CA 08-10250

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	DC No. CR 06-035-MCE
	)	Eastern District of California,
v.	)	Sacramento
	)	
ERIC TAYLOR MCDAVID,	)	
	)	
Defendant-Appellant.	)	
	)	

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
Honorable Morrison C. England, Jr., Judge

MARK J. REICHEL
Attorney At Law
455 Capitol Mall 3rd Floor, Suite 350
Sacramento, California 95814
(916) 498-9258 Fax (916) 441-6553
Mark@reichellaw.com
On the web at www.reichellaw.com

Attorney for Defendant-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

FEDERAL RULES

CA 08-10250

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	DC No. CR 06-0035-MCE
v.	)	Eastern District of California,
	)	Sacramento
ERIC TAYLOR MCDAVID,	)	
	)	
Defendant-Appellant.	)	
	)	

STATEMENT OF ISSUES PRESENTED

A. Where The District Court Gave A Written Instruction To The Jury That Accidentally Told Them That The Government Agent Was Not A Government Agent, Even Though The Court And The Government Had Agreed That She Was An Agent For Entrapment Purposes, And The Jury Then Convicted The Defendant Thereafter By Rejecting His Entrapment Claim, Must The Verdict Be Vacated And The Case Remanded?

B. Where The District Court Misinstructed The Jury In Four Separate Ways On Entrapment Because The Court Felt that The Defendant's Predisposition Is To Be Judged At The Time The Crime Is Committed And Not Beforehand, Must The Verdict Be Vacated And The Case Remanded?

C. Where The Defendant Was Entrapped As A Matter Of Law, Must The Verdict Be Vacated And The Indictment Dismissed?

D. Where The Evidence Was Insufficient To Convict The Defendant On The Sole Count Of The Indictment, Must The Verdict Be Vacated And A Judgment Of Acquittal Be Entered?

E. Because The District Court Erred In Not Instructing The Jury On The Lesser Included Offense, Must The Verdict Be Vacated And The Case Remanded?

F. Must The Verdict Be Set Aside Because The Indictment Was Illegally Amended After The Grand Jury Last Issued It And A Fatal Variance Occurred From The Indictment When The Government Was Allowed To Argue A Crime Materially Different Than The Indictment And Urge Facts Which Were Materially Different From Those Alleged In The Indictment?

G. Where The Trial Court Did Not Grant The Defense Motions To Suppress Evidence Where The Evidence Was Gained Illegally When The Defendant's Home Was Installed With FBI Audio And Video Taping Equipment And A Warrant Was Needed But Not Obtained, and Where The Trial Court Did Not Grant The Defense Motion To Dismiss Based Upon Outrageous Government Misconduct Even Though The Conduct Was Shocking To The Conscience, Must The Verdict Be Vacated and The Indictment Dismissed With Prejudice Or Must the Case Be Remanded?

H. Where The Aggregated Errors So Infected The Trial With Unfairness That The Resulting Conviction Is A Denial Of Due Process Must The Verdict Be Vacated?.....

I. Where The Defendant's 235-Month Sentence Was Issued Illegally And Is Clearly Unreasonable Under The Circumstances, Must The Case Be Remanded For Re-Sentencing?

I

STATEMENT OF THE CASE

A. Statement of Jurisdiction

Eric McDavid ("Eric") appeals his conviction and judgment sentencing him to 235 months imprisonment followed by 3 years of supervised release for violation of 18 U.S.C. §844 (n). Judgment was entered May 8, 2008 ; a timely notice of appeal was filed May 16 2008. ER 1994.[1]

The district court had jurisdiction pursuant to 18 U.S.C. §3231; this Court has jurisdiction pursuant to 28 U.S.C. §1291 and 18 U.S.C. §3742.

B. Course of Proceedings

On January 25, 2006, an Indictment was filed charging Eric and two co-defendants with 18 U.S.C. §844 (n) conspiracy to damage and destroy property by fire and explosive. ER 293. Eric's extensive pre-trial motions, ER 311-431, were denied. ER 432-501. At trial he was convicted. Eric's Rule 29 and new trial motions under Rule 33 were denied. ER 1835. The court sentenced Eric to 235 months in custody, to be followed by 3 years of supervised release. ER 1993.

---

[1] "ER" refers to the Appellant's Excerpts of Record filed concurrently herewith. The relevant rulings of the district court and supporting documents on perhaps the dominant issue is in Volume I of the Excerpts of Record. Volumes II-VII contain the balance of the Excerpts of Record.

C. Bail Status and Projected Release

Eric is serving the custodial part of his sentence with a projected release date of February 4, 2023.

II

STATEMENT OF FACTS

Introduction. The case involves a gross miscarriage of justice from the inception of the investigation, through pretrial and the trial, juror deliberations and the eventual sentencing.

Eric was a peaceful 24-year old college student with no prior criminal conduct who left his Northern California home to travel by backpack across the country in the summer of 2004. Justice Department officials were then testifying before Congress about their policy of not investigating lawful political protest without reasonable suspicion of criminal activity.[2] Nevertheless, a 17-year old girl was being urged to become an FBI undercover agent to document lawful political protest. Eric's attendance at political protests intersected with this young girl's mission, and he was thereafter romanced and hounded by her for 18 months because he fit their "profile."[3] The trial showed that the FBI manufactured every detail, from the plane flights, the car they rode in, the means to keep in contact when they dissolved their lives, the

[2] ER 315 (defense pretrial Motion To Dismiss Based Upon Violation of First Amendment).

[3] This acknowledged "political profiling" was never disputed by the government; it was in the criminal complaint, their pretrial motions, and their trial brief.

house the group resided in, the necessary living supplies, food, and all money to live on, the chemistry set, the recipe, and the supplies for the attempted explosive device; and Eric was in love with Anna. Anna was trained by the FBI's behavioral analysis center to make Eric "wait" until "after the mission" was complete for the romance he sought. Jurors submitted declarations for sentencing purposes, advising the district court that they were astonished and "embarrassed" by the FBI's actions and that they believed that Eric had been entrapped. These jurors explained that a typographical error in a jury instruction from the court which instructed the jury that "Anna" was ***not*** a government agent in the case was fatal. The court meant to place "yes" on the jury instruction but the copy the jury got contained the word "no" in that crucial instruction, based upon an apparent clerical. Eric's testifying and cooperating codefendants were sentenced to *no imprisonment* when sentenced following Eric's 19.5 year sentence.

Pretrial Motions. The defense filed extensive pretrial motions. They cited testimony from Congress, had extensive citation from the U.S. Attorney's Manual, F.B.I. Guidelines, and the Attorney General Guidelines. The motions asserted that the government's conduct was a case of entrapment and that there was serious government misconduct throughout, from First Amendment violations to improper media announcements by the U. S . Attorney's Office to improper contact with a

represented party. The motions were filed to prevent surprise at any eventual trial and to assure a fair trial. Significantly, the motions requested suppression of evidence as the house Eric resided in had been outfitted with audio and video recording equipment without a warrant.[4]

Defense theory. The defense was that he was entrapped as he did not have the means, ability or desire to commit the crime, that the parties never agreed on a target, and if they did, it certainly wasn't a target as listed in the indictment, and, that he was guilty at the very most of what the co defendants had plead guilty to, a general conspiracy, a lesser included offense.

Trial Evidence[5]

"Anna." The main witness for the government was "Anna." This was not her true name, but a name she testified under as her true name was not revealed to the jury. ER 672-674 .[6] In the fall of 2003, When "Anna" was 17 years old, she was

[4] These pretrial motions are in the ER. In some instances the ER pages of those motions are referenced for legal authority. This is made necessary by the fact that this appeal raises a multitude of errors made by the district court.

[5] All references herein in the ER are almost always testimony of *government witnesses*.

[6] The reporters for news and print media did not show Anna's face based upon government requested anonymity. Yet, for whatever reason, in May 2008, 21-year old " Anna" gave an extensive interview in *Elle* Magazine which included several full body color photos of her in various fashion outfits, taking her face and identity to a

summoned to the Miami Police Department and met with two Miami police officers and an F.B.I. agent. ER 682. At that time, she was asked to go undercover for the F.B.I. to infiltrate protestors at the G-8 Summit planned for spring 2004 in Georgia; also at the Republican National Convention in New York City and the Democratic National Convention in Boston, both being held in the summer of 2004. She agreed. ER 683.[7]

Her role was to "...go undercover and report on any *potential* illegal activity that was taking place. I was asked to keep eyes and ears open for anyone that would *possibly* get ready to commit vandalism, property destruction, or harm to another individual." ER 684. (Italics added). She was to infiltrate political protestors at the RNC and DNC and "observe everything" and report back real time over her cell phone and text message. ER 685; 878-880.[8] Anna would wear a disguise and portray

---

world wide level. The government asked

> "On the witness list that we show to the jury, one of them of those is 'Anna' we have provided...we're going to attempt, with Mr. Reichel's permission, to refer to her in this trial simply as Anna to protect her identity from the outside world." ER 577 A.

[7] This was not surprising, as Anna was then just 17, and at age 15, Anna had wanted to join military counterintelligence, posting to military intelligence web sites her own views on military matters. ER 854-856.

[8] This evidence contradicts that she was only reporting back to the FBI on "illegalities" she observed.

herself as a "medical professional" for the protestors, because "they needed medics...to render aid...to come to if they need to..." but admitted that she had no medical training at all. ER 885.

Anna met Eric in August 2004 when she was undercover for the FBI in Des Moines, Iowa. They stayed a week - - sleeping next to each other and "cuddling" in the attic of a farm house. ER 1549. While there, Anna spoke openly about committing illegal acts herself; yet she reported back in live time to the FBI that - - in the face of her provocative talk - - Eric was not someone of interest or someone who the FBI should be concerned about; that he was simply a "college kid", gentle, non-threatening, unlikely to do anything illegal in the future. The pair exchanged contact information. ER 890-893.[9]

Anna met Eric again at the Republican National Convention in New York City; she was there to "spy" for the FBI on protestors and report back to the FBI. ER 898. Afterward, Anna and Eric parted ways, he went home to Northern California. ER 896. Anna, however, went to the Presidential Inauguration in January 2005 as an

[9] FBI Agent Richard Torres testified that it was not "illegal" in his mind for her to report back on *everyone* at protests, especially those doing nothing unlawful, so long as he "did not write it down." It was the act of the FBI "writing it down" that Agent Torres felt could transform her conduct into something illegal. ER 1131. As will be seen later, Anna sent "blast" emails out to persons she had encountered at gatherings and protests, showing that at least she was illegally writing these things down.

undercover infiltrator who spied on political protesters and reported back in real time to the FBI from "inside." ER 895-897.

After the inauguration detail in January 2005, she spent the next four months sending out *unsolicited* "blast emails" to the "contacts" she had gained in her efforts over the last year. ER 898-903. This was at the request of the FBI, who wanted her to find old contacts and see "what they were planning." ER 905.[10] Anna had been having email contact with Eric between August 2004 and May 2005. He had been sending her love letters. Eric told Anna that he "had to leave town, he needed to go away" from his home in Northern California under the "direction of someone" and would be traveling the country again in spring of 2005.[11] Eric and Anna did not meet

---

[10] In one email, written in May 2005, she wrote to a "Cal Brewer" from Texas a list of the upcoming political protests nationwide for the rest of the year, and that she wanted to know if any "fun" was planned, as she would like to host a "party." ER 900. She said she had "disposable income" so he should "ask around, all your contacts" if she can "bring anything in from the outside, it'd be safer" and she could bring "paint, chains, nails, pipe, anything, tar and feathers." ER 909. Cal advised that there was a "die in" in front of the Haliburton building where protestors would lay down and pretend they were dead. Anna described this as a "economic protest" that was "symbolic" but not a "political" protest. ER 908. Anna was 18 years old at this point.

[11] She testified that Eric was leaving town at the request and advice of his attorney as the FBI and the U.S. Attorney for the Eastern District of California were attempting to question him as a "person of interest" in the pending investigation of Ryan Lewis from Auburn, California, right next to Eric's hometown. ER 921-924. Mr. Lewis was subsequently convicted in the Eastern District of arson and "eco terror" crimes. Lewis's case would eventually figure prominently in the government's

up, though, until June 2005 in Philadelphia at the house of future codefendant Lauren Weiner. ER 910-911.

It was here the famous "balcony scene" occurred. At night, in mid-June of 2005, in Philadelphia, on Ms. Weiner's balcony, just Anna and Eric spent time, where Eric told Anna he had strong romantic feelings for her. ER 910-913; 1015.[12]

At the end of the Philadelphia meeting, Anna was told by the FBI to now follow Eric closely. They had found out that he was wanted for questioning as a

---

case against Eric.

[12] The balcony scene caused government witness and cooperating codefendant Lauren Weiner to state she thought that they were having sex in her room. ER 1014. Logical, because at that point, Ms. Weiner thought, as most people did who were around at the time, that Anna and Eric were "a couple." ER 1254. The balcony scene would also cause Eric to write the famous October 26, 2005 "love" email, as Anna described it. The email Eric wrote stated

> "Hey.. Feeling... nostalgic, I guess. Totally miss you...never far from my thoughts or heart...fighting that part..a lot...I do not know why but shortness of breath always follows the ...remembering you or the excitement knowing I'll see you again soon. I can still remember your voice, the smile and that last embrace in Philly. Giggly chills. ...feels good to get it out...it would feel better to be with you face to face and tell you straight out...just wanted to say hi and that I've been thinking of you. Much love, me." ER 913.

Anna said that there were at least three "love letters" but could not account for where the other two missing love letters went. ER 904-917. By early January, 2006, she would tell Lauren Weiner, in reply to Ms. Weiner stating "he loves you" that "it is a love slash hate. He hates everything I stand for, but every time he sees me, he goes nuts." ER 1015.

person of interest in Sacramento and she was to keep in contact and question Eric about the Ryan Lewis case. ER 707-708

Eric's contact with Anna and the other two was very sporadic, and almost non-existent from August 2005 until November 2005. ER 728-730.[13] The FBI desperately wanted Anna to get out to the West Coast and to have a meeting with the three future defendants there, "all in one place." ER 939-950.

So, Anna paid for the airline flight for Lauren Weiner and convinced Eric and Zach to meet out there; Eric was very reluctant as he didn't have the time, he was dealing with very serious family matters. ER 939-950. Despite this, the group met in mid- November 2005 at the house of Eric's parents, where he was house sitting. At the end of the discussions, the group agreed to meet again in the future. The group re-assembled in January 2006, when Anna drove Zachary and Lauren from Washington D.C. to California in her car, picked up Eric in Sacramento, and drove them all to a house in Dutch Flats, California, not far from Eric's parents home in Foresthill, California. The house had a few bedrooms, full kitchen, living room and bathrooms. The house at Dutch Flats had been rented by the FBI. The group was planning to stay for the entire month of January, possibly longer, but ended up staying there for six

[13] He had simply been spending time with his family.

days until their arrest on January 13, 2006. ER 993-1057.[14] While there, the group had discussions on their feelings and thoughts about "direct action;" they wrote things down in a book later called a "burn book."[15] While there, the group drove out and took a tour of the Nimbus Dam and fish hatchery in the Sacramento area, and at the Institute for Forest Genetics, in nearby Placerville, California. ER 993-1057. The group also bought supplies for an attempt to make a small explosive to be tested in a deserted area in or near Susanville, California. ER 1017-1022 . The group attempted to make the explosive, but was unsuccessful. ER 1017-1022. When the group had just brought another round of supplies with Anna's money for a repeated test, they were arrested in Auburn, California in a parking lot.

The night before the arrest, the evening of January 12, 2006, Anna had "blown up" at the group and walked out,[16] walking down to the FBI outpost, where she was crying and very upset. She described it as the group "squabbling" and not agreeing on

---

[14] The group had planned to be there at least a month, possibly longer. ER 1028. We learn later when Lauren Weiner testifies that Anna didn't want to stay that long, and kept hurrying and rushing everyone along. ER 1331-1335.

[15] Anna had brought this book, as a surprise, and it was already filled out for several pages with recipes and radical writings - - pre-made piece of important evidence. ER 1003-1004

[16] This was the only real explosion in the events; symbolically occurring from Anna.

targets or time frames; there was no "final" agreement for anything, and they were excluding Anna. ER 1-39-1040. She was no longer part of their "group."

The group had started to be a "block" which excluded Anna, as her interests were diametrically opposed to the group; she wanted "action" and to go forward, and they didn't. It was through the later testimony of Lauren Weiner and Zachary Jenson that we learn that these three had decided to *not go forward* with the actions Anna demanded of them and they were rebelling against her pushing them too hard.

Lauren Weiner and Zachary Jenson. Codefendants Lauren Weiner and Zachary Jenson both testified for the government, under plea agreements where they plead guilty to the lesser charge of general federal conspiracy, 18 U.S.C. §371, with a sentence range from 0-5 years, as opposed to their original charge in the indictment with Eric, a charge carrying from 5-20 years.

Lauren met Eric and Anna in June 2005 in Philadelphia when she was age 20. They all stayed at Lauren's apartment for about a week. ER 252. At the time, she thought that Eric and Anna were dating, and asked people that question. ER 254. She testified that Eric was a gentle, pleasant person, an honest person, a peaceful person who had no money, as he would eat out of dumpster for food and begged for money in the streets. ER 1254-1256; 1268-1271. This took place all summer of 2005 as she and Zach traveled together with Eric that summer. Zach, Lauren and Eric were all

almost devoid of money - - Lauren had about $100 a month she lived on before the three traveled that summer. ER 1257-1260. When at the apartment that week in June, 2005, Anna bought the food for the group. ER 1264. When traveling that summer, the three slept in sleeping bags rolled out on highway exits, hitchhiked and ate at soup kitchens in the summer of 2005. ER 1260-1264. The time in Philadelphia, June 2005, they had discussed "direct action" but definitely had no targets in mind or targets discussed at all. She felt that the future fall trip to California in November of 2005 would be to talk about direct action and traveling and targets. ER 1209.

From June 2005 through that summer of 2005, the three traveled primarily with Anna around to gatherings. Only Anna had money, and the three traveled in Anna's car, never paid for gas, Anna bought the food, lent them money, and *bought them all tents as well*[17]. ER 1261-1265. Anna told the group she had disposable income in the form of cash from saving it up from her job as a "stripper" in Florida. ER 1263. She even bought them all swimming goggles. Near the end of the summer, August 2005, the group ended up back at Lauren's apartment in Philadelphia, and they were again dumpster diving when Anna did not stay there with them. ER 1268.

[17] It is unknown if these tents were wired with audio and video recording devices.

By the end of August 2005, Lauren felt that she knew Eric well; he was honest, kind, gentle, trustworthy, happy and a peaceful person.[18] She also knew that Eric had strong romantic feelings for Anna. ER 1271. By the end of the summer 2005, Lauren felt that what the future held for any one of them was very uncertain. ER 1272. They were young, they had no money, didn't have a car, and had no game plan for life at that point. ER 1272.

Despite this uncertainty, one thing was certain: Lauren abhorred airplane flights and was scared to death to fly. ER 1273-1277. She had terrible inner ear problems, making flying very painful. She was having "really bad" panic attacks at that point in her life and airports really scared her. She had no money to fly around the country in November 2005. Anna paid for her plane ticket out to California in November 2005. ER 1275-1277. On a layover on the plane flight out, Lauren called Anna because she was "freaking out" with anxiety - - she called her on the way home as well for the same reasons. ER 1313-1314.[19]

---

[18] The end of August 2005 is in the heart of the "conspiracy period" as alleged in the indictment.

[19] Despite this, Anna cajoled and badgered Lauren to fly out again in January, 2006, eventually relenting and agreeing to drive to Washington D.C. to get Lauren and drive her and Zach out to California in January 2006.

At Eric's parents' house in Foresthill, California, outside of Sacramento, Eric still had no money, he was house sitting for his parents, who had left some money for groceries. The group ate food and - - other than Anna - - drank wine Anna had purchased. ER 1279.[20] Other than Anna, they also smoked marijuana at the house. ER 1280.

At the end of the November 2005 meeting, there was "no finality" as to any future plans. "There was no real set plan for anything at the end of November 18, 2005..we had talked about different ideas, we didn't have any set targets, like nothing was defined." The group was going to try to stay in contact and see if they could get together again. ER 1305-1306; 1308-1309. This is because in the November meetings, the group talked about Lauren's idea of "firefly." "Firefly" means different types of direct actions, separated by time, geographic distance, and type of target.

> "...when you're like looking out at night and there are fireflies, you see like a green light, green light, green light, and if they are all over, and there are a lot of fireflies all over, you can't really tell which one there is. ..."

ER 1306-1208. It included targets from vandalism of billboards to something more serious. The group discussed different targets for direct action, at locations all over the country, and Eric specifically discussed not doing *any* direct action near his home

[20] Anna was 19 at that time, not yet 21, which is the required age for alcohol purchase in California. Anna had a fake I.D. which apparently made her 21. ER 1279.

in Northern California. ER 1308-1309. The targets in the eventual indictment were located very near his home in Northern California.

When the group showed up at the house in Dutch Flats with nothing, Eric was the poorest of the extremely poor.

During that week in Dutch Flats, Anna paid for everything, and had lots of hundred dollar bills. ER 1322; 1390. When Eric went into the store to buy something, he would pull $100 bills out of his pockets that Anna had just given him. ER 1330. She had gotten this money from "stripping" and from working in a college chemistry lab over that summer. [21] ER 1323. Anna surprised everyone when she brought a chemistry set - - unsolicited - - to the Dutch Flats house in January 2006. ER 1323. The group was so dependant on Anna that if Anna left them there, they would be stranded. ER 1330-1332.

After the group had seen the Nimbus Dam area, they all agreed that it was not a target of their "direct action." ER 1335 . This is because *prior to driving out to the Nimbus Dam, in Sacramento*, the group had spoken about direct action on dams. Direct action that would involve "...you know, the possibility of even just hitting them

[21] The chemistry story proved quite convenient for her later plans with the group.

with a sledgehammer. Like, not big dams." ER 1335-1338.[22] "Little dams that went out to the ocean." The dams they spoke about were "real close to the ocean, ...little dams that created ponds, and just were, you know, more than like 3 feet high, that kept salmon from being able to jump up and go upstream to do their salmon thing." Along the coast in California and Oregon, all over. ER 1335-1338.

On January 12, 2006, the night before the arrest, there was no agreement between the three as to whether the "IFG" (Institute of Forest Genetics) should be a target of the group. ER 1339. As well, at the end of the day January 12, 2006, there was not any agreement between the three conspirators as to any cell phone towers in any defined area as a target of their action. ER 1338.

On the day of the 12th of January, the "test" was performed outside. The idea was to have something small to test with, to make a test out in the desert with it. ER 1319. Anna had paid for these materials for the group and was an advisor based upon her work as a chemistry assistant in college. Prior to this, there was also not one fixed goal as far as a recipe that they would use to yield an explosive. ER 1323-1324. The group was hoping to have something small to test with out in the desert - - it could have been as simple as a Molotov cocktail. ER 1323. Eric was considered very unsophisticated and naive in the ways of making any explosives. ER 1324.

---

[22] Nimbus Dam was a "target" as charged by the government.

During the "mixing," Lauren was trying to stay inside, scared of the idea. She was "urged" on by Anna to come outside and to participate. ER 1328.

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

ER 1328. (Italics added.)

That night the group had an argument and Anna stormed out. Anna had stormed out, very upset at the group for having no fixed goals, having a lack of direction, a lack of goals.[23] That night she was angry because (1) there was no fixed target the group had agreed upon, (2) it seemed like Zach was getting cold feet, (3) Zach was hesitant, (4) he wanted to slow it down, (5) there was no meeting of the minds between Zach, Lauren and Eric on a fixed target. ER 1317-1319. In response to the government's questions on re- direct about that night's argument, Lauren stated "Well, I felt that it was too big, too much, too fast, like in all the ways it could be." ER 1353. The government then asked Lauren

> Q: So, at that point, is the conspiracy getting more narrowly focused?

[23] Which can be fatal to any conspiracy.

A: Well, we never picked one.

Q: Right.

A: We couldn't decide.

Q: Right.

A: So that turned into conflict as well.

Q: You each had proposals?

A: Right.

ER 1353.

The argument came about that night also because Anna wanted everyone to identify their targets, "she asked multiple times," she was very insistent.[24] ER 1326. After Anna left, on the night of January 12, 2006, Lauren and Eric smoked some "pretty good marijuana," and feeling the effects, wrote in the "burn book." ER 1344.

At that point in time, in the cabin in Dutch Flats, Lauren was "acting" to fool Anna. She looked up to her as a big sister, she wanted to make her happy, she acted in a way different than her true feelings, and wanted Anna to like her and think she was smarter; she did not want to let Anna down. ER 1356-1359.

[24] This was because the video camera was set up perfectly, hidden in the living room where she had the future defendants sit on the couch to be captured clearly on the tape, desiring to get their admissions.

Zachary Jenson. Zach testified that he first met Eric in Des Moines Iowa, August 2004, where Anna met Eric. ER 1448. Eric was having a "physical relationship" with Anna in Des Moines; he described this as "cuddling and sleeping together." ER 1549. Anna stood out from Zach and Eric; she had cash and money. ER 1451. Eric was basically homeless at that point "living off of the land." ER 1450. Zach would come to know Eric very well for the next 18 months, describing him "like a brother" until the arrest in January 2006. ER 1441. They traveled together and lived with each other. Money-wise, Eric was the same from August 2004 to the arrest in January 2006: he was a "pauper." ER 1459. Zach was the same. The $100 in food stamps he had when he left cross country in January 2006 was all the assets he had. ER 1027. He and Eric ate from dumpster and both were penniless; in fact, they would have been homeless but for the residence at Dutch Flats in January 2006. ER 1070. Eric and Zach traveled together out to the Republican National Convention and then returned back to their respective locations on the West Coast. They agreed to travel together in the spring and summer of 2005.

When the two traveled together in the spring of 2005, and prior to that, Eric never talked of any "direct action" at all. ER 1463-1464. Their plans were simply to travel together up through the summer of 2005; Eric was a very peaceful and gentle person. ER 1462-1465. "Direct action" to Zach meant a full spectrum of things;

from a "sit in" to a "break away march," to gluing doors together, spray painting, riding bicycles together in a city to cause traffic problems, all the way to "violent stuff." Based upon this, Zach felt that when someone spoke about "direct action" it would not be possible to know what action the speaker was discussing. ER 1523-1525.

In spring of 2005, Eric told Zach that upon his attorney's advice, Eric was traveling out of California, to avoid being involved in the investigation regarding Ryan Lewis in the Sacramento area. ER 1412. As for the summer of 2005, Zach knew Eric was not going to be involved in any direct action in California[25], based on the investigation in Ryan Lewis's case, very near his home in the Sacramento area; *such an idea had to have come from somewhere else, not Eric*. ER 1464. (Italics added.)

Zach had no doubt that by June 2005, Eric had a romantic interest in Anna. ER 1466. Anna knew of Eric's romantic interest in her, and it was no secret to anyone that they were around. ER 1467. He never saw Anna repulse Eric's interest in the time they were all together. ER 1466.

Eric emailed Zach in late October 2005 that he was going to have to miss any fall 2005 meetings because of family issues; he wouldn't make any meeting. ER

[25] Contrary to what was charged in the eventual indictment.

1487-1488. The group was therefore going to meet in a hotel room somewhere without Eric. ER 1496. This did not sit well with Anna and there was friction at that point because Anna was very upset that Eric was not going to make such a fall meeting. ER 1496 .

At Eric's parents house in November 2005, during the discussions out at the fire pit, Zach and Eric were high on marijuana. ER 1458. Zach described marijuana use as causing paranoia, memory loss, blurred reality, a freeing of the spirit to write things down that he would otherwise not do if he was not high, and in fact doing things that didn't even make sense. ER 1456. Zach answered government counsel that

> Q: During the weekend in Foresthill in November 2005, had McDavid asked Anna to do anything between that meeting and when the group got together after Christmas to further the plans for direct action?
>
> A: He didn't ask her to do anything.

ER 1431.

Exactly like Lauren, by January of 2006, Zach was "acting" to please Anna. On the drive out to California in Anna's car Zach was "acting." ER 1488-1492. He had already left the plans of Anna in his mind at that time. ER 1488-1492 . He was reluctant, not 100% good to go. Nevertheless, homeless and penniless, he rode in Anna's car, with Anna's gas, to Anna's location in California. ER 1488-1492. On the car ride, he told Anna that he felt that she was leading them all into "a trap,"

because of "something she had done in the past." ER 1494. He said this because it seemed like she was "leading everybody on everything." ER 1494.

At Dutch Flats, Anna had advised that she had spent the summer as a chemistry teacher, and she was going to instruct Eric on everything to do with the "recipe." ER 1500.[26] Eric proved himself to be extremely naive and uneducated about anything to do with chemistry or making explosives; Eric didn't know what a hydrometer was. ER 1504. Zach had no idea what type of explosive was involved and he didn't know if the mixing of bleach was for an explosive that required a fuse or not. ER 1506. The end product of this testing was to make a small explosive to then be tested in Susanville, California, or somewhere else. ER 1506-1507. A "small little explosive." ER 1506. They were going to try to make a test product, test it, and if it worked, see what they would do then. ER 1506-1508. They never got that far, though, as the product was never even made. ER 1508. The group was a bunch of amateurs, with Anna the only one knowing what she was doing, the "brains of the operation" when it came to the chemistry stuff. ER 1509.

During the attempt to mix the chemicals outside on the 12th, Eric was telling Anna she was being too pushy, he was telling Anna to also leave Lauren alone and

[26] Anna had also brought - - unexpectedly - - two (FBI loaded) laptops to the house there for the group to use. ER 1530.

let her be. ER 1516-1517. The argument ensued that night between Anna and the group of three. In the face of Anna's ranting and screaming, Eric was advocating Zach's position to slow down, that they were going too fast; Lauren was also trying to "pull the throttle back." ER 1516. In the argument, Eric was in complete agreement with Lauren and Zach for slowing things down, the group was going too fast, that the best thing to do would be "flash" or "firefly" which was the most minimal direct action, which would have been the most safe, and in geographic places far from where they were. ER 1531-1532. Also, if Anna had not rented the house in Dutch Flats, he and Eric would have been homeless and penniless, living in San Francisco and eating from trash dumpster. ER 1531-1536. (Italics added).

After Anna stormed out, Lauren and Eric smoked marijuana, but Zach did not. ER 1526. Lauren and Eric showed the signs of the effects of the marijuana, and then wrote down things in the "burn book." ER 1526.

In his final statements to the jury, Zach advised that he had been acting for the group by the time he was in Dutch Flats[27], and that he knew how strongly Eric felt about Anna, and he had no idea if Eric was acting also at that point. ER 1561-1562.

---

[27] With Lauren and Zach acting, and Eric supporting their reluctant stance, it is no wonder Anna described the members' behavior as late as January 2006 as "dilly dallying." ER 982-983.

Zach told the jury that he plead guilty to a conspiracy to destroy property that hurt the environment. ER 1442[28].

Philadelphia FBI Agent Ricardo Torres testified that he became an FBI Agent in 2003, just before Anna started as an informant. ER 1118. In order for an FBI agent to do any undercover work themselves, they must have additional FBI training *above and beyond* the standard 4-month training at Quantico, Virginia. ER 1119-1120. Not only did Agent Torres not have that extra training, ER 1119-1120, obviously, Anna had none of that training. ER 1120-1122. She had "on-the-job training." ER 1121. He provided Anna her guidance and training throughout the investigation in this case. ER 1131-1132. She answered to him.

Logically, the defense questioning centered on Agent Torres's training and knowledge of the "rules" himself, and also on what of that knowledge he had imparted to Anna. On cross-examination, he stated he was aware that there are guidelines issued by the Attorney General on the use of undercover informants, and also in the FBI Special Agents Handbook. ER 1134-1138.[29] For whatever reason, he was *not*

---

[28] Not the crime charged in the indictment under which Eric was tried.

[29] Candidly, he admitted at the start of the cross examination that

> Q. Now the use of undercover informants by the FBI...there is a lot of literature from the FBI on how to do that, right?

aware at all of the September 2005 U.S. Department of Justice, Office of the Inspector General Report of the FBI's Compliance with the Attorney General's Investigative Guidelines, an extremely critical and widely publicized report on the use of confidential undercover informants by the FBI .[30]

More surprising however, Agent Torres said he had contacted the Philadelphia FBI branch over the lunch hour in the trial, prior to his cross-examination. He had

---

A. *I would assume so*, yes, sir.

Q. Well, do you know if there is?

A. I personally have not read all of it, no, sir.

ER 1123. (Italics added).

[30] http://www.usdoj.gov/oig/special/0509/final.pdf . The district court was very aware of the defense position that the informant and the FBI agents in this case were "out of control" and acted however they wanted, without regard to any rules, and that the defense desired to show this to the jury. This position had been shot down by the district court at the pretrial motions where the district court had little time even for the argument, and again in limine and during the trial. ER 432; 510.

The report showed that the FBI frequently violates the Bureau's rules for handling confidential informants, the Justice Department's internal watchdog stated in this report by Inspector General Glenn Fine. The review of 120 confidential informant files from FBI offices around the nation found violations in 104 cases, or *87 percent*, Inspector General Glenn A. Fine said in a 301-page, partially blacked-out report that examined the FBI's compliance with rules that govern most investigations.

The report created large public support for reform, was reported extensively internationally and nationwide in all major newspapers, and resulted in congressional committee oversight hearings. This escaped Agent Torres.

asked them to fax to him the "Attorney General Guidelines" that he had read to Anna in her training by him, and which he used as the guidance with Anna from June 2005 until January 2006. He had made this emergency noon time request after consultation with the FBI case agent, Mr. Walker, who sat at government counsel table during the trial, with the AUSA trying the case, and after Anna had testified that morning. The group had a discussion over the recess about the subject of the instructions Anna had been given by Agent Torres, and agreed that these actual instructions should be faxed and brought to court. ER 1142-1145.

What was most surprising was that he produced a two page statement to cooperating witnesses, or an "advisement," which became defense exhibit D-2. ER 1167-1168.[31] He repeatedly referred to this two page document as the "Attorney General's Guidelines" on the use of undercover informants. ER 1149. He apparently did not understand that the "guidelines" that were being discussed in the courtroom around him were an official publication containing numerous pages with extensive regulations on the subject.[32] Agent Torres repeatedly told the jury that he read these "guidelines" regarding the use of informants - - the Attorney General Guidelines - -

---

[31] D-2 is an advisement for those who have committed a crime and and are going to attempt to get a break from law enforcement for their work for the FBI. It was not even closely related to the official source materials being discussed.

[32] http://www.usdoj.gov/olp/dojguidelines.pdf.

to Anna in June 2005. ER 1142.[33] This explains Agent Torres's testimony that the Attorney General Guidelines provide no discussion of entrapment at all, and that he did not therefore read anything to Anna regarding entrapment. ER 1142-1145.[34]

This two page document for those who were "working off a beef" was to serve as Anna's training and instructions and was, apparently in Agent Torres's view, the equivalent of the "extra training" above the four months standard Quantico training for FBI Special Agents. The document, D-2, is a must read for the reviewing court.

Agent Torres acknowledged that Anna had told him, as her handler, in June of 2005 that Eric had an attorney advising him to stay away from the West Coast, to avoid questioning regarding the Ryan Lewis case out in Sacramento, and that Eric was telling Anna about that legal advice he was getting. ER 1139-1141.[35] Agent Torres felt this was perfectly legal and acceptable for the FBI to do - - either send an informant or himself as an FBI agent - - to go and talk with a target or suspect who

---

[33] This caused even the district judge to note that the agent didn't know about the Attorney General Guidelines.

[34] To no great surprise, the relevant passages of the actual Attorney General Guidelines do provide appropriate instruction on the use of informants and the issue of entrapment.

[35] In this area, again, defense counsel was shut off by the court from meaningful inquiry into that area. ER 1141-1142.

had an attorney advising them to not talk with them regarding a criminal investigation. ER 1141.

On the issue of Anna infiltrating protestors and reporting back to the FBI in live time as she was doing, on what they were saying, Agent Torres felt that there was nothing wrong with this so long as the FBI did not *write any of it down*. ER 1131.

Character Witnesses. Character witnesses Eric Gonzales, Sarah Gonzales and Sara McDavid attempted to testify on Eric 's behalf, but the attempt to put on character witnesses was thwarted by the district court's rulings that these witnesses could only testify to Eric's relevant character traits for the time period listed when the indictment alleged that the conspiracy had been committed, June 2005 and thereafter, *and not before*. ER 73.[36]

The defense case in closing argument was, among other things, entrapment. The jury asked a series of written questions during deliberations, focusing on the time frame that they should evaluate evidence, for clarity on predisposition and also whether Anna was a government agent. ER 247. The district court, and counsel for both sides agreed the answer was that "Yes, she was an agent." ER 160.

[36] These intentions were to foreshadow the court's future rulings when deciding jury instructions on predisposition, entrapment and in answering written and oral questions from the jury as to "what time period should we be focusing on?" ER 80-108; 118-231 .

Unfortunately, for reasons still unknown to anyone connected to the case, the written reply to the jury, from the district court, that went into the jury room stated "No" in regard to Anna being a government agent. ER 249.[37]

Eric was sentenced on May 8, 2008. His counsel filed an extensive Sentencing Memorandum objecting to a variety of sentencing enhancements and also arguing that the 3553 factors, including the disparity of sentences between similarly situated defendants, compelled a much lower sentence than the 13 years recommended by the probation department. The defense submitted the declarations of two jurors, one of whom on her own had contacted defense counsel. ER 278A -287A. The jurors urged the court to sentence the defendant lightly, listing several reasons but highlighting that they had received the written "No" in reply to their question of Anna's status during deliberations, and had then removed the defense of entrapment from their deliberations and *had now found out that was an accident*. ER 278A - 287A. They also felt that all of the defendants were equally culpable, that no one was a leader of the group other than Anna, that they found Anna not credible, and that they were shocked and embarrassed with the FBI.[38]

---

[37] This was not known to defense counsel until the court's written reply to the jury was filed electronically on line, after the verdict. ER 2024.

[38] What was interesting about this was that the jurors expressed their shock with the FBI, yet defense counsel was repeatedly prevented from raising the issue or

The district court rejected the recommended sentence from the probation department and issued a sentence of 235 months. Eric McDavid had never before been arrested.

Zachary Jenson was sentenced in December 2008 and received a sentence of the approximate five months he had served prior to being granted bail. ER 2036. He has been at liberty since June 2006 following an agreement to testify against Eric at trial. Lauren Weiner was also sentenced in December 2008 and received a sentence of the approximate two weeks she had served prior to being released in January 2006 and agreeing to cooperate with the government against Eric. ER 2036.

---

questioning witnesses on the FBI's misconduct in the trial by the district court, who strongly cautioned defense counsel on several occasions to not get into that area. ER 1118-1155.

III

SUMMARY OF ARGUMENT[39]

The court's error in its written reply to a jury question during deliberations that the government agent was *not an agent* for entrapment purposes, is fundamental and not harmless. The court also erred by misinstructing the jury in four separate ways on entrapment, primarily centering on the court's view that the "relevant time period" to assess the defendant's predisposition was the time of the commission of the offense, and not beforehand; there were other serious instructional errors as a result of the court's "view" in that regard. The evidence also showed that the defendant was entrapped as a matter of law. As well, there was insufficient evidence to convict the defendant of the sole conspiracy count, as the testifying and co-operating codefendants themselves testified that the defendant did not conspire to commit the crime charged in the indictment. The district court committed reversible error in denying the defendant's request to instruct the jury on a lesser included offense, denying the defendant the right to have that offense submitted to the jury. Additionally, there was

[39] While it is difficult to select which error is the most egregious, defendant believes the clearest and most fundamental error in the case is the district court's response to the jury that "Anna" was not a government agent which removed the entrapment defense. However, this results in a series of arguments that begin at the end (the jury deliberations instructions); therefore the court's indulgence is sought. As well, this learned court might in fact find one of the *other* arguments more compelling.

an illegal constructive amendment and/or fatal variance from the charge in the indictment to what the government relied on at trial to convict the defendant. The trial court should have granted the defendant's motions raised at the close of the government's case, which would have disallowed the introduction of government evidence based upon illegal and warrantless video and audio surveillance equipment installed in the defendant's home, and which also would have resulted in a dismissal of the indictment based upon outrageous government misconduct. The cumulative effect of the trial errors violates due process. Finally, the defendant's 235-month prison sentence should be vacated as "unreasonable" under the multitude of circumstances.[40]

[40] Not the least of which is that - - by their own testimony - - the equally culpable co defendants received two weeks (Lauren) and four months (Zach) in county jail for their "bargain" in cutting a cooperation deal with the government.

IV

ARGUMENT

A. Telling The Jury That Anna Was Not A Government Agent Was A Fundamental Error That was Not Harmless.

Legal standard: Whether a jury instruction correctly sets forth the elements of a statutory crime is a question of law reviewed de novo. United States v. Reese, 2 F.3d 870, 883 (9th Cir. 1993) (citations omitted), cert. denied, 114 S. Ct. 928 (1994).

During deliberations, the jury asked the following question:

"Was Anna a government agent in August 2004? If not, when did she become one?" The parties agreed that the answer to the first part of the question was "yes," and that therefore the second part didn't need to be answered. ER 160. The next morning, the jury was brought in to be given this answer, as well as a number of other answers to other questions. Their other questions concerned a requested read back of the cross-examination of Anna as well as the cross-examination of Agent Torres regarding training informants. They also wanted definitions for predisposition and for "contact" in the entrapment context. ER 245; 247.

The court began by reading aloud answers to their various questions, and in the middle of this stated "yes" in reply to the question regarding Anna being a government agent. ER 226. The court continued on with its definitions and instructions. The court

had already decided to provide a written reply to the jury after reading aloud the replies. It was a lot of material. At the end, Juror 11 stated

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

ER 227. The jury then resumed deliberation, and this was at about 10:45 a.m. The court then had the written responses typed up and delivered to the jury room.

At 3:08 p..m. they had reached a verdict of guilty. ER 232-233. Neither counsel for either side had the chance to see the final written response the court sent in to the jury room. The court's written reply was filed with the court's electronic docket the next day, September 28, 2009. Defense counsel saw it for the first time at that point, noting that the court had written "NO," that Anna was not a government agent for purposes of the entrapment instruction. A Motion For New Trial was filed on this ground which was denied by the district court.

The entirety of the case was about entrapment. The evidence centered on that, the arguments centered on that, the parties and the court met numerous times to debate the entrapment instructions for the jury. The parties submitted extensive supplemental briefing on entrapment just before closing arguments, and during deliberations, in response to jury questions. Jury questions asked repeatedly about the entrapment

defense instructions. ER 242-248. Juror Diane Bennett provided a declaration which stated

> The following matter in this paragraph is of great importance to me and I brought them up first with Mr. Reichel in a phone conversation, without his prompting. Mr. Reichel did not bring up this subject to me, but I did with him. Specifically, I would like the court to know that the jury, including myself, was very confused about the jury instructions, especially regarding whether Anna was a government agent or not. During deliberations, we asked the court to please clarify for the jury the issue of whether Anna was a government agent, and if so, when did she become one. We were deliberating about the issue for the defense of entrapment. We asked the court in writing if Anna was a government agent in August of 2004, and if not, when did she become one? We were told orally by the court that she was one in August of 2004; we were also told to await the written answers to our questions when we deliberated. We then got the court's written answers, and that answer was that Anna was not a government agent. At that point we were then all very confused and did not know what the correct answer to that question was. The written answer was from the court and stated "no," that she was not a government agent, yet we were told orally that she was. ***With the written response of "no," and after reading the other written responses from the court, we ended our consideration of the issue of entrapment and soon thereafter voted to convict. Originally, on the issue of entrapment, the vote was 7-5 to consider the entrapment issue as a defense. Once the written response advised Anna was not a government agent, we then changed to a guilty verdict soon thereafter.***

ER 279A - 280A. (Bold and italics added.) Juror Carol Runge submitted a declaration which agrees with Ms. Bennett in virtually all aspects. ER 284A- 287A. In denying the motion for a new trial, the court ruled

> 10. Mistaken Written Answer to Jury Question
>
> ...
>
> Because the jurors indicated after the verdict to counsel and the media their verdict was a product of the Court's instructions, Defendant argues this erroneous written response requires a new trial. The Government argues any error committed was harmless. Looking at the timing of these facts and the conscientiousness and frequency with which this jury asked questions of the Court, it cannot be said the jury mistook the written answer after the Court had orally advised the jury Anna was a government agent in August of 2004. Therefore, any error was harmless.

ER 1858-1859. There do not appear to be many cases on "all fours" with the case at bar.

Under the harmless error standard, the government bears the burden of demonstrating that the alleged error could not have affected the outcome. Chapman v. California, 386 U.S. 18, 23-24, 87 S. Ct. 824 (1967). Specifically, the government must show that it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." Neder v. United States, 527 U.S. 1, 18, 119 S. Ct. 1827 (1999). When applying the harmless error standard in a case of instructional error, the court must evaluate the record as a whole. Id. at 19 ("Of course, safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record.") Here, the **direct written response from the court eliminated the defense of entrapment**. It relieved the government of its

constitutional duty to prove the elements of the offense beyond a reasonable doubt, and defendant's constitutional right to present a meaningful defense. It defies logic to point to the jury's deliberative process in the case - - they convicted soon after the misinstruction - - as evidence that the erroneous instructions preventing defendant from presenting a defense was harmless. By preventing the jury from considering defendant's critical claim of entrapment, defendant was deprived of his right to "due process . . . a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038 (1973).

The jury could not consider the defense of entrapment if there was not a government agent involved. The error was not harmless.

B. The Court Committed Reversible Error In Its Four Separate Errors When Instructing The Jury In The Area Of Entrapment.

Legal standard: The failure to give an entrapment instruction, where one is required, is reversible error. United States v. Escobar deBright, 742 F.2d 1196, 1201 (9th Cir. 1984). Entrapment instruction error should be subjected to de novo review United States v. McConney, 728 F.2d 1195, 1201 (9th Cir.)(en banc), cert. denied, 469 U.S. 824, 105 S. Ct. 101 (1984).

The court (1) incorrectly instructed the jury as to the time frame for them to consider evidence of predisposition, (2) incorrectly answered a jury question from the

bench without affording the defendant the opportunity to be heard, (3) refused to instruct the jury on a valid theory of defense regarding entrapment, and (4) refused to instruct the jury on inducement despite instructing on predisposition.

Near the end of the first day of deliberations, September 26, 2007, the jury was brought out to get clarification about what testimony they desired in their read back request[41], and also to be told that the *next day* they were going to be given written answers to their other note and request. That other note was their 3:00 p.m. note regarding (1) predisposition, (2) Anna's status in August 2004, and (3) how to define "contact" for entrapment purposes. At that point, they were told that they would receive a reply the next morning to those issues. The court then asked if there were any further questions. Juror 12 then asked

> JUROR 12: I have one. In regards to the predisposition, what is the time frame that we're to use for predisposition? Is it June of '05, beginning, or is it August of '04?
>
> THE COURT: Thank you. Anything else?

ER 186-187. The court then let the jury either continue to deliberate or to go home and reassemble in the morning of the 27th.

The next morning, another note came out regarding entrapment and inducement.

---

[41] The jury wanted only the cross-examination of Agent Torres and Anna regarding her "training;" they assured the court they did not want the direct examination in this area. ER 184-185.

ER 242. After extensive discussion and written pleadings of the parties, over objections of the defense, the court instructed the jury on predisposition.[42]

> Question number two: Was Anna considered a Government agent in August '04?
>
> The answer: Yes.
>
> Question number three: What does contact mean?
>
> Contact as used in the instruction is the time that you determine was the first time that there was some communication between the defendant and the Government agent about the crime charged in the Indictment.

ER 225-226. The "contact" they were asking about was in regard to predisposition prior to "contact" with a government agent.

Two of the jurors, juror #2 and juror #12, then asked additional questions after having been read these replies. Without waiting for the defense to be allowed comment on the jury inquiry, the court illegally responded to the questions.

> JUROR 2: The time frame. When does the evidence start? June 2005 or prior to that?
>
> THE COURT: Can you be more specific than when does the evidence start. There's been evidence of a lot of things that have occurred during the course of the trial.
>
> JUROR 2: It's one of our biggest questions is where we start looking at it?

---

[42] Which discussed as an element "the character of the defendant," despite the disallowance of evidence from the defense on this point; government attacks on the defendant's bad character were replete.

JUROR12: In the entrapment portion, do we consider entrapment from June of '05 or back to August of '04?

THE COURT: You don't have this in front of you, but, again, the instruction that I've given today regarding contact, I think will give you the answer if you reread when you receive it.

JUROR 12: Can you read that again?

THE COURT: Yes. Again, not putting any undue influence on it, but if you'll listen to what the instruction is, I think it may help you answer the question. Contact as used in the instruction is the time that you determine was the first time that there was some communication between the defendant and a Government agent about the crime charged in the Indictment. Hopefully, that will help define what you are asking. Anything else?

JUROR 11: Will that be in the information that you're going to give us?

THE COURT: This will all be in response to your questions. It will be signed by me and given to you just as the other response was given. It's just that this has been a work-in-progress up until just a few moments ago, and I don't think you could follow what I've just read to you without me cleaning it up a little bit. But you should have it within the next ten to fifteen minutes at the latest.

MR. REICHEL: Your Honor, may we have a brief sidebar on the question that was asked?

THE COURT: No. We'll dismiss the jury first. Ladies and gentlemen, you've heard the responses. If you would please now return to your deliberations. Thank you.

ER 228-229.

The instructions given had been the subject of extensive argument of counsel and briefing on the issue. ER 1-31; 80-239. Defense counsel repeatedly read to the

court from the Supreme Court's opinion in Jacobson v. United States 503 U.S. 540, 553 (1992) and from this Circuit in United States v. Poehlman, 217 F.3d 692 (9th Cir. 2000), as well as from the Ninth Circuit Manual of Model Jury Instructions. The defense position was that the jury was to consider the defendant's "disposition" *prior* to contact with government agents. ER 155-183.

The district court ruled that the relevant time period for consideration of evidence on the issue of predisposition and "contact" by a government agent begins on the date that ***the indictment alleges that the defendant committed the crime***, in this case entering and starting the conspiracy in June of 2005. ER 155-183. This is flatly contrary to the teachings of this Circuit and our Supreme Court in Jacobson.

This Circuit teaches that predisposition is the defendant's willingness to commit the offense prior to being contacted by government agents, coupled with the wherewithal to do so. United States v. Poehlman, 217 F.3d 692, 698. (9th Cir. 2000). "Quite obviously, by the time a defendant actually commits the crime, he will have become disposed to do so. However, the relevant time frame for assessing a defendant's disposition comes before he has any contact with government agents, which is doubtless why it's called *pre*disposition." Id. at 703, (italics in original)

(citations to Jacobson omitted).[43] (Accord see United States v. Williams 547 F.3d 1197, 1198 (9th Cir. 2008)).

The error here is not harmless. The numerous juror questions on this exact issue, coupled with the fact that a large volume of the trial evidence was on the exact issue, compel reversal.

Further, the court should not have answered - - without speaking with defense counsel - - a jury question of "When does the evidence start? June 2005 or prior to that?... It is one of our biggest questions is where we start looking at it." The trial

---

[43] The language from our Circuit could not be more exact.

> Despite Jacobson's willingness to commit the offense at the first opportunity offered to him, the Supreme Court held that the government had failed to show predisposition because it had failed to show that he would have been disposed to buy the materials ***before the government started its correspondence with him***. The fact that he was willing to order illegal materials after he'd been harangued by the government for over two years was not deemed sufficient to show predisposition. Jacobson's decision to order, the Court reasoned, could have been a consequence of the government's inducement.
>
> By analogy, the fact that Poehlman willingly crossed state lines to have sex with minors after his prolonged and steamy correspondence with Sharon cannot, alone, support a finding of predisposition. It is possible, after all, that it was the government's inducement that brought Poehlman to the point where he became willing to break the law. "As in Jacobson, we must consider what evidence there is as to Poehlman's state of mind prior to his contact with Sharon."

Id. (Italics and bold added.)

court, without giving defense counsel a chance, replied to the jury that the instructions and answers they had just got and were going to get in writing would answer that question. In essence, the court directly told the jury to look at evidence only from June 2005 forward, when "contact" started.[44]

Jury messages should be "answered in open court and . . . petitioner's counsel should [be] given an opportunity to be heard before the trial judge responds." United States v. Barragan-Devis, 133 F.3d 1287 (9th Cir. 1998); Rogers v. United States, 422 U.S. 35, 39, 95 S. Ct. 2091 (1975)(citations omitted); United States v. Frazin, 780 F.2d 1461, 1469 (9th Cir. 1986) (holding "constitutionally fatal" the absence of both defendants and counsel in formulating judge's response to jury, without deciding whether defendants personally must be present at conference). An instruction is defective if it permits a jury to draw a permissive inference from isolated facts (United States v. Rubio-Villareal, 967 F.2d 294 (9th Cir. 1992) (en banc) at 299-300). The instruction here allowed the jury to make a finding that the only relevant evidence

[44] The court had previously gotten an agreement from the parties that the court would never respond to a question without affording the parties an opportunity to be heard. ER 141. As well, the court had specifically *not* answered such a similar question, asked the day before by a juror, deferring instead to honor its promises and the law. Defense counsel immediately asked for a sidebar with the court after the court's response but before the court discharged them to deliberate, in order to not be seen as objecting to the court's conduct and control of the courtroom, but this sidebar was denied. ER 228-229.

began in the trial from July 2005 forward . This response was an inappropriate intrusion into the jury's deliberations and permitting the jury to convict without considering all the evidence presented at trial. Id. at 300. All evidence in the trial that had been admitted was obviously "relevant" for the jury to consider. Fed. R. Evid. 402.

The error implicates the defendant's constitutional rights and must result in a new trial. When constitutional requirements are involved, the proper execution of this duty is a matter of insuring due process of law as guaranteed by the Fourteenth Amendment. McDowell v. Calderon, 130 F.3d 833 (9th Cir. 1997). The court - - for unknown reasons - - repeatedly refused to instruct the jury on "wherewithal" as set forth in United States v. Poehlman, 217 F.3d 692, 698. (9th Cir. 2000). The defendant sought this in his original jury instructions and at every opportunity possible. The defense-requested instruction, denied by the court on several occasions, was simply lifted exactly from Poehlman.

A defendant is entitled to a jury instruction on a theory of defense if the theory has a basis in law and in the record. United States v. Hayes, 794 F.2d 1348, 1350-51 (9th Cir. 1986), cert. denied, 479 U.S. 1085, 107 S. Ct. 1289, (1987); United States v. Escobar deBright, 742 F.2d 1196, 1198 (9th Cir. 1984). This was clear error and is not harmless.

The district court also refused to instruct on inducement, while instead giving

an instruction on predisposition which did not in any way define inducement. ER 210-238. The defense-requested instruction, as set forth above, directly from Poehlman, covered a definition of inducement perfectly. It is hard to believe that in this situation, with the evidence in this case, and the questions coming from the jury, that no instruction on the definition of inducement was provided.[45] The error is not harmless.

C. The Defendant Was Entrapped As A Matter Of Law.

Legal Standard: This Circuit reviews de novo claims of entrapment as a matter of law. United States v. Williams 547 F.3d 1197 (9th Cir. 2008). A verdict should be affirmed when the jury has been instructed on the elements of entrapment "unless, viewing the evidence in the government's favor, no reasonable jury could have concluded that the government disproved the elements of the entrapment defense." Id.

---

[45] Poehlman taught how to avoid this:

> The jury nonetheless convicted Poehlman, which means that either it did not find that the government induced him, or did find that Poehlman was predisposed to commit the crime.... Without a special verdict, we don't know which is the case. Because the determination of whether a defendant is entrapped is often confusing and difficult, we encourage district courts to use special verdict forms that query jurors as to the elements of the entrapment defense. Not only does this ease the process of appellate review, it encourages juries to focus their deliberations on the elements of the defense. Id. at Fn 7.

To establish entrapment as a matter of law, the defendant must point to undisputed evidence making it patently clear that an otherwise innocent person was induced to commit the illegal act by trickery, persuasion, or fraud of a government agent. This is a subjective inquiry into whether the government's deception actually implants the criminal design in the mind of the defendant. Inducement can be any government conduct creating a substantial risk that an otherwise law-abiding citizen would commit an offense, including persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy or friendship. United States v. Williams 547 F.3d 1197 (9th Cir. 2008).

Eric was an innocent person induced to commit the illegal act by trickery, persuasion, or fraud of a government agent.

D. The Evidence Is Insufficient For A Jury To Find Each Of The Elements Of The Offense Proven Beyond A Reasonable Doubt.

Legal standard: On appeal, this Circuit views the evidence "in the light most favorable to the prosecution, to determine if 'any rational trier of fact could have found the essential elements of the offense charged beyond a reasonable doubt,'" United States v. Rosales, 516 F.3d 749, 751-52 (9th Cir. 2008).

The Constitution requires criminal convictions to rest upon a jury determination that a defendant is guilty of every element of the crime with which he is charged,

beyond a reasonable doubt. The Fifth and Sixth Amendments require conviction by a jury of all elements of a crime. The prosecution bears the burden of proving all elements of the offense charged, and must persuade a fact finder beyond a reasonable doubt of the facts necessary to establish each of those elements.

The evidence was insufficient that the defendant had conspired with *either of the two codefendants* to commit the crimes of 844 (I) and f(1). Zach and Lauren both testified that they did not have an agreement with Eric as to any "target" the government either alleged in the case nor produced evidence of its essential "nexus" as required (government property, government funding or an interstate commerce link).

There was no evidence of any agreement to "damage or destroy" nor was there any agreement as to a means of "fire or an explosive" for any such "alternative" object other than what was in the indictment. Importantly, as both Zach and Lauren testified, they were "acting" and as such, there can be no "meeting of the minds" as needed by a conspiracy charge.

Finally, for whatever reason, over the defense objection, and at the government's urging, the court refused to provide any instruction to the jury on the definition of "fire or explosive" as those terms are used in the statute. ER 99.

E. The Court Committed Reversible Error In Not Giving the Required Lesser Included Instruction.

Legal standard. A defendant is entitled to an instruction on a lesser-included offense if the law and evidence satisfy a two-prong test. United States v. Arnt, 474 F.3d 1159, 1163 (9th Cir. 2007). Under the first prong, "the elements of the lesser offense [must be] a subset of the elements of the charged offense," then a lesser-included offense jury instruction is warranted. Id. (quoting Schmuck v. United States, 489 U.S. 705, 716, 109 S. Ct. 1443, (1989)). The second prong of the test is satisfied if "the evidence would permit a jury rationally find [the defendant] guilty of the lesser offense and acquit [her] of the greater." Id. (quoting Keeble v. United States, 412 U.S. 205, 208, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973)). This Circuit reviews the first prong de novo and the second prong for abuse of discretion. Id. (citing United States v. Naghani, 361 F.3d 1255, 1262 (9th Cir. 2004)).

At the close of the government's case, defendant requested the instruction for a lesser included offense of 18 U.S.C. 371, the general federal conspiracy statute that the co defendants had in fact plead guilty upon.[46] The district court wholeheartedly

---

[46]

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

agreed with defense counsel. Later, the court conceded to the government's urging and denied the instruction.

The state of the evidence was clear that the jury reasonably could have found the defendant guilty of the lesser offense but not the greater offense. The lesser offense simply required these elements: (1) an agreement to engage in criminal activity, (2) one or more overt acts taken to implement the agreement, and (3) the requisite intent to commit a substantive crime. United States v. Johnson, 297 F.3d 845, 868 (9th Cir. 2002). There is the evidence that Eric always said to *not* target federal property; ER 928-929; that he did not want to do anything illegal close to home which means these "targets" in *this indictment* were not the objects of the conspiracy; ER 1308-1309; that the three actually never agreed upon a target se set forth in the

---

> THE COURT: ....
> THE COURT: What I'm going to do is I'm going to include the instruction, and if you provide me authority, prior to me coming in, showing that this is not a lesser-included, or 371 is not applicable here, then I'll deal with that at that time. But as of right now, I find that a rational jury could find Mr. McDavid guilty of the lesser crime but not of the greater because the elements are: There was an agreement between two or more people to commit a federal crime; the defendant became a member of the conspiracy knowing of at least one of its objects and intending to accomplish it; and one of the members of the conspiracy performed at least one overt act. And that seems to satisfy the three elements that I'm looking at. Because there were a number of things that were discussed and talked about. They weren't all about explosives and bombs, etc, that were in fact or could be considered illegal and could be not of the greater.

ER 80-82.

charges; ER 1318-1355; that the three most likely agreed to "firefly' which did not necessarily involve the numerous and unique mandatory elements of §844 (I) or (h); and the jurors declarations on the issue. ER 1306-1307. The failure to instruct was reversible error.

F. There Was An Illegal Constructive Amendment Of The Indictment At Trial And/Or A Fatal Variance.

Legal Standard: This court reviews de novo whether a constructive amendment occurred so that it is impossible to know whether the grand jury would have indicted for the crime actually proved. Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270 (1960); United States v. Miller, 715 F.2d 1360 (9th Cir. 1983).

An amendment of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by the prosecutor or a court after the grand jury has last passed upon them. A variance occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment.

In this case, both occurred. The indictment, while not physically altered, was amended when the court ruled that the government no longer needed to prove to the jury that the "targets" listed in the indictment needed to be the "objects" or targets of the conspiracy. ER 87-95. The indictment specifically charged conspiring with two

codefendants to damage or destroy, by means of fire or an explosive, to-wit: the IFG, cell phone towers, electrical and gas stations and the Nimbus Dam. The indictment does not state that the defendant conspired with the others to "*generally*" violate 844(f) and (I)

The government offered stipulations[47] on the interstate commerce nexus of cell phone towers, and that the Nimbus Dam and IFG received federal funding. ER 1114. However, the evidence at trial, from the mouths of the witnesses for the government, was that the defendant did not conspire with these codefendants as to these targets. As such, the government then shifted course and argued to the jury that the government *need not* prove that these three areas were the targets in order to convict the defendant. Defense counsel objected, citing the grand jury clause of the U.S. Constitution, and argued that such a process would be a fatal variance as well under the Fed.R.Crim.Pro Rule 7. The objection was overruled. ER 88-90.[48]

---

[47] The defense agreed to these. The belief was that these were the targets of the conspiracy, to be proved by the government. When the government witnesses, the two codefendants, testified that they did not conspire for these targets, the case took a different turn.

[48] The jury pool was told at the beginning of the jury selection, at the government's request

> I should indicate to you the locations of these alleged targets, so that we can determine if being one of you might live near this area or have friends that live there so it might have some effect on you being a fair and impartial juror in this

It is a fundamental principle of the Fifth Amendment that a defendant may be tried "only on the charges included in the grand jury's indictment." United States v. DiPentino, 242 F.3d 1090, 1094 (9th Cir. 2001) (citing United States v. Stirone, 361 U.S. 212, 215-216 (1960)). "[A] court cannot permit a defendant to be tried on charges that are not made in the indictment against him." Stirone, 361 U.S. at 216 (citing Ex Parte Bain, 121 U.S. 1 (1887)). A conviction on a charge that is not contained in the indictment must be vacated as a fatal variance or an illegal constructive amendment of the indictment.

> case. And the alleged targets for this were the United States Forest Service Institute of forest genetics, Nimbus dam and fish hatchery and there were a certain cell phone and electrical towers there were also targeted. First, first of all, do any of you in the top row have any recollection of this particular case?
>
> Juror number four mentioned working with the forest service and also knowing people that work in Placerville with the forest service. Juror four had been to the Institute of Forest Genetics a few times. Juror number 13 mentioned knowing about the hatchery a lot, had been there quite a bit. Juror number 15 had also been to the "locations" many times. Juror number 4 was eventually excused for cause by the court because of his connection with the forest service and this "location."

ER 578.

G. The Court Erred In Denying the Defendant's Pretrial Motions, Raised Again At The Close Of The Government's Case, to (1) Suppress Evidence Seized Through The Warrantless Installation Of Video Cameras and Audio Recording Devices In The Defendant's Home, and (2) To Dismiss The Indictment For Outrageous Government Misconduct.

1. Warrantless Entry and Search of Defendant's Residence.

Legal standard: This Circuit reviews de novo the district court's denial of a suppression motion. United States v. Pang, 362 F.3d 1187 (9th Cir. 1994).

The court denied the pretrial motion to suppress all evidence, video tapes and audio tapes, gained from the devices which the FBI had installed in the house in Dutch Flats, California. ER 311; 502. The court ruled that Eric had no privacy right in what he exposed to others in the group, including Anna. ER 432. It was denied again when raised again at the close of the governments's case. ER 1582-1583. [49]

---

[49] Anna testified that the house was wired so that every room and every corner of the house could be heard by the agents listening in. ER 782. Prosecutors told the court about instructions to agents to "minimize" when Anna was not present; like wiretap procedures. (Wiretaps require warrants.) Despite this, Anna acknowledged watching portions of the tapes where she was not present in the home, when she was out, and she watched tapes of Eric and Zachary in the house discussing her in her absence. Zachary Jenson also testified to watching this portion of one of the video tapes. ER 1514-1515.

All of the main government witnesses - - Anna, Jenson and Weiner - - testified that they had reviewed as much of the audio and video taped evidence as possible, and that it had been used by them in preparation of their testimony; that it had aided their testimony. ER 1084; 1251; 1514-1515. As well, the overwhelming majority of government trial exhibits given to the jury were the undercover video and audio tapes made at the house in January 2006, as well as the transcripts of the tapes. ER 20-21.

The Fourth Amendment requires a warrant in such an instance. "Nowhere is the protective force of the fourth amendment more powerful than it is when the sanctity of the home is involved." United States v. Hammett, 236 F.3d 1054, 1059 (9th Cir.), cert. denied, 534 U.S. 866 (2001).

Two cases from this Circuit, when distilled, provide the law. United States v. Koyomejian, 970 F.2d 536 (9th Cir. 1992), involved the surreptitiously installed hidden audio and video recorders in the defendant's business, which was under investigation by law enforcement. The officers, however, had *taken the time to get a warrant prior to the installation*. Also, there is guidance from United States v. Nerber, 222 F.3d 597 (9th Cir. 2000). There, the informant and law enforcement quickly rented a motel room, and installed hidden video surveillance without a warrant. The defendants were led to the motel room for a one time drug deal with the informant. They were to be there for a very brief period of time. They entered, did the deal, and then stayed while the informant left for a brief period of time. The informant did not come back for a few hours, and when the defendants left the motel room, they were arrested. They objected to the use at trial of the video and audio surveillance of the motel room as violative of the Fourth Amendment's warrant protection. Id. at 599.

The distillation is that our Circuit condemns the practice and counsels that the

---

The government attorneys obviously used the tapes for their own preparation.

practice of such warrantless police conduct gives the Circuit "pause." The Circuit then sets the parameters by advising that this warrantless search *barely* passes constitutional scrutiny because (I) the defendants' privacy expectation –a brief visit to a motel--was substantially diminished; (ii) unlike this defendant in this case, they were not "residents" of the hotel nor even overnight guests of the occupants, and (iii) they were there solely to conduct a business transaction at the invitation of the occupants - - unlike the defendant in this case who was living full time at the premises, (iv) with whom they (the Nerber defendants) were only minimally acquainted - - unlike the very long term and extremely close relationship between defendant and "Anna."

Finally, exactly on point, this Circuit commanded that "*We do not intend to imply that video surveillance is justifiable whenever an informant is present. For example, we suspect an informant's presence and consent is insufficient to justify the warrantless installation of a hidden video camera in a suspect's home*." (Italics added.) Id. at 604.[50]

The district court was in error in not granting the motion.

---

[50] As well, once the informant was not in the house, the video and audio taping was illegal under the Fourth Amendment. The conduct was likewise violative of the Federal Wiretap Act, 18 U.S.C. §2510 et seq.

2. Outrageous Government Misconduct.

Legal Standard: This Circuit reviews de novo claims of outrageous government conduct, viewing the evidence in the light most favorable to the government and reviewing the district court's factual findings for clear error. United States v. Gurolla, 333 F.3d 944, 950 (9th Cir. 2003).

The defendant re-raised the pretrial motions to dismiss upon outrageous government misconduct which were. ER 1582-1584. The evidence was as follows:

Anna had been infiltrating lawful political protest; she had a complete lack of "informant" training as a government agent; she for some reason lost love letters sent by the defendant to her during the initial part of the investigation; she questioned and electronically recorded Eric as a "person of interest" on the ongoing Ryan Lewis case because the FBI desired to conduct a formal interview with him but he had counsel who was advising him not to talk with them; Anna's romantic involvement with Eric and telling him that the real romance would begin "...after the mission" was completed; the FBI's Behavioral Sciences Unit had performed a study for Anna; the issues of entrapment as set forth in the entrapment section of this brief; the prejudicial press conferences held by the local U.S. Attorney's Office during the grand jury investigation and deliberations; the "threat" to indict defense counsel for allegedly tampering with witnesses in the case; the illegal video and audio taping in the house;

the late release - - during the trial - - of the FBI psychological profile and the "journal" of Anna.

The cumulative effect of this conduct results in outrageous government misconduct.[51] "'Outrageous government conduct is not a defense[52], but rather a claim that government conduct in securing an indictment was so shocking to due process values that the indictment must be dismissed.'" United States v. Holler, 411 F.3d 1061, 1065 (9th Cir. 2005).

Also, shortly after arraignment, Eric obtained counsel of his choice, former Assistant Federal Defender Mark Reichel. At a hearing on February 21, 2007, government counsel stated to the court the details of a present grand jury investigation and also that Mr. Reichel is either the subject or target of that grand jury investigation, certainly precluding counsel from calling Ryan Lewis or those connected with that case as witnesses. The court took the matter under submission and never ruled on it. ER 308.[53]

---

[51] The defendant's pretrial motion on the subject sets forth all of the relevant statutes, case law and law enforcement guidelines. ER 311.

[52] Defendant sought it as a defense in the case, submitting a jury instruction on the matter, which was denied. ER 6.

[53] This appears a violation of grand jury secrecy, to say the least. As well, "Ryan Lewis" issues would come to play a very large part in the government's case in the future trial of Eric, contrary to the statements of government counsel at various times pretrial in the case.

During grand jury deliberations, between the arrest of Eric on the complaint on January 13, 2006 and the indictment January 25, 2006, numerous press conferences and press releases which were at times untrue and in all instances highly inflammatory were put forth by the Department of Justice, from the Attorney Generals Office to the local FBI office and the U.S. Attorney's Office.[54]

The matter of entrapment is highlighted by the fact that the FBI used a behavioral sciences study for Anna to keep Eric on the hook for romance after a mission was complete - - and this information and the study were not disclosed or made known to defense counsel until the end of the trial. ER 1611-1622.

Due process compels the dismissal of the indictment and verdict. As this Circuit explained in Gurolla "[t]his standard is met when the government engineers and directs a criminal enterprise from start to finish," but "is not met when the government merely infiltrates an existing organization, approaches persons it believes to be already engaged in or planning to participate in the conspiracy, or provides valuable and necessary items to the venture." Id. United States v. Gurolla, 333 F.3d 944, 950 (9th Cir.2003).

The government over–involvement in the charged crime offends due process and requires dismissal. The crime was created by the government and its agent, Anna.

[54] ER 311.

As Justice Roberts wrote more than 75 years ago, the "courts must be closed to the trial of a crime instigated by the government's own agents" Sorrells v. United States, 287 U.S. 435, 459 (1932) (Roberts, J., concurring).

H. The Aggregated Errors So Infected The Trial With Unfairness As To Make The Resulting Conviction A Denial Of Due Process

The "cumulative errors" denied the defendant a fair trial. Highly prejudicial and late noticed "expert testimony" was allowed without any type of admissibility hearing when, prior to the testimony of Anna, agent was Bruce Nabiloff testified for the government as an expert in the area of the "eco terror" groups and the "anarchist movement" and also "Earth Liberation Front" and "Animal Liberation Front." His testimony was highly prejudicial and the defense objected strenuously under a variety of grounds, including but not limited to Fed.R.Evid and 404(b), and the fact it was inadmissible expert testimony noticed late and violative of Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993). No Daubert hearing was held and the government's theory of admissibility shifted on several occasions in argument before the court, changing between a position that he was an expert and then again that he was not an expert. ER 510-526.

Thereafter, despite defense in limine motions on point, untimely and un-noticed Fed. Rule Evid. 404(B) prior bad act and character evidence was admitted against the

defendant without any discussion; objections based upon violations of Fed. Rule Evid. 403 and 401 were overruled without any weighing on the record by the trial court (violating Doe v. Glanzer, 232 F.3d 1258 (9th Circuit 2000)), and *favorable* character evidence of the defendant was disallowed by the trial court for any period prior to the commission of the offense. ER 73. "Although possibly no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors has still prejudiced the defendant." Whelchel v. Washington, 232 F.3d 1197, 1212 (9th Cir. 2000) "We must ask whether the aggregated errors 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Parle v. Runnels, 387 F.3d 1030, 1045 (9th Cir. 2004).

I. The Sentence Was Illegal And Must Be Vacated.

Legal standard. The Supreme Court has set forth a two-step process for reviewing sentences imposed by district courts, Gall v. United States, 128 S. Ct. 586 (2007). First, the appellate court reviews for "significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the §3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence." Gall, 128 S. Ct. at 597. If there is no significant procedural error, then the appellate court considers the "substantive reasonableness of the sentence imposed under an

abuse-of-discretion standard," employing a totality-of-the-circumstances test. Gall, 128 S.Ct. at 597.

Eric's extensive sentencing pleadings[55] and witnesses urged the court to sentence no more than 5 years[56], commensurate with the maximum the codefendants could get once they were sentenced.[57] The probation department recommended 156 months, or 13 years, which Eric's counsel argued was greater than necessary to protect the public from further crimes by the defendant and to deter criminal conduct by others, as well as the other relevant §3553 factors. ER 1920-1927. Despite the numerous challenges to the U.S.S.G. calculations and arguments under §3553(a)(2), the court gave no indication it had considered these §3553(a) arguments or any of the

---

[55] To save word space in this brief, the Sentencing Memorandum, Exhibits and the arguments contained therein are not repeated here, but incorporated by reference to the ER which contain the relevant arguments and authorities. The entirety of the Juror Declarations should be read by this reviewing court for their incredible insight.

[56] This included the jurors views.

[57] Among the many grounds were (1) the nature of the offense, (2) the peaceful nature of Eric; (3) the lack of a criminal record, (3) the sentence in the Ryan Lewis case (6 years), (4) the need for medical care (Eric had contracted percarditis in the jail, (5) sentencing entrapment, (6) isolation in prison and (7) extensive family ties. ER 1871 . Pericarditis is a serious heart condition, and the court had evidence from jail doctors on the matter. Courts have departed post-Booker based on chronic health conditions. U.S. v. Hein 463 F. Supp.2d 940 (E.D. Wisc. 2006). Ryan Lewis is mistakenly reported in the PSR in this case to have gotten 8 years prison; the public record of the docket leaves no doubt that he received only a 6-year sentence. Eastern District Case No. 05-CR-S- 00083 EJG.

§3553(a) factors. Instead, it merely restated the guidelines range, discussed the nature of the offense in the context of a "new world," and imposed a sentence of 235 months. Failure to apply the §3553(a) factors is procedural error. Gall, 128 S. Ct. at 596.

Jurors concerned about the case post-verdict submitted declarations on their strongly held thoughts on a variety of issues including, but not limited to, issues like the fact that the jury did not find "an intended target to be something of a government building ... or that the group created a substantial risk of death or serious bodily injury" which is a necessary predicate to support a base level offense of 24[58]; objecting to victim related adjustments because the defendant did not intend to intimidate government conduct to support his political beliefs[59]; and urging a

[58] The jurors themselves, in post verdict interviews, in the presence of FBI Agent Nasson Walker, acknowledged that they did not make a finding that the defendant Eric conspired with the others to destroy government facilities. ER 278A - 287A. Specifically, Juror Diane Bennett declared that "Eric did not agree with either Zach or Lauren to destroy the Institute of Forensic Genetics, the Nimbus Dam, cell towers or gas stations." See Declaration of Diane Bennett at ¶4.

[59] See declaration of Diane Bennett at ¶5 wherein she stated "I did not find, nor do I think the other jurors did, that Eric committed crimes in the name of "ELF" or the Earth Liberation Front."

reduction for imperfect entrapment as the majority of the jurors felt that this was a strong case of entrapment.[60]

Defendant argued that any sentence over five years would cause disparity with similarly situated codefendants. The Probation Department agreed, in part,[61] noting

> In the case before the Court, the conspirators did not complete all the acts necessary for their plan to succeed , and their acts did not result in any harm or damage to any person or entity (unlike Lewis). Additionally, this offense was similar in nature to the Hayat case. The defendant has no prior record, yet his criminal history is VI due to the guideline scoring requirements. For all of these reasons, a sentence below the applicable advisory guidelines is recommended. It is believed a reduction of 6 years from the low end of applicable advisory guideline range to a sentence of 156 months is sufficient, but not greater than necessary, to achieve the goals of sentencing set forth in 18 U.S.C. §3553(a).

Pre Sentence Report ¶69.

Defendant argued his criminal history was overstated to which the Court responded:

> ...
> But the law is that if you conspire to damage or destroy a federal building, institution under certain conditions, that that becomes an act of domestic terrorism, for which your criminal history category will be put to the max at VI. Whether you've ever been involved with the law or not.
>
> And in this particular case, the jury has found that there was a conspiracy to destroy a federal installation, one of them, Nimbus Dam, IFG or the cell phone

[60] Diane Bennett at ¶2.

[61] Senior probation officer Linda Alger in considering the factors to be considered under 18 U.S.C §3553(a) compared McDavid to Ryan Lewis who received a 6 year prison sentence.

> towers. And if that is the case, why is that the Court should not follow what the apparent intent of Congress was both from a statute and also from the advisory guideline range?

ER 1970-1971.

The Court continued:

> Congress has made it very clear, one time, it's a one-strike offense, if you will. If you engage in this type of conduct, then that is the point of it, you are a VI. Advisory, understood, but there seems to be a serious–a very serious intent here that any type of act at this type of level deserves a very onerous or strict repurcussion.

ER 1973-1974 .

The district court rejected all of Eric's arguments and the recommendation of probation and used the fact that this was a serious offense committed in a "new world after September 11, 2001." ER 1981. The court did not address the disparity argument raised by both Eric and the Probation Report.

The guidelines were not calculated properly. Eric argued that the Base Offense Level could not have been a level 24. The U.S.S.G. require that a "reasonable certainty" must be established for any intended conduct before it can be an adjustment. The evidence actually puts this at level 9. The jury did not find an intended target to be something of a government building, something of a public use, as reflected in the PSR, and no "target verdict" or "target instruction" was given to the jury - - despite

requests from the defense. The same is to be said for the PSR's "finding" that the group "knowingly" created a substantial risk of death or serious bodily injury. Both of these required findings together make the Base Level a 24, rather than a 9. There is no evidence whatsoever to support it, especially in the face of declarations of jurors Carol Runge and Diane Bennett. With this evidence from the jurors, both 2K1.4 (a) (1) and (a) (2) do not apply. 2K1.4(b)(1) establishes a base level of 2 plus the offense level from 2b1.1, which starts at 7. Eric's correct base level should be 9.[62]

Codefendants Zach and Lauren testified that the defendant did not conspire to commit arson against the targets listed in the indictment; the court also then instructed the jury that the defendant could be convicted if he conspired to commit arson by fire or an explosive, and that they did not have to find that he conspired to commit arson against any of the targets in the indictment; the government then argued this exact point in closing argument to the jury; finally, the jurors themselves, in post verdict interviews, in the presence of McDavid FBI Case Agent Nasson Walker, acknowledged that they *did not make a finding that the defendant conspired with the others to destroy government facilities*.

[62] These juror declarations have been made legally vital–in the absence of special verdict forms-- by our Supreme Court's instruction. Specifically, the timing of Cunningham v. California, 549 U.S. 270, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007), makes the epicenter of Sixth Amendment jurisprudence for sentencing purposes located on the facts found by a jury beyond a reasonable doubt.

The government bears the burden of proof for facts found in support of Guidelines enhancements that turn out to have a disproportionate impact on the ultimate sentence imposed to be *established by clear and convincing evidence*.. United States v. Staten, 466 F.3d 708, 720 (9th Cir. 2006), United States v. Pike, 473 F.3d 1053, 1057 (9th Cir. 2007). The difference here (24 versus 9) is ***clearly disproportionate.***

The Victim Related Enhancement for "Domestic Terrorism" suffers the same fate. Having a disproportionate impact on the ultimate sentence imposed must be established by clear and convincing evidence. United States v. Staten, 466 F.3d 708, 720 (9th Cir. 2006). This adjustment takes Eric to a Category VI ***from a Category I*** and adds 12 levels.

The PSR suggests the enhancement "because the defendant's intention was to intimidate government conduct to support his political beliefs." However, there is no evidence that this issue - - this **vitally important** issue - - was determined true by the jury nor that "clear and convincing evidence" is in the record that the crime was to influence government conduct. None whatsoever. The enhancement is not applicable.

Seeking a variance /departure from the U.S.S.G., Eric argued a variety of

grounds, including but not limited to imperfect entrapment,[63] disparity with similarly situated codefendants, isolation in prison based upon his high notoriety, a serious heart infection he will have for life, and family ties. These requests were met with little or no response from the court.

Such consideration of the §3553(a) factors is not discretionary but is essential to determining a reasonable sentence. It is only after considering the §3553(a) factors that the district court can determine whether a within-guidelines sentence is appropriate or whether, instead, the court ought to deviate, either above or below, from the starting point established by the guidelines.[64]

Here the record is void of any evidence indicating that the district court considered all of the §3535 factors set forth by Eric . In fact, the court responded to the arguments set forth above with "All Right. Next issue" ... "Next Issue"... "Next" and "Mr. Reichel, anything else." Furthermore, the district court confused its authority to use discretion in deciding the criminal history of Eric. Specifically, the court noted that:

---

[63] U.S. v. Garza-Juarez, 992 F.2d 896, 910-912 & n. 2 (9th Cir. 1993); see U.S. v. McClelland, 72 F.3d 717 (9th Cir. 1995) (district court properly departs downward 6 levels for imperfect entrapment under §5K2.12 even though defendant initiated plan).

[64] It is not enough for the court merely to adopt a within-guidelines sentence; it "may not presume that the Guidelines range is reasonable." Gall, 128 S. Ct. at 596-97.

> ...I'm very cognizant of the fact that the---this particular statute will cause a person who has a zero criminal history to be raised to the highest level, a VI, for sentencing purposes. *This particular decision is not for the judicial branch to deal with*."

ER 1945. (Emphasis added).

In imposing the sentence the court offered no reason for selecting the term of 235 months, but comments such as "it's a one strike" enhancement and it's a "new world" offer insight into the courts mind set. It simply focused on one factor and that was the nature of the offense. Under Rita v. United States, 127 S. Ct. 2456, 2468 (2007), failure to offer any reason whatsoever for rejecting the defendants' §3553(a) arguments or any explanation for following the guidelines range constitutes failure to consider the §3553(a) factors. Under Gall, that failure is procedural error and an abuse of discretion, so the sentence must be vacated and remanded for re-sentencing. It appears that the sentence was based on one factor - - the serious nature of the offense. ER 1981. The court explained its sentence by reciting that we live in "new world" after September 11, 2001. The "new world" justification is not an *adequat*e explanation of the sentence but was a device used to maintain a "de facto" mandatory guideline system; the co defendants got a *post* "new world sentence" in December 2008 when sentenced to no prison time instead of Eric's 19.5 years in prison.

CONCLUSION

For the foregoing reasons, Eric McDavid requests this Court reverse the judgment and remand the matter to district court for dismissal of the charges or a new trial. Alternatively, that the sentence imposed be vacated as illegal.

Dated: September 17 2009

Respectfully submitted,

/s/ Mark J. Reichel

MARK J. REICHEL
Attorney At Law

CERTIFICATE OF RELATED CASES

Counsel for Eric McDavid certifies that he is not aware of any other case pending in this Court raising the same or similar issues .

DATED: September 17, 2009

Mark J. Reichel

MARK J. REICHEL
Attorney At Law

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(a)(7)©, I certify that this brief is proportionately spaced using 14 points Times New Roman and contains 17, 838 words.

DATED: September 17, 2009 *Mark J. Reichel*

MARK J. REICHEL
Attorney At Law

CERTIFICATE OF SERVICE

I hereby certify that on September 17 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I hereby certify that on May 5, 2009 I hand delivered Volumes I-VII of the Appellant's Excerpts of Record in this case upon the parties below:

Steven R. Lapham
Assistant United States Attorney
501 I Street, 10th Floor
Sacramento, CA 95814

Dated: September 17, 2009

s/ *Mark J. Reichel*