
14 they can fill in -- please fill in who you believe it was with.  
15 And once they have found we unanimously agree, then we will go  
16 from there.

17 All right. So I'm going to put 8.21 in. It will be  
18 behind the entrapment instruction. I'll make that A, whatever  
19 number that is. I'll just put this in and insert it there as  
20 A. All right? Very good. Let's get that, and we'll bring the  
21 jury in now, and I will get this other instruction prepared.

22 (Jury in.)

23 THE COURT: Good morning, ladies and gentlemen. I  
24 apologize for the delay. We had one more issue to address  
25 outside of your presence. I'm very concerned that you will

1 believe that this Court and attorneys are not able to tell time  
2 or estimate time, and I apologize to you. We're doing our very  
3 best to keep you on schedule. I've been a juror myself a  
4 couple of times, and I understand what it's like to wait and  
5 not know what's going on in the courtroom. So I'm sorry for  
6 that. And in just a few moments the waiting will be over, at  
7 least from your standpoint. We'll be waiting for you.

8 For the record, all parties are present here in  
9 court. Ready to proceed?

10 MR. REICHEL: Yes, we are, Your Honor.

11 MR. LAPHAM: Your Honor, we don't have a copy of the  
12 instructions.

13 THE COURT: One moment. The additional instruction  
14 we discussed will be 18-A. That will be coming as well.

15 (Pause.)

16 THE COURT: Counsel, I'm sure they are going to be  
17 coming. Do you mind if I start with some of the preliminaries?

18 MR. REICHEL: That would be fine with me, Your Honor.

19 MR. LAPHAM: That would be fine.

20 THE COURT: All right. Thank you.

21 Members of the jury, now that you have heard all the  
22 evidence, it is my duty to instruct you on the law which  
23 applies to this case. A copy of these instructions will be  
24 available in the jury room for you to consult.

25 It is your duty to find the facts from all the

1 evidence in the case. To those facts you will apply the law as  
2 I gave it to you. You must follow the law as I give it to you,  
3 whether you agree with it or not, and you must not be  
4 influenced by any personal likes or dislikes, opinions,  
5 prejudices or sympathy. That means that you must decide the  
6 case solely on the evidence before you. You will recall that  
7 you took an oath promising to do so at the beginning of the  
8 case.

9 In following my instructions, you must follow all of  
10 them and not single out some and ignore others. They are all  
11 equally important. You must not read into these instructions  
12 or into anything the Court may have said or done any suggestion  
13 as to what verdict you should return. That is a matter  
14 entirely up to you.

15 The Indictment is not evidence. The defendant  
16 pleaded not guilty to the charge. The defendant is presumed to  
17 be innocent and does not have to testify or present any  
18 evidence to prove innocence. The Government has the burden of  
19 proving every element of the charge beyond a reasonable doubt.

20 A defendant in a criminal case has a Constitutional  
21 Right not to testify. No presumption of guilt may be raised  
22 and no inference of any kind may be drawn from the fact that  
23 the defendant did not testify.

24 Proof beyond a reasonable doubt is proof that leaves  
25 you firmly convinced that the defendant is guilty. It is not

1 required that the Government prove guilt beyond all possible  
2 doubt.

3 A reasonable doubt is a doubt based upon reason and  
4 common sense and not based purely on speculation. It may arise  
5 from a careful and impartial consideration of all of the  
6 evidence or from lack of evidence.

7 If after a careful and impartial consideration of all  
8 of the evidence, you are not convinced beyond a reasonable  
9 doubt that the defendant is guilty, it is your duty to find the  
10 defendant not guilty. On the other hand, if after a careful  
11 and impartial consideration of all of the evidence, you are  
12 convinced beyond a reasonable doubt that the defendant is  
13 guilty, it is your duty to find the defendant guilty.

14 The evidence from which you are to decide what the  
15 facts are consists of: One, the sworn testimony of any  
16 witness; two, the exhibits which have been received into  
17 evidence; and three, any facts to which all the lawyers have  
18 stipulated.

19 In reaching your verdict, you may consider only the  
20 testimony and exhibits received into evidence. Certain things  
21 are not evidence, and you may not consider them in deciding  
22 what the facts are. I will list them for you:

23 One, arguments and statements by lawyers are not  
24 evidence. The lawyers are not witnesses. What they have said  
25 in their opening statements, have said in their closing

1 arguments and at other times is intended to help you interpret  
2 the evidence, but it is not evidence. If the facts as you  
3 remember them differ from the way the lawyers state them, your  
4 memory of them controls; two, questions and objections by  
5 lawyers are not evidence. Attorneys have a duty to their  
6 clients to object when they believe a question is improper  
7 under the Rules of Evidence. You should not be influenced by  
8 the question, the objection, or the Court's ruling on it;  
9 three, testimony that has been excluded or stricken or that you  
10 have been instructed to disregard is not evidence and must not  
11 be considered. In addition, some testimony and exhibits which  
12 have been received for only a limited purpose. Where I have  
13 given a limiting instruction, you must follow it; four,  
14 anything you may have seen or heard when the Court was not in  
15 session is not evidence. You are to decide the case solely on  
16 the evidence received at the trial.

17 Evidence may be direct or circumstantial. Direct  
18 evidence is direct proof of a fact such as testimony by a  
19 witness about what that witness personally saw or heard or did.  
20 Circumstantial evidence is proof of one or more facts from  
21 which you could find another fact. You should consider both  
22 kinds of evidence. The law makes no distinction between the  
23 weight to be given to either direct or circumstantial evidence.  
24 It is for you to decide how much weight to give to any  
25 evidence.

1           In deciding the facts in this case, you may have to  
2 decide which testimony to believe and which testimony not to  
3 believe. You may believe everything a witness says, or part of  
4 it, or none of it.

5           In considering the testimony of any witness, you may  
6 take into account: One, the opportunity and ability of the  
7 witness to see or hear or know the things testified to; two,  
8 the witness' memory; three, the witness' manner while  
9 testifying; four, the witness' interest in the outcome of the  
10 case and any bias or prejudice; five, whether other evidence  
11 contradicted the witness' testimony; six, the reasonableness of  
12 the witness' testimony in light of all the evidence; and seven,  
13 any other factors that bear on believability.

14           The weight of the evidence as to a fact does not  
15 necessarily depend on the number of witnesses who testify.

16           The defendant is on trial only for the crime charged  
17 in the Indictment, not for any other activities.

18           You have heard testimony that the defendant made  
19 statements. It is for you to decide, one, whether the  
20 defendant made the statements, and, two, if so, how much weight  
21 to give to it or them. In making those decisions, you should  
22 consider all of the evidence about the statements, including  
23 the circumstances under which the defendant may have made it or  
24 them.

25           You have heard evidence of the defendant's character

1 for peacefulness. In deciding this case, you should consider  
2 that evidence together with and in the same manner as all the  
3 other evidence in the case.

4 You have heard testimony from Anna, a witness who  
5 received reimbursement of her expenses and compensation from  
6 the Government in connection with this case.

7 For these reasons, in evaluating Anna's testimony you  
8 should consider the extent to which or whether Anna's testimony  
9 may have been influenced by any of these factors.

10 In addition, you should examine Anna's testimony with  
11 greater caution than that of other witnesses.

12 You have heard testimony from Lauren Weiner, a  
13 witness who admitted being an accomplice to the crime charged.  
14 An accomplice is one who voluntarily and intentionally joins  
15 with another person in committing a crime.

16 Lauren Weiner pleaded guilty to a crime arising out  
17 of the same events for which the defendant is on trial. This  
18 guilty plea is not evidence against the defendant, and you may  
19 consider it only in determining this witness' believability.

20 For these reasons, in evaluating Lauren Weiner's  
21 testimony, you should consider the extent to which or whether  
22 Lauren Weiner's testimony may have been influenced by any of  
23 these factors.

24 In addition, you should examine Lauren Weiner's  
25 testimony with greater caution than that of other witnesses.

1           You have heard testimony from Zachary Jenson, a  
2 witness who admitted being an accomplice to the crime charged.  
3 An accomplice is one who voluntarily and intentionally joins  
4 with another person in committing a crime.

5           Zachary Jenson pleaded guilty to a crime arising out  
6 of the same events for which the defendant is on trial. This  
7 guilty plea is not evidence against the defendant, and you may  
8 consider it only in determining this witness' believability.

9           For these reasons, in evaluating Zachary Jenson's  
10 testimony you should consider the extent to which or whether  
11 Zachary Jenson's testimony may have been influenced by any of  
12 these factors.

13           In addition, you should examine Zachary Jenson's  
14 testimony with greater caution than that of other witnesses.

15           You have heard testimony from Anna, an undercover  
16 cooperating witness, who was involved in the Government's  
17 investigation in this case. Law enforcement officials are not  
18 precluded from engaging in stealth and deception, such as the  
19 use of undercover cooperating witnesses, in order to apprehend  
20 persons engaged in criminal activities.

21           Undercover cooperating witnesses may properly use  
22 false names and appearances and may properly assume the roles  
23 as members in criminal organizations. The Government may use a  
24 broad range of schemes and ploys to ferret out criminal  
25 activity.

1           The defendant is charged with conspiring to damage or  
2           destroy Government or private property by fire or explosives in  
3           violation of Sections 844(f)(1), 844(n), and 844(i) of Title 18  
4           of the United States Code. In order for the defendant to be  
5           found guilty of that charge, the Government must prove each of  
6           the following elements beyond a reasonable doubt: One,  
7           beginning in or about June 2005 and ending on or about  
8           January 13, 2006, there was an agreement between the defendant  
9           and at least one other person to commit the crime charged in  
10          the Indictment; two, the defendant became a member of the  
11          conspiracy knowing of at least one of its objects and intending  
12          to help accomplish it; and three, one of the members of the  
13          conspiracy performed at least one overt act for the purpose of  
14          carrying out the conspiracy, with all of you agreeing on a  
15          particular overt act that you find was committed.

16                 I shall discuss with you briefly the law relating to  
17          each of these elements.

18                 A conspiracy is a kind of criminal partnership, an  
19          agreement of two or more persons to commit one or more crimes.  
20          The crime of conspiracy is the agreement to do something  
21          unlawful; it does not matter whether the crime agreed upon was  
22          committed.

23                 For a conspiracy to have existed, it is not necessary  
24          that the conspirators made a formal agreement, or that they  
25          agreed on every detail of the conspiracy. It is not enough,

1           however, that they simply met, discussed matters of common  
2           interest, acted in similar ways, or perhaps helped one another.  
3           You must find that there was a plan to commit at least one of  
4           the crimes alleged in the Indictment as an object of the  
5           conspiracy, with all of you agreeing as to the particular crime  
6           that the conspirators agreed to commit.

7                         One becomes a member of a conspiracy by willfully  
8           participating in the unlawful plan with the intent to advance  
9           or further some object or purpose of the conspiracy, even  
10          though the person does not have full knowledge of all the  
11          details of the conspiracy.  Furthermore, one who willfully  
12          joins an existing conspiracy is as responsible for it as the  
13          originators.  On the other hand, one who has no knowledge of a  
14          conspiracy but happens to act in a way which furthers some  
15          object or purpose of the conspiracy, does not thereby become a  
16          conspirator.  Similarly, a person does not become a conspirator  
17          merely by associating with one or more persons who are  
18          conspirators, nor merely by knowing that a conspiracy exists.

19                        An overt act does not itself have to be unlawful.  A  
20          lawful act may be an element of a conspiracy if it was done for  
21          the purpose of carrying out the conspiracy.  The Government is  
22          not required to prove that the defendant personally did one of  
23          the overt acts.

24                        To find the defendant guilty of conspiring to damage  
25          or destroy Government or private property by fire or explosive,

1 the Government must prove the following elements beyond a  
2 reasonable doubt: One, the defendant conspired with at least  
3 one other person; two, to maliciously damage or destroy or  
4 attempt to damage or destroy by means of fire or an explosive  
5 any building, vehicle or other personal or real property in  
6 whole or in part owned or possessed by, or leased to the United  
7 States, or any department or agency of. 18 United States Code,  
8 Section 844(f)(1); or, whoever maliciously damages or destroys  
9 or attempts to damage or destroy by means of fire or an  
10 explosive any building, vehicle, or other real or personal  
11 property used in interstate or foreign commerce or in any  
12 activity affecting interstate or foreign commerce -- or in any  
13 activity affecting interstate or foreign commerce; and, three,  
14 at least one person in the conspiracy, not necessarily the  
15 defendant, committed an overt act in furtherance of the  
16 criminal activity.

17           Additionally, you must agree on the particular overt  
18 act done in furtherance of the crime.

19           To prove arson under 18 United States Code, Section  
20 844(i), the Government must show that the defendant maliciously  
21 damaged or destroyed or attempted to damage or destroy a  
22 building or property by means of fire or explosive; two, that  
23 the building or property was used in or affecting interstate  
24 commerce; and, three, that the defendant acted maliciously.

25           To prove arson under 18 United States Code, Section

1 844(f) (1), the Government must show that the defendant, one,  
2 maliciously damaged or destroyed or attempted to damage or  
3 destroy a building or property by means of fire or explosive;  
4 two, that the building or property was owned by the United  
5 States or any department or agency thereof; and, three, that  
6 the defendant acted maliciously.

7 Because the defendant is charged with conspiracy to  
8 violate those sections, rather than the completed act, the  
9 Government would be required to prove the second and third  
10 elements of each underlying crime as set forth above.

11 Before being convicted of a conspiracy, an individual  
12 must conspire with at least one co-conspirator. There can be  
13 no conspiracy when the only person with whom the defendant  
14 allegedly conspired was a Government informer who secretly  
15 intended to frustrate the conspiracy.

16 The Government has the burden of proving beyond a  
17 reasonable doubt that the defendant was not entrapped. The  
18 Government must prove the following: One, the defendant was  
19 predisposed to commit the crime before being contacted by  
20 Government agents, or, two, the defendant was not induced by  
21 the Government agents to commit the crime.

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

1           When you begin your deliberations, you should elect  
2 one member of the jury as your foreperson. That person will  
3 preside over your deliberations and speak for you here in  
4 court.

5           You will then discuss the case with your fellow  
6 jurors to reach agreement, if you can do so. Your verdict,  
7 whether guilty or not guilty, must be unanimous.

8           Each of you have must decide the case for yourself,  
9 but do so only after you have considered all the evidence,  
10 discussed it fully with the other jurors, and listened to the  
11 views of your fellow jurors.

12           Do not be afraid to change your opinion if the  
13 discussion persuades you that you should. But do not come to a  
14 decision simply because other jurors think it is right.

15           It is important that you attempt to reach a unanimous  
16 verdict, but, of course, only if each of you can do so after  
17 having made your own conscientious decision. Do not change an  
18 honest belief about the weight and affect of the evidence  
19 simply to reach a verdict.

20           Your verdict must be based solely on the evidence and  
21 on the law as I have given it to you in these instructions.  
22 However, nothing that I have said or done is intended to  
23 suggest what your verdict should be. That is entirely for you  
24 to decide.

25           Some of you have taken notes during the trial.

1 Whether or not you took notes, you should rely on your own  
2 memory of what was said. Notes are only to assist your memory.  
3 You should not be overly influenced by the notes.

4 The punishment provided by law for this crime is for  
5 the Court to decide. You may not consider punishment in  
6 deciding whether the Government has proved its case against the  
7 defendant beyond a reasonable doubt.

8 A verdict form has been prepared for you. After you  
9 have reached unanimous agreement on a verdict, your foreperson  
10 will fill in the form that has been given to you, sign and date  
11 it, and advise the Court that you are ready to return to the  
12 courtroom.

13 If it becomes necessary during your deliberations to  
14 communicate with me, you may send a note through the Court  
15 Security Officer, signed by your foreperson or by one or more  
16 members of the jury.

17 No member of the jury should ever attempt to  
18 communicate with me except by a signed writing, and I will  
19 respond to the jury concerning the case only in writing or here  
20 in open court.

21 If you send out a question, I will consult with the  
22 lawyers before answering it, which may take some time. You may  
23 continue your deliberations while waiting for the answer to any  
24 question.

25 Remember that you are not to tell anyone, including

1 me, how the jury stands numerically or otherwise on the  
2 question of the guilt of the defendant until after you have  
3 reached a unanimous verdict or have been discharged.

4 Ladies and gentlemen, that will conclude my formal  
5 instructions to you at this time.

6 I always give an informal instruction which is  
7 concerning read back of testimony. I permit the read back of  
8 testimony from the court reporter. However, in making that  
9 request for a read back, I'm going to ask that you be very  
10 specific as to what you are actually looking for with what  
11 person. That will, number one, assist the court reporter in  
12 trying to locate that particular passage that you are looking  
13 for within her transcript.

14 If you ask for a very generic statement such as, I  
15 would like to hear the testimony of Lauren Weiner, for example,  
16 she will be required to read you all of the testimony of Lauren  
17 Weiner, start to finish, without interruption. So it would  
18 behoove you to make sure that you be as specific as you can as  
19 to what you are asking for.

20 Also, while the court reporter is in the jury  
21 deliberation room, you are to suspend your deliberations and  
22 not deliberate or speak until after she has completed the read  
23 back and has left the deliberation room.

24 Madam Clerk, will you please swear in the Court  
25 Security Officer to take charge of this jury.

1 THE CLERK: Yes, Your Honor.

2 (Court Security Officer sworn by the Clerk.)

3 CSO: I do.

4 THE COURT: Ladies and gentlemen, once you are taken  
5 by the Court Security Officer, your timing for breaks and  
6 lunches will be at his discretion, and so I'd ask that you  
7 follow his instructions at this time.

8 If you would please follow him into the deliberation  
9 room as far as the 12 seated jurors.

10 We'll talk in just a moment. Stay here.

11 ALTERNATE JUROR TWO: Can I go get my stuff out of  
12 the --

13 THE COURT: Yes. Please. Thank you.

14 (Jury out.)

15 THE COURT: All right. The jury has left the  
16 courtroom at this time.

17 There are several typos that I'm going to have  
18 cleaned up on the instructions, and, actually, the Sears  
19 instruction will be placed after 16. I think that makes more  
20 sense to be 16-A rather than 18.

21 I normally try for a stipulation regarding questions  
22 from the jury. And my normal procedure is that if there is a  
23 request for paper, pencils, anything else, or even an actual  
24 question regarding instructions or something else, that the  
25 jury would put that in writing and would submit it to the

1 Court.

2           Once it's received, I will have it date stamped, with  
3 the time. And if it's a simple request to have pencils or  
4 paper, my answer would be they will be forthcoming.

5 Regardless, you will be notified of the Court's intended  
6 response. If that's acceptable to you, then we'll proceed that  
7 way.

8           A little bit different question is that if there is a  
9 question regarding an instruction or something else, I will  
10 have a proposed response that I will have in writing. The  
11 Clerk will contact you by telephone and advise you of my  
12 intended response. If there is no objection to the response,  
13 it will be put in writing, date stamped, with time, and  
14 returned to the jury without the necessity of you coming back  
15 to court and bringing Mr. McDavid back in.

16           If for some reason you do not agree with the Court's  
17 intended response, the stipulation that we may enter into in a  
18 few moments would be revoked, at least as to that question, and  
19 we would then come back to open court, there would be an  
20 on-the-record discussion. The Court would make its ruling.  
21 Any objections to that would be noted. And I will bring the  
22 jury back into open court under the traditional method and  
23 provide them with that response.

24           The idea is to try to expedite some of the timing  
25 that we can during the deliberation process.

1           For the Government, do you have any problems with  
2 that proposed procedure?

3           MR. LAPHAM: No, Your Honor.

4           THE COURT: Will you stipulate to that?

5           MR. LAPHAM: We do.

6           THE COURT: Mr. Reichel, do you have any problem with  
7 the proposed procedure?

8           MR. REICHEL: No, we do not, Your Honor. And I would  
9 stipulate to that.

10          THE COURT: Mr. McDavid, do you understand the  
11 procedure that I've just outlined?

12          THE DEFENDANT: Yes, I do.

13          THE COURT: And do you stipulate to the fact that at  
14 certain times that you will not be present here in court when a  
15 response is given to the jury, provided that your attorney  
16 agrees with it?

17          THE DEFENDANT: I do understand that, yes.

18          THE COURT: And you agree to that?

19          THE DEFENDANT: Yes.

20          THE COURT: All right. I have a personal agreement  
21 from the defendant as far as the stipulation, so that is how we  
22 will proceed.

23                 I don't believe we have any other issues. We have  
24 all of your cell numbers, etcetera. I'd like you to be within  
25 15 minutes.

1 MR. REICHEL: I have an appearance in Woodland  
2 tomorrow morning in State court, but it should be quick. And  
3 Woodland is roughly 20 minutes.

4 THE COURT: Keep us updated.

5 MR. REICHEL: Oh, yes.

6 MR. LAPHAM: Your Honor, just two points. Number  
7 one, I agree -- or I assume Mr. Reichel agrees with the  
8 instructions as read?

9 MR. REICHEL: Yes.

10 MR. LAPHAM: No objection?

11 THE COURT: I heard no objections.

12 MR. REICHEL: Unless there's something in there then,  
13 obviously, I need to relook at them, Your Honor. Not that I --  
14 you know, we went through them.

15 MR. LAPHAM: Just trying to make a record on appeal.

16 And, Your Honor, if you're going to be redoing some  
17 of the instructions, I note in jury instruction number 17 --

18 THE COURT: Yes.

19 MR. LAPHAM: -- paragraph two -- the first paragraph  
20 of that refers to 844(f)(1). The second paragraph does not  
21 refer to 844(i). I thought we had brought that to the  
22 attention of the Court, but maybe we didn't. But I would ask  
23 that that be included in the written instructions.

24 THE COURT: There's also duplicate --

25 MR. LAPHAM: Correct.

1 THE COURT: And that may have been what happened.  
2 Maybe that line came down, and it took off the other one is  
3 what I'm guessing.

4 MR. LAPHAM: Right. And also the start of that  
5 paragraph has "whoever" in it, and I think that should probably  
6 come out and replaced with "to." And then if we're going to  
7 make that change, then damages and destroys should drop the  
8 "s".

9 THE COURT: Done. Yes. And I'm talking out the last  
10 line.

11 MR. LAPHAM: Right.

12 THE COURT: It's repeated, "or in any activity  
13 affecting interstate or foreign commerce." It's a duplicate  
14 line.

15 MR. LAPHAM: Right.

16 THE COURT: It should be a semicolon after --

17 MS. ENDRIZZI: It should have the reference to  
18 844(i).

19 THE COURT: That's already in this.

20 MS. ENDRIZZI: Okay.

21 MR. REICHEL: You took out private?

22 MR. LAPHAM: No. That was my note to myself.

23 MR. REICHEL: Okay. That's like work product.

24 MR. LAPHAM: Exactly.

25 THE COURT: All right. Nothing else?

1           MR. REICHEL: Let me just ask you, Your Honor, I  
2 think this is the pattern instruction 17 from the Ninth  
3 Circuit, which I'm fine with.

4           My only concern is, you know, it is confusing down at  
5 the bottom where it says: Because the defendant is charged  
6 with a conspiracy rather than the completed act, the Government  
7 is required to prove the second and third element of the  
8 underlying crime as set forth above.

9           But if you look at the second and third element, it  
10 would be that the defendant acted maliciously, that the  
11 building or property was owned...

12           And it omits, you know, the first element. But I  
13 think that's well-covered above and in jury instruction number  
14 17.

15           Is that what Mr. Lapham was worried that I would have  
16 concerns about? Because that is kind of confusing, but it's a  
17 pattern instruction.

18           MR. LAPHAM: No. I asked whether you objected  
19 because the Ninth Circuit usually likes to know that.

20           MR. REICHEL: Oh.

21           MR. LAPHAM: If the instructions were --

22           MR. REICHEL: Well, there was a series of  
23 instructions that I requested that were denied, and I objected.

24           THE COURT: We've already dealt with that. We're  
25 just talking about what were read here in open court.

1 MR. LAPHAM: Exactly.

2 THE COURT: That's all.

3 MR. REICHEL: He is up to something, Your Honor, and  
4 I can't figure it out yet.

5 THE COURT: You're paranoid, Mr. Reichel.

6 MR. REICHEL: That doesn't mean he's not up to  
7 something.

8 THE COURT: You're going to make me paranoid now.  
9 Nothing else?

10 MR. LAPHAM: Nothing else.

11 THE COURT: We will be in recess for now.

12 Counsel, one thing we have -- I want -- we should do  
13 this. The verdict form. So there are no concerns about the  
14 verdict form? I have a verdict form that was submitted. I  
15 don't have it here with me now.

16 MR. REICHEL: Was it the one that was read to us?

17 THE COURT: My suggestion is using the Government's  
18 proposed verdict form. Just simply say, after the guilty or  
19 not guilty line, that if you find the defendant guilty, list  
20 the co-conspirators that you unanimously agree upon acted with  
21 the defendant. And leave a space, and they can fill it in.

22 MR. REICHEL: The --

23 THE COURT: Because if they don't find him guilty,  
24 then there is no reason to fill it out. And the only reason  
25 they are going to have to do this is if they find him guilty.

1 Then you would simply say, if you find the defendant guilty,  
2 please list who the defendant conspired with.

3 MR. LAPHAM: I think that's fine.

4 MR. REICHEL: I like the one you had earlier. It was  
5 a lot better.

6 MR. LAPHAM: Which was the earlier one?

7 MR. REICHEL: Just before we instructed.

8 THE COURT: What was that? I don't recall now.

9 MS. ENDRIZZI: There was a suggestion of  
10 fill-in-the-blanks with the "and/or," but as long as you leave  
11 it, "list all co-conspirators" that satisfies.

12 THE COURT: Again, it goes against my grain to do  
13 things based upon an appeal, but I think that if you say that  
14 the jury finds unanimously that he is guilty, and in the hand  
15 of the jury foreperson it's written that we find unanimously  
16 that the co-conspirators with the defendant were, and they  
17 write it in --

18 MR. REICHEL: Yes.

19 THE COURT: -- nothing can be said. The jury made  
20 the finding.

21 MR. REICHEL: What you just said is fine. If you  
22 find the defendant guilty, please list the -- do you want to  
23 put persons or co-conspirators?

24 THE COURT: Co-conspirators. The persons that you  
25 unanimously agree were co-conspirators with the defendant.

1 MR. REICHEL: Hold on a second.

2 Were the co-conspirators with the defendant --  
3 unanimately that the defendant conspired with.

4 So if you find the defendant guilty, comma, please  
5 list the persons you unanimately agree the defendant conspired  
6 with.

7 MR. LAPHAM: With whom the defendant conspired. The  
8 former teacher to my left would have made that suggestion if  
9 I hadn't.

10 MS. ENDRIZZI: I would have started twitching.

11 MR. REICHEL: Can we put "ain't" in there somewhere.  
12 We find the defendant guilty, please list the persons whom you  
13 --

14 THE COURT: Here is what I have. Please list the  
15 names, with a bracket on the "s" for plural --

16 MR. REICHEL: Okay.

17 THE COURT: -- of the co-conspirators you unanimately  
18 agree acted with the defendant.

19 MR. REICHEL: I think it has to be "the defendant  
20 conspired with" to get a conviction.

21 THE COURT: Co-conspirator.

22 MR. REICHEL: If he acted with someone -- I think  
23 it's confusing to them. A co-conspirator is who he acted with  
24 is different than who you find the defendant conspired with.  
25 It's very clean and clear.

1 THE COURT: Please list names of the persons -- what  
2 did you say?

3 MR. REICHEL: Please list names of the persons you  
4 unanimately agree whom the defendant conspired with.

5 THE COURT: It's not proper grammar.

6 MR. LAPHAM: With whom the defendant conspired.

7 MR. REICHEL: Yes. I'm reading my handwriting which  
8 is real bad.

9 Please list the persons whom you unanimately -- with  
10 whom --

11 So it would be, please list persons you unanimately  
12 agree with whom the defendant conspired with. Is that right?

13 THE COURT: No.

14 MR. LAPHAM: Leave off the last "with."

15 MR. REICHEL: With whom the defendant conspired.

16 MR. LAPHAM: Correct.

17 MR. REICHEL: I may have this right.

18 Is it, please list the persons you unanimately agree  
19 upon with whom the defendant conspired?

20 MR. LAPHAM: Probably dispense with "upon."

21 THE COURT: Hold on.

22 MR. REICHEL: Otherwise it's them agreeing with whom  
23 the defendant conspired.

24 THE COURT: Please list the names of the persons you  
25 agree conspired with the defendant. Your decision must be

1 unanimous. That's it.

2 MR. LAPHAM: Sounds fine.

3 THE COURT: And the "names" will be in bracketed "s,"  
4 plural.

5 MR. REICHEL: So it is please list names --

6 THE COURT: -- of persons, with brackets, you agree  
7 conspired with the defendant. Period. Your decision must be  
8 unanimous. That's a direct charge, and they will understand,  
9 and it's clear. They have to list names, and whatever name  
10 they put down must be unanimous.

11 MR. REICHEL: Is it, your decision on the names must  
12 be unanimous, right?

13 THE COURT: Yes. That's what we're referring to.

14 MR. REICHEL: Well, my concern is they may find --

15 THE COURT: Well, they would have to have a tortured  
16 reading of one sentence. And we're talking about listing the  
17 names of the people that conspired with the defendant and your  
18 decision regarding that. I mean, that's subjects, objects, and  
19 all that sort of thing that applies. I'm not going there.  
20 Verb, predicates, and all that sort of thing. We can diagram  
21 the sentence out, but I think that will take care of it.

22 MR. REICHEL: They are going to read it in there,  
23 Your Honor, and go over it line-by-line is my concern, and  
24 that's why I wanted --

25 THE COURT: And I think that that's the point.

1 Listing. If you find the defendant guilty, please list the  
2 names of the persons you agree conspired with the defendant.

3 That tells them that they have to have agreed upon  
4 that person. And then it says, your decision must be  
5 unanimous.

6 MS. ENDRIZZI: Because they already have --

7 THE COURT: Unanimity.

8 MS. ENDRIZZI: They are unanimous on the verdict  
9 already.

10 MR. REICHEL: As long as it's clear that six of them  
11 can't say he conspired with Ren, six think he conspired with  
12 Zachary Jenson, and you put that together, and he is guilty.  
13 That's my only concern.

14 THE COURT: Okay. Your decision as to any person  
15 must be unanimous. Now?

16 MR. REICHEL: Thank you. Thank you, Your Honor.

17 THE COURT: Done.

18 MR. LAPHAM: Thank you, Your Honor.

19 THE COURT: Thank you.

20 (10:00 a.m.)

21 (Jury deliberating. )

22 (Jury question 3:31 p.m.)

23 (Jury out.)

24 THE COURT: All right. We're on the record again.

25 We're outside the presence of the jury.

1           The Court has received written communication from the  
2 jury, and that was at 3:00 p.m. today, which stated as follows,  
3 and I will quote:

4           Jury instructions number 18, part one.

5           1. What does predisposition mean?

6           2. Was "Anna" considered a Government agent in  
7 August '04? If not, when did she become one?

8           3. What does contact mean?

9           This is referencing the entrapment defense  
10 instruction, and it's all related to the first sentence or  
11 first numbered paragraph, if you will, which states: The  
12 defendant was predisposed to commit the crime before being  
13 contacted by Government agents.

14           Now, with respect to predisposition, I think that  
15 predisposition has been fairly well-established through the  
16 case law as to what that can be described as, and there's even  
17 additional factors that can be given that are cited in the use  
18 notes for the instruction itself, the five factors that can be  
19 used to help the jury make that determination.

20           As far as actual predisposition, it is defined even  
21 in Black's Law Dictionary as: Defendant's inclination to  
22 engage in illegal activity for which he has been charged, i.e.,  
23 that he is ready and willing to commit the crime.

24           It focuses on the defendant's state of mind before  
25 Government agents suggested he commit the crime. I'm just

1 putting that on the record so that we have that.

2 And the factors that the Court could give to the jury  
3 to help them understand predisposition would be: The character  
4 or reputation of the defendant, including any prior criminal  
5 history; whether the Government initially made the suggestion  
6 of criminal activity; whether the defendant engaged in criminal  
7 activity for profit; whether the defendant evidenced reluctance  
8 to commit the offense that was overcome by repeated inducement  
9 or persuasion; and the nature of the inducement or persuasion  
10 supplied by the Government.

11 Counsel, do you wish to be heard?

12 MR. LAPHAM: Your Honor, I think that's all accurate  
13 as to the factors that can be considered in arriving at  
14 predisposition. Of course, in this case there's no evidence  
15 that the Government's suggested the idea. And I think that's  
16 the way you started off the first part of your thoughts here.  
17 So we might -- depending on what kind of instruction we craft,  
18 we need to amend that.

19 THE COURT: I'm just trying to put this all out in  
20 the open right now. I'm expecting to hear your position and  
21 hear Mr. Reichel's position and come up with it.

22 MR. LAPHAM: I think what I'd prefer to do is do a  
23 little research on this before we instruct the jury, maybe plan  
24 on instructing them or answering their inquiry tomorrow  
25 morning. Let's have them keep deliberating.

1 THE COURT: As to predisposition?

2 MR. LAPHAM: Yes.

3 MS. ENDRIZZI: And, Your Honor, I think with the five  
4 factors, we would request that the Court look at Thickstun  
5 where it has one of the factors as the defendant's reluctance.  
6 Because that -- we get the quote, while no factor is most  
7 important, the defendant -- you know, no factor is controlling.  
8 The defendant's reluctance is most important. And that's not  
9 in that one.

10 MR. REICHEL: Thank you, Your Honor.

11 Whether we do that or not, I would just read from the  
12 Poehlman opinion on the Ninth Circuit where it talks about the  
13 time period.

14 And it says, despite Jacobson's willingness to commit  
15 the offense at the first opportunity afforded to him, comma --  
16 and Mr. Lapham says the first opportunity would be July of  
17 2004 -- and this opinion says, despite Jacobson's willingness  
18 to commit the offense at the first opportunity afforded to him,  
19 comma -- we could call it July of '05 here -- the Supreme Court  
20 held the Government had failed to show predisposition. It had  
21 failed to show that he would have been disposed to buy the  
22 materials before they started that contact.

23 THE COURT: We're talking about what is  
24 predisposition, though. You're trying to get to the Poehlman  
25 case again.

1           MR. REICHEL: I agree, Your Honor. I have an  
2 instruction I've provided the Court on predisposition, which is  
3 also from Poehlman, which was defense jury special instruction  
4 on predisposition and --

5           THE COURT: Quite frankly, counsel, the five factors  
6 that have been set forth here in the cases seem to be relevant  
7 to me, and that's what the Ninth Circuit suggests strongly that  
8 the Court give for the jury to determine if there is  
9 predisposition.

10           I'm inclined to look to those factors and advise them  
11 that these are the factors they may consider to determine  
12 whether or not the defendant was predisposed to commit the  
13 crime.

14           MR. REICHEL: I agree.

15           THE COURT: I don't see why we should go into any  
16 greater detail than what the Circuit has already determined  
17 would be appropriate for a follow-up instruction.

18           MR. REICHEL: It provides the manual of jury  
19 instructions. It is not exclusive as to the only instructions.  
20 And Poehlman is right on point where it says -- and this is a  
21 quote from it: It's the defendant's willingness to commit the  
22 offense prior to first being contacted coupled with the  
23 wherewithal to do so.

24           And I ask that that be part of it.

25           MR. LAPHAM: Well, Your Honor, once again, I'd like

1 to research that. I don't think -- I think that language is  
2 in --

3 MR. REICHEL: Poehlman.

4 MR. LAPHAM: -- Poehlman, but I don't know that.  
5 That wasn't the issue directly before the Court.

6 MR. REICHEL: That's fine. I want us to research it  
7 then because it was directly before the Court.

8 THE COURT: Well, I understand, but still the bottom  
9 line is Poehlman is not what's been cited today as being the  
10 way the Court should instruct. The Ninth Circuit has not said  
11 that Poehlman is the proper instruction. It may be a case  
12 which is there, but that doesn't mean that it would be error to  
13 not give Poehlman.

14 I think that the Court should start out with the most  
15 restrictive amount of instruction that it can give to see if  
16 the jury can make its determination.

17 And predisposition has been very clearly set forth in  
18 the case law as to the factors that the jury should use to  
19 determine predisposition. If they come back and say, we still  
20 can't figure out what predisposition means, then I think you go  
21 and take it another step.

22 But the more that you start giving such detailed,  
23 pinpoint instructions on a particular issue, the greater  
24 opportunity that you have of instructing the jury directly as  
25 to where you want to go.

1           And so pinpoint instructions, you have to craft them  
2 very carefully. And before you get there, you use the least  
3 restrictive, and you work your way into them.

4           That's why the instruction is written the way it is  
5 in entrapment. And so I understand where you're trying to go,  
6 Mr. Reichel, but I'm not going to jump from the pattern  
7 instruction to an absolute pinpoint instruction right now. I  
8 don't think that's appropriate.

9           We're going to look at this and research it. It's  
10 late in the day, and I'm not prepared to make a rash decision  
11 about anything right now, but I'm just telling you my  
12 inclinations is that we don't go to pinpoint on the first  
13 rattle out of the box.

14           So we'll take a look. All of us will take a look at  
15 that.

16           Was Anna considered a Government agent in August of  
17 '04? If not, when did she become one? Your response?

18           MR. LAPHAM: Well, Your Honor, off the top of my  
19 head, I think we'd have to say she was a Government agent. She  
20 was working for the Government in August of '04. We would  
21 define contact, though, differently.

22           MR. REICHEL: That's fine.

23           THE COURT: But the question is, was Anna considered  
24 a Government agent in August of '04? The answer is "yes"?

25           MR. LAPHAM: Yes.

1           THE COURT: So that takes care of number two. What  
2 does contact mean? And that has to be read in context of the  
3 question. Contacted by Government agents. So when was the  
4 defendant contacted by Government agents.

5           He was contacted by Government agents back in '04,  
6 and then he was contacted on several occasions subsequent to  
7 that date.

8           MR. LAPHAM: But our position would be that the  
9 contact that is important to the entrapment defense has to be  
10 contact with reference to this crime. Not some prior contact  
11 that has nothing to do with it.

12          THE COURT: I understand. That would be consistent  
13 with my rulings all along regarding character evidence. But  
14 the fact that there was contact in and of itself is not  
15 necessarily controlling as to when the contact for the purposes  
16 of the entrapment defense would arise.

17          MR. REICHEL: We're mixing with inducement. I think  
18 Mr. Lapham is correct. The Court's correct about contact is --  
19 is the time of any inducement, whether there is or is not  
20 inducement. But that's the contact time you look at for  
21 inducement.

22          Your Honor, for predisposition, the contact time you  
23 look at is prior to any contact. It's very clear in Jacobson.  
24 It's very clear in Poehlman.

25          THE COURT: I don't think it's that clear,

1 Mr. Reichel. I understand your position, but this is a  
2 continuing series of contacts. You can't just look and say it  
3 started on day X. That's not the way the facts are.

4 MR. REICHEL: Then let me ask, Your Honor, why did  
5 the Government put one iota of evidence in, one iota of  
6 evidence about Mr. McDavid's predisposition prior to June of  
7 2005. One iota. They spent a lot in that area.

8 In his closing, he specifically referred as: Prior  
9 to that, many months earlier, he had learned in West Virginia  
10 about C4 explosives. Prior to June of 2005.

11 Why does the defense then say that you should look at  
12 predisposition prior to June of '05, and the Government says,  
13 no, you shouldn't, no, you shouldn't, but they get to say he  
14 was predisposed.

15 Why isn't the defense allowed to say, look at the  
16 predisposition prior to June of '05? Exactly as instructed in  
17 Jacobson.

18 Eleven months before Mr. Jacobson ever met the  
19 Government in any fashion, they looked at that evidence, what  
20 he had done. Because they said disposition is at the time of  
21 the commission of the crime.

22 Mr. Lapham says that begins June or July of 2005.  
23 That's disposition.

24 The Supreme Court and Poehlman and the Ninth Circuit  
25 clearly say it's called predisposition because you look at

1 prior to disposition. Clearly by the time --

2 THE COURT: When was the contact for the purposes of  
3 entrapment? When did that occur?

4 MR. REICHEL: There's two elements of entrapment,  
5 inducement and predisposition, Your Honor. And that's what's  
6 confusing us here. The contact for inducement -- the contact  
7 for inducement is one time period to determine when there was  
8 inducement. The contact for predisposition is prior to any  
9 contact. Any contact.

10 You look at the individual's character, their  
11 reputation, all this other stuff. That's what you look at  
12 prior to the contact. And it's any contact.

13 And in this case, it's very relevant contact in  
14 August of '04. She's there with them at these things, at the  
15 CrimethInc, and so forth, where they discuss all this stuff.  
16 They talked about it.

17 She's there to make these people. In fact, she  
18 called the FBI about him immediately, made plans to go to the  
19 RNC as well, kept e-mail communication, written communication.  
20 That's relevant contact, Your Honor.

21 It's less contact than June of 2005. I think it's  
22 less contact. It's very relevant contact. This, to me, is  
23 clearly the heart of the matter. I think, this, for the  
24 record, you know, for any appeal, this is it. August of '04,  
25 whether that's contact for predisposition, not for inducement,

1 but for predisposition that's the relevant time.

2 THE COURT: This is all about predisposition.  
3 Paragraph one is all about predisposition. We're not talking  
4 about inducement. It's all about predisposition. Response?

5 MR. LAPHAM: Your Honor, there has to be a triggering  
6 event, and that triggering event is going to be the first time  
7 the subject of the criminal activity comes up, whether it's  
8 brought up by the Government for the first time or the  
9 defendant for the first time. That's the triggering event.

10 In this case, the triggering event occurred in  
11 actually July of 2005. That's the first time that Mr. McDavid  
12 ever broached the subject of this bombing campaign in  
13 California.

14 THE COURT: And something big is going to happen.

15 MR. LAPHAM: Well, he alluded to that. That's right.  
16 In June. But it was actually late July of '05 that he finally  
17 reveals what this "something big" comment referred to without  
18 any suggestion by the Government. So that seems to me to be  
19 the triggering event.

20 THE COURT: To me, Mr. Reichel, it's only logical  
21 that that -- at or about that time has to be the triggering  
22 event when you look for predisposition.

23 Once you trigger, then what did she do, allegedly, to  
24 induce him to continue on? And whether or not it's your saying  
25 renting the home, getting the money, doing all those things,

1 those are all inducements.

2 But when you start to define what is the predisposing  
3 point in time, it doesn't get triggered while they're just  
4 friends, if they know each other, if they're talking about  
5 other matters that have nothing to do with anything else.

6 MR. REICHEL: Your Honor --

7 THE COURT: They could be talking about politics.  
8 They could be talking about anything. That's not the point.

9 Until such time as the agent finds out that there's  
10 something that's happening, that's coming up, the triggering  
11 event, you look shocked at it --

12 MR. REICHEL: That's inducement.

13 THE COURT: But when would you ever have  
14 predisposition? You're never going to have this because the  
15 fact that you're agent is next to your client in and of itself  
16 is not necessarily a triggering event.

17 MR. REICHEL: You look -- quoting from Jacobson and  
18 Poehlman. As in Jacobson, comma, we consider what evidence  
19 there is as to Poehlman's state of mind prior -- they  
20 italicized it in the opinion -- prior to his contact with  
21 Sharon, who was the Government agent. They look at his state  
22 of mind prior to his first contact with Sharon.

23 And in this case, even if that was June of 2005, you  
24 look at his state of mind and his predisposition all before  
25 then. Who was the person at that time?

1 THE COURT: For the purposes of entrapment it doesn't  
2 arise until there's some contact with the Government entity.

3 MR. REICHEL: In --

4 THE COURT: What triggers it? You're going to go  
5 back to when he was 12-years-old to look at his character.

6 MR. REICHEL: Yes. For predisposition, yes, you do,  
7 Your Honor.

8 THE COURT: I disagree. I totally disagree on that.  
9 We have total disagreement on that, Mr. Reichel. I can't, no.

10 MR. REICHEL: Your Honor, just finally, in --

11 THE COURT: You've made your record on this point.  
12 No. I can't say that you go back to age 12-years-old to look  
13 to a defendant's predisposition when it comes to the point of  
14 entrapment.

15 MR. REICHEL: Then, Your Honor, why do they look --

16 THE COURT: It wouldn't make any sense. You would  
17 look at every person who is dealt with with a Government agent,  
18 are you telling me that you would go back to age 12 or 15, or  
19 whatever it is, to see if they were really, truly the perfect  
20 kid, the alter boy, or whatever they were going to be?

21 MR. REICHEL: You look at their state of mind prior  
22 to the contact with the Government, Your Honor.

23 THE COURT: That's illogical.

24 MR. REICHEL: Then why does the Government introduce  
25 a prior conviction for, let's say, drug dealing ten years

1 earlier for an individual in a case of drugs, and say it can't  
2 be entrapment because they were previously disposed ten years  
3 ago or so. You look at the individual prior to their contact  
4 with law enforcement.

5 As they instruct from the Supreme Court, you look at  
6 their state of mind prior to their contact with the Government.  
7 And exactly in Jacobson --

8 THE COURT: Prior to their contact with the  
9 Government --

10 MR. REICHEL: Right.

11 THE COURT: -- for the purposes of entrapment.  
12 That's my point. You look right at that point. And when did  
13 it start? In 2005.

14 MR. REICHEL: Mr. McDavid was a -- someone that was  
15 in the sphere of contact with this FBI agent in August of '04.

16 THE COURT: Being in the sphere of contact could be  
17 for anything. There's been no evidence presented in this  
18 trial, which is what we have to look to. Point to the evidence  
19 in this trial that there was any contact or communication  
20 regarding any type of illegal conduct with your client prior to  
21 that time period with the informer?

22 MR. REICHEL: In August of 2004 they explained what  
23 CrimethInc was. They had her explain what August of '04 in Des  
24 Moines, Iowa, what CrimethInc was, the skill share workshops,  
25 the illegal behavior --

1 THE COURT: And what's illegal?

2 MR. REICHEL: They made it nefarious. Everything  
3 they were doing there. Everything that was discussed was  
4 anti --

5 THE COURT: Was it illegal? She didn't do anything.  
6 She just described what the conference was.

7 MR. REICHEL: They had directed her four months  
8 earlier to go to these things.

9 THE COURT: There was some type of illegal Government  
10 activity to go to a conference?

11 MR. REICHEL: It is not illegal Government activity,  
12 however, it is contact with the agent with someone that she  
13 wants to see if he is a suspect or not. She meets him. She  
14 fraternizes with him. They stay together for three or  
15 four days or a week. They keep in contact. They agree to  
16 travel together some more. They continue to contact by  
17 e-mails.

18 THE COURT: But never once talk about committing any  
19 illegal activities, though.

20 MR. REICHEL: Which shows, Your Honor, that he was  
21 not --

22 THE COURT: Am I correct? Is there any evidence that  
23 they talked about committing illegal acts during this time?

24 MR. REICHEL: Yes. Absolutely.

25 THE COURT: What was it?

1           MR. REICHEL: They talked about doing illegal things  
2 at the RNC, the Republican National Convention, immediately  
3 thereafter.

4           THE COURT: Is he on trial for conspiracy regarding  
5 the RNC?

6           MR. REICHEL: They talked about illegal activity at  
7 the RNC. They talked about doing things that were illegal.  
8 Molotov Cocktails.

9           THE COURT: That's not what he is on trial for here  
10 in this courtroom.

11          MR. REICHEL: But it answers the Court's question:  
12 Did they talk about illegal activity?

13          THE COURT: No. But in reference and in context of  
14 what we're on trial for here.

15          MR. REICHEL: I understand, Your Honor.

16          THE COURT: That's the point. You can talk about a  
17 million things. They could have talked about going and buying  
18 illegal drugs. That's illegal, too. But he is not on trial  
19 for illegal drugs.

20                 We're here for conspiracy for specific items. When  
21 did that occur? When did that take place?

22          MR. REICHEL: Then our big problem is when Mr. Lapham  
23 put in evidence and then argued about it in his closing that  
24 Mr. McDavid was predisposed. He was predisposed as far back as  
25 February of '05 for a variety of reasons. His connection with

1 Ryan Lewis. Additionally -- hold on -- the fact that he had  
2 told Anna, that, you know, when he first heard about C4s, and  
3 wanted to do this was in Virginia in March of '05.

4 And he said repeatedly in closing, four months before  
5 June of '05. The entire -- they were proving his  
6 predisposition prior to June of '05. That's what they were  
7 doing.

8 MR. LAPHAM: About this particular crime. What  
9 Mr. Reichel is talking about -- and it was two to three months  
10 before -- not four months -- but those were words straight out  
11 of the defendant's mouth about when he first came up with the  
12 idea for this particular crime. Not predisposition in general,  
13 but the bombing campaign.

14 THE COURT: I'm focusing in on the particulars for  
15 this particular crime. That's where I'm focusing in. And,  
16 Mr. Reichel, you're looking at everything.

17 MR. REICHEL: To me, the law is very clear that  
18 whether the person was predisposed at the time of contact with  
19 Government agents. And it's not for this particular crime.  
20 It's for criminal activity.

21 In fact, they are going to talk about it in the  
22 instruction, the willingness to commit criminal activity. And  
23 the entire trial was about prior to June of '05 by the  
24 Government.

25 It just -- I know what the law is. I've read all the

1 cases. And there's not much, you know, more we can do at that  
2 point. We can brief it some more. I'm willing to do that.

3 Jacobson, to me, is very clear. They said that --  
4 Mr. Jacobson was acquitted by the Supreme Court. He was  
5 acquitted by the Supreme Court because he was contacted -- the  
6 first time he ever met the Government was February of '85. And  
7 the Government used evidence of predisposition from something  
8 of February of '84, and the Supreme Court said that's wholly  
9 insufficient. You have to have more of that prior to contact  
10 to show predisposition and vacated his conviction.

11 That's exactly what has happened in Mr. McDavid's  
12 case. Even if they want to say June of '05 is their contact  
13 point, they have to prove his predisposition before that time.

14 THE COURT: Engage in the use of explosives or fire,  
15 bombs, or whatever it was, in general terms. That's what we  
16 were talking about was that there was going to be a bombing  
17 campaign. And that's the predisposition that was at this point  
18 allegedly in your client's mind, prior to Anna being in contact  
19 with him.

20 MR. REICHEL: Well --

21 THE COURT: It's a much more narrow focus than where  
22 you are. And I understand that you're looking at the year and  
23 all the different things from the Jacobson case, but you have  
24 to look at this case and focus in that there were -- this is a  
25 continuum of activities that your client's allegedly engaged in

1 over a period of time.

2 And the Government contact you can't say was during  
3 that entire period of time. There was Government contact  
4 during one period, which really has no affect on the contact on  
5 the second period.

6 What we're looking at is what was the Government  
7 contact after -- for lack of a better term -- the bombing  
8 campaign became a matter of interest or a point of discussion.  
9 Because previous to that, it was just simply conversation about  
10 various things, some which may have been illegal, some which  
11 may have been very legal.

12 But those aren't the relevant points for the  
13 conspiracy that is before this trial, so I want to keep  
14 focusing on -- and I have not gotten to the issue of what does  
15 contact mean.

16 For the purposes of this instruction, contact must  
17 mean some point in time where the informer, Government  
18 informer, had contact with the defendant relative to the issues  
19 that are before the Court for the trial.

20 I'm trying to struggle with the language here.

21 MR. LAPHAM: Relative to the charged offense.

22 THE COURT: Relative to the charged offense here.

23 Exactly.

24 MR. REICHEL: Well, Your Honor, just to --

25 THE COURT: I mean, how else would contact mean from

1 the Government?

2 MR. REICHEL: She was a Government agent. She was  
3 employed full time by the Government to do one thing. That one  
4 thing was to tell a certain name, to have a certain identity,  
5 to investigate certain individuals, the anarchists  
6 specifically, to go to these places.

7 She met him in August of '04 with, ironically enough,  
8 Zach Jenson was there as well. And they hung out the entire  
9 time. It was at CrimethInc. She said you had to be approved  
10 secretly to get in there. The Government said give us  
11 live-time information on it.

12 THE COURT: About what? Give live-time information  
13 about what?

14 MR. REICHEL: About the individuals that are there.

15 THE COURT: Was she asked to give live-time  
16 information about Eric McDavid?

17 MR. REICHEL: Not until she got there. Anybody that  
18 was --

19 THE COURT: No. His name.

20 MR. REICHEL: No.

21 THE COURT: Back then. I want to find out about Eric  
22 McDavid.

23 MR. REICHEL: No, Your Honor. They did not ask her  
24 to find out about Eric McDavid.

25 THE COURT: When did Eric McDavid's name specifically

1 come to the forefront?

2 MR. REICHEL: August of 2004 when she called them and  
3 said, this is who I met, this is who was there.

4 THE COURT: And what was said at that time?

5 MR. REICHEL: She said he is not of interest to the  
6 FBI right now.

7 THE COURT: Thank you.

8 MR. REICHEL: Exactly.

9 THE COURT: When did he become a person of interest  
10 for the particular crime that we're talking about, 2005?

11 MR. REICHEL: I don't know, Your Honor. I just know  
12 that she sent out e-mails in April of '05 asking where -- she  
13 then -- They went to the RNC together. They did things that  
14 were illegal there. She testified about things that were  
15 illegal there.

16 THE COURT: 2005.

17 MR. REICHEL: No, Your Honor. I'm sorry. The RNC  
18 was still in 2004.

19 THE COURT: But 2005 is when things started to pick  
20 up.

21 MR. REICHEL: She's seeking them out in April of 2005  
22 to bring them to the Florida conference. She's to seek them to  
23 bring them to the Philadelphia conference. She's working,  
24 doing one thing. She's a Government agent. You can just say  
25 she's an FBI agent. An FBI agent went to CrimethInc.

1           THE COURT: So following your logic, any time a  
2 Government agent or informer walks into any conference, from  
3 that moment on, anyone who attends that conference has had,  
4 quote, unquote, contact with a Government agent for the purpose  
5 of a potential entrapment defense in the future.

6           MR. REICHEL: No. My statement would be, Your  
7 Honor --

8           THE COURT: That's all she did. She went to a  
9 convention.

10          MR. REICHEL: She investigated them, Your Honor. She  
11 stayed with him. She was an undercover FBI agent. She wasn't  
12 wearing the uniform. She was undercover. She investigated  
13 him.

14          THE COURT: She wasn't an undercover FBI agent.

15          MR. REICHEL: She was an undercover agent.

16          MR. LAPHAM: She was not employed full time.

17          THE COURT: She was not employed. We have to stop  
18 using this term "undercover FBI agent." She was never an FBI  
19 agent. That was very clear. She was an undercover informer at  
20 some point in time when she was informing the FBI in an  
21 undercover capacity of certain activities that were taking  
22 place at various conferences.

23          MR. REICHEL: She was --

24          THE COURT: That is far different from an undercover  
25 FBI agent, one who is sworn with a badge, who then takes on an

1 assumed identity, and then approaches a particular conference.  
2 They are two entirely different situations.

3 MR. REICHEL: She was asked to go there. She went  
4 there solely because of her relationship for the FBI. That's  
5 what she testified for me. So she went there in this capacity  
6 for the FBI.

7 THE COURT: As an undercover informer.

8 MR. REICHEL: And she called them and told them  
9 everything that went on there, and she was their eyes and ears  
10 inside there. That's why she was there. And, in fact, she got  
11 paid thereafter again.

12 But nevertheless, she's in there, Your Honor. For  
13 all intents and purposes, no, she's not an FBI agent, but why  
14 was she there? She was there solely because the FBI told her  
15 to go there.

16 Nevertheless, you know, the entire time there was an  
17 investigation. And just because she wasn't wearing a police  
18 officer's uniform is one thing. She's in there. She's  
19 investigating. That's what she's doing. She's reporting back  
20 to them. And Mr. McDavid spoke with her. They met. They  
21 exchanged -- they exchanged a lot. They got to know each other  
22 well.

23 She then called the FBI to give a report on him,  
24 agreed to go traveling with him immediately thereafter to  
25 another protest where crimes were going to be committed. She

1 then continued to solicit and seek him out. And acknowledges  
2 that love letters were written by him, which is -- only shows  
3 that they had made at least a friendship at that time.

4 Your Honor, that is contact. That is criminal  
5 contact. Part of her investigation. It is clear. What more  
6 could she do? Was she not contacting him in Philadelphia in  
7 July of '05 or June of '05.

8 THE COURT: This is not about putting Anna on trial.  
9 This is not about this.

10 MR. REICHEL: I'm not saying that.

11 THE COURT: You are. That's where you're going with  
12 this, and the Government -- that's not the issue. It really  
13 doesn't come up unless and until your client does something  
14 that triggers a further investigation. Because everything that  
15 you are talking about is absolutely appropriate. It's not  
16 illegal.

17 MR. REICHEL: It may be appropriate, Your Honor. I'm  
18 not saying it's illegal.

19 THE COURT: It's appropriate. It's totally  
20 appropriate.

21 MR. REICHEL: It's appropriate. It's appropriate  
22 criminal investigation, and it's contact by law -- it's contact  
23 by the FBI with Eric McDavid.

24 THE COURT: Every criminal investigation does not end  
25 up in an entrapment situation simply because there was an

1 investigation. There has to be a triggering event, especially  
2 in one where you're talking about someone going to an event  
3 such as CrimethInc where there are hundreds or even thousands  
4 of people there.

5 This is not the same as going down and finding your  
6 local cocaine dealer, and trying to find that person, and say  
7 I'm going to get you to start supplying me with large  
8 quantities of cocaine.

9 MR. REICHEL: The Government evidence was there was  
10 30 to 40 people at the most at CrimethInc, for the record, Your  
11 Honor, in August of 2004.

12 THE COURT: At that particular conference, fine. But  
13 at RNC, G-8, and DNC and Inauguration, far more people.

14 MR. REICHEL: Right.

15 THE COURT: Well, we're not going to go anywhere. I  
16 think, Mr. Reichel, one thing we have done is that there is a  
17 complete record on your position, and why I disagree with your  
18 position.

19 MR. REICHEL: I know. Thank you.

20 THE COURT: And why it is going to be not taken with  
21 respect to instructing the jury.

22 What I'm looking to now is to figure out -- and I  
23 think Mr. Lapham you came up -- we had a little bit of a -- and  
24 I've forgotten it now, what it was, but I would like for you to  
25 put that together again regarding contact and the timing that

1 it approaches.

2 Number two has been answered.

3 And we will all take time to review predisposition as  
4 far as the definition and return tomorrow morning.

5 MR. REICHEL: I'm lost that he was going to draft  
6 something on contact.

7 Does the Court want to entertain not advising on  
8 contact and let them find when they think there's contact?

9 THE COURT: No.

10 MR. REICHEL: I want to know what the research --

11 THE COURT: No. I started off saying the words, and  
12 my last two words got somewhat jumbled, and he suggested two  
13 other words that made complete sense to me. Do you recall what  
14 I said?

15 MR. LAPHAM: The contact has to relate to the crime  
16 that's charged.

17 THE COURT: Exactly. The contact between the  
18 Government informer and the defendant is referring to the time  
19 period for which the crime that's being charged against the  
20 defendant occurred.

21 In other words, it's just not contact, as I think you  
22 would like it to be, which is the moment they laid eyes upon  
23 each other it was contact.

24 MR. REICHEL: I'm not saying that if he ran into Anna  
25 at Albertson's in 1997, that's relevant.

1 My point was at CrimethInc in August of '04, when she  
2 was there for the FBI as an undercover agent, spent the entire  
3 time with him, and called back to them about him.

4 THE COURT: And said that he was nothing. That is  
5 not contact for the purposes of entrapment.

6 MR. REICHEL: And continued to monitor him and  
7 interact with him and go to other conferences.

8 THE COURT: Monitor. She can monitor all day. They  
9 can monitor me. They can monitor you. That's probably what's  
10 happening, but that is not illegal conduct.

11 MR. REICHEL: No, it's not illegal, Your Honor. It's  
12 contact, though. It's Government contract.

13 THE COURT: Not for the purposes of entrapment. All  
14 right.

15 MR. REICHEL: Thank you.

16 THE COURT: We're at an impasse, Mr. Reichel. All  
17 right. So if you would do that. Tomorrow 9:00. I'm going to  
18 bring the jury in.

19 Actually, while we're here I can actually bring them  
20 in now.

21 MR. REICHEL: Are they in there?

22 THE COURT: Yeah, but they have double doors. They  
23 can't hear. That's why they are doubled-doors.

24 MR. REICHEL: Too bad.

25 THE COURT: What I'm going to do is bring them in and

1 tell them -- it's 4:05 -- what's happening right now. Tell  
2 them also --

3 By the way, the court reporter's located the  
4 cross-examination for the read back of Anna. And it's from  
5 page 103, line 17, to page 115, line 10. So it's a continual  
6 portion. It's not broken up.

7 And there is another request, too, I think you're  
8 still looking to find it at this point in time, so we'll let  
9 you know. But the idea is that whatever the request is, that  
10 it be a continual read, it not be broken, not cherry-pick  
11 particular portions of it. It's what it is. And as I told  
12 them earlier, once she goes in, they stop deliberating. When  
13 she finishes, they walk out, but they can't stop her.

14 MR. REICHEL: So the Court's going to do a  
15 predisposition instruction from the Ninth Circuit?

16 THE COURT: After we look through this again one more  
17 time tonight.

18 MR. LAPHAM: And, I'm sorry, Your Honor, you may have  
19 just answered this. We've scanned for cross-examination and  
20 redirect on the topic? Because it may --

21 THE COURT: They only asked for cross-exam. Is that  
22 what you're saying?

23 MR. LAPHAM: Maybe they -- so they only asked for the  
24 cross-examination?

25 THE COURT: Yes.

1 MR. LAPHAM: I see. I wasn't aware of that.

2 THE COURT: They asked for the cross-exam, so  
3 Mr. Reichel's cross-examination of that particular issue. They  
4 didn't ask for the testimony. And they actually wrote in the  
5 words "cross-exam."

6 They had written first of all, the testimony from --  
7 and this is spoken incorrectly -- "testimony from during  
8 concerning of Anna, the reading of FBI rules." And then they  
9 wrote above, "during cross-exam."

10 MR. LAPHAM: Okay.

11 THE COURT: So if you read it, testimony during  
12 cross-exam concerning Anna and the reading of the FBI rules.

13 MR. LAPHAM: All right.

14 THE COURT: It's a little tough to read through, but  
15 if you want to take a look at it, you can see.

16 And then they are asking for Ricardo Torres'  
17 testimony regarding rules on CW-CI guidelines, which would be  
18 everything on those guidelines. Confidential witness,  
19 confidential informant. So that's both sides. Okay.

20 MR. LAPHAM: All right. Will we get a copy of the  
21 testimony that's read back or no?

22 THE REPORTER: You have it.

23 THE COURT: Apparently you already have it. It's  
24 already been certified.

25 MR. LAPHAM: Right. Thank you.

1 THE COURT: Thank you, Mr. Reichel.

2 MR. REICHEL: Compliments of Mr. McDavid, actually.

3 THE DEFENDANT: You're welcome.

4 THE COURT: Anything else at this time? Be here at  
5 9:00 tomorrow.

6 Bring the jury in. Let them know what's happening.  
7 That way if there's no problem, I'll let them separate tonight  
8 at 4:30 without bringing them back in again.

9 Counsel, you know, with respect to Ricardo Torres,  
10 I'm going to ask them, just so we're clear, that they are  
11 asking for all the testimony regarding his testimony on the  
12 rules of confidential witness and confidence informant  
13 guidelines. Just to make sure that that's what they are asking  
14 for. But reading this again, if you've seen this note, it's a  
15 little difficult.

16 In fact, just so we're clear, I may just ask them  
17 about the whole thing. Because the literal reading is:  
18 Testimony from during cross-exam concerning of Anna, the  
19 reading of FBI rules. Number four, informants. Also Ricardo  
20 Torres' testimony regarding rules and CW-CI guidelines. That's  
21 what it actually says, and so I'm having to figure this out a  
22 little bit.

23 Off the record.

24 (Jury in.)

25 THE COURT: All right. Good afternoon. And for the

1 record, the jury has returned to the courtroom.

2 Ladies and gentlemen, first of all, I wanted to make  
3 sure that I was reading appropriately one of the first  
4 communications that you had, and that's regarding a read back  
5 of testimony.

6 And my reading of the request is -- testimony -- it  
7 says, from during cross-exam concerning of Anna.

8 Is it correct that you're asking for the  
9 cross-examination of Anna regarding the FBI rules for  
10 informants? Is that -- Mr. Gisler, is that what you are  
11 requesting as the foreperson?

12 JUROR 11: Yes, Your Honor. We are.

13 THE COURT: All right. The second portion of this  
14 request is Ricardo Torres' testimony regarding rules on CW-CI  
15 guidelines. Now the word "also," does that mean the cross-exam  
16 or all of the testimony of Ricardo Torres?

17 JUROR 11: I would believe just the cross, Your  
18 Honor. Maybe that explains on what the criteria is of the  
19 rules and regulations of being an informant or a person that's  
20 going to be working for the Government in that case.

21 THE COURT: And just so that we're clear, you're  
22 saying the cross-examination only, meaning the defense portion  
23 of the examination of the witness?

24 JUROR 11: Yes, I believe so.

25 THE COURT: Or are you asking for the Government's as

1 well?

2 JUROR 6: Having to do with anything with Mr. Torres'  
3 explanation of the FBI rules.

4 THE COURT: So it appears that everyone else is  
5 nodding affirmatively that you actually want -- if I'm not  
6 stating this correctly, please let me know.

7 So what you're asking for then is the testimony of  
8 Ricardo Torres regarding any rules that he was aware of  
9 regarding confidential witnesses and/or confidential  
10 informants?

11 JUROR 6: Anything to do with FBI rules.

12 THE COURT: Regarding CWs and CIs?

13 THE WITNESS: Yes.

14 THE COURT: Let me write this out to make sure this  
15 is what you want.

16 Did you say on training of CWs and CIs?

17 JUROR 11: Yes.

18 THE COURT: All right. So here's what I have. You  
19 would like to have the testimony of Ricardo Torres, both direct  
20 and cross, meaning both the Government and the defense,  
21 regarding FBI rulings on the training of confidential witnesses  
22 and confidence informants.

23 JUROR 11: Yes, I believe that's it.

24 THE COURT: All right. It will take a little bit  
25 more time for the court reporter to locate this, but let me

1 remind you that when she does come in to give those read backs,  
2 you are to suspend your deliberations and only begin  
3 deliberating once she has left the jury deliberation room. And  
4 you also will not be able to stop or talk to her regarding  
5 anything that's being read back during that time. Is there  
6 anything else?

7 MR. REICHEL: Your Honor, I talked to Mr. Lapham  
8 about possibly perhaps, once the jury leaves, we can discuss  
9 about read back taking place out in open court actually.

10 THE COURT: All right. The next question that was  
11 received regarding jury instruction number 18, part one, there  
12 were three subparts to that question.

13 And at this time, ladies and gentlemen, we are  
14 formulating a response for you for each of those three parts.  
15 In light of the time of today, we're going to be adjourning  
16 here in just a moment -- well, in a few minutes here. I don't  
17 believe that we're going to be able to respond to your question  
18 today, but we'll do so first thing in the morning.

19 I apologize for the delay, but it takes some time  
20 getting everyone back here to understand what the questions are  
21 and to formulate the response.

22 Are there any questions other than this? What you've  
23 asked at this point? That maybe we can deal with on the  
24 record?

25 JUROR 12: I have one. In regards to the

1 predisposition, what is the timeframe that we're to use for  
2 predisposition? Is it June of '05, beginning, or is it August  
3 of '04?

4 THE COURT: Thank you. Anything else?

5 If not, at this point, ladies and gentlemen, you're  
6 going to be separating in just a few minutes when you return.

7 As a deliberating jury, it's extremely critical that  
8 you not discuss what your deliberations are doing and how they  
9 are proceeding with anyone when you're outside the courtroom.  
10 And, again, let me remind you to please do not read any  
11 newspaper accounts about this case, listen to any television or  
12 radio reports regarding the case.

13 And if there is nothing else, we'll allow you to  
14 return to the jury deliberation room and separate at 4:30; in  
15 other words, leave at 4:30, if you would like to continue  
16 deliberating, and then return tomorrow morning at 9:00, and  
17 we'll start as soon as we can with the responses for you to all  
18 of your questions, but it will be after the read back of the  
19 testimony.

20 All right. If there's nothing else, thank you very  
21 much, and we'll have you back tomorrow morning. Thank you.

22 (Jury out.)

23 THE COURT: All right. We're outside the presence of  
24 the jury at this time. Now, Mr. Reichel, you were saying  
25 something regarding --

1 MR. REICHEL: Talking about the read back taking  
2 place out on the record.

3 THE REPORTER: I can't hear you.

4 MR. REICHEL: I'm sorry. I wanted to talk about the  
5 read back taking place out in the courtroom.

6 THE COURT: Go ahead.

7 MR. REICHEL: It seems to be that it gives us an  
8 opportunity to hear that portion as well. And if they should  
9 have a question later on or anything else, at least I know what  
10 they just listened to. As well, it's a jury question. They  
11 want certain pages. And I don't even know what pages those  
12 are. And I might have an objection that pages 1 through 11 is  
13 what they were looking for clearly, and we read them 30 through  
14 47.

15 THE COURT: Well, you already have what's going to be  
16 read tomorrow for Anna.

17 MR. REICHEL: I do. But I don't have as to  
18 Mr. Torres. I have the exact pages as to Anna. But not to  
19 Mr. Torres.

20 THE COURT: Well, at this point, she doesn't know  
21 what it's going to be, but if you were given those pages?

22 MR. REICHEL: I think then that's fine. That's my  
23 only concern.

24 THE COURT: To me, it seems that if you simply have  
25 the pages that were read, that's the best record we can have.

1 Because while she's reading back, it's not going to be on the  
2 record anyway.

3 MR. REICHEL: I understand. I don't have those  
4 pages.

5 THE COURT: We don't know. Nobody knows at this  
6 point. She was just telling me she doesn't know where they  
7 even are, and the question was whether or not it should be sent  
8 to you as a rough draft tonight or not, and I said, no, it  
9 shouldn't be. It should only be what is going to be the actual  
10 read back, which would be tomorrow at some point in time.

11 And if there's a request for the official transcript  
12 of what was read, then it's there and available.

13 MR. REICHEL: Right. But I won't know what's read  
14 until after it's read, and so I thought for the read back we  
15 could be present for the read back. And I don't want a  
16 transcript and I don't want her to have to do a transcript.  
17 But I want to be present for the read back, so I can hear what  
18 it was.

19 THE COURT: From the Government?

20 MR. LAPHAM: Your Honor, I'm used to having read  
21 backs in open court, but I think that's your discretion.

22 THE COURT: It is my discretion as to whether or not  
23 it should be. I mean, having read backs at all is my  
24 discretion. And the fact that we're even having them is  
25 something else.

1           MR. LAPHAM: If I understand your procedure  
2 correctly, the court reporter is simply going to do the read  
3 back, nothing more, and leave the jury room.

4           MR. REICHEL: We don't know exactly what she's going  
5 to read back.

6           THE COURT: Well, that's the point is that I would  
7 have -- just like you have Anna's testimony, I think the way to  
8 eliminate this would be for you to have the testimony of what's  
9 going to be read back.

10          MR. REICHEL: Right.

11          THE COURT: Because I don't know how long it is  
12 either. That's the point. It may be relatively short. It may  
13 be long. I don't recall. And until we find out today, it's  
14 going to be hard for me to say.

15          What I suggest is that we come back here tomorrow at  
16 9:00 -- no, I can't. That's criminal calendar.

17          THE CLERK: We can start at 8:30 a.m. or 8:00.

18          THE COURT: Why don't you come back here at 8:30  
19 tomorrow, and that way we'll be able to find out how much we're  
20 talking about. It may be that this way will work. It may not.  
21 Because if we're in open court tomorrow, and I've got a  
22 calendar, we're not coming out here anyway. It sounds like  
23 it's relatively short amounts with Anna, so it's going to be a  
24 delay before we ever get the jury back out here. So that's the  
25 other downside of doing it in open court tomorrow.

1 MR. REICHEL: And we're also going to answer the  
2 questions about --

3 THE COURT: And we've got to answer the questions as  
4 well, so 8:30 tomorrow morning we'll deal with the three  
5 questions from 18, and now the fourth one which was asked  
6 today.

7 MR. REICHEL: Kind of the same question.

8 THE COURT: When is it? When is contact?

9 MR. REICHEL: Yeah. That's his question. June of  
10 '05 or August of '04.

11 THE COURT: Exactly.

12 MR. REICHEL: Mark or Steve is what he is asking.  
13 Mark or Ellen.

14 THE COURT: 8:30.

15 MR. REICHEL: What time does your criminal calendar  
16 start?

17 THE COURT: 9:00.

18 MR. REICHEL: Okay. Thank you.

19 MR. LAPHAM: Thank you, Your Honor.

20 (Court adjourned. 4:20 p.m.)  
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22  
23  
24  
25

CERTIFICATION

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

/S/ DIANE J. SHEPARD  
DIANE J. SHEPARD, CSR #6331, RPR  
Official Court Reporter  
United States District Court