C.A. NO. 08-10250

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	C.A. NO. 08-10250
Plaintiff-Appellee,	)	
	)	
v.	)	D.C. NO. 2:06-cr-35 MCE
	)	(E.D. Calif., Sacramento)
ERIC TAYLOR McDAVID,	)	
	)	
Defendant-Appellant.	)	
	)	

Appeal from the United States District Court
for the Eastern District of California

BRIEF FOR APPELLEE

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Defendant-Appellant.	

JURISDICTION

Defendant McDavid was charged with violating 18 U.S.C. § 844(n), conspiracy to damage or destroy property by means of fire or explosives. The district court therefore had jurisdiction under 18 U.S.C. § 3231. Judgment was orally pronounced on May 8, 2008 and entered on the record on May 19, 2008. McDavid filed a timely notice of appeal on May 16, 2008. E.R. 2028-29; Fed. R. App. P. 4(c). This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

ISSUES PRESENTED FOR REVIEW

1. Did the district court commit reversible error by inadvertently providing a written response to a juror's question that was inconsistent with the court's oral response in open court.

2. Was there insufficient evidence such that no rational jury, viewing the evidence in the light most favorable to the prosecution, could have found the essential elements of the crime beyond a reasonable doubt.

3. Was there undisputed evidence making it patently clear that the defendant was an otherwise innocent person who was induced to commit an illegal act by trickery, persuasion, or fraud of a government agent.

4. Where there was no evidence that a government agent made the first mention of commission of a crime, did the district court err by instructing the jury that "Contact [with a government agent] ... is the time 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."

5. Is 18 U.S.C. §371 a lesser included offense of 18 U.S.C. § 844(n), thus entitling McDavid to a lesser included offense instruction.

6. Was there a constructive amendment of the indictment or a material variance of proof at trial, where the indictment charges that the defendants conspired to attack federally owned property and interstate communication facilities, and also identifies specific targets, and evidence at trial shows that the defendants plotted to attack these targets.

7. Did the district court properly deny McDavid's pretrial motions to suppress evidence of consensually monitored recordings and to dismiss the indictment based on allegedly outrageous government conduct.

8. Did cumulative errors prevent McDavid from receiving a fair trial.

9. Was the district court's bottom-of-the-Guidelines

sentence legal and reasonable where the court properly calculated the Guidelines, acknowledged the advisory nature of the Guidelines and considered § 3553 factors.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition of the Case in the District Court

The government agrees with that portion of the defendants' brief entitled "Course of Proceedings." A.O.B. at 3.

B. Bail Status

The defendant is serving the 235-month term of imprisonment imposed by the district court.

STATEMENT OF FACTS

A. Background

In Fall 2003, "Anna," who was then 17-years old, was a college sophomore in Florida. E.R. 676. As an extra credit project for a political science class, she attended a protest of the Free Trade Agreement of the Americas that was then taking place in Miami. E.R. 677. Her purpose was to try to understand the protestors' motivations and to write a paper about it. E.R. 677. Although she tried to dress the part by obtaining "ratty" clothes from Goodwill, she was not accepted on the first day. E.R. 678. On the second day, after adjusting her wardrobe to more closely resemble that of the protesters, she was allowed into the meeting where protest plans were formulated. E.R. 679-80.

When Anna presented her paper to the class it was well received, particularly by a Florida Department of Investigations (FDI) officer who was a student in the class and who requested a copy of her paper. E.R. 681:15. Impressed, the officer's supervisor invited Anna to a meeting at the FDI to discuss her paper. E.R. 682. At that meeting, which was attended by an FBI agent, Anna was asked if she would be interested in doing something like that again. E.R. 682. Anna said she would. E.R. 682.

In 2004, at the request of the FBI, Anna was asked to work in an undercover capacity at the G-8 summit in Georgia, the Democratic National Convention in Boston, and the Republican National Convention in New York City. E.R. 683. Anna's instructions were to report any potential illegal activity such as vandalism, property destruction, or harm to another individual. E.R. 684:17. She was not to report on the expression of any opinions or political views. E.R. 684-85. At each of these three events Anna was able to provide real-time reports on planned illegal activity, including property damage and vandalism. E.R. 685-88.

In August 2004, Anna was invited to attend a "Crimethinc Convergence" in Des Moines, Iowa. E.R. 688:25-690:2.[1] That is

[1] Crimethinc, which may derive from George Orwell's book 1984, is a group of small anarchist cells. A Crimethinc Convergence is an annual gathering of like-minded people who meet

where she first met the defendant, Eric McDavid. E.R. 690:5. Other than reporting the fact that McDavid was there, Anna thought McDavid was "inconsequential" and of no interest to the FBI. E.R. 690:9-14.

After attending the four above-described events, Anna believed that she was through working for law enforcement. E.R. 691:13.[2] Nevertheless, the Secret Service asked her to attend the 2005 Presidential Inauguration, and the FBI asked her to attend a meeting of the Organization of American States, both of which had planned protests. E.R. 692-93.

In all of these undercover activities, Anna never reported on any individual as having violent intentions. E.R. 694. Instead, she gave real-time reports on what the protestors were doing. E.R. 694.

B. June 2005: Philadelphia Biotech Convention

In June 2005, Anna was asked to attend the Philadelphia Biotech Convention and to report on any planned illegal activities there. E.R. 694:14. After arriving in Philadelphia, Anna sought out Eric McDavid because she wanted to use him to

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to discuss techniques and strategies for staging anarchist inspired protest activities. E.R. 643:11-645:18.

[2] Anna's original agreement was to attend the G-8, the Democratic Convention and the Republican Convention, but when she was invited to go to the Crimethinc Convergence it was felt that that might provide her additional intelligence for the Republican Convention which was yet to occur. E.R. 691:24-692:7.

build her credibility in order to gain access to the convergence center where the protest activities were planned. E.R. 697:3. McDavid was someone who could do this because he had seen Anna at the Crimethinc Convergence. E.R. 697:3[3] McDavid was staying with co-defendant Zachary Jensen at co-defendant Lauren Weiner's apartment. E.R. 697:14.

Anna found a very different Eric McDavid than the person she had met at the Crimethinc Convergence in August 2004. This McDavid had become "radicalized" and "felt that protests were no longer working." E.R. 700:3-701:3. In lieu of protest activity, he was proposing "individual and small group-oriented direct action including property destruction, vandalism, and violence." E.R. 701:4. During one of the protests at the Biotech Conference, a police officer collapsed and died of a heart attack. E.R. 701:8. Some of the protestors wanted to have a candlelight vigil for the officer. McDavid, however, expressed the view that the officer's death should be celebrated, that he wished he could have been there to witness it, and that he wished he could participate in killing more officers. E.R. 703:6. Later that night, McDavid again discussed the uselessness of mass protests and suggested engaging in property destruction at the

[3] Starting in or about January 2005, McDavid began communicating sporadically with Anna via email as he hitchhiked and train-hopped from Northern California through the southwest United States. E.R. 695:19-696:13.

homes of executives of the pharmaceutical company. E.R. 705:8-22. He also told Anna that he had "something big" to tell her but that there were "too many ears around." E.R. 706:12-24.[4]

Anna reported McDavid's statements to the FBI. E.R. 706-07. After running a criminal check, FBI Philadelphia determined that McDavid was a person of interest in Sacramento and asked Anna to follow him closely and report any comments he might make about criminal activity that had occurred in Sacramento the previous year. E.R. 707:7.[5]

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[4] Co-defendant Zachary Jenson noticed a similar change. Prior to the Philadelphia Biotechnology Conference, Jenson had traveled the country with McDavid attending various protests along the way. E.R. 1377:15-1378:14; 1382:8-1383:6; 1409:10-1410:13. Jenson testified that at the Philadelphia Biotechnology Conference, McDavid seemed to have "gone beyond the typical anti-government, anti-war protest activity," E.R. 1411:2, and began to see protest as ineffective. E.R. 1412:2. At that Biotechnology protest, McDavid discussed the use of Molotov cocktails. E.R. 1412:3.

[5] In Spring 2005, in one of his emails to Anna, McDavid stated that he had to leave his home in Northern California. E.R. 695:25-696:11. In a subsequent conversation after they met up in Philadelphia, McDavid elaborated. He told Anna that a close friend, Ryan Lewis, had committed arson and property destruction in the Auburn, California area. E.R. 707:21-08:7. McDavid made similar statements to co-defendant Zachary Jenson. E.R. 1412:14-24. Lewis was, in fact, charged with conspiring with others to commit arson on behalf of the Earth Liberation Front in December 2004 through February 2005, and ultimately pled guilty. United States v. Ryan Lewis, No. 2:05-cr-83 EJG. In yet another conversation, McDavid explained to Anna, Weiner and Jenson that, in connection with the Lewis prosecution FBI agents had visited his parents' home in an attempt to locate and interview him. E.R. 733:9.

C. 2005 Crimethinc Convergence

The next event that Anna attended was the annual Crimethinc Convergence in Bloomington, Indiana. E.R. 710. At McDavid's request, Anna picked him up at a protest in West Virginia and drove him to Bloomington. E.R. 710. At the Convergence, McDavid told Anna about a workshop he and co-defendant Zachary Jenson had attended on "urban guerilla warfare." E.R. 711-12. McDavid told Anna that the workshop was about "armed resistence against the state ... overthrowing the government, overthrowing of certain commercial institutions ...." E.R. 713:6-16. He also told Anna that during the workshop the subject of attacking federal buildings came up and that one participant expressed the view that an attack on a federal building would sharply increase criminal punishment. As McDavid told the story to Anna, Jenson disagreed and stated that "[w]e really need to get things started," a statement with which McDavid agreed. E.R. 713:17-714:10.[6]

After the Convergence, Anna drove McDavid to Chicago at his request. E.R. 714:11. On the drive, Anna told McDavid that there were "no other ears present" and that they could freely talk about the subject he had raised in Philadelphia. E.R. 715:1. McDavid responded by telling her about his good friend,

[6] Zachary Jenson corroborated McDavid's attendance at the urban guerrilla warfare workshop and the conversation about attacking federal buildings. E.R. 1413:20-1414:24.

Ryan Lewis, who had set an apartment building on fire in the name of ELF and Crimethinc. E.R. 715:11-23. After denying involvement in the Lewis matter, McDavid then said that he had his own plans. E.R. 716:16-23. McDavid then said that he had a "bomb recipe for C4" and his plan was to make C4 bombs to be used with a remote garage door opener. E.R. 717:1-12.[7] McDavid then reeled off a list of targets including "banks, cell phone towers, a tree facility in Placerville, California, gas stations, and communist party facilities." E.R. 719:1.

Shortly after discussing these targets, McDavid lapsed into silence and then told Anna that he had something to get off his chest. He then said, "If you are a cop or you're working with law enforcement, I will fucking kill you." E.R. 720:3. He then elaborated by telling her that he would "go for the neck and then for the main artery in the leg" with the hunting knife that he carried with him at all times. E.R. 720:11-21. Anna described that knife as an eight-inch long standard hunting knife. E.R. 720:11-21.[8]

Later in the drive, McDavid told Anna that he planned to start his bombing campaign in the winter and asked her to join him. E.R. 721:11-23. When they got to Chicago, Anna dropped

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[7] McDavid described the recipe to Anna in some detail. E.R. 718:13-18.

[8] A knife was recovered from McDavid when he was arrested. R.T. 617:18.

McDavid off at the airport and immediately drove back to Bloomington. E.R. 721:24-722:6.

Anna next saw McDavid when she briefly passed though Philadelphia on her way back to Florida. McDavid was back in Philadelphia for Pointless Fest, an anarchist music festival and Anna needed to give him an answer whether she would be joining him in the bombing campaign. E.R. 722:10-24. By then she had talked to the FBI about whether to continue down the road that McDavid was asking her to travel. E.R. 722-23. Anna had about a half-hour conversation with McDavid outside of Weiner's apartment and told him that she was still interested in joining him in the winter for a bombing campaign. E.R. 723:5-11. McDavid then asked her if she could find him a chemical equivalency list - that is, a list that gives the names of common household products for certain chemicals. E.R. 723:18.

D. August 2005: Formation of the Conspiracy

Co-defendant Lauren Weiner pled guilty to conspiracy to commit arson and testified on behalf of the government. E.R. 1199. Asked to describe the conspiracy, Weiner testified that the group - which included McDavid, Jenson and Anna - had planned to use explosives at different locations because they wanted to try to "stop things that we thought were wrong." E.R. 1199. Specifically, they "didn't like the fact that trees were being genetically modified, cell phone towers were hurting bird

migration, and protesting wasn't working anymore." E.R. 1199.

Weiner testified that she first became involved in the conspiracy in August 2005 when she met McDavid and Jenson at a café in Philadelphia that was just down the street from her apartment. E.R. 1200:25-1201:4. McDavid and Jenson were back in Philadelphia for Pointless Fest, a punk rock festival. E.R. 1416:13. According to Weiner, at the meeting they all agreed that protests were not working and that they should begin engaging in "direct actions," by which they meant criminal activity. E.R. 1202:12-19. McDavid raised the subject of using explosives, indicating that he knew how to make them. E.R. 1202:5-20. During the meeting, McDavid stated that he had discussed these ideas with Anna and that Weiner should get in touch with Anna and let her know they had talked. E.R. 1203:19.[9]

Weiner testified that following her meeting with McDavid and Jenson she called Anna "a bunch of times" to talk about what the trio had discussed. E.R. 1204:5-10. For security reasons, she did not want to discuss direct actions over the phone and wanted

[9] Co-defendant Zachary Jenson described this meeting in similar terms, and testified that his understanding was that the trio was going to meet again to discuss going forward with direct actions. E.R. 1416:13-1418:16. Jenson also testified that following the meeting, he and McDavid hitchhiked back to the West Coast. E.R. 1418:21. On the way, he and McDavid talked about the use of explosives. E.R. 1418:23.

Anna to come to Philadelphia. E.R. 1204:11-21.[10] Eventually, they met at Weiner's apartment and then went to a restaurant where Weiner told Anna about her meeting with Jenson and McDavid and their discussion about explosives. E.R. 1205:3. Weiner testified that Anna acknowledged having talked to McDavid about these things but seemed surprised that McDavid had talked to Weiner and Jenson. E.R. 1206:25.

Anna testified that this meeting with Weiner occurred in October. Anna also testified that at this meeting Weiner told her that the day that Anna had talked to McDavid outside of Weiner's apartment was the same day that McDavid had invited Jenson and Weiner to join the bomb plot. E.R. 724:18. She also testified that Weiner seemed "very excited" about the group's plans and was looking forward to moving to California in the wintertime. E.R. 726:21-727:5.

Anna testified that when she reported these events to the FBI, the FBI was very interested that the bomb plot had now increased to three individuals plus herself, and they wanted her to gather more information on what was occurring, including McDavid's current whereabouts and whether the group was still planning on winter for their bombing campaign. E.R. 725:13-

[10] For the same reason, none of the conspirators referred to each other by their real name. McDavid was "D", Jenson was "Ollie", and Weiner was"Ren". Weiner did not even know McDavid's real first or last name. E.R. 1206.

726:2. Accordingly, Anna contacted McDavid by cell phone, indicated that she would be coming to California to visit a sick aunt, and asked if they could "meet up and discuss what we needed to discuss." E.R. 730:9-14. McDavid expressed excitement about that. E.R. 730:23.[11]

Meanwhile, Weiner made her own independent plans to go to California. Weiner testified that at some point after her meeting with Anna, she became dissatisfied with her living situation in Philadelphia and emailed McDavid and Jenson that she would like to join them in California. E.R. 1207:17-1208:4. After getting the go-ahead from McDavid, Weiner contacted Anna, whom she knew was going to be driving to California in the winter. E.R. 1208:10.[12] Anna agreed to give her a ride. E.R. 1208:10[13]

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[11] Anna's handler, Special Agent Ricardo Torres, testified that because it appeared that "a cell was coalescing around this bombing plan ... we decided it was extremely serious, that these individuals were going to move this bombing campaign forward. So in order to insure the safety of the public, you know, we took some steps to gain control of the situation. And one of which was to set the stage for a possible meeting among all the conspirators." E.R. 1111:3-12. Torres further testified that that meeting was very critical "because if they would have discussed some benign subjects, we'd breathe a sigh of relief and say, okay, let's move on. This is not a serious threat." E.R. 1112:4.

[12] Weiner could not recall if she learned that Anna was going to California from Anna or from McDavid. E.R. 1208:18.

[13] In his phone conversation with Anna, McDavid had asked her if Weiner would be coming also. E.R. 731:1. At that point, Anna asked Weiner if she would like to come too. According to

Weiner testified that she assumed that when she got to California the group would have further discussions about direct actions; she also testified that, after the August meeting, she had looked up books on explosives and researched targets. These books included The Poor Man's James Bond and, later, The Survival Chemist, both of which contained explosives recipes. E.R. 1209:17-1210:10.

E. November 2005: Foresthill, California

On the weekend of November 18-20, 2005, pursuant to their prior discussions, McDavid, Weiner, Jenson and Anna assembled in the Sacramento area. At McDavid's direction, the four met at his parents' home in Foresthill, California, and held further discussions during which plans were formulated to commit acts of eco-terrorism. E.R. 732:17-733:7. At the outset, McDavid gave the group an article written by Derrick Jensen that he encouraged the group to read. McDavid said he was inspired by Jensen's belief that "fence sitters" cannot be swayed and should be ignored. McDavid was also inspired by Jensen's suggestion of targets that included cell phone towers, fish hatcheries, and transit systems. E.R. 735:3-14; see S.E.R. Tab 3.

Anna, Weiner said she would, but did not know if she could come up with the money for an airline ticket. That prompted Anna to offer to pay for part of the ticket if Weiner could pay her back at some point. The two women then flew separately to California. E.R. 731:1-17. Weiner's testimony is consistent with Anna's except that Weiner was under the impression that Anna was giving her a free plane ticket. E.R. 1209:4.

After having dinner, the group settled in around a fire pit to discuss the bomb plot. Among other things, the group discussed "the bomb plot in general, bomb recipes that McDavid had, his desire to get more bomb recipes for the different explosives[,] targets that the whole group had in mind[,] [a]nd how to claim responsibility or how to go about finishing the actions that they were planning. E.R. 736:1-7.[14]

Anna testified that shortly after sitting down at the fire pit, McDavid informed the group that simply discussing what they were discussing was "conspiracy" and that they were broaching on the subject of "terrorism." E.R. 740:25-741:7. Jenson too recalled McDavid saying that the meeting itself constituted an act of conspiracy and that he was willing to go to jail for his beliefs. E.R. 1420:15-22. Weiner testified that she recalled McDavid saying that the conversation they were having was "illegal and we could go to jail for it." E.R. 1213:17.

1. Discussion About Targets

Anna testified that during the discussion at the fire pit, each of the members were asked to offer suggestions about

[14] In one of the recordings that the government played for the jury, McDavid explained to the group where he acquired his bomb recipe. He said he got it while he was protesting against the Massey coal company in West Virginia. S.E.R. Tab 4 at 44-45. This places the date of his acquisition of the recipe sometime after the Biotechnology Conference but before the Crimethinc Convergence. E.R. 710:4-11. It was, of course, after the Crimethinc Convergence that McDavid first approached Anna, Weiner and Jenson about forming a conspiracy. Supra, at 8-9.

potential targets. These included oil tankers, gas stations, cell phone towers, banks and ATMs, transit systems, and the U.S. Forest Service Institute of Forest Genetics (IFG) in Placerville. E.R. 741:14-742:6. This latter facility was McDavid's idea, E.R. 741:23-742:1, and in support of it he circulated among the group an article on genetically-engineered trees. E.R. 742:7-19. On the back of the article, in McDavid's handwriting, was the address of the facility. E.R. 742:20-743:10.

Weiner confirmed that each of these targets was discussed, and she provided the conspirators' point of view as to why each had merit: oil tankers and gas stations because they contribute to global warming, cell phone towers because of their effect on bird migration, and the "tree factory" because "we all had an issue with genetically modified organisms." E.R. 1214:6-1217:17.[15] Weiner also testified that targeting the "tree factory" was McDavid's idea. E.R. 1217:18-1218:4.

Co-defendant Jenson provided similar testimony about the targeting discussion. E.R. 1423:18-22. He also testified that Anna did not advocate for any particular target but asked a lot of questions and solicited the opinions of the others. E.R. 1424:1-12.

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[15] Co-defendant Jenson testified that "tree factory" was how they referred to the IFG. E.R. 1423:23.

2. Discussion About Use of Explosives

There was also a discussion that night about how the targets would be attacked. Anna testified that the discussion revolved around McDavid's planned recipe for the previously discussed C4 bombs. E.R. 743:15.[16] McDavid also mentioned wanting to get more explosives recipes because he did not think the C4 would cover all the targets that he had in mind. E.R. 743:15.

Anna also testified that during this discussion Weiner stated that from her research she knew a book, The Poor Man's James Bond, that contained explosives recipes. Upon hearing this, McDavid tasked her to get a copy of the book. E.R. 745:17-25. Weiner corroborated this account. E.R. 1219:2-9.

3. Claiming Responsibility

The group also discussed how to claim responsibility for their actions. That discussion involved whether they should claim responsibility on behalf of the Earth Liberation Front, with the countervailing argument being that doing so would attract the attention of the FBI. E.R. 746:1-22 (Anna); 1221:21-1222:3 (Weiner).

4. Next Meeting

At the end of the weekend, everyone understood that the group would reassemble after the first of the year to begin the

[16] Anna, Weiner, and Jenson each recalled McDavid discussing his recipe, which involved mixing bleach and ammonia to get a crystallized explosive. E.R. 745:4; 1219:2; 1424:13.

bombing campaign. E.R. 748:12-750:6 (Anna); 1223:3 (Weiner); 1424:24 (Jenson). They also agreed that: Weiner would obtain The Poor Man's James Bond; Anna was to find a secluded cabin; and when the group reconvened they would start planning actions. E.R. 750:7-17 (Anna); 1223:8-20 (Weiner).

F. December 2005

After the group separated at the end of the weekend, McDavid followed up on these discussions. On December 7, McDavid sent an email to Anna asking about any further bomb recipes she might have discovered since the meeting. E.R. 753:1-12. A few hours later, McDavid sent Anna two additional emails inquiring about explosives recipes and mentioning that "book about Poor James" that Weiner was getting. E.R. 753:13-755:5.

Anna had lengthy discussions with the FBI about how to respond to McDavid's requests for explosives recipes. Obviously, she could not provide him with a functional recipe. Therefore, after consulting with bomb technicians, the decision was made to have Anna provide him with a recipe that would not result in a bomb but might look like it would. E.R. 756:5-23. Accordingly, on December 7, Anna sent McDavid a coded email message containing a recipe for the "safe bomb." E.R. 757:1-14. Jenson was with McDavid when he received the email from Anna and helped McDavid decode it. E.R. 1431:15-1432:5

During this interim period, Weiner purchased not only The

Poor Man's James Bond but also The Survival Chemist, another book about explosives, both of which she provided to the group when they reconvened in January 2006. E.R. 1224:4.

G. January 2006: Dutch Flat, California

The group reconvened in January at a remote location in Dutch Flat, California. E.R. 768:5-18.[17] From January 8-13, 2006, the conspirators discussed plans to construct homemade explosive and incendiary devices, target commercial and government facilities with these destructive devices, and claim credit for these acts in a public communication that justified the group's actions.

1. January 8, 2006

The first night, there was no substantial discussion of the plot but the group did prepare a list of topics to be discussed the following morning. E.R. 770:7. Anna presented the group with a book that the group could use to record all of their ideas, targets, tactics, bomb recipes, and so forth, and then burn at the end. E.R. 770:18-771:5. There was some discussion about the wisdom of using the book, with Weiner initially being reluctant, but McDavid told her it would be safe because the book would ultimately be burned. E.R. 771:6-10; 1230:9-25. It

[17] The group accepted Anna's offer to arrange for a "safe house" in Northern California from which to operate. Prior to their arrival, agents installed audio/video surveillance equipment in the common areas of the residence.

thereafter became known as the Burn Book. E.R. 779:14. That night Anna wrote down the various topics raised by the group for the discussion the following day. The following morning she gave the book to McDavid who maintained control of it thereafter. E.R. 776:7-18; 1432:15.

2. January 9, 2006

The following morning, the group assembled to discuss the list of topics that had been drawn up the night before. E.R. 779:2. The discussion took several hours and included the following topics: surveillance, accidental death of civilians, target selection, and reconnaissance. E.R. 779:20-782:4. The entire conversation was recorded and several excerpts were played for the jury. E.R. 782:8-24; Gov't Ex. 30.

On the subject of accidental death of civilians, the group discussed the possibility that a security guard might be killed by one of their bombs. Although others in the group seemed troubled by the prospect, McDavid exhibited no such qualms when Anna tried to get him to reveal his feelings in the following exchange:

> Anna: What are your feelings? You seem pretty okay with it talking right now?
>
> McDavid: Yeah.
>
> Anna: Yeah. Collateral damage?
>
> McDavid: I wouldn't call it that.
>
> Anna: What would you call it?

McDavid: I don't know exactly what I'd call it.

(Laughter)

McDavid: I'd call it--

Anna: Oops.

McDavid: No, no. I wouldn't call it collateral damage though. I mean it's just like a guy died doing his job, apparently. Whatever he wants. Or, whatever they're gonna call it. They're gonna call it that.

Anna: Yeah. Right.

McDavid: They're gonna call it murder first of off, is what they're, what they're gonna call it.

E.R. 782:8-24; S.E.R. Tab 5 at 50.

Later in the conversation, the group acknowledged the gravity of their planned undertaking when Jenson expressed reservations about the prospect of an accidental death:

Jenson: That's like going a little bit too far for me. That, that, that's going into the area of like, I mean, we're already like technically going toward the area of terrorism, but that is like in the area of terrorism.

McDavid: No we are, we in--

Weiner: We are in the area of terrorism.

Jenson: I know. But it's more extreme.

Weiner: It's a matter of definition between your definition of terrorism and the U.S. Government definition of terrorism.

Jenson: Okay yeah.

Anna: Is it

McDavid: And legally speaking, your definition of

terrorism doesn't matter for shit.

S.E.R. Tab 5 at 52-53.

The group's discussion about targets covered many of the same facilities discussed on prior occasions including gas stations, cell phone towers, the IFG Placerville, factories and commerce institutions, dams and fish hatcheries. E.R. 785:20. The group also discussed: tracking procedures used by law enforcement, E.R. 786:13-787:8; methods of communication should the group have to split up, E.R. 789:12-20; internet research that needed to be conducted, E.R. 792:14-793:9; and other topics. The group also created a list of things to accomplish in the following three days. E.R. 794:12-795:6; 1241:16-22; 1433:18.

3. January 10, 2006

On January 10, 2006, McDavid and Anna engaged in internet research on dams and power stations while Jenson and Weiner investigated how to download the Google Earth program to look for satellite surveillance. E.R. 795:16-796:9; 1237:17-23. The government introduced several pages of material that the group downloaded as a result of this research. See generally S.E.R. Tab 2.

The group next went to the Nimbus Dam and Fish Hatchery, the Folsom Dam, and the IFG. E.R. 800:2-10; 1433-34. At the Nimbus Dam and Fish Hatchery, the group took a self-guided tour and discussed how to blow up the fish ladders so that the salmon

could continue to swim in the river rather than be directed into the hatchery. E.R. 801:7-802:5; 1242:5-1243:4.

The group next drove to the IFG in Placerville. E.R. 807:12-18; 1244:19. The plan was to park away from the facility so that their car could not be observed and to pretend to be college students. E.R. 807:19-808:16; 1244:23; 1434.4. Once there, McDavid did most of the talking. E.R. 808:18. Following his lead, each member of the group gave a fake name, and McDavid signed the guest book using a fake name followed by "group." E.R. 808:17-810:1; 1434:22. The government introduced the guest book at trial. E.R. 1566-67. As the group toured the facility, McDavid pulled out the Burn Book and began drawing a map of the facility, noting the location of surveillance cameras. E.R. 810:25-811:5; 1246:1-17. During the tour a USFS employee noted that there were scientists living on the premises, but McDavid was unphased and still considered the facility a viable target. E.R. 811:15-25.

4. January 11, 2006

On January 11, 2006, the group traveled to San Francisco to conduct further research and to buy materials for the explosives recipes. E.R. 815:2-13; 1246:18-25. The group felt that purchasing the components in different locations would make it more difficult for law enforcement to track them. E.R. 815:2-13; 1246:18-25. While in San Francisco, McDavid looked up the

locations and phone numbers for several chemical supply stores and began calling them to see if he could purchase items for his explosives recipe. E.R. 817:12-16; 1247:9-12; 1436:11-16.

On the way back from San Francisco, the group stopped at a WalMart and bought supplies for use in an explosives recipe including canning jars, a car battery, coffee filters, mixing bowls, a hot plate, bleach, a battery tester, and a battery hydrometer. E.R. 820:1-822:19; 1247:13-22.

5. January 12, 2006

For January 12, 2006, the Burn Book calendar said simply "Play with Toys" - a reference to mixing and testing the explosives recipe. E.R. 823:7-13; 1247:23. That was why the group purchased supplies the night before at WalMart, and the purpose of a trip that morning to Auburn was to purchase more supplies. E.R. 823:14-23. On the Auburn trip, McDavid purchased trick birthday candles to be used to create fuses for the explosives and Weiner purchased hair dye to help conceal aspects of her identity. E.R. 827:2-17; 1248:4-14. McDavid also bought two boxes of shotgun shells explaining that he intended to extract the gun powder for use in his fuses. E.R. 827:18-828:25; 1248:4-14.

Immediately upon returning to the cabin, McDavid began mixing the ingredients for the explosives recipe. E.R. 830:15; 831; 1248:15-20. While he was waiting for the bleach to boil, he

began breaking open the shotgun shells, extracting the black powder, and laying it down in lines. McDavid then scraped the wax off the trick candles and laid them at the end of the lines of black powder. E.R. 830:20-831:17; 1248:21-1249:6. The purpose of this was to time how long it took for the fuse to burn from start to finish. E.R. 831:18; 1249:4-6.[18]

After McDavid finished the fuse timers, he checked the hydrometer in the boiling mixture, saw that it had reached the correct reading, and turned the hot plate off to allow the mixture to cool. E.R. 834:8. The mixture, however, cooled too fast for the glass bowl on the metal burner and the glass shattered, causing the bleach and ammonia mixture to spill all over the burner and onto the ground. E.R. 834:13-21. This caused some harsh words to be exchanged and some tension in the group.[19]

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[18] Because Anna's role within the group was to be the medic, her job was to stand back and observe. E.R. 832:1.

[19] Three other events that day caused tension within the group as well as for Anna in particular. First, on the drive to Auburn that morning, a wire fell from the dashboard and when McDavid fiddled with the wire the recording device fell into his hand. Because Anna reacted quickly, McDavid did not realize what he was holding before she stuffed it back under the dashboard. E.R. 824:16. Second, as the group was leaving Auburn, Anna, who was driving, rolled through a stop sign and a CHP officer pulled her over. The group was very upset by this and Anna felt they were angry with her for allowing that to happen. E.R. 829:3-830:9. Third, that night there was a discussion about Anna's continued possession of her cell phone with Jenson in particular saying that it made him feel uncomfortable. The other members of the group did not carry one because they believed cell phones

That night the group vented their frustrations and considered possibly taking things a bit slower. E.R. 837:1-8. Because her own stress level was running high, Anna left the group for a period of time. See supra, n.17. When she returned, the rest of the group seemed calmer and more welcoming. E.R. 841:7. They showed Anna the new entries they had made in the Burn Book during her absence that established a new schedule for going forward with the plot. E.R. 841:20-831:7.

Jenson filled in some of the details of what went on during Anna's absence. He testified that the group discussed setting a schedule for each day so things would go a little more smoothly. E.R. 1440:12-16. He also testified that no one wanted to pull out of the conspiracy and that the plan was still to try to destroy federal or commercial property. E.R. 1440:23-1441:3. The plan for the following morning was to "go get some more supplies to try and put something together again." E.R. 1440:5.

6. January 13, 2006

The next morning, the group decided to return to Auburn to

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were a way for law enforcement to track them. E.R. 833:12-23. Because of these events and the shattering of the glass bowl, which caused Anna to believe that a great amount of evidence had been lost, her stress level was "sky high" and her undercover role was no longer secure. E.R. 835:20-836:8. That night, Anna excused herself from the group to take a walk but actually met with the FBI at their offsite location. She was very upset and did not believe she could continue in her undercover role much longer. She returned to the cabin with the understanding that the defendants would be arrested the following morning. E.R. 840:5-841:6.

purchase more supplies for making an explosive. E.R. 843:1-5; 1249:18-1250:8. The Burn Book contained a shopping list of things they needed to buy for that purpose. E.R. 843:6-20. After McDavid had purchased several items at a Kmart, including a mixing bowl, a respirator, bleach and ammonia, he was arrested in the parking lot along with the other defendants. E.R. 844:12-845:21. On the morning of January 14, 2006, the FBI Evidence Response Team conducted a search of the Dutch Flat residence. The team seized bomb-making literature, tools, and materials.

H. Lack of Evidence of Romantic Relationship

Although McDavid insinuated throughout the trial that there was a romantic relationship between himself and Anna, the evidence was to the contrary. First, Anna categorically denied any such relationship. E.R. 1099:19. Second, a tape recording that was played to the jury shows that on November 19, 2005, the defendant broached the subject with Anna and was shot down, Anna stating, "I don't not like you. I only like you," and that she wants to keep the relationship "professional".[20] S.E.R. Tab 7 at 63-64. Third, Anna told Lauren Weiner that, while she was aware of the defendant's attraction to her, she had no interest in the

[20] The defendant starts this discussion by stating that he couldn't recall if they had talked about this subject before. Anna replies, "You're right. We have not talked about this." That exchange is strong evidence that the only thing that existed prior to that time were the defendant's unilateral and unrequited desires. S.E.R. Tab 7 at 62.

defendant and that Weiner was free to pursue her interest in the defendant.

Nor is there any objective evidence of a romantic relationship between Anna and McDavid. When the group met in November at the Foresthill home of McDavid's parents, Anna shared sleeping quarters with Jenson, while McDavid and Weiner slept downstairs. E.R. at 1211:4-22. At Dutch Flat, Jenson took the bedroom that had two small beds, McDavid and Weiner shared a bedroom that had one large bed, and Anna slept on the couch. E.R. 1228:9-15. Further, while McDavid adduced no evidence that Anna ever came on to him, there is evidence that she discouraged - or at least did nothing to encourage - such a relationship.

Counsel misquotes the record when he asserts that Jenson testified that McDavid and Anna had a "physical relationship" which included "cuddling and sleeping together." A.O.B. 22. Asked to clarify the meaning of "physical relationship," Jenson said: "It was more just like cuddling, sleeping *next to each other*," E.R. 1549:14, which has a decidedly different implication than "sleeping together." Counsel also neglects to point out that Jenson testified seconds later that (1) McDavid had the same type of relationship with two other woman at that time, (2) that he never saw McDavid and Anna make out, (3) that in his opinion, Anna never encouraged a romantic relationship with McDavid, and (4) at one point, he was concerned that McDavid

was forcing himself on Anna. E.R. 1549-50.

SUMMARY OF ARGUMENT

1. The district court's inadvertent error in providing a written response to a jury note that was inconsistent with its oral response in open court was harmless beyond a reasonable doubt because the court's correct response to another juror question rendered the answer to the first question irrelevant.

2. Because a reasonable jury could have found that the conspirators plotted to attack the specific targets named in the indictment with the specific means identified in the indictment, there was sufficient evidence to convict McDavid of the charged conspiracy.

3. Because a rational jury could have found that either there was no government inducement or that McDavid was predisposed to commit the crime, McDavid was not entrapped as a matter of law.

4. The district court's instructions on "contact" was fully consistent with the law of entrapment. Predisposition can only be judged by using the crime charged as a reference point.

5. McDavid was not entitled to a lesser included offense instruction because 18 U.S.C. § 371 is not a lesser included offense of 18 U.S.C. § 844(n). As the district court concluded, on the facts presented, the jury could have found either that McDavid had violated both statutes or that he violated neither.

6. Because the government's evidence at trial tracked the allegations set forth in the indictment, there was neither a constructive amendment of the indictment or a fatal variance of proof at trial.

7. The district court properly denied McDavid's pretrial motions to suppress evidence and dismiss the indictment based on outrageous government conduct. The suppression motion was properly denied because consensually-monitored recording does not violate the Fourth Amendment. The motion to dismiss was properly denied because the government's conduct in this case was well within the bounds of reason.

8. McDavid's conviction did not violate due process because the evidence of guilt was overwhelming and errors, if any, were insufficient to deny the defendant a fair trial.

9. McDavid's sentence was legal because the district court properly calculated the advisory sentencing Guidelines, understood the advisory nature of the Guidelines, properly considered § 3553 factors, and imposed a sentence at the bottom of the applicable Guidelines based on his judgment that the resulting sentence was reasonable.

ARGUMENT

I. THE DISTRICT COURT'S ERROR IN PROVIDING A WRITTEN RESPONSE TO A JURY NOTE THAT WAS INCONSISTENT WITH ITS ORAL RESPONSE WAS HARMLESS BEYOND A REASONABLE DOUBT

A. Standard of Review

Fed. R. Crim. P. 52(a) provides: "Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." It is also true that "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." Cupp v. Naughten, 414 U.S. 141, 146-47 (1973).

Harmless error analysis applies even where a jury instruction omits an essential element of the offense. Neder v. United States, 527 U.S. 1, 9-10 (1999) (failure to instruct that materiality is an element of the offense in a tax case was harmless). In Neder, the Supreme Court found that despite the omission of the materiality instruction no jury could reasonably have found that Neder's failure to report substantial amounts of income on his tax returns was not "a material matter." Id. at 16; see also United States v. Bell, 303 F.3d 1187 (9th Cir. 2002) (omission of course of conduct element in interstate stalking

case was harmless because properly instructed jury would have found course of conduct requirement satisfied).

B. The District Court's Inadvertent Error Was Harmless

McDavid claims that the district court erred when it gave inconsistent answers to the jury's question, "Was Anna a government agent in August '04?" After consulting the parties, the court orally advised the jury in open court that the answer to that question was "yes." In a subsequent written answer, however, the response to that question was "no." McDavid asserts that the latter response eliminated the defense of entrapment and can therefore not be characterized as harmless.

In making this argument, McDavid neglects to mention that the question regarding whether Anna was a government agent in August 2004 - the month she first met McDavid at the Crimethinc Convergence in Des Moines - was immediately followed by the question, "What does contact mean?" The district court responded to this question by properly instructing the jury that, "Contact as used in the instructions 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." E.R. 226. The answer to this question essentially negated the relevance of the answer to whether Anna was an agent in August 2004. The district court told the jury that the proper focus of their attention was that point in time when there was

some communication regarding the crime at issue. Because it is undisputed that the first communication between Anna and McDavid regarding the crime at issue did not occur until at least July 2005, McDavid suffered no prejudice. No jury could reasonably have found that there was "contact" in August 2004, even if they had been properly instructed that Anna was a government agent at that point in time.

II. THE EVIDENCE WAS SUFFICIENT TO CONVICT McDAVID OF THE CHARGED CONSPIRACY

A. Standard of Review

The standard of review for determining the sufficiency of the evidence "is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Inzunza, 580 F.3d 894, 899 (9th Cir. 2009) (citing Jackson v. Virginia, 443 U.S. 307, 319 (1979)) (emphasis in original).

B. The District Court's Ruling

Following the close of the government's case in chief, McDavid moved for a judgment of acquittal on the grounds that the government had not established all the elements of the crime beyond a reasonable doubt. E.R. 1583:9. The district court denied the motion citing, among other things, McDavid's own words at the November meeting when he informed his compatriots that "even sitting here and talking about this I know is against the

law." E.R. 1584:1-20.

C. The Evidence Was Sufficient

McDavid devotes barely over one page of his brief to this argument. A.O.B. at 49-50. He contends that there was no evidence of an agreement as to the specific target to be attacked or the specific means to be used. Id. Neither argument has merit.

The indictment charged the defendants with conspiring to damage or destroy by means of fire or explosives (1) property owned by the U.S. Forest Service, (2) property owned by the U.S. Bureau of Reclamation, and (3) property used in interstate commerce including cell phone towers. E.R. 294.[21] The evidence adduced at trial, showed that the defendants discussed in November and again in January the desirability of bombing gas stations, cell phone towers, fish hatcheries, transit systems, banks and ATMs, and the USFS Institute of Forest Genetics (IFG) in Placerville. E.R. 741-42; 780-82. In January, they performed reconnaissance on the Nimbus Dam and Fish Hatchery, the IFG in Placerville, and took note of potentially vulnerable cell towers. E.R. 800-11.

This Court has held that the agreement which forms the basis

[21] The parties stipulated that cell phone towers are used in interstate commerce, that Nimbus Dam & Fish Hatchery is owned and operated by the U.S. Bureau of Reclamation, and that the IFG is owned and operated by the U.S. Forest Service. E.R. 1580:3-13.

for a conspiracy may be inferred from the defendant's acts or from other circumstantial evidence that the conspirators acted together for a common illegal goal. United States v. Hayes, 190 F.3d 949, 946 (9th Cir. 1999), as modified on reh. en banc 231 F.3d 663, 667; United States v. Cloud, 872 F.2d 846 (9th Cir. 1989); United States v. Penagos, 823 F.2d 346, 348 (9th Cir. 1987). This Court has also held that "[i]nferences of the existence of such an agreement may be drawn 'if there be concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose." United States v. Hubbard, 96 F.3d 1223, 1226 (9th Cir. 1996) (quoting United States v. Monroe, 552 F.2d 860, 862 (9th Cir. 1977)).

McDavid's assertion that there was no agreement is belied by the evidence. McDavid points to no evidence of any disagreement among the co-conspirators as to any of these targets, much less that, at the time of their arrests any of these targets were off the table. At most, it might be argued that the conspirators could have still changed their minds and spared the three targets named in the indictment. That, however, misapprehends the nature of conspiracy. Conspiracy is "a distinct evil" that "may exist and be punished whether or not the substantive crime ensues," United States v. Recio, 537 U.S. 270, 274 (2003). It is therefore not relevant that one or more targets may not have made

the final cut. A conspiracy is complete when the participants agree on the illegal purpose of the scheme and one of the co-conspirators performs an overt act in furtherance of that purpose. United States v. Monroe, 522 F.2d 860, 864 (9th Cir. 1977); United States v. Lothian, 976 F.2d 1257, 1262 (9th Cir. 1992); United States v. Boone, 951 F.2d 1526 (9th Cir. 1991). For the same reason, even assuming that the defendants were not settled on a final target, "[d]isagreements among participants in a conspiracy does not mean that they have not been and continue[] to be involved in the overall conspiracy." United States v. Alred, 144 F.3d 1405, 1415-16 (11th Cir. 1998) (divorce of two of the co-defendants that resulted in competition among the conspirators during the later stages of the conspiracy did not render evidence of the conspiracy insufficient absent affirmative evidence of withdrawal; therefore, defendant remained liable for the acts of co-conspirators after divorce).

Finally, it is a tall order to suggest that no reasonable jury could have found that the conspirators had settled on a method of attack. From the earliest discussions in August through their arrests in January, the defendants spoke about nothing but a bombing campaign. Throughout this period, McDavid searched for bomb recipes and exhorted Anna and Weiner to do the same. When the defendants visited proposed targets, such as the Nimbus Fish Hatchery and the IFG, they discussed how explosives

could be used to accomplish their purpose. Finally, in the latter stages of the conspiracy the defendants procured the requisite ingredients that they thought would result in a bomb and then attempted to construct it.

III. McDAVID WAS NOT ENTRAPPED

A. Standard of Review

McDavid correctly states that "[t]o 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." United States v. Williams, 547 F.3d 1187, 1197 (9th Cir. 2008). Further, the defense of entrapment fails "[i]f the defendant is predisposed to commit the crime." Id.; United States v. McClelland, 72 F.3d 717, 722 (9th Cir. 1995)("[i]f the defendant is found to be predisposed to commit a crime, an entrapment defense is unavailable regardless of the inducement.").

"[W]here, as here, the entrapment defense is submitted to the jury, an appellate court should not disturb the jury's finding unless, viewing the evidence in the light most favorable to the government, no reasonable jury could have concluded that the government had disproved either of the elements of the entrapment defense." United States v. Jones, 231 F.3d 508, 516 n.4 (9th Cir. 2000); Williams, 547 F.3d at 1197 n.8.

B. McDavid Was Not Entrapped

Viewing the evidence in the government's favor, a reasonable jury could have concluded the government disproved the elements of the entrapment defense. First, there was no inducement. The uncontradicted evidence is that the idea for this crime eminated from McDavid, not Anna. Once the crime was afoot, Anna merely played it out in order to ascertain the level of commitment of each of the conspirators. McDavid points to no trickery, persuasion or fraud on her part. At most, she provided financial assistance at various stages so that their true intent could be determined but this falls far short of inducement. Matthews v. United States, 485 U.S. 58, 66 (1988) ("[E]vidence that Government agents merely afforded an opportunity or facilities for the commission of the crime would be insufficient to warrant [] an [entrapment] instruction"); United States v. Jones, 231 F.3d 508, 517 (9th Cir. 2000).

Second, McDavid was predisposed to commit the crime. Predisposition is based on an analysis of five factors: 1) the character and reputation of the defendant; 2) whether the government made the initial suggestion of criminal activity; 3) whether the defendant engaged in the activity for profit; 4) whether the defendant showed any reluctance; and 5) the nature of the government's inducement. Williams, 547 F.3d at 1198. Although none of these factors controls, the defendant's

reluctance to engage in the criminal activity is the most important. Id.

1. Character and Reputation of the Defendant

There was ample evidence that McDavid was an avowed anarchist who had come to believe that legal protests no longer worked and needed to replaced with violent tactics. Anna saw this change in McDavid and so did Jenson. Supra, at 6, 6 n.4. His words and deeds at the Biotechnology Conference, and his acquisition of knowledge about the manufacture of explosives, support these observations. Moreover, this change was real and not fabricated for Anna's benefit. McDavid's had become an adherent of Derrick Jenson, whose interview justifying use violent tactics McDavid distributed to his fellow conspirators. S.E.R. Tab 3. In short, McDavid was not an individual who had to be "implanted" with the idea of committing violent protest.

2. Whether Government Made the Initial Suggestion

As previously noted, there is no evidence that the government made the initial suggestion for this criminal activity. To the contrary, Anna and both co-defendants testified that they were invited into the conspiracy by McDavid, whose idea it was to use explosives. Supra, at 9-10. Moreover, McDavid invited Weiner and Jenson into the conspiracy without Anna's knowledge. Supra, at 11. Anna only found out about this several weeks later when Weiner informed her of that fact. Supra, at 11.

3. Profit Motive

This is not, by its nature, a profit-motivated crime. However, McDavid's motivation to commit the crime - strongly held political beliefs - is arguably much stronger than a mere profit motive. Hence, the government submits that, to the extent this factor applies on the issue of predisposition, it cuts heavily against the defendant.

4. Reluctance

There is no evidence that McDavid showed any reluctance at any point during the life of this conspiracy, though there were certainly instances that afforded him opportunities to reflect on his course of action. Most notably, when McDavid is confronted with the harsh reality that innocent civilians might be killed by his actions, he seems unphased even though his compatriots found such an outcome unacceptable. S.E.R. Tab 5.

To the contrary, the evidence shows that McDavid was out front of the other conspirators, alternately directing Weiner to get the "Poor James" book, telling Anna to come up with more explosives recipes, and probing Jenson on his level of commitment. The evidence also showed that McDavid clearly understood that he was committing a crime, and that he nevertheless actively engaged in planning, researching, conducting reconnaissance, purchasing explosives ingredients, and attempting to construct a bomb. See United States v. Abushi, 682

F.2d 1289, 1297 (9th Cir. 1982) (no entrapment where defendants showed little resistance to participating in the transaction and were not concerned with the transaction's illegal nature).

5. Inducement

The final factor is the nature of the government's inducement. Here, however, the defendant has produced no evidence of any inducement. Case law defines inducement as "government conduct that creates a substantial risk that an otherwise law-abiding citizen will commit an offense." United States v. Manarite, 44 F.3d 1407, 1418 (9th Cir. 1995). Inducement can include "persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy or friendship." United States v. Davis, 36 F.3d 1424, 1430 (9th Cir. 1994). Inducement has also been defined as "'repeated and persistent solicitation' or 'persuasion' which overcomes the defendant's reluctance. Mere suggestions or the offering of an opportunity to commit a crime is not conduct amounting to inducement." United States v. Jones, 231 F.3d 508, 517 (9th Cir. 2000) (quoting United States v. Simas, 937 F.2d 459, 462 (9th Cir. 1991)); see also Matthews v. United States, 485 U.S. 58, 66 (1988) ("[E]vidence that Government agents merely afforded an opportunity or facilities for the commission of the crime would be insufficient to warrant [] an [entrapment] instruction.").

IV. THE DISTRICT COURT DID NOT ERR WHEN IT INSTRUCTED THE JURY ON ENTRAPMENT

McDavid claims that the district committed four separate errors with respect to the entrapment instructions. The government addresses each of these claims below.

A. Standard of Review

"Although a defendant 'is entitled to have the judge instruct the jury on his theory of defense, provided that it is supported by law and has some foundation in the evidence, ... [w]here the parties dispute whether the evidence supports a proposed instruction, [this Court] review[s] a district court's rejection of the instruction for abuse of discretion.'" United States v. Ambriz-Ambriz, 586 F.3d 719, 724 (9th Cir. 2009) (quoting United States v. Bello-Bahena, 411 F.3d 1083, 1088-89 (9th Cir. 2005)).

B. Time Frame for Consideration of Predisposition

During deliberations the jury asked for a definition of the word contact as used in Instruction 18.[22] The district court gave the following additional instruction: "Contact as used in the instruction is the time that you determine was the first time

[22] Instruction 18 used "contact" twice: it first told the jury that the government had the burden of proving that the defendant was predisposed to commit the crime "before being contacted by government agents." It then said: "Where a person, independent of and before government contact, is predisposed to commit the crime, it is not entrapment if government agents merely provide an opportunity to commit the crime." E.R. 270.

that there was some communication between the defendant and the Government agent about the crime charged in the Indictment." E.R. 226:19-22.

McDavid claims that the court's supplemental instruction improperly focused the jury's attention on June 2005, when the crime charged in the indictment was first discussed, rather than August 2004, when the defendant and informant first met. The argument is without merit.

First, as a preliminary observation, it is important to note that the district court specifically avoided focusing the jury's attention on any particular date, leaving that to their own deliberations. When a juror asked whether to consider June 2005 or August 2004, the court advised that the answer to that question would be found in the supplemental instruction on contact which he then re-read at the juror's request. E.R. 228:8-21.

Second, taken together the two instructions told the jury to determine when the subject of the bomb plot first came up and to work backward from there to determine if McDavid was predisposed to commit such a crime. Predisposition can only be judged by using the crime charged in the indictment as the reference point. In United States v. Thomas, 134 F.3d 975, 979 (9th Cir. 1998), for example, the court held that in an entrapment case, "evidence of prior good acts is admissible under Rule 404(b) to prove the

defendant's intent or state of mind as long as it 'bears meaningfully on the defendant's lack of a criminal disposition at the time of the government's inducement.'" (emphasis added); see also United States v. Barry, 814 F.2d 1400, 1402-03 (9th Cir. 1987) (in an entrapment case, "[e]vidence of prior acts ... must be sufficiently related and proximate in time to the crime charged to be relevant under Rule 403").

McDavid's analytical problem is that the uncontradicted evidence is that McDavid was the one who first raised the subject of the bomb plot with Anna, Jenson and Weiner. In other words, he induced them. It is therefore a bit odd - and it may have struck the jury as such - to ask the question whether McDavid was predisposed to commit a crime that he himself proposed. But because McDavid pursued an entrapment defense the jury was required to go through the analytical steps to determine predisposition. Given that state of affairs, it makes no sense to ask whether McDavid was predisposed to commit the crime at some earlier point in time, such as when he and Anna first met in August 2004. Suppose, for example, that instead of a 10-month gap between their first meeting and the first proposal to commit the crime, there was a 10-year gap. Would it make sense to inquire about McDavid's state of mind at the earlier time? The government submits that it would not.

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C. Answering a Juror Question Without Consulting Counsel

McDavid claims that when the juror asked whether they should consider June 2005 or August 2004, the court should have consulted counsel before responding. This claims is meritless.

On the afternoon of September 26, the jury submitted a number of questions to the court regarding predisposition and contact. With counsel present, the court informed the jury that responses would be provided the following day and asked if there were any other questions. E.R. 186. Juror 12 asked, whether the time frame for predisposition was June 2005 or August 2004. Id. The court noted the additional question and then released the jury for the day. Id. at 187. The following morning, the court reconvened out of the presence of the jury to discuss the jury's questions with counsel. During this discussion, defense counsel said, "I want that to be very clear for them, that they are not going to get direction from the court that contact means this exact date or something like that." E.R. 202:19.

When the court brought the jury back, he read them the additional instructions that had been discussed with counsel. He did not respond directly to Juror 12's question and so she repeated it. E.R. 224-228:9. Pursuant to the prior discussions with counsel, the court declined to give a time frame and directed the jury's attention to the instruction defining contact. E.R. 228:10-21. Accordingly, the district court

committed no error but simply repeated the agreed response.[23]

V. THE COURT DID NOT ERR BY DECLINING TO GIVE McDAVID'S REQUESTED "LESSER INCLUDED OFFENSE" INSTRUCTION

A. Standard of Review

"A defendant is entitled to an instruction on a lesser included offense if: (1) the offense contained in the instruction truly is a lesser included offense of that charged, and (2) the jury rationally could conclude that the defendant was guilty of the lesser included offense but not the greater." United States v. Nichols, 9 F.3d 1420, 1421 (9th Cir. 1993) (per curiam); United States v. Pedroni, 958 F.2d 262, 267-68 (9th Cir. 1992). "The first issue is reviewed de novo, while the district court's resolution of the second is reviewed for abuse of discretion." Id.

B. The District Court Properly Declined McDavid's Proposed Lesser Included Offense Instruction

McDavid asserts that § 371, the general conspiracy statute, is a lesser included offense of § 844(n), the arson conspiracy statute and that the jury should therefore have been given the option to convict on § 371. The district court properly rejected

[23] McDavid's remaining two arguments, that the court refused to instruct on a valid theory of entrapment and refused to instruct on inducement - are frivolous. The court gave standard pattern instructions on entrapment with supplemental instructions as requested by the jury. These adequately covered McDavid's defense. Because McDavid never submitted an inducement instruction, he cannot now claim it was error for the court not to give such an instruction, especially where inducement was adequately covered elsewhere.

that claim. In Sansome v. United States, 380 U.S. 343, 350 (1965), the Court held:

> "[a] lesser-offense charge is not proper where, on the evidence presented, the factual issues to be resolved by the jury are the same as to both the lesser and greater offenses . . . In other words, the lesser offense must be included within but not, on the facts of the case, be completely encompassed by the greater. A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense." (Citations omitted).

The reason is because "to hold otherwise would only invite the jury to pick between the felony and the misdemeanor so as to determine the punishment to be imposed, a duty Congress has traditionally left to the judge." Id. at 350 n.6.

Relying on Sansome, the district court properly found that "the jury could have only concluded Defendant violated both sections 371 and 844, or he violated neither. United States v. McDavid, 2008 WL 850307 at 11 (E.D. Cal. Mar. 28, 2008). The district court was correct. To convict under § 371, the government would have been required to prove that McDavid conspired to commit an offense against the United States. Under the facts of this case, that "offense" would have been §§ 844(f) and 844(*i*). To convict under §844(n), the government was required to prove that McDavid conspired to violate §§ 844(f) and

844(*i*).[24]

VI. THERE WAS NEITHER CONSTRUCTIVE AMENDMENT OF THE INDICTMENT NOR FATAL VARIANCE OF PROOF AT TRIAL

McDavid claims that either a constructive amendment of the indictment or a fatal variance of proof at trial occurred. A.O.B. at 53. The district court correctly rejected this claim finding that the proof at trial was fully consistent with the charges contained in the indictment. United States v. McDavid, 2008 WL 850307 3-4 (E.D. Cal. Mar. 28, 2008).

A. Standard of Review

The Court reviews de novo allegations of due process violations. United States v. Chang Da Liu, 538 F.3d 1078, 1087 (9th Cir. 2008); United States v. Bhagat, 436 F.3d 1140, 1145 (9th Cir. 2006).

B. Constructive Amendment

"A constructive amendment exists if 'there is a complex of facts presented at trial distinctly different from those set forth in the [indictment],' or if 'the crime charged in the indictment was substantially altered at trial, so that it was impossible to know whether the grand jury would have indicted for the crime actually proved.'" United States v. Bhagat, 436 F.3d 1140, 1145 (9th Cir. 2006) (quoting United States v. Adamson, 291

[24] In setting forth the elements of § 371, McDavid neglects to mention the "offense against the United States" element. A.O.B. 52.

F.3d 606, 615 (9th Cir. 2002)).

The indictment charges McDavid with conspiring to damage or destroy by means of fire or an explosive three named targets: (1) property owned by the U.S. Forest Service, (2) property owned by the U.S. Bureau of Reclamation, and (3) cellular telephone towers and electrical power stations. E.R. 293-95. In setting forth overt acts, the indictment specifically names the IFG and the Nimbus Dam and Fish Hatchery. The evidence at trial amply demonstrated that the defendants discussed each of these targets, that the group visited the IFG and fish hatchery, and noted the location of cell towers that would be vulnerable to their attack. In other words, the crime with which McDavid was charged was the crime for which he was convicted. McDavid's argument, therefore, fails because 1) the facts presented at trial were not distinctly different from those set forth in the indictment, and 2) the crime charged in the indictment was not altered at trial such that it would be impossible to know whether the grand jury would have indicted for the crime actually proved. The facts and the charges remained the same.

C. Material Variance

"'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.'" United States v. Von Stoll, 726 F.2d 584, 586 (9th

Cir. 1984) (quoting United States v. Cusumano, 659 F.2d 714, 718 (6th Cir. 1981)).

For the reasons previously expressed, the evidence offered at trial did not prove facts materially different than those alleged in the indictment. Therefore, there was no material variance. See United States v. Garcia-Paz, 282 F.3d 1212, 1215-16 (9th Cir. 2002) and United States v. Hartz, 458 F.3d 1011, 1019-21 (9th Cir. 2006), rejecting claims similar to those raised by McDavid.

VII. THE DISTRICT COURT CORRECTLY DECIDED THE McDAVID'S PRETRIAL MOTIONS

A. Motion to Suppress

McDavid moved pre-trial to suppress audio and video recordings from the cabin. C.R. 132; E.R. 484-492. The district court correctly denied the motion, explaining that no illegal wiretap or warrantless seizure of audio and video had occurred. E.R. 492.

1. Standard of Review

This Court reviews de novo a district court's denial of a motion to suppress. United States v. Terry-Crespo, 356 F.3d 1170, 1173 (9th Cir. 2004) (citing United States v. Jones, 286 F.3d 1146, 1150 (9th Cir. 2002)). Factual findings are reviewed for clear error. Id.

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2. The Location of the Recording Devices

Commencing with the November gathering at Foresthill, audio and video recording devices were used to consensually monitor the defendants' activities and conversations. Anna typically wore a concealed body recorder when she was in the defendants' presence. Additionally, the FBI-owned vehicle that Anna drove was equipped with a video and audio recorder. Finally, the FBI installed a audio and video recording equipment in the common areas of the Dutch Flat cabin that it had rented for the group in January.[25]

3. Consensual Audio and Video Recording Is Legal

Consensual audio and video recording is authorized under 18 U.S.C. § 2511(2)(c). As well, the Supreme Court has clearly "adopted the principle that, if a person consents to the presence at a meeting of another person who is willing to reveal what has occurred, the Fourth Amendment permits the government to obtain and use the best available proof of what the latter person could have testified about." United States v. Lee, 359 F.3d 194, 200

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[25] McDavid mischaracterizes the testimony when he states that Anna testified that "every room and every corner of the house could be heard by the agents listening in." A.O.B. at 56, n.49. His citation to the record reveals only the following unenlightening question and answer:

> Q. And also the cabin itself was wired for sound and video?
>
> A. Yes, it was.

E.R. 782:13.

(3d Cir. 2004) (citing Lopez v. United States, 373 U.S. 427 (1963), Hoffa v. United States, 385 U.S. 293 (1966), United States v. White, 401 U.S. 745 (1971) (plurality), and United States v. Caceres, 440 U.S. 741 (1979)).

It is too late in the day to argue that consensual monitoring of a suspect's conversations violates the Fourth Amendment. In On Lee v. United States, 343 U.S. 747(1952), the defendant argued that the informant's entry on his property was a trespass because the entry was obtained by fraud because he did not tell him the true purpose of his entry, which was to obtain recorded conversations. Id. at 753; see also United States v. Jacobsen, 466 U.S. 109, 123 (1984) ("Government may utilize information voluntarily disclosed to a governmental informant, despite the criminal's reasonable expectation that his associates would not disclose confidential information to the authorities."); United States v. Caceres, 440 U.S. 741, 750 (1979) ("If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks."); Katz v. United States, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public,

even in his own home or office, is not a subject of Fourth Amendment protection."); Lopez v. United States, 373 U.S. 427 (1963) (concluding that the suspect had assumed the risk that the conversation "would be accurately reproduced in court, whether by faultless memory or mechanical recording.")

Moreover, this rule applies even if the conversations occurred in a place in which the suspect would otherwise have a heightened expectation of privacy for Fourth Amendment purposes. In Hoffa v. United States, 385 U.S. 293, 296-301 (1966), the Court held that because the informant was invited into the suspect's hotel room, the suspect "was not relying on the security of the hotel room; he was relying upon his misplaced confidence that [the informant] would not reveal his wrongdoing." Id. at 302. Therefore, the Fourth Amendment is not implicated even though hotel room has the same Fourth Amendment protection as a home or office. Id. at 301.

The cases cited by McDavid do not alter this analysis. In United States v. Nerber, 222 F.3d 597 (9th Cir. 2000), this Court affirmed the proposition that the "defendants had no reasonable expectation that they would be free from hidden video surveillance while the informants were in the room." Id. at 604. The crucial question there was what happens when the informant was not in the room, a problem not raised in this case.

The other case McDavid cites, United States v. Koyomejian,

970 F.2d 536 (9th Cir. 1992) did not involve consensual monitoring, but rather court authorized installation of recording equipment in the defendant's offices. The case therefore has no application here.

4. Recordings Outside the Informant's Presence

The United States explained to the agents monitoring the cabin that they were not permitted to record when the informant was out of the room; this session is what the United States called its "minimization" instructions.[26] As McDavid states, the United States did inform the defendant and the district court that a few accidental recordings occurred when agents did not realize that the informant had left the room, for instance, to use the bathroom. These recordings were not used at trial and McDavid does not cite to any witness testimony based on the mistakenly-recorded videos. McDavid has suffered no harm.

B. Outrageous Government Conduct

McDavid seeks reversal of his conviction and dismissal of the underlying indictment based on allegations of outrageous government conduct. A.O.B. at 59-61. As McDavid's claims do not satisfy the definition of "outrageous government conduct" they should be denied.

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[26] While "minimization" is used in wiretap cases so as not to record non-pertinent calls, it was an apt analogy when explaining that the recordings could not occur outside the informant's presence. The United States is well aware that wiretaps require an order from a federal judge of competent jurisdiction. See 18 U.S.C. §§ 2516, 2518.

1. Standard of Review

The Court 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).

2. Legal Framework

In United States v. Russell, 411 U.S. 423, 432 (1973), the defendant argued that the government's outrageous conduct in creating his crime was so great that a criminal prosecution for the crime would violate due process, notwithstanding his predisposition to commit the crime. In an opinion written by then-Justice Rehnquist, the Court soundly rejected that argument stating, "the defense of entrapment ... was not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve." The Court then stated, "[w]hile we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction ... the instant case is distinctly not of that breed." Id.

Seizing upon this dictum,[27] the defendant in Hampton v.

[27] As the circuit court aptly observed in United States v. Tucker, 28 F.3d 1420, 1422-24 (6th Cir. 1994), the "may some day" language of Russell was not only dicta, but was inconsistent with the Court's rejection of the "objective" approach to entrapment which sought to place the focus of the defense on examination of

United States, 425 U.S. 484 (1976), attempted to construct an outrageous misconduct defense rooted in the due process clause. Hampton lost his case but succeeded in legitimating the doctrine, albeit precariously. Writing again for the Court, then-Justice Rehnquist attempted to retract his "maybe someday" dicta by stating, "The remedy of the criminal defendant with respect to the acts of Government agents lies solely in the defense of entrapment." Id. at 490. Justice Rehnquist's recantation, however, failed to gain a majority in Hampton because two justices who had joined him in the majority in Russell wrote separately and were unwilling to lay down a categorical rule that limited the analysis solely to predisposition.

Today, over 30 years after Hampton, the possibility that an indictment could be dismissed for outrageous government conduct is still the subject of considerable debate, with many courts conceding the theoretical possibility, but few finding the appropriate case to apply the doctrine.

This court has held that a defendant may raise a due process-based outrageous government conduct defense to a criminal indictment, but has observed that "the due process channel which Russell kept open is a most narrow one." United States v. Stenberg, 803 F.2d 422, 429 (9th Cir. 1986). "For a due process dismissal, the Government's conduct must be so grossly shocking and so outrageous as to violate the universal sense of justice." United States v. Smith, 924 F.2d 889, 897 (9th Cir. 1991);

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the government's conduct rather than the predisposition of the defendant.

United States v. So, 755 F.2d 1350, 1353 (9th Cir. 1985); United States v. Ramirez, 710 F.2d 535, 539 (9th Cir. 1983); United States v. Citro, 842 F.2d 1149, 1152 (9th Cir. 1988). The Government's involvement must be malum in se or amount to the engineering and direction of the criminal enterprise from start to finish. Smith, 924 F.2d at 897; Citro, 842 F.2d at 1153. This is an "extremely high" standard. Smith at 897. The police conduct must be "repugnant to the American system of justice." Smith at 897; Shaw v. Winters, 796 F.2d 1124, 1125 (9th Cir. 1986) (quoting United States v. Lomas, 706 F.2d 886, 891 (9th Cir. 1983)). In general, that standard is met only when the police completely fabricate the crime solely to secure the defendant's conviction. United States v. Franco, 136 F.3d 622, 629 (9th Cir. 1998); United States v. Emmert, 829 F.2d 805, 813 (9th Cir. 1987).

This court has repeatedly rejected claims of outrageous government conduct on facts more egregious than this case: United States v. Gurolla, 333 F.3d 944, 950 (9th Cir. 2003) (government informant pretended to be an experienced money launderer, approached the defendant, proposed that they launder money, and then provided the money to be laundered); United States v. Haynes, 216 F.3d 789, 797 (9th Cir. 2000) (government informant encouraged defendants to engage in new criminal activity); United States v. Franco, 136 F.3d 622, 629 (9th Cir. 1998) (government informant supplied precursor chemicals used to manufacture illegal drugs); United States v. Garza-Juarez, 992 F.2d 896, 904 (9th Cir. 1993) (government agent initiated all

contacts, raised subject of illegal firearms, and offered to supply materials); United States v. Hart, 963 F.2d 1278, 1283-84 (9th Cir. 1992) (government used an informant who befriended the defendant allegedly during a time of emotional turmoil and induced him to buy drugs); United States v. Winslow, 962 F.2d 845 (9th Cir. 1992) (undercover agent purchased beer and food for defendants, paid for a trip to Seattle, and paid for bomb components in connection with a plot to detonate a bomb at a gay bar in Seattle); United States v. Berrera-Moreno, 951 F.2d 1089, 1092 (9th Cir. 1991) (government failed to be aware of and stop informant's use and distribution of cocaine and falsely asserted that informant was tested for drug use); United States v. Citro, 842 F.2d 1149, 1152-53 (9th Cir. 1988) (undercover agent proposed and explained details of credit card scheme and supplied defendant with counterfeit credit cards); United States v. Simpson, 813 F.2d 1462, 1465-71 (9th Cir. 1987) (continued use of a known prostitute after the government became aware that she was having sex with the suspect); United States v. Stenberg, 803 F.2d 422, 430 (9th Cir. 1986) (the commission of equally serious offenses by an undercover agent as part of the investigation); Shaw v. Winters, 796 F.2d 1124, 1125 (9th Cir. 1986) (use of false identities by undercover agents); United States v. Wiley, 794 F.2d 514, 515 (9th Cir. 1986) (government introduced drugs into a prison to identify a distribution network); United States v. Williams, 791 F.2d 1383, 1386 (9th Cir. 1986) (the assistance and encouragement of escape attempts); United States v. So, 755 F.2d 1350, 1353 (9th Cir. 1985) (creative inspiration for money

laundering operation came from defendant, while Government provided funds and opportunity to launder money).

Even crediting McDavid's exaggerated claims, McDavid has not met his burden of showing outrageous government conduct. Anna's original job was to report on potential real-time threats to public safety during protests. In the roughly year and a half prior to re-encountering McDavid at the Philadelphia Biotechnology Conference, Anna never identified any individual worthy of specific investigation, nor did she have a motive to do so. When she encountered the newly radicalized McDavid, she reported his statements and the FBI asked her to keep tabs on him. That was eminently reasonable as was born out a few weeks later when McDavid invited Anna to join him in a bombing campaign. Even then, the FBI did not aggressively pursue the matter. It was not until Anna learned in October, 2005 that McDavid had invited Weiner and Jenson into the plot, that the FBI tasked Anna with following up on the bomb plot discussions. From there, Anna merely played out her role as a co-conspirator in order to determine the degree of commitment of the co-conspirators and the contours of the plot.

3. Public Statements

McDavid argues that the indictment should be dismissed because during the two week period between arrest and indictment "numerous press conferences and press releases that 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. States Attorney's Office."

A.O.B. at 61.

McDavid's brief does not attempt to identify each of these outrages, undoubtedly because it is not an impressive list, but a summary can be found in Exhibit A to McDavid's pretrial motion. E.R. 401. A total of six documents are identified. Two of the documents are very short news articles - one from the Sacramento Bee and one from the L.A. Times - reporting on the arrest of the defendants. E.R. 401, 402. The next document is a one paragraph statement reporting on arraignment of the defendants apparently taken from the website of a Sacramento television station. E.R. 403. The next document is a press release issued by the Department of Justice announcing a 65-count indictment in an unrelated Oregon case involving individuals acting on behalf of the Animal Liberation Front and the Earth Liberation Front. The press release does not mention the McDavid case or any of the defendants. E.R. 403. The next document is a press release from the U.S. Attorney's Office announcing the indictment of the defendants and providing a completely factual summary of the charges together with the disclaimer that "the charges are only allegations and the defendant is presumed innocent until and unless proven guilty beyond a reasonable doubt." E.R. 405-07. The final document is an article from the Auburn Journal reporting on the indictment and a press conference held by the U.S. Attorney.

Thus, despite McDavid's histrionics, he can point to no press releases and no news conferences regarding the case between arrest and indictment that might have infected the grand jury's

decision making, and only a rather tepid response from the media.

4. Interference with Attorney Relationship

McDavid's hyperbolic claim that the government's said that his attorney was a subject or target of a grand jury investigation is groundless. In a very early hearing in the case, the Federal Defender's Office indicated that, due to their representation of Ryan Lewis, they might have a conflict representing one of the defendant's in this case and would have to substitute out. E.R. 301. In an document barely over a page in length, the government advised the court: "If this is indeed the reason for the substitution, the government notes that Mark Reichel, who presently represents Eric McDavid, was an Assistant Federal Defender in the OFD while that office represented Lewis. The government is not suggesting that Mr. Reichel has an actual conflict, but given the OFD's action, and out of an abundance of caution, the court may wish to inquire into whether there is a conflict or potential conflict." E.R. 301, 302; C.R. 38.

The government's innocuous suggestion prompted a 10-page brief and a two page declaration from Mr. Reichel. C.R. 43. In his declaration, Mr. Reichel minimized his involvement in the Ryan Lewis case, stating that he only met Lewis on two occasions, never discussed his case with him, and never received any confidential communications from him. Id. at 12.

Mr. Reichel's declaration compelled the government to inform the court at the February 21, 2006, hearing that it had information contradicting various statements in Reichel's declaration about the timing and nature of Mr. Reichel's

relationship with Ryan Lewis. E.R. 307-08. The government then improvidently told the court that some of its knowledge came from "a Grand Jury witness tampering investigation that has evidence that Mr. Reichel has been in touch with the Lewises at least one month ago." E.R. 308:4. There is absolutely no support for McDavid's claim that the government threatened to indict Reichel or said that he was a subject or target of an investigation, as he now claims in his brief. A.O.B. 59, 60. Nor did McDavid suffer any prejudice from the alleged misconduct. Reichel remained his attorney throughout the proceedings even to the present appeal.[28]

VIII. McDAVID'S CONVICTION DID NOT VIOLATE DUE PROCESS

McDavid asserts that cumulative errors during the course of the proceedings have denied him due process of law. See A.O.B. at 62. Throughout this brief, the government has dismantled McDavid's myriad claims of error. If any error did occur it was minor, and certainly there was not an aggregation of harmless errors sufficient to deny McDavid a fair trial under due process.

A. Standard of Review

Allegations of due process violations are reviewed de novo. United States v. Chang Da Liu, 538 F.3d 1078, 1087 (9th Cir. 2008).

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[28] "A claim of outrageous government conduct premised upon deliberate intrusion into the attorney client relationship will be cognizable where the defendant can point to actual and substantial prejudice." United States v. Stringer, 535 F.3d 929, 941 (9th Cir. 2008).

B. Discussion

"In those cases where the government's case is weak, a defendant is much more likely to be prejudiced by the effect of cumulative errors." United States v. Frederick, 78 F.3d 1370, 1381 (9th Cir. 1996). As this Court has noted, "This is simply the logical corollary of the harmless error doctrine which requires us to affirm a conviction if there is overwhelming evidence of guilt." Id. (citations omitted). Further, the Ninth Circuit has said that it "is particularly sensitive to allegations of prejudice where ... the convictions are based on the largely uncorroborated testimony of a single accomplice or co-conspirator." United States v. Wallace, 848 F.2d 1464, 1476 (9th Cir. 1988).

McDavid's is not a case where the government's evidence was weak or one in which it relied on the largely uncorroborated testimony of a single accomplice or co-conspirator. As set forth above, the evidence at trial was from a variety of sources - recordings of McDavid's own and his co-conspirators' plans, visits to locations for "reconnaissance", testimony of those co-conspirators and a cooperating witness, receipts from retail stores, drawings and journal entries, and other evidence demonstrating that McDavid espoused "direct action" and was a member of the violent environmental movement - and the government did not rely on one form or channel of evidence.

McDavid's brief is a laundry list of allegations supported mostly by bluster and the inappropriate garnering and use of juror declarations. Like the defendant in United States v. Inzunza, 580 F.3d 894 (9th Cir. 2009), McDavid lost his motions for acquittal and new trial before the district court and appealed on a wide variety of issues. Inzunza's appeal included issues such as: insufficiency of the evidence; insufficiency of the honest services mail fraud indictment, jury instructions and constitutionality of the statute;[29] the government's failure to disclose Brady and witness statements of the indictment; and objections to the content of the government's closing argument. Id. at 899-911. McDavid has presented this Court with a similarly long litany.

The Inzunza Court rejected the defendant's arguments and determined that no cumulative error occurred. Id. at 1381-82. It wrote, "The trial in this case lasted several weeks and involved extensive closing argument. We have discussed nearly all of Inzunza's claims of error, and we find no merit in the remaining claims that we have not discussed. In light of the sheer scale of this case, we hold that the isolated errors exhaustively catalogued by Inzunza do not support reversal in the

[29] The Ninth Circuit is staying its mandate in this case to await the decision of the Supreme Court in United States v. Weyhrauch, 548 F.3d 1237 (9th Cir. 2008), cert. granted, __ U.S. __, 129 S.Ct. 2863 (2009). The issue before the Court relates to the elements of honest services mail fraud.

aggregate." Inzunza, 580 F.3d at 1381; see also United States v. Larson, 460 F.3d 1200, 1217 (9th Cir. 2006) ("Having discovered no error in [the defendants'] trial, we reject this [cumulative error] argument as well."). Likewise, this Court should reject McDavid's claim of cumulative error here.

IX. McDAVID'S SENTENCE WAS NOT ILLEGAL

McDavid argues that the district court 1) committed procedural error when calculating the applicable advisory Sentencing Guidelines, and 2) imposed an unreasonable sentence in light of the 18 U.S.C. § 3553(a) sentencing factors. A review of the judgment and sentencing transcript, E.R. 1927-1993, demonstrates that during the court appearance, which lasted approximately one and one-half hours, E.R. 1993, the district court: correctly determined the advisory Guideline range; stated clearly that it knew the Guidelines were advisory and that it was not bound by that range; considered McDavid's arguments under § 3553(a); and permitted family members to speak on behalf of McDavid at the sentencing. The 235-month sentence is at the low end of the Guidelines range, and given the information before the district court, from pleadings, trial testimony and observations, and argument, the sentence is reasonable, below the statutory maximum, and no longer than necessary to comply with the purposes set forth in 18 U.S.C. § 3553(a)(2).

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A. Standard of Review

This Court must review sentencing decisions for significant procedural error regardless of whether the issue was raised on appeal. United States v. Ressam, __ F.3d __, 2010 WL 347962 *17 (9th Cir. Feb. 2, 2010). An abuse of discretion standard applies. Id. This Court also reviews "the district court's interpretation of the Guidelines de novo, the district court's application of the Guidelines to the facts of the case for abuse of discretion, and the district court's factual findings for clear error." United States v. Treadwell, __ F.3d __, 2010 WL 309027 *7 (9th Cir. Jan. 28, 2010) (citing United States v. Lambert, 498 F.3d 963, 966 (9th Cir. 2007)). It is an abuse of discretion for a district court to apply the Guidelines to the facts in a way that is "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." Treadwell, 2010 WL 309027 *7 (quoting United States v. Hinkson, 585 F.3d 1247, 1263 (9th Cir. 2009)) (en banc).

B. No Procedural Error Occurred in the Sentencing Decision

In Ressam, this Court reiterated identified examples of what the Supreme Court considers significant procedural error: 1) failing to calculate (or improperly calculating) the Guidelines range; 2) treating the Guidelines as mandatory; 3) failing to consider the § 3553(a) factors; 4) selecting a sentence based on clearly erroneous facts; and 5) failing to adequately explain the

chosen sentence - including an explanation for any deviation from the Guidelines range. Id. (citing Gall v. United States, 552 U.S. 38, 51 (2007)) (emphasis from Ressam decision omitted).

McDavid argues that the district court committed procedural error, alleging that "the court gave no indication it had considered [the] 3553(a) arguments or any of the § 3553(a) factors" and "did not address the disparity argument." A.O.B. at 64-65, 66. McDavid also claims that the advisory Guidelines range was improperly calculated because the government targets were not established to a reasonable certainty, id. at 67, nor was a "'finding' made that the group 'knowingly' created a substantial risk of death or serious bodily injury." Id. at 68. McDavid wrongly argues that juror statements as to these issues are vital and should be considered. Id.

1. The Guidelines Range Was Calculated Correctly

First, the district court calculated the advisory Sentencing Guidelines range correctly. McDavid was convicted of conspiring to Damage or Destroy Government Property by Means of Fire or Explosive. 18 U.S.C. §§ 844(f)(1), (n). The base offense level for that conviction is 24 under both § 2K1.4(a)(1)(A) and (B). Pursuant to subsection (a)(1)(A), the base offense is 24 if the offense created "a substantial risk of death or serious bodily injury to any person ... and that risk was created knowingly."

The district court asked the defense attorney:

> Mr. Reichel, I know you recall, as I did, the testimony as well as the very detailed exhibits regarding the Institute of Forrest Genetics as far as the visits, the maps, and the locations that were designated on the maps as to where various parts of buildings were, where people were located.
> Where does that fit in as far as your argument that this is not involving federal lands or property, if you will?

E.R. 1943. Defense counsel did not answer this question then, nor now, but instead backpedaled into a prior argument that had been decided in McDavid's post-trial motions - whether the jury actually picked one of the specific targets listed in the indictment. Id.

There was testimony regarding the IFG and the examples the district court identified above, and further, there was testimony from Randy Meyer, a laboratory technician at the Institute of Forest Genetics. E.R. 1563-1579. Meyer testified about locations that McDavid drew on the map of the IFG in the "burn book", entered into evidence. See S.E.R. Tab 1 at 2 (drawn map), 3 (IFG public map). In particular, Meyer noted that the map contained a drawing of housing for scientists and students, and Meyer testified that in early 2006 there were rooms available and there was "a long-term scientist that would have been right there." E.R. 1572. Meyer also testified that the defendants would have seen large propane tanks in plain view on the property. E.R. 1574-75. The burn book map of the IFG additionally had a notation where the greenhouse is located, marked "GH", and right next to it is a clearly marked chemical storage building. E.R. 1576. Meyer testified that the IFG has a

mandatory response plan filed with the El Dorado County Fire Department, id., because in the chemical storage shed "[t]here is chemicals in there that if they start fire are toxic, and your first responders need to know that before they go in. There could be an occasion where they let [the IFG] burn and get people evacuated from the area ... Just about any of our buildings up there if they burnt would release some kind of toxic gas or smoke." E.R. 1577. In light of this plain and uncontested testimony, McDavid cannot, and in fact does not, claim that he did not know that setting fire to the IFG would create a substantial risk of death or serious bodily injury to persons other than the defendant and his co-conspirators.

Subsection 2K1.4(a)(1)(B) also allows for a base offense level of 24 if the offense involved the "attempted destruction of a ... government facility ...." McDavid does not contest that the IFG is a facility of the United States Department of Agriculture, United States Forest Service, and signed a stipulation to that effect. E.R. 1580.

Sentencing Guidelines Manual section 2X1.1 allows the base offense level to be reduced by 3 if the offense was a conspiracy. U.S.S.G. § 2X1.1(b)(2). At this point in the calculation, McDavid's offense level is 21.

Finally, because this crime is a "felony that involved, or intended to promote, a federal crime of terrorism," the offense level is increased by 12, U.S.S.G. § 3A1.4(a), and McDavid's total offense level is 33. This Guidelines section also mandates that a defendant's criminal history category "shall be Category

VI." U.S.S.G. § 3A1.4(b). McDavid first argues that his conviction is not a federal crime of terrorism, as defined in 18 U.S.C. § 2332b(g)(5), because evidence did not exist to prove that the offense was "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." 18 U.S.C. § 2332b(g)(5)(A).

The evidence demonstrates that McDavid targeted the IFG to retaliate against the government's support and funding of a world-renowned forestry science facility dedicated to research, disease resistance, and molecular genetics and genomics. In a single recording McDavid expresses his "problem" with genetically modified organisms, S.E.R. Tab 6 at 56, particularly the trees grown at IFG because in his view "[T]hey're doing it with pine trees so that they can grow the pine trees faster so they can chop them down sooner. For that turnover, for logging purposes." Id. McDavid also explained to Weiner that they would be attacking the IFG buildings: "No. I wouldn't burn down the trees. I'd just throw a little bit of plastic explosive at the base of every single one of them." Id. at 59. McDavid also expressed interest in using Molotov cocktails against the IFG. "McDavid: Fuck it, Molotov. / Anna: Molotov the place? / McDavid: Yeah. It's easy." Id. at 60.

McDavid's second argument is that an automatic increase in Criminal History Category to Category VI, has "a disproportionate impact on the ultimate sentence imposed." A.O.B. at 69. As the

district court stated, "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 repercussion." E.R. 1973-74.

McDavid himself admitted that he was committing a terroristic crime. A recording preserved his comments about murder, collateral damage, and terrorism. See S.E.R. at Tab 5. ("... And legally speaking, your definition of terrorism doesn't matter for shit.") McDavid's arguments about the terrorism enhancement seem hollow as he knew that he was committing a crime against the United States and would be held accountable if caught.

2. The District Court Did Not Treat the Guidelines as Mandatory and Did Address the § 3553(a) Factors

Throughout the judgment and sentencing, the district court repeatedly stated that it knew it was not bound by the Guidelines range, and that it considered all of McDavid's sentencing filings, objections, argument, character letters, and testimony. E.R. 1929, R.T. J&S at 4, 1931, 1932, 1933, 1939, 1940, 1945, 1958, 1959, 1972-73. The district court also asked specific questions of defense counsel regarding counsel's various assertions and issues. E.R. 1937-38, 1943, 1969-70, 1971, 1972-73. To claim that "the record is void of any evidence indicating that the district court considered all of the § 3535 [sic] factors," and that the court rushed the sentencing by "next"-ing

defense counsel is wildly inaccurate. A.O.B. at 70.

When the district court explained its reasoning for the sentence, it did address § 3553(a) factors - criminal history, sentencing disparity, nature of the offense, the family's claim that McDavid is peaceful - as well as the facts and testimony in the record, McDavid's stated goals, and whether the plan was "all talk" as McDavid suggests. E.R. 1977-1982. The district court also acknowledged the recording in which McDavid cavalierly contemplated "collateral damage" and the loss of human life. E.R. 1981.

The Supreme Court has held that "[w]here the sentence imposed falls within the Sentencing Guidelines range, it is reasonable to conclude that the district court remained 'cognizant' of the Sentencing Guidelines." Ressam, 2010 WL 347962 at *19 (citing Gall v. United States, 552 U.S. 38, 50 n.6 (2007)). A Guidelines sentence is usually reasonable, but not presumptively so. Ressam, 2010 WL 347962 at *19. "'When a sentence is within the Guidelines range, we know that 'both the sentencing judge and the Sentencing Commission has reached *the same conclusion*' that the sentence is 'proper.'" Ressam, 2010 WL 347962 at *18 (citing United States v. Carty, 520 F.3d 984, 996 (9th Cir. 2008) (Kozinski, C.J., concurring) (emphasis in original) (quoting Rita v. United States, 551 U.S. 338, 347 (2007)). The Ressam Court acknowledged that an explanation of a sentence that is within the advisory Guidelines does not have to be lengthy. 2010 WL 347962 at *21 ("Thus, other than addressing specific and non-frivolous arguments raised by the parties, a

district court need not offer much in the way of explanation to demonstrate that it has satisfied this requirement in imposing a sentence within the advisory Guidelines range.") (citing Carty, 520 F.3d at 992). The district court allowed McDavid to present his sentencing argument, which was a summary of his brief; however, it declined to agree with McDavid's arguments.

McDavid claims that the district court gave short shrift to his request for leniency due to "isolation in prison", "a serious heart infection," and "family ties." A.O.B. at 70. However, these are not persuasive arguments - the isolation is based on conjecture rather than fact; there are plenty of penitentiaries serving defendants with far more grave illnesses than pericarditis; and the district court granted McDavid's request to be placed at FCI Herlong because it is close to his family. E.R. 1988, see E.R. 1976. Just because the district court declined to sentence McDavid to his requested five-year term, despite his myriad of arguments, that decision does not create error. The district court did not commit procedural error during sentencing.

B. McDavid's 235-month Sentence Is Substantively Reasonable

Once it has been determined that the sentencing court did not commit procedural error, this Court turns its analysis to whether the sentence is substantively reasonable. "A substantively reasonable sentence is one that is 'sufficient, but not greater than necessary' to accomplish § 3553(a)(2)'s sentencing goals." United States v. Ressam, __ F.3d __, 2010 WL 347962 *22 (quoting United States v. Crowe, 563 F.3d 969, 977

(9th Cir. 2009)) (additional citations omitted). A circuit court determines substantive reasonableness by considering the totality of the circumstances. Ressam, 2010 WL 347962 *22.

Here, the district court considered McDavid's arguments. It sentenced McDavid at the low end of the advisory Guidelines and it provided a solid record to support that sentence. McDavid has presented no argument sufficient to demonstrate that the district court abused its discretion.

C. Sentencing Disparity Claim

McDavid argues that he should have received a sentence no greater than that which his codefendants faced - five years. A.O.B. at 64, 66. McDavid received a reasonable and just sentence of 235 months' incarceration, and the codefendants received reasonable and just sentences in light of their actions, cooperation, and personal characteristics.

Lauren Weiner and Zachary Jenson both pleaded guilty to a charge of conspiracy under 18 U.S.C. § 371. C.R. 82, 103. Conspiracy under § 371 has a five-year statutory maximum term of incarceration, as opposed to the 20-year statutory maximum term McDavid faced for violating 18 U.S.C. § 844(n). Both Weiner and Jenson acknowledged their criminal acts and pleaded guilty within six months of indictment. Both agreed that they would be subject to the terrorism enhancement under U.S.S.G. § 3A1.4; and both agreed to cooperate with the United States, which included testifying at trial against McDavid.

Weiner and Jenson are years younger than McDavid. At the time of the arrest, Weiner and Jenson were 20-years old.

McDavid, on the other hand, was the oldest of the group at 28. Weiner and Jenson were true followers, and their statements, recorded and at trial, demonstrate that they both idolized McDavid. Weiner and Jenson were looking for a person/group that would accept them, so they willingly participated in the violent environmental movement; Weiner testified that even made up her own "direct action" story to make her seem more dedicated to the cause. Weiner and Jenson are best described as inept, with exceptionally poor judgment and limited common sense.

McDavid is different. He was nearing 30 at the time of the arrest and clearly should have known better. Yet, McDavid chose to assemble a group for "something big" in California. McDavid had his family in the area and could have left the Dutch Flat cabin at any time. He did not. Instead, McDavid had a meeting at his parents' home before the group executed their plans, and he later used a fake name and cover story to conduct reconnaissance of his primary target - the IFG. McDavid was a close friend of a convicted arsonist, Ryan Lewis, and instead of denouncing Lewis' criminal and dangerous act, McDavid told his coconspirators how he would have improved on Lewis' crime.[30] McDavid is an adherent of Derrick Jenson, a voice for environmental change through extreme violence. McDavid is unrepentant and he seeks financial and moral support from the same coalition that is anti-government/pro-"direct action".

[30] Lewis burned down unfinished homes in a private development. The terrorism enhancement did not apply to his sentence. Thus, Lewis is not a similarly situated defendant and should not be used as evidence of a sentencing disparity.

McDavid's acts and individual characteristics demonstrate that he is not similarly situated to Weiner and Jenson.

The government did identify a similar case, from the Eastern District of California, where the defendant, Patterson, sought to blow up industrial propane storage tanks. E.R. 1956. In a four-count indictment Patterson was charged in Count Two with Conspiring to Use a Destructive Device in violation of 18 U.S.C. § 844. He was convicted on all counts. United States v. Kevin Ray Patterson, No. 2:99-cr-551 EJG, docket entries 215, 219. The government pointed out to the district court that McDavid had completed more steps toward his goal of destruction than Patterson had towards his. E.R. 1956. When Patterson was sentenced, the district court applied the terrorism enhancement and he was sentenced on Count Two to 240 months' incarceration. Patterson's final sentence was 293 months, with a greater sentence imposed in the first count, and with all sentences to run concurrently. Patterson, docket entries 215, 219. Thus, the Patterson court imposed the statutory maximum, where the McDavid court imposed a lesser sentence despite the fact that the statutory maximum fell within the advisory Guidelines sentence.

The district court did not commit error in any aspect of sentencing. McDavid conspired to commit a violent act against the United States and his sentence reflects that.

CONCLUSION

For the foregoing reasons, the United States submits that

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McDavid's conviction and sentence should be affirmed.

DATED: February 19, 2010

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By:/s/ R. Steven Lapham

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STATEMENT OF RELATED CASES

The government is not aware of any cases related to this appeal.

DATED: February 19, 2010

/s/ R. Steven Lapham
R. STEVEN LAPHAM
Assistant U.S. Attorney

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that the Brief for Appellee is monospaced, has 10.5 or less characters per inch, and contains 17,975 words. By order of this Court, the government was permitted to file an oversized brief.

DATED: February 19, 2010

/s/ R. Steven Lapham
R. STEVEN LAPHAM
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the
Appellate CM/ECF System

I hereby certify that on February 19, 2010, 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.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ R. Steven Lapham
R. STEVEN LAPHAM
Assistant U.S. Attorney