

FILED

JAN -8 2015

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY [Signature]
DEPUTY CLERK

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7
8 IN THE UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,
11
12 Plaintiff,
13 v.
14 ERIC MCDAVID,
15 Defendant.

CASE NO. 06-CR-0035-MCE
FINAL SETTLEMENT AGREEMENT
COURT: HON. CHIEF DISTRICT JUDGE
MORRISON J. ENGLAND, JR.

16 The United States of America, by and through its counsel of record, André M. Espinosa,
17 Assistant United States Attorney, and defendant, Eric McDavid ("McDavid"), by and through his
18 counsel of record, Mark R. Vermeulen and Ben Rosenfeld, hereby agree to this Final Settlement
19 Agreement and stipulate and agree as follows:

20 **I. RELEVANT PROCEDURAL AND FACTUAL HISTORY**

21 **A. McDavid's Trial and Direct Appeal**

22 1. The petitioner in this matter, Eric McDavid ("McDavid") and two co-defendants were
23 charged with conspiring, between June 2005 and January 13, 2006, to destroy by fire or explosives one
24 or more targets in the Sacramento area, including the United States Forest Service Institute of Forest
25 Genetics, the Nimbus Dam, and local cellular telephone towers, in violation of 18 U.S.C. § 844(n).

26 2. McDavid's two co-defendants pled guilty, cooperated with the United States, and
27 testified against McDavid at trial. After a 10-day trial, the jury rejected McDavid's entrapment defense
28 and convicted McDavid of the crimes charged in the Indictment. The Court sentenced McDavid to 235

1 months in custody, and the Ninth Circuit affirmed McDavid's conviction and sentence. United States v.
2 McDavid, 396 Fed. Appx. 365 (9th Cir. 2010), cert. denied, 131 S.Ct. 2469 (May 16, 2011).

3 3. McDavid is scheduled to be released from custody on or about February 10, 2023.

4 **B. McDavid's Motion Under 28 U.S.C. § 2255**

5 4. On or about May 15, 2012, McDavid filed a motion under 28 U.S.C. § 2255, seeking
6 collateral review of his conviction and sentence and alleging: (a) five claims of ineffective assistance by
7 his trial and appellate counsel; (b) that the United States procured and used false testimony at trial; and
8 (c) that the United States violated his due process rights by failing to disclose during discovery in the
9 underlying criminal prosecution all favorable evidence material to guilt or punishment, as required under
10 Brady v. Maryland, 373 U.S. 83 (1963). On or about July 2, 2012, McDavid filed an amended
11 memorandum in support of his § 2255 motion. On or about July 31, 2012, the Court ordered the United
12 States to respond to McDavid's §2255 motion within 30 days. Thereafter, the Court granted the United
13 States' motion for an extension of time to file a response in opposition to McDavid's §2255 motion,
14 which the United States filed on October 12, 2012.

15 5. On or about February 22, 2013, McDavid filed a reply to the United States' opposition.

16 6. On or about March 6, 2013, the Court granted McDavid's motion to file an amended
17 reply to the United States' opposition, which McDavid had filed a day earlier on March 5, 2013 (with an
18 accompanying request for an order permitting the filing of the amended reply).

19 7. On or about January 30, 2014, McDavid filed a supplemental memorandum in support of
20 his § 2255 motion, in which he raised claims based on the decisions in Alleyne v. United States, 133
21 S.Ct. 2151 (2013) and Peugh v. United States, 133 S.Ct. 2072 (2013).

22 8. Following a hearing on May 15, 2014 before the Honorable Edmund F. Brennan ("Judge
23 Brennan"), the Court ordered McDavid to file a supplemental memorandum in support of his Brady
24 claim and any related motion for discovery. On or about July 14, 2014, McDavid filed an amended
25 memorandum in support of his § 2255 motion and the Brady claims, along with a related motion for
26 discovery.

27 9. On or about September 19, 2014, the Court granted the United States' request for an
28 extension of time to file a response to the supplemental memoranda in support of McDavid's §2255

1 motion, and ordered the United States to file such response by November 17, 2014. The Court also
2 ordered McDavid to file any reply by December 8, 2014.

3 10. On or about November 6, 2014, the United States disclosed to McDavid certain
4 documents that were not disclosed to him during the criminal proceedings that preceded this matter.

5 11. On or about November 13, 2014, the Court accepted a stipulation between the parties,
6 vacated the pending briefing schedule, and set a status conference on December 15, 2014.

7 12. On or about December 12, 2014, the United States disclosed to McDavid certain
8 additional documents that were not disclosed to him during the criminal proceedings that preceded this
9 matter.

10 13. On or about December 15, 2014, the parties appeared before Judge Brennan and
11 presented the outline of a proposed settlement to the claims asserted in McDavid's § 2255 motion.

12 **II. FINAL SETTLEMENT TERMS**

13 14. McDavid does hereby agree to settle and compromise each and every claim of any kind,
14 whether known or unknown, arising directly or indirectly only from the acts or omissions that gave rise
15 to McDavid's motion under 28 U.S.C. § 2255 and the underlying criminal investigation and prosecution,
16 and only such claims, under the terms and conditions set forth herein.

17 15. The United States and McDavid hereby agree to, and do jointly recommend that the
18 Court, in the interest of justice, accept McDavid's waiver of indictment and plea of guilty, pursuant to a
19 written plea agreement, to a Superseding Information charging McDavid with conspiracy to destroy by
20 fire or explosives one or more targets in the Sacramento area, contrary to 18 U.S.C. §§ 844(f) and (i), in
21 violation of 18 U.S.C. § 371. (A copy of the Plea Agreement is attached hereto as Exhibit A. A copy of
22 the Superseding Information is attached here to as Exhibit B).

23 16. The United States and McDavid hereby agree to, and do jointly recommend that, at an
24 immediate sentencing hearing to be held on the same date that the Court accepts McDavid's plea of
25 guilty to the Superseding Information referred to in Paragraph 15 of this Agreement, that the Court, in
26 the interest of justice, sentence the defendant to time already served in custody.

27 17. Additionally, the parties hereby agree to, and do jointly recommend that the Court, in the
28 interest of justice, impose no more than a two-year period of Supervised Release to follow the expiration

1 of McDavid's custodial sentence.

2 18. The United States and McDavid hereby agree to, and do jointly recommend that, after the
3 Court has accepted McDavid's guilty plea to the Superseding Information referred to in Paragraph 15 of
4 this Agreement and after the Court has imposed sentence, the Court, in the interest of justice, grant
5 McDavid's motion under 28 U.S.C. § 2255, to the extent stipulated by the parties in this Agreement, and
6 vacate the conviction and sentence finalized by the Judgment and Commitment entered by the Court on
7 May, 19, 2008, in the underlying criminal prosecution in this matter.

8 19. In consideration of the mutual promises contained in this Agreement and Exhibit A
9 hereto, McDavid agrees and stipulates that this Agreement shall constitute the full settlement and
10 satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature,
11 arising from, and by reason of any and all known and unknown, foreseen and unforeseen injuries,
12 including injuries to intangible civil rights, bodily and personal injuries, and damage to property and the
13 consequences thereof, resulting and to result, from the incidents and facts that gave rise to McDavid's
14 motion under 28 U.S.C. § 2255 and the underlying criminal investigation and prosecution, which are the
15 subject of this Agreement, including any claims for wrongful death, for which McDavid or his
16 guardians, heirs, executors, administrators or assigns, and each of them, now have or may hereafter
17 acquire against the United States, its agents, servants, and employees.

18 20. In consideration of the mutual promises contained in this Agreement and Exhibit A
19 hereto, McDavid and his heirs, executors, administrators or assigns, agree and stipulate that this
20 Agreement shall constitute the full settlement, satisfaction, and release of any and all claims, demands,
21 rights, and causes of action of whatsoever kind and nature, including claims for civil rights violations,
22 personal injury claims, and wrongful death claims arising from, and by reason of, any and all known and
23 unknown foreseen and unforeseen bodily and personal injuries, damage to property and the
24 consequences thereof which they may have or hereafter acquire against the United States, its agents,
25 servants, and employees on account of the incidents and facts that gave rise to McDavid's motion under
26 28 U.S.C. § 2255 and the underlying criminal investigation and prosecution, which are the subject of
27 this Agreement, including any future claim or lawsuit of any kind or type whatsoever, whether known or
28 unknown, and whether for compensatory, exemplary, or other damages. McDavid and his guardians,

1 heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the
2 United States and its agents, servants and employees from and against any and all causes of action,
3 claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation
4 or the prosecution of claims on account of the incidents and facts that gave rise to McDavid's motion
5 under 28 U.S.C. § 2255 and the underlying criminal investigation and prosecution, which are the
6 subject of this Agreement, by McDavid or his guardians, heirs, executors, administrators or assigns
7 against any third party or against the United States, including claims for civil rights violations, personal
8 injuries, and wrongful death.

9 21. McDavid expressly waives any rights or benefits available pursuant to Section 1542 of
10 the Civil Code of the State of California' which provides:

11 **A general release does not extend to claims which the creditor does not know or**
12 **suspect to exist in his or her favor at the time of executing the release, which, if**
13 **known by him or her must have materially affected his or her settlement with the**
14 **debtor.**

15 The parties understand and agree that this Agreement shall act as a release of future claims that may
16 arise on account of the incidents and facts that gave rise to McDavid's motion under 28 U.S.C. § 2255
17 and the underlying criminal investigation and prosecution, which are the subject of this Agreement,
18 whether such claims are currently known, unknown, foreseen or unforeseen. The parties understand and
19 acknowledge the significance and consequences of the specific waiver of section 1542 and McDavid
20 hereby assumes full responsibility for any injury, loss, damage or liability that may be incurred hereafter
21 by reason of or related to the incidents and facts that gave rise to McDavid's motion under 28 U.S.C. §
22 2255 and the underlying criminal investigation and prosecution, which are the subject of this
23 Agreement.

24 22. The parties disagree about the merits of each of the claims McDavid asserts in his motion
25 under 28 U.S.C. § 2255. This Agreement is not, and is in no way intended to be, and should not be
26 construed as, an admission of fault or liability on the part of the United States, its agents, servants, or
27 employees, and it is specifically denied that they acted improperly in any way or are liable to McDavid.
28 The parties enter into this Agreement for the purpose of compromising the disputed claims in
McDavid's motion under 28 U.S.C. § 2255, to avoid the expenses and risks of further litigation, and to
advance the interests of justice.

1 23. The United States and McDavid also agree that the terms of the Plea Agreement attached
2 hereto as Exhibit A are incorporated by reference herein as though set forth individually in their entirety.

3 24. The United States and McDavid also agree that the respective parties will each bear their
4 own costs, fees, and expenses and that any attorneys' fees owed by McDavid will be paid by McDavid.

5 25. By signing this Agreement McDavid expressly warrants and represents that he: (i) has
6 had sufficient time to discuss the terms of this Agreement with counsel; (ii) has, in fact, discussed the
7 terms of this Agreement with counsel; (iii) understands and knowingly, intelligently, and voluntarily
8 agrees to be bound by the terms of the Agreement; and (iv) is satisfied with the advice provided by
9 counsel concerning the meaning and effect of each and every term of this Agreement.


10 IT IS SO STIPULATED.

11 MARK R. VERMEULEN
12 BEN ROSENFELD
Attorneys for Defendant

13 Dated: January 7, 2015

By: 
14 MARK R. VERMEULEN

15
16 Dated: January 7, 2015


17 ERIC MCDAVID
Defendant

18
19
20
21 Dated: January 7, 2015

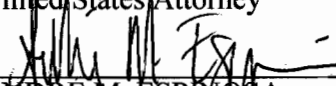
BENJAMIN B. WAGNER
United States Attorney

22 ANDRE M. ESPINOSA
Assistant United States Attorney

EXHIBIT A

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6 Attorneys for the
7 United States of America

8
9 IN THE UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA,
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13 Plaintiff,
14
15 v.
16 ERIC MCDAVID,
17
18 Defendant.

CASE NO. 06-CR-0035-MCE

PLEA AGREEMENT

DATE: JANUARY 8, 2015

TIME: 9:00 A.M.

COURT: Hon. Morrison C. England, Jr.

19 I. INTRODUCTION

20 A. Scope of Agreement.

21 The single-count Superseding Information in this case charges the defendant with a violation of
22 18 U.S.C. § 371 – Conspiracy (“Count One”). This document contains the complete plea agreement
23 between the United States Attorney’s Office for the Eastern District of California (the “government”)
24 and the defendant regarding this case. This Plea Agreement is limited to the United States Attorney’s
25 Office for the Eastern District of California and cannot bind any other federal, state, or local
26 prosecuting, administrative, or regulatory authorities.

27 B. Court Not a Party.

28 The Court is not a party to this Plea Agreement. Sentencing is a matter solely within the

1 discretion of the Court, and the Court may take into consideration any and all facts and circumstances
2 concerning the criminal activities of defendant, including activities which may not have been charged in
3 the Superseding Information. The Court is under no obligation to accept any recommendations made by
4 the government, and the Court may in its discretion impose any sentence it deems appropriate up to and
5 including the statutory maximum stated in this Plea Agreement.

6 If the Court should impose any sentence up to the maximum established by the statute, the
7 defendant cannot, for that reason alone, withdraw his guilty plea, and he will remain bound to fulfill all
8 of the obligations under this Plea Agreement. The defendant understands that neither the prosecutor,
9 defense counsel, nor the Court can make a binding prediction or promise regarding the sentence he will
10 receive.

11 **II. DEFENDANT'S OBLIGATIONS**

12 **A. Guilty Plea.**

13 The defendant will plead guilty to Count One of the Superseding Information, charging a
14 violation of 18 U.S.C. § 371 – Conspiracy. The defendant agrees that he is in fact guilty of that charge
15 and that the facts set forth in the Factual Basis for Plea attached hereto as Exhibit A are accurate.

16 The defendant agrees that this Plea Agreement will be filed with the Court and become a part of
17 the record of the case. The defendant understands and agrees that he will not be allowed to withdraw his
18 plea should the Court not follow the government's sentencing recommendations.

19 The defendant agrees that the statements made by him in signing this Agreement, including the
20 factual admissions set forth in the Factual Basis for Plea, shall be admissible and useable against the
21 defendant by the United States in any subsequent criminal or civil proceedings, even if the defendant
22 fails to enter a guilty plea pursuant to this Agreement. The defendant waives any rights under Fed. R.
23 Crim. P. 11(f) and Fed. R. Evid. 410, to the extent that these rules are inconsistent with this paragraph or
24 with this Agreement generally.

25 **1. Waiver of Indictment:**

26 The defendant acknowledges that under the United States Constitution he is entitled to be
27 indicted by a grand jury on the charge to which he is pleading guilty and that pursuant to Fed. R. Crim.
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1 P. 7(b) he agrees to waive any and all rights he has to being prosecuted by way of indictment to the
2 charges set forth in the Superseding Information. The defendant agrees that at a time set by the Court,
3 he will sign a written waiver of prosecution by indictment and consent to proceed by Superseding
4 Information rather than by indictment.

5 2. Waiver of Statute of Limitations:

6 In consideration of the promises exchanged between the parties in this Agreement, by execution
7 of this Agreement the defendant knowingly, intelligently, and voluntarily agrees to and does waive, to
8 the fullest extent permissible under law, the right to assert any affirmative defense to the charges in the
9 original Indictment, filed on January 25, 2006, and the Superseding Information to be filed in connection
10 with this Agreement, under 18 U.S.C. § 3282 or any other applicable statute of limitations. The
11 defendant agrees to waive such a defense until January 9, 2017, or until entry of a Judgment and
12 Commitment by the Court, pursuant to this Agreement, whichever is sooner. However, the defendant
13 further agrees that if he ever attempts to vacate his plea, dismiss the underlying charges, or modify or set
14 aside his sentence on the count to which he is pleading guilty, his waiver of the statute of limitations in
15 this Agreement shall extend through such proceedings and until final judgment is entered after trial, or
16 otherwise, on the offense charged in the original Indictment, filed on January 25, 2006, and the
17 Superseding Information to be filed in connection with this Agreement.

18 **B. Restitution.**

19 The defendant agrees to pay restitution pursuant to 18 U.S.C. § 3663(a)(3) for the full losses
20 suffered by the victims of the offense to which the defendant is pleading guilty, if any, as ordered by the
21 Court. Restitution payments shall be by cashier's or certified check made payable to the Clerk of the
22 Court. However, the parties jointly agree that no restitution is owed in this matter and the parties do not
23 recommend imposition of any restitution.

24 **C. Fine.**

25 Defendant agrees to pay a fine as imposed by the Court. However, the parties jointly agree that
26 the defendant is unable to pay a fine and the parties do not recommend imposition of a fine.
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1 **D. Special Assessment.**

2 The defendant agrees to pay a special assessment of \$100 at the time of sentencing by delivering
3 a check or money order payable to the United States District Court to the United States Probation Office
4 immediately before the sentencing hearing. The defendant understands that this Plea Agreement is
5 voidable at the option of the government if he fails to pay the assessment. If the defendant is unable to
6 pay the special assessment at the time of sentencing, he agrees to earn the money to pay the assessment,
7 if necessary, by participating in the Inmate Financial Responsibility Program, or by other means.

8 **E. Violation of Plea Agreement by Defendant/Withdrawal of Plea.**

9 If the defendant violates this Plea Agreement in any way, withdraws his plea, or tries to
10 withdraw his plea, this Plea Agreement is voidable at the option of the government. The government
11 will no longer be bound by its representations to the defendant concerning the limits on criminal
12 prosecution and sentencing as set forth herein. The determination whether the defendant has violated
13 the Plea Agreement will be under a probable cause standard.

14 If the defendant violates the Plea Agreement, withdraws his plea, or tries to withdraw his plea,
15 the government shall have the right to: (1) prosecute the defendant on any of the counts to which he
16 pleaded guilty; (2) reinstate any counts, including counts in the original Indictment filed on January 25,
17 2006, that may be dismissed or vacated pursuant to this Plea Agreement or the Final Settlement
18 Agreement concerning the Judgment and Commitment entered by the Court on May 19, 2008 and the
19 defendant's pending §2255 claims (the "Final Settlement Agreement")¹; and (3) file any new charges
20 that would otherwise be barred by this Plea Agreement or the Final Settlement Agreement. The
21 defendant shall thereafter be subject to prosecution for any federal criminal violation of which the
22 government has knowledge, including perjury, false statements, and obstruction of justice. The decision
23 to pursue any or all of these options is solely in the discretion of the United States Attorney's Office.

24 By signing this Plea Agreement, the defendant agrees to waive any objections, motions, and
25 defenses that the defendant might have to the government's decision. Any prosecutions that are not
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27 ¹ The parties agree that the Final Settlement Agreement is incorporated into this Agreement as
28 though set forth in its entirety.

1 time-barred by the applicable statute of limitations as of the date of this Plea Agreement, and as
2 modified by paragraphs II.A.2 of this Agreement, may be commenced in accordance with this
3 Agreement, notwithstanding the expiration of the statute of limitations between the signing of this Plea
4 Agreement and the commencement of any such prosecutions. The defendant agrees not to raise any
5 objections based on the passage of time with respect to such counts including, but not limited to, any
6 statutes of limitation or any objections based on the Speedy Trial Act or the Speedy Trial Clause of the
7 Sixth Amendment to any counts that were not time-barred as of the date of this Plea Agreement, and as
8 modified by paragraphs II.A.2 of this Agreement.

9 In addition, all statements made by the defendant, whether before or after this Plea Agreement,
10 shall be admissible in evidence in any criminal, civil, or administrative proceedings hereafter brought
11 against the defendant; and the defendant shall assert no claim under the United States Constitution, any
12 statute, Rule 11(f) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of
13 Evidence, or any other federal rule, that statements made by the defendant before or after this Plea
14 Agreement, or any leads derived therefrom, should be suppressed. By signing this Plea Agreement, the
15 defendant waives any and all rights in the foregoing respects.

16 **III. THE GOVERNMENT'S OBLIGATIONS**

17 **A. Recommendation of Acceptance of Final Settlement Agreement.**

18 The government agrees that, after the Court imposes sentence on the charge to which the
19 defendant is pleading guilty pursuant to this Agreement, the government will recommend that the Court
20 accept, file, and order the relief recommended by the parties in the Final Settlement Agreement. The
21 government further agrees not to reinstate any dismissed count, except if this Agreement is voided, as
22 provided in paragraphs II.E (Violation of Plea Agreement by Defendant/Withdrawal of Plea), VI.B
23 (Guidelines Calculations), and VII.B (Waiver of Appeal and Collateral Attack) herein.

24 The government acknowledges and the parties agree that their object in this Plea Agreement and
25 the Final Settlement Agreement is to effect a complete resolution of all civil and criminal claims
26 between the parties arising out of the defendant's conduct and the investigation and prosecution of that
27 conduct. Therefore, it is the goal and expectation of the parties that the Court will accept this Plea
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1 Agreement and the defendant's guilty plea pursuant to its terms only if the Court also agrees to accept,
2 file, and grant the relief recommended by the parties in the Final Settlement Agreement. The parties
3 agree that if the defendant should enter a guilty plea pursuant to this Plea Agreement and, thereafter, the
4 Court were to reject the terms of the Final Settlement Agreement, the government will agree to consent
5 to the defendant's motion to withdraw that guilty plea.

6 **B. Recommendations.**

7 1. Incarceration Range.

8 The government will recommend that the Court sentence the defendant to time already served as
9 of the date the Court imposes sentence pursuant to this Agreement. Additionally, the government and
10 the defendant will jointly recommend that the Court impose a two-year period of Supervised Release.

11 2. Acceptance of Responsibility.

12 The government will recommend a two-level reduction (if the offense level is less than 16) or a
13 three-level reduction (if the offense level reaches 16) in the computation of his offense level if the
14 defendant clearly demonstrates acceptance of responsibility for his conduct as defined in U.S.S.G. §
15 3E1.1. This includes the defendant not engaging in conduct that constitutes obstruction of justice within
16 the meaning of U.S.S.G § 3C1.1, during the plea and sentencing proceedings.

17 **C. Use of Information for Sentencing.**

18 The government is free to provide full and accurate information to the Court and Probation,
19 including answering any inquiries made by the Court and/or Probation and rebutting any inaccurate
20 statements or arguments by the defendant, his attorney, Probation, or the Court. The defendant also
21 understands and agrees that nothing in this Plea Agreement bars the government from defending on
22 appeal or collateral review any sentence that the Court may impose.

23 **IV. ELEMENTS OF THE OFFENSE**

24 At a trial, the government would have to prove beyond a reasonable doubt the following
25 elements of the offense to which the defendant is pleading guilty, Count One of the Superseding
26 Information, charging a violation of 18 U.S.C. § 371 – Conspiracy:
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- 1 1. That beginning in or about August 2005, and ending on or about January 13,
2 2006, there was an agreement between two or more persons to commit at least
3 one of the crimes as charged in the Superseding Information – namely, arson in
4 violation of 18 U.S.C. § 844(f) and (i);
- 5 2. The defendant became a member of the conspiracy knowing of at least one of its
6 objects and intending to help accomplish it; and
- 7 3. One the members of the conspiracy performed at least one overt act for the
8 purpose of carrying out the conspiracy.

9 Additionally, if the defendant contends that he was entrapped by a government agent. The
10 government would have to prove beyond a reasonable doubt that the defendant was not entrapped by
11 proving either:

- 12 1. The defendant was predisposed to commit the crime before being contacted by
13 government agents, or
- 14 2. The defendant was not induced by the government agents to commit the crime.

15 The defendant fully understands the nature and elements of the crimes charged in the
16 Superseding Information to which he is pleading guilty, together with the possible defenses thereto, and
17 has discussed them with his attorney.

18 **V. MAXIMUM SENTENCE**

19 **A. Maximum Penalty.**

20 The maximum sentence that the Court can impose is 5 years of incarceration, a fine of \$250,000,
21 a 3-year period of supervised release and a special assessment of \$100. By signing this Plea Agreement,
22 the defendant also agrees that the Court can order the payment of restitution for the full loss caused by
23 the defendant's wrongful conduct. The defendant agrees that the restitution order is not restricted to the
24 amounts alleged in the specific count(s) to which he is pleading guilty. The defendant further agrees, as
25 noted above, that he will not attempt to discharge in any present or future bankruptcy proceeding any
26 restitution imposed by the Court. However, the government represents that no restitution is owed by the
27 defendant related to the charged offense and does not recommend that the Court impose restitution.

28 **B. Violations of Supervised Release.**

The defendant understands that if he violates a condition of supervised release at any time during

1 the term of supervised release, the Court may revoke the term of supervised release and require the
2 defendant to serve up to 2 additional years imprisonment.

3 **VI. SENTENCING DETERMINATION**

4 **A. Statutory Authority.**

5 The defendant understands that the Court must consult the Federal Sentencing Guidelines and
6 must take them into account when determining a final sentence. The defendant understands that the
7 Court will determine a non-binding and advisory guideline sentencing range for this case pursuant to the
8 Sentencing Guidelines and must take them into account when determining a final sentence. The
9 defendant further understands that the Court will consider whether there is a basis for departure from the
10 guideline sentencing range (either above or below the guideline sentencing range) because there exists
11 an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into
12 consideration by the Sentencing Commission in formulating the Guidelines. The defendant further
13 understands that the Court, after consultation and consideration of the Sentencing Guidelines, must
14 impose a sentence that is reasonable in light of the factors set forth in 18 U.S.C. § 3553(a).

15 **B. Stipulations Affecting Guideline Calculation.**

16 The government and the defendant agree that there is no material dispute as to the following
17 sentencing guidelines variables and therefore stipulate to the following:
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1 1. **Base Offense Level:** The base offense level applicable to the charge to which the
2 defendant is pleading guilty in Count One of the Superseding Information is: **24**. See
U.S.S.G. § 2X1.1(a) and § 2K1.4(a)(1).

3 2. **Specific Offense Characteristics:**

4 a. Three levels are subtracted (-3) because the offense conduct was not
5 completed or complete but for the interruption of law enforcement agents.
6 Id. at (b)(2);

7 3. **Preliminary Adjusted Offense Level: 21.**

8 4. **Acceptance of Responsibility:** Three levels will be subtracted (-3) if the
9 conditions set forth in this Agreement are satisfied. See U.S.S.G. § 3E1.1; paragraph
III.B.2 above.

10 5. **Victim-Related Adjustment:** The offense level is increased to **32** because the
11 offense was a felony that involved, or was intended to promote, a federal crime of
12 terrorism. U.S.S.G. § 3A1.4. In the previous sentencing proceedings in this case, the
13 defendant contested the application of this adjustment, and the Court ruled that this
Guidelines adjustment applies. For purposes of this plea agreement and these sentencing
14 proceedings, the defendant accepts and does not contest that ruling and the application of
15 this adjustment.

16 6. **Criminal History:** By operation of U.S.S.G. § 3A1.4, the defendant's criminal
17 history category is **VI**. As noted immediately above, in the previous sentencing
18 proceedings in this case, the defendant objected to this, and the Court ruled that the
19 adjustment under U.S.S.G. § 3A1.4 applies, resulting in a criminal history category of **VI**.
The defendant accepts and does not contest the Court's ruling and its impact on the
20 computation of the criminal history category in connection with this plea and sentencing.

21 7. **Applicable Sentencing Range:** In light of the above, the parties anticipate that
22 the guideline sentencing range in this case will be **210 to 262 months**.

23 8. **Departures or Other Enhancements or Reductions:** The parties agree that they
24 will not seek or argue in support of any other specific offense characteristics, Chapter
25 Three adjustments (other than the decrease for "Acceptance of Responsibility"), cross-
26 references, or departure from the Sentencing Guidelines not already set forth in this
27 Agreement.

28 The defendant and the government agree to jointly recommend that the Court sentence the
defendant to time already served as of the date the Court imposes sentence pursuant to this Agreement.
Additionally, the defendant and the government will jointly recommend that the Court impose a two-
year period of Supervised Release with standard terms and conditions.

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VII. WAIVERS

A. Waiver of Constitutional Rights.

The defendant understands that by pleading guilty he is waiving the following constitutional rights: (a) to plead not guilty and to persist in that plea if already made; (b) to be tried by a jury; (c) to be assisted at trial by an attorney, who would be appointed if necessary; (d) to subpoena witnesses to testify on his behalf; (e) to confront and cross-examine witnesses against him; and (f) not to be compelled to incriminate himself.

B. Waiver of Appeal and Collateral Attack.

The defendant understands that the law gives the defendant a right to appeal his guilty plea, conviction, and sentence. However, as part of his Plea Agreement the defendant agrees to give up and waive to the fullest extent permitted under law his right to appeal, the guilty plea, conviction, and the sentence imposed in this case. The defendant also specifically gives up the right to appeal any order of restitution the Court may impose. The defendant understands and acknowledges that this Agreement constitutes a complete waiver of all appellate rights.

In addition, regardless of the sentence the defendant receives, the defendant also gives up any right to bring a collateral attack, including a motion under 28 U.S.C. § 2255 or § 2241, challenging any aspect of the guilty plea, conviction, or sentence, except for non-waivable claims.

Notwithstanding the agreement in paragraph III.A above that the government will, at the time of sentencing pursuant to this Agreement, recommend that the Court accept, file, and order the relief recommended by the parties in the Final Settlement Agreement, if the defendant ever attempts to vacate his plea, dismiss the underlying charges, or modify or set aside his sentence on the count to which he is pleading guilty, the government shall have the rights set forth in paragraph II.E of this Agreement.

C. Waiver of Attorneys' Fees and Costs.

The defendant agrees to waive all rights under the "Hyde Amendment," Section 617, P.L. 105-119 (Nov. 26, 1997), to recover attorneys' fees or other litigation expenses in connection with the investigation and prosecution of all charges in the above-captioned matter and of any related allegations (including without limitation any charges to be dismissed pursuant to this Plea Agreement and any

1 charges previously dismissed).

2 **VIII. ENTIRE PLEA AGREEMENT**

3 Other than this Plea Agreement and the Final Settlement Agreement presented to the Court in
4 connection with this Plea Agreement, no agreement, understanding, promise, or condition between the
5 government and the defendant exists, nor will such agreement, understanding, promise, or condition
6 exist unless it is committed to writing and signed by the defendant, counsel for the defendant, and
7 counsel for the United States.

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IX. APPROVALS AND SIGNATURES

A. Defense Counsel.

I have read this Plea Agreement and have discussed it fully with my client, including all possible defenses my client might have asserted in this case. The Plea Agreement and the Final Settlement Agreement accurately and completely set forth the entirety of the agreement. I concur in my client's decision to plead guilty as set forth in this Plea Agreement.

Dated: January 1, 2015

MARK R. VERMEULEN
BEN ROSENFELD
Attorneys for Defendant

By: 
MARK R. VERMEULEN

B. Defendant:

I have read this Plea Agreement and the Final Settlement Agreement and carefully reviewed every part of them with my attorney. I understand them, and I voluntarily agree to them. Further, I have consulted with my attorneys and I fully understand all possible defenses I might have asserted in this case and my rights, including my rights with respect to the provisions of the Sentencing Guidelines that may apply to my case. No other promises or inducements have been made to me, other than those contained in this Plea Agreement and the Final Settlement Agreement. In addition, no one has threatened or forced me in any way to enter into this Plea Agreement or accept the terms of the Final Settlement Agreement. Finally, I am satisfied with the representation of my attorneys in this case.

Dated: January 7, 2015


ERIC MCDAVID
Defendant

C. Attorney for United States:

I accept and agree to this Plea Agreement on behalf of the government.

Dated: January 7, 2015

BENJAMIN B. WAGNER
United States Attorney

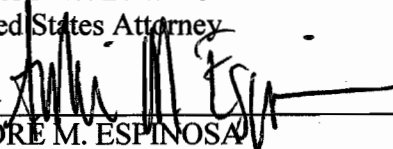

ANDRE M. ESPINOSA
Assistant United States Attorney

EXHIBIT "A"

Factual Basis for Plea

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3 In August 2005, defendant Eric McDavid ("McDavid") met with Lauren Weiner ("Weiner") and
4 Zachary Jenson ("Jenson") in a Philadelphia, Pennsylvania, coffee shop. At this meeting McDavid,
5 Weiner, and Jenson discussed different ideas for protest and activism. Among the ideas they discussed
6 was the idea of using explosives to destroy commercial and/or government property. McDavid told the
7 group that he wanted to make "boom," which Weiner understood as McDavid expressing his desire to
8 make and use homemade explosives. During the meeting, each person agreed to research other possible
9 targets. Shortly after the meeting, Weiner told a confidential FBI source known as "Anna" about the
10 discussion, including the idea of using explosives. After the meeting, Weiner also researched books
11 containing explosives recipes.

12 On the weekend of November 18-20, 2005, McDavid met with Weiner, Jenson, and Anna at
13 McDavid's parents' residence in Foresthill, California, while McDavid's parents were out of town.
14 There, the group further discussed committing acts of property destruction. During the meeting
15 McDavid, Weiner, and Jenson knew that their meeting was for the purpose of planning criminal acts.
16 McDavid warned the group that the discussion in which they were engaged was itself a criminal act.
17 The group agreed to reassemble in early January 2006, at a remotely situated residence in Northern
18 California secured by Anna, to manufacture homemade explosives for possible detonation at various
19 commercial and government targets.

20 From January 8-13, 2006, McDavid maintained temporary residence at a cabin in Dutch Flat,
21 California. In this span of time, he discussed with Weiner, Jenson, and Anna, plans to construct
22 homemade explosive and incendiary devices and to target commercial and government facilities with
23 these destructive devices, and discussed claiming credit for those acts.

24 On January 10, 2006, McDavid traveled with Weiner, Jenson, and Anna to the United States
25 Forest Service Institute of Forest Genetics ("IFG") in Placerville, California. There, McDavid
26 participated in a reconnaissance operation, the purpose of which was to determine the site's potential as
27 a target. To hide his identity, he provided a fake name to an IFG employee the group encountered. On
28

1 January 11, 2006, McDavid assisted in purchasing several items to be used in making destructive
2 devices from a fake explosives recipe provided by Anna, which McDavid had earlier requested and
3 believed to be a viable explosive recipe, including: canning jars, coffee filters, mixing bowl, hot plate,
4 petroleum jelly, a gasoline can, bleach, extension cord, and battery testers. On January 12, 2006,
5 McDavid assisted in the initial stages of manufacturing homemade explosives. On January 13, 2006,
6 McDavid was arrested after purchasing additional items to be used in making destructive devices,
7 including respiratory masks and a mixing bowl.

8
9 I have read and carefully reviewed the Factual Basis for Plea with my attorneys. I agree that as it
10 concerns my conduct it is correct. I also agree that if this matter proceeded to trial, the United States
11 could establish each of the facts contained within the Factual Basis for Plea beyond a reasonable doubt,
12 and that those facts satisfy the elements of the offense to which I am pleading guilty.

13 Dated: January 7, 2015.


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16 ERIC MCDAVID
17 Defendant
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EXHIBIT B

1 BENJAMIN B. WAGNER
United States Attorney
2 ANDRÉ M. ESPINOSA
Assistant United States Attorney
3 501 I Street, Suite 10-100
Sacramento, CA 95814
4 Telephone: (916) 554-2700
Facsimile: (916) 554-2900

5 Attorneys for the
6 United States of America

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8 IN THE UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA

10
11 UNITED STATES OF AMERICA,) CASE NO. 06-CR-0035-MCE
12 Plaintiff,)
13 v.) VIOLATION: 18 U.S.C. § 371 --
14 ERIC MCDAVID,) CONSPIRACY
15 Defendant.)
16

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18 **SUPERSEDING INFORMATION**

19 The United States Attorney charges: T H A T

20 Beginning on or about August 2005 and continuing through January 13, 2006, in Placer County,
21 in the state and Eastern District of California, and elsewhere,

22 **ERIC MCDAVID**

23 did knowingly and intentionally agree, combine, and conspire with Lauren Weiner, Zachary Jenson,
24 who are charged elsewhere, and others known and unknown to maliciously damage and destroy, and
25 attempt to do so, by means of fire and an explosive, (1) a building, and personal and real property of the
26 United States Forest Service, United States Department of Agriculture; (2) a building, personal and real
27 property of an institution and organization receiving financial assistance from the United States Bureau
28 of Reclamation, United States Department of the Interior; and (3) personal and real property used in

1 interstate commerce and in an activity affecting interstate commerce, specifically, cellular telephone
2 towers and electric power stations, contrary to Title 18 United States Code, §§ 844 (f) and (i).

3 In furtherance of the conspiracy, and to effect the objectives thereof, the defendant and others
4 committed the following overt acts, among others:

5 1. In August 2005, defendant Eric McDavid ("McDavid") met with Lauren Weiner
6 ("Weiner") and Zachary Jenson ("Jenson") in a Philadelphia, Pennsylvania, coffee shop. At this
7 meeting McDavid, Weiner, and Jenson discussed different ideas for protest and activism. Among the
8 ideas they discussed was the idea of using explosives to destroy commercial and government property.

9 2. During the August 2005 meeting, McDavid told the group that he wanted to make
10 "boom," which Weiner understood as McDavid expressing his desire to make and use homemade
11 explosives. During the meeting, each person agreed to research other possible targets.

12 3. Shortly after the August 2005 meeting, Weiner told a confidential FBI source known as
13 "Anna" about the discussion, including the idea of using explosives. After the meeting, Weiner also
14 researched books containing explosives recipes.

15 4. During the weekend of November 18-20, 2005, McDavid met with Weiner, Jenson, and
16 Anna at McDavid's parents' residence in Foresthill, California, while McDavid's parents were out of
17 town. There, the group further discussed committing acts of property destruction. During the
18 November 18-20, 2005 meetings, McDavid, Weiner, and Jenson knew that their meeting was for the
19 purpose of planning criminal acts. McDavid warned the group that the discussion in which they were
20 engaged was itself a criminal act. The group agreed to reassemble in early January 2006, at a remotely
21 situated residence in Northern California secured by Anna, to manufacture homemade explosives for
22 possible detonation at various commercial and government targets.

23 5. From January 8-13, 2006, McDavid maintained temporary residence at a cabin in Dutch
24 Flat, California (the "Dutch Flat Cabin"). In this span of time, he discussed with Weiner, Jenson, and
25 Anna, plans to construct homemade explosive and incendiary devices and to target commercial and
26 government facilities with these destructive devices, and discussed claiming credit for those acts.

27 6. On January 10, 2006, McDavid traveled with Weiner, Jenson, and Anna from the Dutch
28 Flat Cabin to the Nimbus Dam and Nimbus Fish Hatchery and, later that day, to the United States
Forest Service Institute of Forest Genetics ("IFG") in Placerville, California. At those locations,

1 McDavid participated in reconnaissance operations, the purpose of which was to determine each site's
2 potential as a target for destruction and damage by fire and explosive. During the reconnaissance trip
3 to the IFG, McDavid hid his identity by providing a fake name to an IFG employee the group
4 encountered.

5 7. On January 11, 2006, McDavid and his co-conspirators travelled from the Dutch Flat
6 Cabin to a store in Sacramento to purchase items and ingredients to be used in making destructive
7 devices for a fake explosives recipe provided by Anna, which McDavid had earlier requested and
8 believed to be a viable explosive recipe, including: canning jars, coffee filters, mixing bowl, hot plate,
9 petroleum jelly, a gasoline can, bleach, extension cord, and battery testers.

10 8. On January 12, 2006, McDavid participated in the initial stages of manufacturing
11 homemade explosives by measuring, mixing, and heating chemicals on a hot plate inside the Dutch Flat
12 Cabin.

13 9. On January 13, 2006, McDavid was arrested after purchasing additional items to be used
14 in making destructive devices, including respiratory masks and a mixing bowl.

15 All in violation of Title 18, United States Code, Section 371.

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17 Dated: January 8, 2015.

Respectfully Submitted,

BENJAMIN B. WAGNER
United States Attorney

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20 By: 

21 ANDRE M. ESPINOSA
22 Assistant United States Attorney
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