

1 McGREGOR W. SCOTT
United States Attorney
2 R. STEVEN LAPHAM
ELLEN V. ENDRIZZI
3 Assistant U.S. Attorneys
501 I Street, Suite 10-100
4 Sacramento, California 95814
Telephone: (916) 554-2700
5
6
7

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

11 UNITED STATES OF AMERICA,) NO. 2:06-cr-00035 MCE
12 Plaintiff,)
13 v.) **UNITED STATES' MOTION IN LIMINE TO**
14 ERIC McDAVID,) **PRECLUDE DEFENDANT FROM RAISING**
15 Defendant.) **LEGAL ISSUES PREVIOUSLY DECIDED**
16)
17) Date: September 7, 2007
18) Time: 9:00 a.m.
19) Honorable Morrison C. England, Jr.
20)
21)
22)
23)
24)

25 Introduction & Background

26 In late December 2006 and early January 2007, Defendant Eric
27 McDavid filed 26 pretrial motions.¹ Pursuant to Rule 103(a)(2) of
28 the Federal Rules of Evidence, "[o]nce the court makes a definitive
ruling on the record admitting or excluding evidence, either at or
before a trial, a party need not renew an objection or offer of proof
to preserve a claim of error for appeal." Fed. R. Evid. 103(a)(3).

¹ This Court heard argument on 19 of the motions and the
magistrate court heard argument on the remaining 7. The Court
dismissed 16 motions, and the remaining 3 will be decided if
necessary. C.R. 192. Of the motions before the magistrate judge, 5
were denied (1 without prejudice), 1 was granted, and 1 remains open
while the magistrate reviews documents in camera.

1 In this case, substantive rulings have been made denying McDavid's
2 myriad of motions to dismiss the indictment and suppress evidence.
3 Those issues are now preserved for appeal.

4 The subject matter of McDavid's motions before the district and
5 magistrate courts ranged from terrorism and domestic spying to
6 illegal searches and arrests, to outrageous government conduct.
7 Throughout the motions, McDavid made many inflammatory accusations
8 that are completely untrue and unsupported by evidence. If these
9 irrelevant comments and suggestions about previously decided legal
10 issues were heard by the jury, they would confuse/misrepresent the
11 issues of the case and substantially prejudice jurors against the
12 prosecution, its witnesses, and special agents of the Federal Bureau
13 of Investigation. See Fed. R. Evid. 402, 403. For these reasons,
14 the United States respectfully requests that the Court bar McDavid
15 from raising at trial - through argument, questioning or insinuation
16 - legal issues that this Court and the magistrate court have already
17 addressed and decided.

18 **Legal Issues & Accusations**

19 Summarized below are the main legal issues raised and
20 accusations made by McDavid.² The United States respectfully
21 requests that the defendant be precluded from raising or presenting
22 in bad faith any legal issue that has been decided by the Court. To
23 the extent that this summary does not address particular motions or
24 issues, the United States does not waive its right to object at
25 trial.

26
27
28

² The United States' memoranda and points of law in opposition to
these motions are in the Court's record, docket numbers 169-174.

1 **A. Internal Department of Justice Manuals and Memoranda,**
2 **Congressional Statements, and Published Commentary**
3 **and Articles Do Not Confer Rights on the Defendant**

4 Throughout his motions, McDavid referenced the United States
5 Attorney's Manual, memoranda from the United States Attorney General,
6 Federal Bureau of Investigation memoranda, Congressional testimony
7 and commentary, and other open source information, such as articles,
8 Internet postings, and web blogs. See generally C.R. 124-151.
9 However, it is well settled that not one of these publications
10 confers to the defendant enforceable rights or has the force of law.
11 See, e.g., United States v. Comprehensive Drug Testing, 473 F.3d 915
12 931, n.31 (9th Cir. 2006) ("The [United States' Attorney's] Manual
13 'does not create any substantive or procedural rights,' United States
14 v. Fernandez, 231 F.3d 1240, 1246 (9th Cir. 2000), and thus any
15 violation of procedures established therein cannot independently
16 establish a Fourth Amendment violation."); United States v. Wilson,
17 614 F.2d 1224, 1227-28 (9th Cir. 1980); United States v. Rockwell
18 Int'l Corp., 924 F.2d 928, 939 (9th Cir. 1991) (concurring opinion).
19 The United States respectfully requests that McDavid be precluded
20 from summarizing/quoting from, questioning witnesses about, or
21 suggesting that he has enforceable rights from these sources.

22 **B. McDavid's First Amendment Rights Were Not Violated**

23 McDavid alleged that his freedom of speech and his right to
24 associate were violated when the government harassed and "targeted"
25 him based on his political beliefs and dissent. C.R. 127. His
26 assumption is incorrect. Furthermore, no one has the right to
27 express him/herself through violence. The federal arson statutes are
28 content neutral and not protected by the First Amendment simply
because those engaged in the criminal activity intend to express an

1 idea. See C.R. 169 at 14-18. McDavid cannot hide behind the First
2 Amendment or use it as an excuse for breaking the law. This Court
3 denied McDavid's motion and should prevent him from using the
4 Constitution as a means of excusing or justifying his agreement to
5 destroy government and private property by fire or explosive.

6 **C. There Was No Outrageous or Improper Government Conduct**

7 McDavid filed numerous motions to dismiss the indictment based
8 on "outrageous government conduct" and improper conduct by the FBI
9 and Anna. C.R. 128-129, 136-139. McDavid alleged that the United
10 States and its agents engaged in the following prohibited and
11 outrageous conduct:

- 12 • Urging, teaching and paying for bomb-making. C.R. 128;
- 13 • Encouraging an alleged romantic relationship between Anna and
14 McDavid. C.R. 129;
- 15 • Contacting McDavid as a represented person. C.R. 136;
- 16 • Violating McDavid's Sixth Amendment right to counsel of his
17 choosing by disparaging defense counsel. C.R. 137; and
- 18 • Making prejudicial public statements against McDavid. C.R. 138.

19 McDavid also filed an "omnibus" motion alleging government misconduct
20 in case the 5 motions did not make his position clear. C.R. 139.
21 The United States refuted each allegation, C.R. 169 at 23-46, and the
22 Court denied each motion. C.R. 192. McDavid's allegations were
23 contrary to law and unsupported by the evidence. He should not be
24 able to claim that any government, law enforcement, or cooperating
25 witness actions were improper, outrageous, or illegal.

26 **D. All Searches Were Legal**

27 McDavid challenged 8 searches, arguing that they violated his
28 Fourth Amendment rights. All of the suppression motions were denied.

1 The first allegation was that "Anna", the government's
2 undercover cooperating witness, searched McDavid's parents' home
3 during the co-conspirators' planning meeting held at the end of
4 November 2005, and that law enforcement illegally entered the
5 property and searched the curtilage. C.R. 133. No such searches
6 occurred and the motion was dismissed. C.R. 192.

7 McDavid then alleged that his email accounts and certain laptop
8 computers were illegally seized and searched. C.R. 131. The
9 searches of McDavid's accounts and the computers occurred pursuant to
10 lawful search warrants and did not violate the Electronic
11 Communications Privacy Act or any other laws. That motion to
12 suppress was likewise denied. C.R. 192.

13 McDavid claimed that Anna illegally searched his possessions
14 during the time they were in contact. C.R. 130. The alleged, but
15 unsubstantiated, searches did not occur, and the Court denied
16 McDavid's motion to suppress. C.R. 192.

17 In January 2006, the co-conspirators traveled to San Francisco
18 in Anna's car, which was owned and provided by the government. While
19 the car was parked on a public street, FBI agents looked in the
20 interior of the car and in the trunk. McDavid, despite the fact that
21 he had no expectation of privacy in the car and did not have
22 standing, challenged the search. C.R. 134. This motion was denied
23 as well. C.R. 192.

24 On January 13, 2006, McDavid was searched incident to his
25 arrest. It is well-established that law enforcement can perform a
26 search in this instance, yet McDavid sought to suppress evidence
27 seized during the search. C.R. 135. The Court determined that the
28 arrest was based on probable cause and found that the subsequent

1 search was lawful. C.R. 192.

2 Finally, McDavid claims the January 14, 2006 search of the Dutch
3 Flat cabin, rented by the FBI, and occupied by McDavid, his co-
4 conspirators, and Anna, was illegal. C.R. 132.

5 **E. McDavid's Arrest Was Legal**

6 McDavid was arrested, based on probable cause, at a shopping
7 center on Friday, January 13, 2006. A complaint was signed that
8 evening. This Court denied McDavid's motion (C.R. 135) arguing that
9 the arrest was unlawful. C.R. 192.

10 **F. All Video and Audio Recordings Were Legal**

11 A substantial amount of evidence in this case was consensually
12 recorded via audio and/or video. Anna wore a recording device on her
13 person, the car that she drove was fitted for audio and video
14 recording, and the living room and Dutch Flat cabin contained
15 microphones and cameras. Recording in the cabin occurred only when
16 Anna was present. There were no federal wiretaps in this case.
17 McDavid's motion to suppress the audio and video recordings (C.R.
18 132) was soundly rejected in the face of extensive Supreme Court and
19 Ninth Circuit case law. C.R. 192; see C.R. 170 at 11-24. McDavid
20 should not be permitted to suggest that the government obtained the
21 recorded evidence illegally.

22 **G. Domestic Spying and Data Mining Did Not Occur**

23 McDavid filed a discovery motion asking that the magistrate
24 court order the United States to produce "all surveillance data and
25 material of this defendant obtained through government domestic
26 spying, harvesting and mining programs." C.R. 124. Without a single
27 shred of evidence, McDavid accused the federal government, and
28 particularly the National Security Agency, of targeting him and

1 illegally seizing his data and communications. This perceived self-
2 importance is based solely on speculation and newspaper articles,
3 politicians' commentary, and unrelated cases. The magistrate judge
4 denied McDavid's motion in a written order. C.R. 181. McDavid only
5 seeks to inflame and prejudice the jury by suggesting an Orwellian
6 conspiracy against him and by using the terms "domestic spying" and
7 "data mining". McDavid's civil liberties have not been infringed and
8 any suggestion or insinuation that they may have been is wholly
9 improper and not to be put before a jury.

10 **G. Availability of Vegan Food at Jail Is Irrelevant**

11 McDavid filed motions and declarations demanding that the
12 Sacramento County Jail provide vegan food. C.R. 52, 54-55.
13 McDavid's complaints were not of a criminal nature, and in the civil
14 case that was ultimately filed, this Court dismissed the federal
15 defendants. See Case no. 2:06-cv-00638 MCE, C.R. 30-31. McDavid's
16 diet while in custody is completely irrelevant to the charge of
17 conspiring to destroy government and private property by fire or
18 explosives. The only purpose the defense would have to raise this
19 irrelevant issue is to create sympathy for McDavid, and that is
20 improper.

21 **Conclusion**

22 For the reasons set forth above, the United States respectfully
23 requests that the Court grant its motion and prohibit McDavid from
24 questioning, commenting, or insinuating that his rights were
25 infringed by any of the actions described above or that the
26 government acted improperly. The legal issues McDavid raised have
27 been decided. He should not be permitted to inflame and prejudice
28 the jury through unfounded accusations against the United States, its

1 witnesses, or law enforcement.

2 DATED: August 31, 2007

3 Respectfully submitted,

4 MCGREGOR W. SCOTT
5 United States Attorney

6 By: /s/ Ellen V. Endrizzi

7 R. STEVEN LAPHAM
8 ELLEN V. ENDRIZZI
9 Assistant U.S. Attorneys

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28