CA 08-10250

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. **ERIC TAYLOR MCDAVID,** Defendant-Appellant.	DC No. CR 06-035-MCE Eastern District of California APPELLANT ERIC MCDAVID'S MOTION TO FILE A BRIEF EXCEEDING THE WORD LIMIT FOR REPLY BRIEF; DECLARATION OF COUNSEL

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Appellant Eric McDavid, through counsel, hereby moves to file an oversized Reply Brief totaling 8, 333 words for the reasons set forth in the attached declaration of counsel. Pursuant to Ninth Circuit Rule 32-2, a copy of the proposed Reply Brief to be filed has also been submitted with this motion. This motion is based on the record in this case and the attached declaration of counsel Mark J. Reichel.

Dated: April 13, 2010

Respectfully submitted,

/s/ Mark J. Reichel
MARK J. REICHEL

Attorney for Defendant-Appellant
ERIC TAYLOR MCDAVID

DECLARATION OF MARK J. REICHEL

I, Mark J. Reichel, declare:

I am the attorney appointed under the Criminal Justice Act to represent the appellant Eric Taylor McDavid in appeal No. 08-10250.

1. Mr. McDavid's appeal is from a judgment of conviction and sentence after a jury trial where he was found guilty of one count of violating 18 U.S.C. § 844(i)(k) and (n), conspiracy to destroy by fire or explosive property of the federal government or engaged in interstate commerce. On May 8, 2008, the district court sentenced Mr. McDavid to 19.5 years imprisonment. Mr. McDavid is currently serving his sentence at FCI Victorville.

2. The record below consists of over 1,700 pages of reporter's transcripts from the jury trial in this case, transcripts from pretrial motions hearings and sentencing hearings, and a number of additional pretrial motions and sentencing pleadings. The government charges and evidence arise out of allegations that McDavid was a member of the "Earth Liberation Front" and "eco terror" groups, a member of an alleged "domestic terrorism" group, that conspired to blow up the Nimbus Dam in the Sacramento area, as well as other "targets.

3. McDavid now moves to file an oversized Reply Brief totaling 8,333 words. The limit under the Ninth Circuit Rules is 7,000 words. This Reply Brief

is therefore 18% oversized.

4. The Appellant's Opening Brief was allowed by order of this court to be 18,000 words, exceeding the limit of 14,000 words by almost 30%. The Brief For Appellee was also sua sponte by order of this court allowed to be 18,000 words.

This Reply Brief is just slightly over the word limit and is almost one half less over the word limit then the respective opening and answering briefs.

5. An oversized brief is necessary to adequately present the issues in this appeal. An oversized brief is necessary because of the novelty and complexity of every issue raised in this appeal. Instructions were given by the district court in which the court stated that it could not locate any case law to instruct the jury upon; according to press statements made by the Department of Justice, this was the first "Eco Terror" case ever to go to jury trial in the country; the installation of warrantless wiretap devices is also a novel question for the Circuit; the "domestic terrorism" enhancement of the U.S.S.G. was applied for one of the few times in the federal system.

6. The appeal raises several meritorious issues from a trial where a 20 something defendant with no prior criminal arrests received a 20 year sentence and the codefendants in the conspiracy received no jail time. The brief has already been substantially cut down and revised, on several occasions. Any further cuts

would result in meritorious issues being un addressed and the brief being difficult to understand. I have had other attorneys with significant experience in criminal appeals to this Circuit review the brief and revise it for brevity.

7. The case involved numerous errors by the trial court and in all cases these would result in a reversal. However, several of them have been cut from the brief so that only the most essential arguments are raised fully. All issued raised have been limited in their legal analysis in order to maintain an adequate statement of facts.

8. Finally, the appeal raises significant sentencing issues. The district court held a sentencing hearing with witnesses and juror declarations. The court imposed a sentence of 19.5 years, 6 ½ years more than the probation report recommended, 19 years more than the codefendants received and at the maximum of the statute. The court did so by finding the "domestic terrorism" enhancement which took the young defendant (who had no prior criminal record) from a sentence of a few years to the 19.5 years. The application of the factors to find the enhancement require analysis (from trial evidence) of the motive for the crime and the targets for the crime. Both of these factors are fact-intensive and require a detailed analysis of the evidence in this case. McDavid's sentencing arguments challenge the sufficiency of the evidence supporting these factors and also

presents various legal arguments why the court's extreme sentence was unreasonable and in violation of the Sixth Amendment in this case.

9. For these reasons, counsel believe it is necessary to submit an oversized Reply Brief in order to adequately litigate all of the meritorious issues in the appeal.

I declare under the penalty of perjury that the forgoing is true and correct. Executed this 13th day of April 2010, in Sacramento, California.

/s/ Mark J. Reichel
Attorney for Defendant-Appellant
ERIC MCDAVID

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2010, I electronically filed the foregoing Motion To Exceed The Word limit with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Mark J. Reichel
Attorney for Defendant-Appellant
ERIC MCDAVID

CA 08-10250

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

APPELLANT'S REPLY BRIEF

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

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I.
INTRODUCTION

> Oh? And when the last law was down, and the Devil turned 'round on you, where would you hide, Roper, the laws all being flat? This country is planted thick with laws, from coast to coast, Man's laws, not God's! And if you cut them down, and you're just the man to do it, do you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake! [1]

Appellant's Opening Brief pointed that the case was a "gross miscarriage of justice" from the inception of the illegalities used in the investigation, in the pretrial stage, during the trial and the sentence. Convicting Eric was done by clear cutting the laws of our Nation.

The parties differ in their factual assertions from the record below. The government asserts that the appellant misstates the record; the appellant replies that a large portion of the word limit in the Reply Brief would be used pointing out the areas where the record is not as asserted by the Appellee.

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[1]Quote by Thomas Moore in A Man For All Seasons Robert Bolt, 1954.

The Appellant stands by the shocking true facts as set forth in the Appellant's Opening Brief, and notes the following important portions are not contradicted:

1. Anna kept files on and reported in live time to the FBI from 2004 to 2006 on persons who had done nothing illegal except to attend meetings. ER 898-903; 909. The Brief Of Appellee acknowledges: "In all of these undercover activities, Anna never reported on any individual as having violent intentions. ...Instead, she gave realtime reports on what the protestors were doing. Brief For Appellee at p.5.[2] ;

2. Anna began a romance with Eric in August 2004, ER 1549 , received "love letter" e mails from him from August 2004 until June 2005 which were somehow missing by the time of trial, ER 904-917; she acknowledged that up until the time of arrest in January 2006 that he did in fact "love" her ER 1015; the FBI Behavioral Analysis Unit conducted an extensive research program on Eric for Anna to use in her mission because Eric was romantically interested in Anna. When Eric broached the subject of their romance becoming finalized in November 2005Anna did what the FBI Behavioral Analysis Unit told her to do; to keep him

[2] Obviously, doing nothing illegal but having reports sent out for what you were "doing" in political meetings is illegal domestic spying.

on the hook and to "...mollify him ...we need to put the mission first. There is time for romance later." ER 1068;

3. Aware that Eric was wanted by the FBI for questioning in the Ryan Lewis federal criminal case, and that he was intentionally staying away from the FBI on the advice of his attorney, the FBI "wired" Anna up and instructed her to question him–without his counsel–on that matter. Brief For Appellee at p. 7;

4. Anna's goal as instructed by the FBI was to get everyone together in California to talk in November 2005, and she initiated the meeting idea. ER 950. Weiner did not make independent plans to go to California, she was invited by Anna. ER 943. Weiner was reluctant because she had no funds. ER 1080. Anna agreed to advance Weiner money for a plane ticket to California. ER 939. Anna wanted Eric to drop whatever he is doing to meet. ER 947. When contacted by Anna about her–as she said it on the tapes–her "awesome devious plan," Eric was not excited and informed her he was stuck and cannot get away for even a day. ER 942: 17-18, 950. He was stressed. ER 952. He wanted to bond with his family. ER 1079, 947, 1311. When they met in November 2005, the friends were high on marijuana when they spoke. At the November meeting, there was no agreement or "meeting of the minds. ER. 986;

5. The home they lived in with Anna was, as Anna herself testified, set up

with audio and video recording devices to document *all the evidence*, for her safety, and to get coverage of everything; persons could not go in a corner and talk quietly; it was set up so that "all seen" and "all heard" was the result of the taping. ER 1000-1001; Agents "monitored" the cabin around the clock, 24 hours a day, even when Anna was gone, but "minimized it" when she was not there. (Government counsel to district court at pretrial motion hearing, ER 487. "The bug, as he likes to call it, was montiored 24 hours a day. It was a situation where you had agents watching and listening to make sure that Anna was in the room All of these agents recieved a minimization briefing, and they were told, you don't see her, it goes down." ER 487.[3] The government showed the jury a portion of a video recording taken after Anna had left the room in January 2006, showing codefendant Jensen and Eric making incriminating statements, talking about Anna and whether she was an informant and the need to check her cell phone for "tracking" devices;

6. The night before the arrest, Anna stormed out angry and left the house because the group lacked direction and goals and could not agree on a specific target. ER 1025, 1039, 1317-1318. When she left, McDavid and Weiner coped by

[3] Obviously, the government has yet to explain how an agent "minimizes" when watching a video tape. Do they turn the contrast down? Is it done manually, by squinting their eyes? Looking away?

smoking pot.

II.

REPLY [4]

The conviction cannot stand because the jury was *misinstructed* on entrapment such that the jury could not consider predisposition; the district court expressly limited the jury's consideration of entrapment evidence to the *time of the offense, and not before the offense.* The district court misinstructed the jury that the agreed upon government agent was not a government agent, precluding deliberation on the element of inducement and on the entire defense of entrapment. These errors completely precluded jury consideration of appellant's entrapment defense, and harmless error analysis is inapplicable. Even if the complete error on these dispositive elements is not structural, the error obviously contributed to the verdict and is therefore not harmless beyond a reasonable doubt.

The district court deprived Eric of the right to counsel the very moment the district court misinstructed the jury that they were not to consider entrapment evidence until the time of the offense alleged in the Indictment.

The evidence was insufficient to convict on the conspiracy as charged. There was a constructive amendment of the Indictment and fatal variance of proof

[4] Some issues addressed in the Opening Brief Of Appellant will be only briefly addressed in this Reply, as the Brief For Appellee has not satisfactorily refuted the arguments.

at trial. The district court erred in not giving a lesser included offense instruction.

The district court also erred in denying the Eric's motion to suppress warrantless audio/video surveillance of his residence, and motion to dismiss for outrageous government misconduct. Eric's conviction was fundamentally unfair, and cumulative error deprived him of due process of law.

Eric McDavid's sentence was also illegal.

ARGUMENT

A. THE ENTRAPMENT INSTRUCTION VITIATED ALL POSSIBLE JURY FINDINGS ON THE ELEMENTS OF THE OFFENSE BY LIMITING EVIDENCE OF PREDISPOSITION TO THE TIME OF THE OFFENSE AND DENYING THE GOVERNMENT AGENT'S STATUS AS A GOVERNMENT AGENT DISALLOWING JURY DELIBERATION ON INDUCEMENT AND ENTRAPMENT. THE ERRONEOUS JURY INSTRUCTIONS REMOVED FROM THE JURY'S CONSIDERATION THE TWO ESSENTIAL ELEMENTS REQUIRING PROOF BEYOND A REASONABLE DOUBT: LACK OF PREDISPOSITION AND GOVERNMENTAL INDUCEMENT. THEREFORE HARMLESS ERROR ANALYSIS IS INAPPLICABLE.

Standard of Review

The United States Attorney's Brief For Appellee misstates the applicable standard of review of jury instructions for appellant's case:

> ... where the parties dispute whether the evidence supports a proposed instruction, this Court reviews a district court's rejection of the instruction for abuse of discretion.

Brief For Appellee p. 41 citing United States v. Ambriz-Ambriz, 586 F. 3d 719, 724 (9th Cir. 2009); United States v. Bello-Bahena, 411 F.3d 1083, 1088-89 (9th Cir. 2005)(citations omitted). Whether the district court should have instructed the jury on entrapment is not an issue in this appeal. Whether the district court misinstructed the jury on the elements of entrapment such that the resulting

conviction violates due process is at issue in this appeal. Ambriz upheld the denial of an "official restraint" jury instruction for a Mexican national Deported Alien Found in the United States at the Canadian border in violation of 8 U.S.C. § 1326 because no official restrained him when he crossed from Mexico following his deportation back home before he got caught trying to cross from the United States into Canada. See: Ambriz, 586 F.3d at 724. Ambriz does not support abuse of discretion review as cited in the United States Attorney's Reply Brief of Appellant. Nor does Bello-Bahena, 411 F.3d at 1089 support deferential review of jury instructions in this case. This Court of Appeals reviewed de novo the district court's instructions to Bello-Bahena's jury, and reversed for a new trial because the instructions failed to cover adequately Bell-Bahena's defense theory. Id. At 1091.

There is no disagreement whether the evidence supports a proposed instruction and no arguable grounds for mere abuse of discretion review. Whether the district court properly instructed the jury on the law of entrapment is a pure question of law subject to de novo review. United States v. Sterner, 23 F.3d 250, 252 (9th Cir. 1994); Cf: United States v. Keys, 95 F.3d 874, 880 n.6 (9th Cir. 1996)(rejecting suggestion of lesser standard of review).

Misinstruction on Predisposition

The district court improperly stated the law of entrapment, Eric's theory of legal defense, by instructing the jury *not to consider* Eric's predisposition to commit the crime for which he was on trial until the time he met the government's agent. A proper entrapment instruction informs the jury that the government has to prove beyond a reasonable doubt the defendant's predisposition "to violate the law before the government intervened." United States v. Sterner, 23 F.3d at 252 citing Jacobsen v. United States, 503 U.S. 540 (1992); United States v. Mkhsian, 5 F.3d 1306, 1311 (9th Cir. 1993).

Remarkably, the government asserts "the district court specifically avoided focusing the jury's attention on any particular date, leaving that to their own deliberations." Brief of Appellee p.42 Obviously there can be no contact about the crime charged in the indictment until that crime allegedly started: at the trial level the government asserted June 2005; on appeal they assert August 2005.

The record is clear. The jury asked the district court about the time frame for its consideration of entrapment– *and all evidence* -- and the district court instructed that it is when the defendant first discussed the charged offense with the government's agent. Thus the jury could not consider predisposition to commit the alleged offense because there is no pre disposition evidence after an offense is

committed. *Thus, the long line of case law on whether prior crimes are admissible to negate lack of predisposition, that prior good character evidence is admissible to establish lack of predisposition, become extinct.*

The government's argument that the 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" obviously misstates the record upon de novo review, considering the instructions as a whole.

Because the jury instructions failed to inform the jury that the government had to prove Eric's predisposition prior to his initial contact with the government's agent/informant, the district court violated appellant's right to have the jury instructed that the government prove each substantive element of its case beyond a reasonable doubt. Sterner, 23 F. 3d at 252 , citing Lessard, 17 F.3d 303, 306 (9th Cir. 1994); Mkhsian, 5 F.3d at 1310-11 (traditional instruction "where a person has no previous intent" and "where a person already has the readiness and willingness to break the law" inadequate apprisal that defendant's predisposition must be gauged before his first contact with law enforcement agents). See also: United States v. Larizza, 72 F.3d 775, 778 (9th Cir. 1995)(entrapment instruction must make clear that the predisposition must have occurred prior to government contact). United States v. Lorenzo, 43 F.3d 1303, 1304-07 (9th Cir.

1995)(approving entrapment instruction stating (a) that a "person is not entrapped when that person has a previous intent or disposition or willingness to commit the crime charged and the law enforcement officers ... merely provide what appears to be an opportunity," and (b) charging the jury to consider the defendant's intent "before encountering the law enforcement officers or their agents").

Harmless error analysis does not apply because the erroneous jury instruction removed from the jury's consideration essential elements of the offense with no alternative way for the jury to find those elements. Once the issue of entrapment was properly before the jury, the burden shifted to the government to prove two essential elements beyond a reasonable doubt: (1) no government inducement of the crime, and (2) the absence of predisposition on the part of the defendant. The government had the burden of proving beyond a reasonable doubt that the accused was not entrapped. Jones, 231 F.3d at 516; Davis, 36 F.3d at 1430.

In United States v. McDavid, 2008 U.S. Dist. LEXIS 25591, the district court embraced its error as follows:

> Defendant cites to Ninth Circuit case law: "[T]he relevant time frame for assessing a defendant's predisposition comes before he has any contact with governmental agents, which is doubtless why it's called predisposition." Poehlman, 217 F.3d at 703 (emphasis added). Following the plain language of Poehlman would have required the

> Court to instruct the jury that contact occurred in 2004. However the facts of Poehlman, and other cases quoting the same language, do not gel with the facts presented here. Had the Ninth Circuit considered the facts of this case, this Court believes it would have phrased the sentence differently. In this case, defining contact from the first time Defendant came into contact with Anna would have resulted in an overzealous application of the entrapment defense. A literal application of Poehlman was not logical in this case.
>
> The Court notes the difficulty in applying the entrapment defense to a case where conspiracy is the only count charged in the indictment. All the cases reviewed by this Court involved crimes such as drug sales, child pornography sales, or crossing state lines for the purpose of engaging in sex acts with minors - situations where the crime was complete after the commission of some physical act. In each of these cases, the government initiated the contact and the contact related only to the crime charged in the indictment. In those cases, it makes sense to evaluate predisposition prior to any contact with the government. The facts of this case did not warrant a blanket instruction to be cut and pasted from distinguishable cases.
>
> The fact that in this case the Government's initial contact related to unlawful protest activity, and the later contact related to the crime charged in the indictment - conspiracy to commit arson - required a more sensitive approach to the issue of predisposition. The instruction given was proper. The instruction Defendant proposed would turn the use of undercover officers and informants on its head and would significantly hinder the Government's ability to prevent crimes such as the one Defendant was convicted of in this case.

Id.

The district court literally forbade the jury from considering entrapment evidence before the time of the charged offense. There is no escaping this structural error at trial.

Worse yet, the district court did not accidently tell the jury not to consider predisposition before the alleged offense. The district court disregarded controlling authority by holding: "In those cases, it makes sense to evaluate predisposition prior to any contact with the government. The facts of this case did not warrant a blanket instruction to be cut and pasted from distinguishable cases." Id. Instead the district court's instruction "required a more sensitive approach to the issue of predisposition." To wit: "Contact as used in the instruction is the time that you determine was the first time that there was some communication between the defendant and the government about the crime charged in the indictment." Id. The district court's written order clearly shows that it decided to limit predisposition to commit the offense evidence to the time of the offense. See: McDavid, 2008 U.S.Dist. LEXIS 25591 part 13 **Definition of "Contact"** discussion of limiting predisposition evidence to time of the offense alleged in indictment.

In justifying its defiance of controlling authority to limit predisposition evidence to the time of the alleged offense the district court noted "the difficulty in applying the entrapment defense to a case where conspiracy is the only count charged in the indictment." The district court further found that an instruction based on controlling authority "would turn the use of undercover officers and

informants on its head and would significantly hinder the Government's ability to prevent crimes such as the one Defendant was convicted of in this case." Id. Thus the district court essentially held, as a matter of law, that a jury should not consider predisposition evidence in a conspiracy case before the formation of the conspiracy. However predisposition evidence is not limited to the time of the offense in conspiracy cases. Cf. United States v. Williams, 547 F. 3d 1187: 2008 U.S.App. LEXIS 23395 (9th Cir. 2008)(citing Poehlman 217 F.3d at 703); Mkhsian, 5 F.3d at 1309-11 (conspiracy convictions reversed for new trial due to erroneous jury instruction on entrapment).

If precedent has direct application in a case, the district court should follow the case even if it rests on reasons rejected in some other line of decisions. The district court should follow the case that directly controls, leaving to the court of appeals the prerogative of over ruling its own decisions. Cf: United States v. Mosely, 505 F.3d 804, 811 (8th Cir. 2007) citing Ouijas v. Shearson/Am.Express, Inc., 490 U.S. 477, 484 (1989)(Supreme Court decisions remain binding precedent until the Supreme Court sees fit to reconsider, regardless of whether subsequent cases have raised doubts about their continuing vitality.). In the instant case, the district court decided, as shown in its written opinion, not to follow controlling authority and fundamental entrapment principles by limiting jury consideration of

predisposition evidence to the time of contact with the government's agent about the offense. The district court did not even cite cases that might question application of fundamental predisposition law.

Harmless error analysis does not apply to erroneous jury instructions that vitiate all of the jury's findings. Hedgpeth v. Pulido, 129 S.Ct. 530 (2008); Neder v. U.S., 527 U.S. 1 (1999). In this case, the erroneous entrapment instruction did not just misinstruct the jury on the law of entrapment, an essential element of the offense at trial, but the instruction also directed the jury not to consider pre-offense evidence thereby making impossible a factual finding on predisposition.

Erroneous Instructions Were Structural Error

The United States Supreme Court divides constitutional errors into two classes. The first is called "trial error" because the errors occurred during the presentation of the case to the jury and their effect may be quantitatively assessed in the context of the evidence presented to determine if they were harmless beyond a reasonable doubt. The second class of constitutional error is called "structural defects." These defy analysis by harmless-error standards because they affect the framework within which the trial proceeds, and are not simply an error in the trial process itself. Such errors include the denial of counsel, the denial of self-

representation, the denial of a right to a public trial, and the right to trial by jury by the giving of a defective reasonable doubt instruction. United States v. Gonzales-Lopez, 548 U.S. 140 (2006), 126 S.Ct. 2557, 2466 (2006) (consequences of right to counsel of choice were not quantifiable , and harmless error analysis in such a context would constitute pure speculation).

These, amongst others, are exceptions to Fed.R.Crim.P. 52(a) which instructs federal courts to disregard any error which does not affect substantial rights. See also 28 U.S.C. § 2111 (harmless error). These exceptions are for a limited class of fundamental constitutional error that defy analysis by harmless error standards. Such errors necessarily render a trial fundamentally unfair and deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocense, and no criminal punishment may be regarded as fundamentally fair. Gonzales-Lopez, 126 S.Ct. at 2569 (Alito J. dissenting). Exceptional error is not just error that is "necessarily unquantifiable and indeterminate" Gonzales-Lopez, 126 S.Ct. at 2564 but also "necessarily render" the proceeding "fundamentally unfair" to the defendant. Rose v. Clark, 478 U.S. 570 (1986).

Neder's holding that misinstruction on an element of the offense is subject to harmless error analysis is not controlling here because as stated in Neder the

instructional error there did not take away or "vitiate" the jury's role as fact finder on all elements of the offense at issue. Indeed in Neder the omitted element of materiality was not at issue. Here, limiting the jury's consideration of predisposition evidence to no sooner than the time of defendant's contact with law enforcement about the alleged offense precluded any meaningful deliberation on the most important and individually controlling factual issue in the case that the government should have been required to prove beyond a reasonable doubt. Such error cannot be harmless.

Agent Not An Agent. In addition to instructing the jury not to consider pre-offense evidence in determining predisposition, the district court instructed the jury in writing that the government's agent was not a government agent. The jury submitted a handwritten note asking "was Anna considered a government agent in Aug. 04? If not, when did she become one?" Docket #268, Appellant's ER 247. The district court answered this question in typed writing "no." The trial judge even signed the answer. Docket #268-2, Appellant's ER 249. The government argues that the district court's erroneous written instruction is harmless because it was not "a material matter" even if it goes to an element of the offense. The government further argues that the district court's "contact instruction" discussed above "..essentially negated the relevance of the answer to whether Anna was an

agent in August 2004." The government argues:

> 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."

Brief of Appellee p.31-32

The government does not address that the court never answered the jury's question, in writing, about *when* she became an agent; the "contact instruction" which was clearly wrong does not somehow cure that error.

On appeal the adequacy of jury instructions are determined by examining the instructions as a whole. United States v. Ancheta, 38 F.3d 1114, 1116 (9th Cir 1994); United States v. Boekelman, 594 F.2d 1238, 1240 (9th Cir. 1979). The instructions, examined in the light of the record as a whole, did not fairly, adequately, and correctly state the law of entrapment and provide the jury with an ample understanding of the applicable principles of the law and the factual issues confronting it. On the contrary, the district court's instructions precluded the jury from considering government inducement by taking away the agent's status as a government agent. There is more than a reasonable likelihood the jury applied the

instructions in an unconstitutional manner because the instructions precluded consideration of inducement and predisposition. Cf. Victor v. Nebraska, 511 U.S. 1, 6 (1994).

The district court assumed "the jury found Defendant was not entrapped because the jury found he was predisposed to commit the act or it found the government did not induce him." McDavid LEXIS 25591 supra. However, the district court's jury instructions limited predisposition deliberation to the time of the offense, and also instructed that the agent was not a government agent thereby precluding the jury from finding inducement. The error is structural because, as the district court found: "At trial, this case presented disputed facts and evidence about conversations, romantic interests, sources of ideas and agreements. This case also involved disputed evidence as to Defendant's level of commitment to the conspiracy." Id. These disputed facts show that the jury might have found appellant was not predisposed to enter the alleged conspiracy and/or was induced by a government agent if the jury had been permitted to deliberate on those dispositive factual issues.

The "no agent" instruction was more than a mere slip of the tongue. It was the district court's type-written response to the jury's hand written question. The judge even signed the erroneous response. Indeed, the district court told the jury

following his verbal answers from the bench he would respond in writing:

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

RT 1469:3-8, Appellant's ER 229.[5]

In United States v. Jones, 468 F.3d 704, 710 (10th Cir. 2006) plain error was not found although the trial judge gave incorrect oral jury instructions because the incorrect oral instructions were followed by correct oral instructions and correct written instructions and correct jury forms. Thus an incorrect oral instruction, mere slip of the tongue, was not plain error inasmuch as there was no objection. Jones, 468 F.3d at 710 citing Ancheta, 38 F.3d at 116-17. In this case, the district court literally said "I don't think you could follow what I've just read to you without cleaning it up a little bit" then submitted an erroneous written instruction making a factual determination on an essential element of the offense right after denying defense counsel a sidebar on the instruction. RT 1469:9, Appellant's ER 2229.

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[5] This was in response to a juror's question on the confusion and extensive replies the court was giving: "JUROR 11: Will that be the information that you're going to give us?"

Finally, and, obviously, the jury asked "If not, when did she become one?" Because the answer was "no" in writing, there was also no follow up advising when she did actually *become an agent*. Thus, they were simply left with an instruction from the court that entrapment was "off the table."

The errors were not harmless if subject to such review.

Assuming the district court's instructions that (1) the jury could not consider predisposition evidence before the date of the indicted offense and (2) written factual finding that the (agreed) government agent was not a government agent did not categorically vitiate all jury findings, even though predisposition and inducement are the only essential elements of entrapment, the instructional error was not harmless.[6]

A jury instruction is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. United States v. Green, 592 F. 3d 1057; 2010 U.S. App. LEXIS 1438 (9th Cir. 2010) citing

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[6] Made even more so by the strange ruling from the district court during the trial that the defendant's character witnesses could offer no character evidence as to his character for *any time prior to the time of the conspiracy*. "The bottom line is, my ruling, is that the evidence as far as character will be limited to the time of this conspiracy, June 2005." ER 73. For whatever reason, the government was, however, allowed to spend a good deal of time during the trial impugning the defendant's character as it existed prior to June 2005; beginning with August 2004 onward.

United States v. Anchrum, 590 F.3d 795, 2009 U.S. App. LEXIS 28752 (9th Cir. 2009); United States v. Gracidas-Ulibarry, 231 F3d 1188, 1197 (9th Cir. 2001); Neder v. United States, 527 U.S. 1 (1999).

The district court itself, just prior to instruction, told the parties that

> THE COURT: First of all, Government, are you going to argue that there is not sufficient evidence that's been presented for an entrapment defense?
>
> MR. LAPHAM: Your honor...we're going to let it go to the jury.
>
> THE COURT: ...And from the evidence that I've heard presented, it's possible that a jury could look to see whether or not there was predisposition or inducement. I mean, there is some-it can go. I think that a rational trier of fact could see things in a very interesting way, and so I don't believe that–I think it would be clear error for this Court, under the facts presented during the course of this trial, to not give the entrapment defense instruction.

ER 99-100. *An extremely potent record to establish the lack of harmless error.*

The record includes the following juror statement:

> ...I would like the court to know that the jury including myself, was very confused about the jury instructions, especially regarding whether Anna was a government agent or not. During deliberations, we asked the court to please clarify for the jury the issue of whether Anna was a government agent, and if so, when did she become one. We were deliberating about the issue for the defense of entrapment. We asked the court in writing if Anna was a government agent in August of 2004, and if not, when did she become one? We were told orally by the court that she was one in August 2004; we were also told to await the written answers to our questions when we deliberated. We then got the court's written answers, and that answer was that Anna was not a government agent. At that point we were all

> very confused and did not know what the correct answer to that question was. The written answer was from the court and stated "no" that she was not a government agent, yet we were told orally that she was. With the written response of "no" and after reading the other written responses from the court, we ended our consideration of the issue of entrapment and soon thereafter voted to convict. Originally, on the issue of entrapment, the vote was 7-5 to consider the entrapment issue as a defense. Once the written response advised Anna was not a government agent, we then changed to a guilty verdict soon thereafter.
> ***
> The jury was confused about what evidence we were allowed to consider for entrapment and what the legal instructions were.

Docket # 316, Appellant's ER 278 Juror's Sworn Statement

Another juror declared she met with counsel and two F.B.I. agents right after the verdict when the court's said that jurors were free to discuss the case. "About 6-8 of the jurors were present. We spoke very openly about the evidence, our deliberations and our feelings on the case ... The FBI Agents engaged us in conversation and listened to all our comments which were primarily very critical of the FBI and informant Anna. ...My opinion of the case is that there was a very strong case of entrapment shown in the case ...

Docket # 315, Appellant's ER 285 Juror's Sworn Statement

These statements were wholly volunteered by jury members. The juror's declarations are clearly rational statements that they would not have voted to convict if the district court had not instructed as it did on entrapment.

There is ample reasonable doubt that the jury would have not have found that the government proved lack of inducement beyond a reasonable doubt if the district court had not erroneously instructed the jury that as a matter of fact the government's agent was not a government agent. Inducement can be any government conduct creating a substantial risk that an otherwise law-abiding citizen would commit an offense, including persuasion, coercive tactics, or pleas based on need, sympathy or friendship. Poehlman, 217 F.3d at 698;. Davis, 36 F.3d at 1430. Appellant Eric McDavid was induced by government agent Anna who used psychological pressure and romantic sex appeal, money, food, clothing, housing, and transportation, among other tactics, to beguile him into agreeing to something he otherwise would not have agreed.

The district court's written instruction to the jury that Anna was not an agent was not harmless error: it is not clear beyond a reasonable doubt that a rational juror would have found lack of inducement beyond a reasonable doubt if the district court had not instructed the factual finding that Anna was not an agent. Likewise, it is not clear beyond a reasonable doubt that a rational juror would have found predisposition beyond a reasonable doubt if the district court had not instructed the jury not to consider evidence before the alleged offense in determining predisposition.

Eric's jury never determined whether he was predisposed to commit the charged offense because the district court expressly limited the jury's consideration of entrapment evidence to the time alleged in the Indictment. Assuming that such a structural error on the determinative element of a charged offense can be subject to harmless error analysis (i.e. that the jury's entire providence has not been vitiated) obviously it is not clear beyond a reasonable doubt that a rational juror would have found the defendant guilty absent the error.

B. APPELLANT WAS DENIED COUNSEL AT THE MOST IMPORTANT POINT IN JUROR INSTRUCTION

Jury instructions are the apex of the criminal trial. All the evidence and arguments presented to the jury are processed and weighed at that time. Jurors are particularly susceptible to influence at this point, and any statements from the trial judge --no matter how innocuous – are likely to have some impact. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. Musladin v. Lamarque, 555 F.3d 830, 2009 U.S.App. LEXIS 2728 (9th Cir. 2009). The delicate nature of communication with a deliberating jury means that defense counsel has an important role to play in helping to shape that communication. The United States Court of Appeals for the Ninth Circuit has repeatedly recognized how seriously jurors consider judges' responses to their questions. Even analytically

correct answers to a jury may unnecessarily – and improperly – influence a jury. Id.

The "stage" at which the deprivation of counsel may be critical should be understood as the formulation of the response to a jury's request for additional instructions, rather than its delivery. Counsel is most acutely needed before a decision about how to respond to the jury is made, because it is the substance of the response that is crucial. The delicate nature of communication with a deliberating jury means that counsel has an important role to play in shaping that communication. Cf: Musladin, supra.

Particularly in a criminal trial, the last word is apt to be a decisive word. At Eric's trial, that last decisive word in writing with the judge's signature on it, was "no" the confidential informant was not a government agent. The last words were analytically incorrect. After those erroneous instructions, there was nothing for the jury to consider. The district court did not hear counsel on this pivotal issue. Therefore Eric McDavid was deprived meaningful assistance of counsel at a crucial stage of the proceedings in violation of due process of law and the Sixth Amendment right to counsel.

C. THE DEFENDANT WAS ENTRAPPED AS A MATTER OF LAW

The Appellant's Opening Brief adequately addresses this issue. The government was required to prove two elements beyond a reasonable doubt: (1) the government did not induce the defendant to commit the crime; and (2) the defendant was predisposed to commit the crime. United States v. Nobari, 574 F.3d 1065; 2009 U.S. LEXIS 16391 (9th Cir. 2009). This they did not do.

D. THE EVIDENCE IS INSUFFICIENT FOR A JURY TO FIND EACH OF THE ELEMENTS OF THE OFFENSE BEYOND A REASONABLE DOUBT

The Appellant's Opening Brief adequately addresses this issue which is not adequately refuted by the Brief For Appellee. Assuming the jury disregarded the trial court's erroneous instructions, no reasonable juror could have concluded that the defendant was neither induced nor predisposed to commit the charged offense.

E. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN NOT GIVING THE REQUIRED LESSER INCLUDED INSTRUCTION

When reviewing the district court's denial of jury instruction on a lesser-included offense, the appellate court employs a two-part analysis. First the appellate court reviews de novo whether the offense on which instruction is sought is a lesser-included offense of that charged. Second, if the requested instruction pertains to a lesser-included offense, the appellate court reviews denial of the

instruction for an abuse of discretion. United States v. Rivera-Alonzo, 584 F. 3d 829; 2009 U.S.LEXIS 23469 (9th Cir. 2009).

An instruction on a lesser included offense is warranted if (1) the elements of the lesser offense are a subset of the elements of the charged offense, and (2) the evidence would permit a jury rationally to find the defendant guilty of the lesser offense and acquit him of the greater. Rivera-Alonzo, supra. Here, the elements of the lesser offense, conspiracy to commit any offense against the United States with a maximum penalty of five years in prison are a subset of the elements of conspiracy to commit any offense against the United States with a maximum penalty of the target crime maximum penalty.

The evidence would permit the jury rationally to convict the appellant Eric McDavid of the lesser conspiracy because his co-defendants Lauren Weiner and Zachary Jensen "pleaded guilty to a crime arising out of the same events for which the defendant is on trial." See Jury Instructions 13 and 14, Docket # 271 p. 14-15, Appellant's ER 263-264.

To warrant a lesser-included offense instruction, the evidence at trial must be such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater. A district court may not weigh the evidence in determining whether to give a lesser included offense instruction. However, a

district court may properly refuse to give an instruction on a lesser included offense if the jury could not have convicted a defendant of the lesser-included offense without finding the element(s) that would convert the lesser offense to the greater. Rivera-Alonzo, supra.

In this case, the jury could have found the defendant guilty of the lesser-included offense without finding the element that would convert the lesser offense to the greater offense: arson.

F. THERE WAS AN ILLEGAL CONSTRUCTIVE AMENDMENT OF THE INDICTMENT AT TRIAL AND/OR A FATAL VARIANCE BETWEEN PLEADING AND PROOF

An appellate court reviews de novo whether there has been a constructive amendment to an indictment. A constructive amendment occurs when the defendant is charged with one crime but, in effect, is tried for another crime. United States v. Lazarenko, 564 F. 3d 1026, 2009 U.S. App. LEXIS 8657 (9th Cir. 2009).

The district court constructively amended the indictment by ruling the government need not prove that the "targets" listed in the Indictment must be "objects" or targets of the conspiracy. The indictment specifically charged Eric McDavid with conspiring with two co-defendants to damage or destroy, by means of fire or an explosive, to wit, the IFG, cell phone towers, electrical and gas

stations, and the Nimbus Dam. The Indictment did not allege that the defendant conspired with others to "generally" violate 18 USC § 844(f) and (I).

Trial testimony, including that of the co-defendants, did not include evidence of an agreement to damage or destroy the places and/or things alleged in the Indictment. So the government argued to the jury that it did not need to prove what it actually charged in the Indictment, a conspiracy to damage certain things and places but rather just needed to prove a general conspiracy. Although the jury had been instructed about "the locations of these alleged targets" specifically by name at the beginning of the case during voir dire, the district court overruled defendant's objection to the variance between pleading and proof.

Indicting appellant Eric McDavid for conspiracy to damage specific places but convicting him of conspiring to damage unspecified targets violated his Fifth Amendment right to be tried "only on the charges included in the grand jury's indictment." United States v. DiPentino, 242 F.3d 1090, 1094 (9th cir. 2001)(citing United States v. Stirone, 361 U.S. 212, 215-16 (1960)(trial must be on indicted charges). Appellant's conviction was for an unspecified conspiracy not alleged in the indictment in violation of his fundamental right to a fair trial.

G. THE DISTRICT COURT ERRED IN DENYING DEFENDANT'S PRETRIAL MOTIONS RAISED AGAIN AT THE CLOSE OF THE GOVERNMENT'S CASE TO (1) SUPPRESS EVIDENCE SEIZED THROUGH THE WARRANTLESS INSTALLATION OF VIDEO CAMERAS AND AUDIO RECORDING DEVICES IN THE DEFENDANT'S HOME, AND (2) TO DISMISS THE INDICTMENT FOR OUTRAGEOUS GOVERNMENT MISCONDUCT

Warrantless Home Surveillance

The tapes were on 24 hours a day, per the government counsel to the trial court. When Anna left, the agents were to "minimize." On a few occasions, they "forgot." Some of this evidence made it into the trial.

Installing a covert audio and video recording device in a home is the most severe intrusion imaginable. The nature of the government intrusion is a factor courts should consider, and hidden video surveillance is one of the most intrusive investigative mechanisms available to law enforcement. The extent to which the Fourth Amendment protects people depends upon where the search occurred. A person's residence deserves the most scrupulous protection from government invasion. Cf: Nerber, 222 F3d at 603.

Secret video surveillance is especially intrusive on the privacy interests protected by the Fourth Amendment. See: e.g., United States v. Koyomejian, 970

F.2d 536, 551 (9th Cir. 1992)(Kozinski, J. concurring).("As every court considering this issue has noted, video surveillance can result in extraordinarily serious intrusions into personal privacy.") United States v. Taketa, 923 F.2d 665, 677 (9th Cir. 1991)(finding that warrantless video surveillance of an office violated the Fourth Amendment rights of those who were recorded, including a person who was recorded in an office that was not his.); United States v. Falls, 34 F.3d 674, 680 (8th Cir. 1994)("It is clear silent video surveillance results ...in a very serious, some say Orwellian, invasion of privacy."); United States v. Mesa-Rincon, 911 F.2d 1433, 1443 (10th Cir. 1990)("Because of the invasive nature of video surveillance, the government's showing of necessity must be very high to justify its use."); United States v. Cuevas-Sanchez, 821 F.2d 248, 251 (5th Cir. 1987)("[I]ndiscriminate video surveillance raises the spectre of the Orwellian state."). The basic principle articulated in these cases – that covert video surveillance is highly intrusive and justifiable only in rare circumstances – trumps the prosecution's reliance on the government agent's consent to monitor her joint residence with the co-defendants. Indeed, the government's only factual argument is that the officers "minimized" as in a wiretap. Wiretaps need warrants.

The videotapes contained both video and audio portions. The audio portions are governed by the federal wiretap statute including § 2511(2)©.

However, those portions must also be admissible under the United States Constitution. United States v. Shryock, 342 F.3d 948, 978 (9th Cir. 2003) citing United States v. Keen, 508 F.2d 986, 989 (9th Cir. 1974)(holding that to be admissible, wiretap evidence must be "obtained in violation of neither the Constitution nor federal law") cert. denied 421 U.S. 929 (1975).

Video surveillance is not justifiable whenever an informant is present. An informant's presence and consent is insufficient to justify the warrantless installation of a hidden video camera in a suspects home. Cf: Nerber, 222 F.3d at 604 n.5.

Outrageous government misconduct.

The defense of outrageous conduct pertains to cases like this in which the government's conduct violates fundamental fairness and is shocking to the universal sense of justice mandated by the Due Process Clause of the Fifth Amendment. This standard is met when the government goes beyond merely infiltrating an existing organization, or merely approaching persons believed to be already engaged in or planning to participate in a conspiracy, or merely providing valuable and necessary items for a pre-existing venture. Cf: United States v. Gurolla, 333 F.3d 944, 950 (9th Cir.) cert. denied 540 U.S. 995 (2003).

H. CUMULATIVE ERROR INFECTED THE TRIAL RESULTING IN A DENIAL OF DUE PROCESS

The Alice In Wonderland conduct of the trial made a Kafka novel look pleasant. There were cumulative errors requiring reversal. Even if individual errors looked at separately did not rise to the level or reversible error, the cumulative effect nevertheless was so prejudicial as to require reversal. In reviewing for cumulative error, the court of appeals must review all errors preserved for appeal and all plain errors. Even if a particular error is cured by an instruction, the court of appeals should consider any "traces" which may remain. United States v. Necoechea, 986 F.2d 1273, 1282 (9th Cir. 1993)(citations omitted).

I. THE SENTENCE WAS ILLEGAL AND MUST BE VACATED

The district court's sentence was an unreasonable abuse of discretion fraught with significant procedural error and substantive unreasonableness.

In determining the substantive reasonableness of a sentence, an appellate court considers the totality of the circumstances and attaches no presumption of reasonableness to the fact that the sentence falls within the applicable U.S. Sentencing Guidelines Manual range. An appellate court may reverse a sentence if, upon reviewing the record, it has a definite and firm conviction that the district

court committed a clear error in judgment in the conclusion it reached upon weighing the relevant factors. United States v. Amezcua-Vasquez, 567 F.3d 1050; 2009 U.S. LEXIS 11658 (9th Cir. 2009).

The district court committed procedural error at the sentencing hearing, and its sentence was substantially unreasonable and greater than necessary. Cf. United States v. Edwards, 595 F.3d 1004 (9th Cir. 2010) 2010 U.S. App. LEXIS ; United States v. Carty, 520 F.3d 984, 993 (9th Cir. 2008)(en banc)(citing Gall v. United States, 552 U.S. 38 (2007).

The district court's sentence was not procedurally sound because it failed adequately to consider all the 18 U.S.C. § 3553(a) sentencing factors. The district court also chose its sentence based on clearly erroneous facts, and failed adequately to explain the sentence selected. Most significantly, the district court announced it could do *nothing* about the fact that Eric was a Category VI Criminal History, because it was in the guidelines and therefore "Congress has made it very clear, one time, it's a one strike offense, if you will....Advisory understood, but there seems to be a serious–very serious intent here that any type of act at this type of level deserves a very onerous or strict repercussion."

ER 1973-1974.

The district court erred in its application of the 3553(a) factors in reaching

its sentence. The sentence was appallingly greater than necessary compared to the co-defendants, who received no prison time, and also, the district court took no affirmative steps to rehabilitate Eric McDavid in its sentence.

Here, as in Amezcua-Vasquez, the within-Guidelines sentence was unduly harsh, and hence substantially unreasonable.

The government relies heavily upon United States v. Ressam, 593 F.3d 1095; 2010 U.S. App. LEXIS 2180 (9th Cir. 2010) in arguing that Eric McDavid's sentence was not illegal. The Ressam case resulted in reversal for a second re-sentencing after the district court imposed the same sentence on the first remand. The district court committed procedural error in failing to address specific nonfrivolous arguments raised by the government in imposing a sentence well below the advisory Sentencing Guidelines range. Ressams' twenty-two year sentence was held unreasonably lenient for a terrorist who was convicted by a jury of nine counts of criminal activity in connection with his plot to carry out an attack against the United States by detonating explosives at LAX on December 31, 1999.

The two defendants are worlds apart. Ressam attended three training camps for Islamic terrorists in Afghanistan. He and five others were part of a terrorist cell charged with destroying a U.S. airport or consulate before the end of 1999. Ressam's car contained well over 100 pounds of explosives with timing devices.

Ressam testified against a co-conspirator who was sentenced to 24 years in prison, two years less than the statutory maximum. Another cooperating defendant was sentenced to six years confinement. Ressam was associated with Zacarias Moussaoui. He knew that a shoe bomb seized from an airliner was still active and dangerous. Ressam was convicted at trial, then cooperated for the government, then stopped cooperating and attempted to take back his cooperation.

The district court at Ressam's re-sentencing hearing discussed other terrorism prosecutions around the country and a study of 124 defendants in terrorism trials in American federal courts since September 12, 2001 which concluded that the average term of imprisonment was a little over eight years. However the district court in Ressam did not rely upon this data in imposing sentence.

The sentence in Eric's case must be vacated.

CONCLUSION

The judgement must be reversed and the matter remanded to the district court for dismissal of the charges or a new trial; Alternatively, the sentence imposed must be vacated as illegal.

Dated: April 13, 2010

/s/ MARK J. REICHEL

Attorney At Law
Attorney for Defendant-Appellant
ERIC TAYLOR MCDAVID

CERTIFICATE OF RELATED CASES

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

DATED: April 13, 2010

Mark J. Reichel

MARK J. REICHEL
Attorney At Law

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(a)(7)©, I certify that this brief is proportionately spaced using 14 points Times New Roman and contains 8, 333 words.

DATED: April 13, 2010

Mark J. Reichel
MARK J. REICHEL
Attorney At Law

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 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. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: April 13, 2010

s/ *Mark J. Reichel*