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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

UNITED STATES, Plaintiff, v. ERIC MCDAVID, Defendant.	No. CR 06-035-MCE (EFB) DEFENDANT MCDAVID'S AMENDED REPLY MEMORANDUM IN SUPPORT OF MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255

Defendant Eric McDavid, through counsel, submits the following Amended Reply Memorandum in support of his motion for relief under 28 U.S.C. § 2255, and in response to the Government's Opposition - Doc. 420 (hereinafter "Gov't Opp."). This Amended Reply Memorandum is submitted to the Court, following its submission to government counsel for review, and government counsel has indicated that the government does not oppose the filing of this Amended Reply Memorandum. A proposed order accompanies this filing.

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I. INTRODUCTION

The government begins its Opposition with a lengthy set of alleged facts which it contends supports the Ninth Circuit's harmless error analysis. The government's facts are all disputed, though, and must be examined in the context of Eric McDavid's ineffective assistance of counsel ("IAC") claims, which go to whether his counsel effectively presented the entrapment defense that applies so compellingly in this case. The government contends that McDavid seeks only to re-litigate issues foreclosed by the Ninth Circuit's decision on appeal. This is incorrect. McDavid's IAC claims must be considered on § 2255 review, and indeed are presented here for the first time. In this light, the earlier harmless error analysis is inapplicable. *See, e.g., United States v. Montalvo*, 331 F.3d 1052, 1057-58 (9th Cir. 2003) (for purposes of § 2255, constitutional errors may not be deemed harmless if petitioner demonstrates the error had a "substantial and injurious effect or influence in determining the jury's verdict;" applying *Brecht* standard).

Therefore, the question before the Court now is not whether a properly instructed jury could have convicted McDavid based on the government's purported facts, but whether the jury in this case, which unquestionably was *improperly instructed*, could have acquitted McDavid had it received proper instruction; that is, if McDavid's counsel had rendered effective assistance in that process.

The record amply demonstrates that the "facts" adduced by the government were all disputed, or are demonstrably false. Thus, if the jury had been properly instructed, it might well have acquitted McDavid, as its questions to the Court (prior to the instructional error) indicated it was seriously considering doing.

II. NUMEROUS OF THE GOVERNMENT'S PURPORTED "FACTS" ARE UNCORROBORATED AND/OR DEMONSTRABLY FALSE, ILLUSTRATING WHY DEFENSE COUNSEL'S INEFFECTIVE ASSISTANCE AND THE COURT'S INSTRUCTIONAL ERROR WERE PREJUDICIAL AND NOT HARMLESS IN THIS CASE

Defendant contests the government's statement of facts, numerous of which are uncorroborated by any witness other than the paid informant, and many of which are

demonstrably false. (*See* Gov't Opp. at 2-19). Therefore, if properly instructed, the jury could have found reasonable doubt regarding the government's presentation and acquitted the defendant. Trial counsel's ineffective assistance, and the Court's instructional error, thus were not harmless. Notably, the government's most incendiary allegations were made by the informant, Anna, based on conversations she alleged she had with McDavid, despite the lack of corroborating recordings, which in each case were not produced by the government. Where recording devices or witnesses were present, they contradict Anna's inflammatory claims about McDavid, as the record amply demonstrates.

A. Anna's First Contact and Targeted Monitoring of McDavid

The government asserts that Anna was "not to report on the expression of any opinions or political views" (Gov't Opp. at 3:16), implying that she would have passed over McDavid and his eventual codefendants had they only been engaged in free expression. The government neglects to mention that Anna in fact *did* pass over McDavid, reporting to the Federal Bureau of Investigation ("FBI") that "At the time I thought he was inconsequential. I thought he was a college student and not of interest to the FBI." (E.R. 690:10-12.) Contrary to the government's contention that the FBI was not marking people just for their political expression, Anna's handler, SA Ricardo Torres, testified that he did not consider it illegal for Anna to report back on anyone and everyone she encountered at protests, even where there was no indication they intended to do anything unlawful, so long as he, SA Torres, did not "record it as such;" in SA Torres' view, it was the act of recording such information which would exceed Dept. of Justice Guidelines. (E.R. 1130:25 – 1131:7.)

Anna, however, would later send "blast" emails to people she met at protests and gatherings, including McDavid, showing she (as an informant working intimately with the FBI) did store and follow up on such information. Revealed by at least one document which the government withheld from the defense (but which was later uncovered by the defense in a FOIA request), the government clearly tasked Anna with probing McDavid's political views. (Ex. 4,

part 1:00065).[1]

It is undisputed that Anna first encountered McDavid at a political convention of sorts, a "Crimethinc convergence," in Des Moines, Iowa in August 2004, and that McDavid had never attended any such event before, nor had he gotten into any sort of trouble with the law. Anna reported to the FBI that he was not a person of interest:

> Q. And, in fact, you reported back to the FBI after Des Moines that he was inconsequential to the FBI, correct?
>
> [Anna]. Correct.
>
> Q. He was not a person of concern?
>
> [Anna]. Correct.
>
> Q. Not of interest?
>
> [Anna]. At that time, no.

(E.R. 890:17-23.)

Anna said she thereafter "buddied up" with McDavid because "He was someone I viewed as 'non-threatening.'" (E.R. 890:5-7.) This clearly marked the moment of "first contact" of such critical importance to the defense, as well as to the jury in its deliberations over the issue of entrapment, as the jurors' incisive questions to the Court on the subject plainly demonstrate. (See further discussion, below.) The government has never adduced a shred of evidence that McDavid was predisposed before this juncture to conspire to destroy government property, nor could they. Instead, the government simply convinced the Court, over defense counsel's meek objections, to advance the date of first contact forward by a year after Anna had begun following and influencing McDavid *as she was instructed and encouraged by the FBI to do*.

B. Evidence of the FBI's/Anna's Romantic Manipulation of McDavid

The government tears down a straw man by arguing that Anna and McDavid did not have a romantic relationship. (Gov't Opp. at 18-19.) McDavid has not alleged that he had a romantic relationship with Anna, but rather, that he had a strong romantic interest in her, which she and

[1] The reference "Ex. ___" is to the exhibits submitted in support of McDavid's earlier filings, and to additional exhibits submitted with this reply.

the FBI carefully nurtured and manipulated in order to be able to entrap him. (E.R. 1253:17-1254:1, E.R. 1549:6-9.) McDavid has presented extensive evidence to support this argument, while the government has provided none to refute it. The following are just a few examples.

On the balcony outside Lauren Weiner's[2] apartment in Philadelphia in June 2005, McDavid professed his love to Anna, as he did in letters which she testified she/the FBI kept – except the government was never able to produce them during trial. (See further discussion, below.)

The FBI's Behavioral Analysis Unit trained Anna to stoke these feelings, while also making him wait to consummate their relationship until after he completed the mission. Anna testified to this herself (E.R. 1067:23 - 1068:12), and it is glaring evidence of inducement and entrapment.

Although the government claims Anna shared sleeping quarters with Zachary Jenson when the group assembled in November 2005 at McDavid's parents' house (Gov't Opp. at 18:22-23), this directly contradicts Weiner's account, where she testified *she* and Jenson shared sleeping quarters upstairs, while McDavid and Anna slept downstairs in the living room together. (E.R. 1211:18-25.)

Although the government contends Anna "shot down" McDavid's advances (Gov't Opp. at 18:13-19), the evidence (including Anna's own trial testimony) establishes otherwise. Anna testified:

> [Anna]. There was a time in November when he made an advance to me while we were at his parents' house. We were driving in the car. We had ordered a pizza, and Jenson and Weiner were still at the family's house. McDavid and I rode in the rental car down to the pizza place to pick up the pizza. And on the way there, McDavid said, I have to get something off my chest. I'm wondering what's going on with us.
>
> Where do we stand? Are we an item? Are we together? And I remembered what the Behavioral Analysis Unit had told me. They said if he makes another advance at you, what you need to say to him to calm him, to mollify him, is that we need to put the mission first. We need to

[2] Both Lauren Weiner and Zachary Jenson were charged as codefendants, and both cooperated with the government thereafter and testified against McDavid at trial.

> put the mission first. There's time for romance later.
>
> Q. And is that what you did?
>
> [Anna]. That is what I told him.

(E.R. 1067:23 - 1068:12 (emphasis added).)

The FBI's Behavioral Analysis Unit instructed Anna to keep McDavid on the hook, and that is exactly what she did. The FBI's plan functioned as designed. As Jenson stated in his declaration submitted in conjunction with these proceedings: "Anna was aware that Eric had a romantic interest in her and led him to believe that the relationship could happen one day, after he proved that he was radical enough. If not for these factors Eric and I would have been traveling and not engaged in a conspiracy." (Ex. 1 at p. 2.) Jenson also testified at trial that he never saw Anna rebuff McDavid. (E.R. 1466:19-22.)

Arguably, the defense would have been even better equipped to support the contention that Anna/FBI entrapped McDavid by manipulating his love for her had the government not conveniently lost or destroyed numerous items of evidence, including all but one of the love letters McDavid reportedly wrote to Anna. Surveillance tapes and testimony introduced at trial revealed McDavid had written Anna at least three love letters, and SA Nasson Walker (Anna's handler in California) referenced 10 other letters/emails in a declaration. (Gov't Ex. 2 at p. 6.) Yet the government produced to the defense only one of the love letters (an email), and Anna's response to it, as discussed in her trial testimony:

> Q. And, (reading): Hey, glad to hear from you again. Do you see where it goes down and says, (reading): Your e-mail made me smile, period?
>
> [Anna]. Yes.
>
> Q. Okay. It says, (reading): Keep e-mailing, keep chatting, see you in the winter?
>
> [Anna]. Correct.
>
> Q. Now, did you -- you didn't put anything in there about knock off the romance, right?
>
> [Anna]. No, I did not.

(E.R. 921:1-10.) Not only did Anna not tell McDavid to knock off the romance, she told him his email "made [her] smile and to "[k]eep e-mailing, keep chatting," and flirtatiously confirmed,

"see you in the winter?"

The government contends Anna discovered a "radicalized" McDavid when she met him in June 2005 at the Biotechnology Conference in Philadelphia. However, they fail to mention that he was plainly trying to impress her, and that she derived this impression directly from comments he made to her while they were alone together on Weiner's balcony where McDavid told Anna of his feelings for her, and later in Philadelphia they shared a "final embrace," which he would later reference in love letters to her. (E.R. 706:12-707:2; E.R. 918:1-4.) Anna testified that the FBI's Behavioral Analysis Unit trained her to make McDavid "wait" until "after the mission" before she would consummate their love in reward for his faithfulness, which he could demonstrate by following through with a plan. (E.R. 1067:23 - 1068:12.) During the conversation on Weiner's balcony, McDavid told Anna *she* was the reason for the changes she observed in him, as she admitted on the stand. (E.R. 1014:7-21.)

C. McDavid Did Not Advocate Targeting Federal Buildings in July 2005

In July of 2005, Anna and McDavid found themselves once again at a "Crimethinc convergence," this time in Bloomington, Indiana. The government claims McDavid attended a workshop on Urban Guerrilla Warfare at this gathering with Jenson, where the subject of targeting federal buildings was raised. The government claims that when McDavid later noted to Anna someone else's opposition to the idea, Jenson disagreed, and McDavid "nodded" in accord with Jenson. The government's framing is highly misleading. First, Jenson testified that the discussion about targeting federal buildings was in a private conversation he had, not in a workshop.

> Q. At some point during the Bloomington convergence did you discuss targeting federal buildings?
>
> [Jenson]. Yes, I did.
>
> Q. Would you summarize what you said?
>
> [Jenson]. I was talking to someone I met there. He had mentioned targeting state buildings, and I said no, target the federal buildings.

(E.R. 1414:16-22.) There is no suggestion McDavid was even present during this conversation. And although Jenson testified that McDavid mentioned potential targets at the gathering (i.e.

mountain top removal projects, banks, and communist party buildings (E.R. 1415:4-5), none of these are federal buildings. Noticeably absent from the list too is the Institute of Forest Genetics ("IFG") – the one federal building the government alleged McDavid consistently targeted from the start.

Most tellingly on this point, Anna was forced to admit at trial that McDavid denied ever saying anything in Bloomington about targeting federal buildings:

> Q. BY MR. REICHEL: ...Your testimony yesterday is that at Bloomington Mr. McDavid -- there was a discussion about blowing up federal buildings, and Mr. McDavid gave his approval, correct?
>
> [Anna]. Correct.
>
> ...
>
> Q. ... And then, now, in your preparation of this case, you reviewed the tape of January 9th of 2006, where you say to Mr. McDavid, kind of reaffirming that to him on a tape recorder, do you remember in Bloomington, Mr. McDavid, you agreed about blowing up the federal buildings, and he responded, I didn't do that, I didn't say that; do you remember that?
>
> [Anna]. Correct, yes.
>
> ...
>
> Q. ... [W]hen you asked him that, that's kind of a reaffirmation, you wanted to get something on tape from him about that, right?
>
> [Anna]. Correct.
>
> Q. And it just didn't get on there, right?
>
> [Anna]. Correct.
>
> Q. In fact, the opposite got on there, correct?
>
> [Anna]. Correct.

(E.R. 927:13-929:13 (emphasis added).)

D. No Conspiracy Was Formed In August 2005

In its Opposition, the government dramatically labels August 2005 as the date of the "formation of the conspiracy." (Gov't Opp. at 7.) This is the period in which Weiner testified that she, Jenson, and McDavid met at a café down the street from Weiner's apartment to discuss possible plans. As a preliminary matter, whatever the group did or did not discuss in August 2005, this was a full year after Anna's first contact with McDavid, and several months, already,

after even the date which the government convinced the Court to use as the date of first contact (i.e. June 2005). Importantly too, the following trial testimony by Jenson undercuts the government's claim that August 2005 was the inception of a conspiracy:

> Q. Following the meeting at the cafe, what was your understanding about whether you, Lauren and McDavid were going to go forward with some sort of direct action?
>
> [Jenson]. I had the idea that we were going to meet up again to discuss it.

(E.R. 1418: 12-13.)

Undoubtedly, this was not the response the government was seeking. In point of fact, there is no evidence the group even would have reassembled had the government, acting through Anna, not exhorted, induced, cajoled, and literally rounded them up and herded them together, as discussed in detail in McDavid's Amended § 2255 Memorandum, Doc. 410 (hereinafter, "Def's Am'd Memo"). Most importantly, the government must concede, based on its own account, that Anna was already discussing with McDavid the ideas that the co-defendants allegedly discussed at the café meeting in Philadelphia. (E.R. 1203:19-1204:2.) Hence, a jury given an opportunity to apply the correct first contact date reasonably could have concluded Anna implanted these ideas, and that McDavid was thus entrapped.

The government asserts, based exclusively on Anna's uncorroborated testimony, that McDavid fomented the alleged conspiracy. (See Gov't Opp. at 8, 29.) The government further asserts that codefendants Jenson and Weiner testified that McDavid invited them to join the alleged conspiracy. But this is patently false. Weiner testified she joined the conspiracy during a conversation with McDavid and Jenson at a café near her home in Philadelphia in August 2005, but she never said McDavid initiated the conspiracy or invited her into it:

> Q. What did the three of you discuss on that occasion? And I'm going to ask you to look at the jury and tell them.
>
> [Weiner]. We had talked about when we were going to see each other again in the spring, and I wanted to start an activist house where we could all live. But then we were going to do direct actions, and we talked about different direct actions such as banner dropping, graffiti. We all agreed that protesting wasn't working. We had been doing that all summer, and it didn't make a difference, so we were going to try to be more direct and –

(E.R. 1201:5-14.) Weiner thus described this critical (for her) conversation as organic and co-equal. ("We all agreed...") She never said McDavid implanted the idea of direct action. When asked why McDavid wanted to do direct action, Weiner responded similarly:

> [Weiner]. *We all* had the same opinion on that. Protesting wasn't working, and we wanted to make a difference, and we wanted to make a change, but what else could we do.

(E.R. 1203:1-5 (emphasis added).)

The conversation, as described by Weiner, does not even suggest the formation of a conspiracy. Rather, it reveals little more than a joint frustration among friends, which a government agent exploited. Following a similar line of inquiry with Jenson, the government got a strikingly similar response:

> Q. Would you describe to the jury the events at the cafe?
>
> [Jenson]. We had a discussion about protests being ineffective, and we had a discussion about going beyond that and going to direct action.

(E.R. 1416:24-1417:3.)

The government claims McDavid "expressed excitement" when Anna said they should get together in November 2005 when she told him she would be in California visiting a sick aunt. (Gov't Opp. at 9:3-5). But if McDavid was excited, it was about seeing Anna, on whom he was romantically fixated, not about engaging in a conspiracy. His lack of interest in the so-called August 2005 conspiracy is why he stayed almost completely out of touch with the group after they saw each other in Philadelphia until the government/Anna invented the sick aunt pretext to suck him back in in November. Anna testified the government was "worried as to where he had disappeared to." (E.R. 728: 5-6.) This is evidence of McDavid's reluctance to pursuing a conspiracy, rather than any interest in doing so.

As for Weiner, she indeed testified that during the gathering in August 2005 she wanted to join "the guys" out west, but not to pursue a conspiracy. Instead, she testified that she "missed the guys, so I wanted to go and continue traveling like we did that summer." (E.R. 1207: 22-24.) The government's contention that "Weiner made her own independent plans to go to California" (Gov't Opp at p. 9) is a complete distortion of the evidence. When it came time to make actual

plans, Weiner balked because she lacked the resources. Had Anna not purchased Weiner's ticket for her, she could not and would not have gone. (E.R. 939: 12-20.)

Contrary to the government's assertion that the group met, "[a]t McDavid's direction," at McDavid's parents' Foresthill home (near Sacramento) in November of 2005 (Gov't Opp. at 9:21-23), the evidence is abundantly clear that the meeting was orchestrated by the FBI and happened only as a result of Anna's prodding and manipulation. Anna testified on re-direct examination:

> Q. And you -- what about encouraging the group to come out and have the meeting in November?
>
> [Anna]. *I was directly instructed by the FBI to encourage the group to come out in November*.

(E.R. 1071:2-5 (emphasis added).) Similarly, on cross examination she testified:

> Q. Now, this is November 6th, and the FBI has told you that you got to -- that they *wanted you as a goal for them to get everybody out to the West Coast, right?*
>
> [Anna]. *Correct*.

(E.R. 950:23 – 951:9 (emphasis added).)

Anna in fact singlehandedly organized the meeting in November, overcoming McDavid's initial reluctance. He originally informed the group he would not meet with them in November. Jenson testified Anna was upset that McDavid was not coming. (E.R. 1496: 11-14.) After enough pressure and bullying (including calling him "selfish") (Ex. 7 at p. 218.), Anna convinced McDavid to join the meeting, but only by literally bringing it to his doorstep at his parents' house where he was staying. In his declaration submitted in conjunction with this motion, Jenson stated:

> If it had not been for the persuasive powers and financial resources of the government informant Anna there would have been no conspiracy. Eric was extremely reluctant to meet with us in November of 2005.... If it had been left to Eric, that meeting would have never occurred. It took Anna's logistical panning [sic], interpersonal manipulation and financial assistance to make that meeting happen. In fact she brought Lauren and I [sic] to Eric's parent's [sic] house because he would not meet with us about the conspiracy.

(Ex. 1 at p. 2.)

The government claims that "plans were formulated to commit acts of eco-terrorism" during the get together at McDavid's parents' house in November 2005. (Gov't Opp. at 9:23-24 (citing to E.R. 732:17-733:7). However, the ER pages to which the government cites say no such thing. Conversely, Weiner testified that at the end of the meeting in November, there was no set plan and no set targets, but only a vague plan to talk again in January 2006. (E.R. 1305:24 - 1306:6.) Anna testified that the group parceled out "tasks" to three of the members, *but not McDavid*. (E.R. 750:7-20.) Weiner was to purchase certain books, Anna was to procure a cabin, and Jenson was to become a "ninja warrior." Anna testified:

> Q. When he announced that, did you believe that that would come to fruition?
>
> [Anna]. No.

(E.R. 990:16 – 992:14.) No task was assigned to McDavid, and there is no evidence he assisted anyone else in the completion of his/her task.

E. No Evidence That Any Targets Were Ever Set

As noted above, Weiner testified that no targets were set in November 2005. The government contends it was McDavid's idea to target the Institute of Forest Genetics. The government produced no evidence of this apart from Anna's testimony. (Gov't Opp. at 10:17-24, citing E.R. 741:14-742:1). But a recording made the day before the arrest undermines the claim. In the recording, Anna tries to get McDavid to say on tape that targeting the IFG was his idea. Unaware, of course, that he was being recorded, McDavid expresses surprise at the insinuation:

> [Anna]: Like the first one you ever talked to me about was…
>
> [McDavid]: Was the cell phone tower.
>
> [Anna]: Was the tree factory - that's the very first thing you ever mentioned me when I thought it was just you and me doing this
>
> [McDavid]: Oh, really?
>
> [Anna]: Yeah.
>
> [McDavid]: Alright…

(Exhibit 8 at 220.)[3]

F. No Evidence That The Group Ever Planned To Use Explosives

Although the government likes to attribute to McDavid a plan to make and use C4 explosive (Gov't Opp at pp. 6:16-19, 11:12-15), Weiner revealed that the group was never serious about such an idea. She testified:

> [Weiner]: Eric said that he had had a conversation with somebody that told him that that person had a friend who had a book or something that had explosive recipes in it. And that the guy had told him that if you mix like bleach and ammonia together, that you can get like a crystalized explosive of some sort. *But it sounded really sketchy and dangerous and more of a hearsay recipe than anything concrete. That's when I said I'd get The Poor Man's James Bond book.*

(E.R. 1219: 2-9 (emphasis added).) She also testified:

> [Weiner]: Right. That's why I wanted to get the books, the hearsay recipes just sounded really sketchy and dangerous.
>
> Q. Basically, what he repeated to you is what he heard from someone, it sounded like not going to work, right?
>
> [Weiner]: Right.
>
> Q. So very unsophisticated and naive, right?
>
> [Weiner]: Yes.

(E.R. 1325: 2-8.)

Thus, contrary to the government's assertion that McDavid tasked Weiner with getting the recipe books (Gov't Opp. at 11:18-19), Weiner's testimony above plainly reveals she took this upon herself to do. There is not a scintilla of evidence that McDavid made any actual attempt to acquire or produce C4 explosive.

Similarly, Jenson testified that McDavid had zero know-how when it came to making explosives. He testified

> Q. By December of 2005 are you aware of any instance where Mr.McDavid in all of these discussions by December of 2005 said to Anna, I've got a recipe, I'm fine, I don't need any more help on this?

[3] The parties' transcriptions of this recording differ slightly. Both are provided in Exhibit 8. The original recording (VHS D17 - January 12, 2006) is of course the best source. The recording can be provided upon the Court's request or for an evidentiary hearing.

> [Jenson]. I don't remember that, no.
>
> Q. Okay. Is that because that didn't happen? …
>
> [Jenson]. No, it did not happen.

(E.R. 1499:4-12.) McDavid's, and the rest of the group's lack of facility with explosives, is why Anna herself had to pre-fill the first several pages of the "Burn Book" with "recipes."

G. January 2006: Dutch Flat, California

Although the group had discussed meeting again in January 2006, it is undisputed that actually meeting was impossible without Anna, who made it happen by literally driving Jenson and Weiner across country in her own car, and by procuring the cabin in Dutch Flat, California where they gathered. (E.R. 992:8-20; 993:21-994:4; 999:14-16.)

During their meeting at Dutch Flat from January 8-13, 2006, the group displayed a complete inability to agree on anything or do anything, despite Anna's constant badgering and cajoling. They continued not to agree on any target or timeline, or even whether or not to use the ELF tag during any possible actions. Indeed, the timing of their arrest had everything to do with the fact that Anna felt she was not succeeding in maneuvering them into the FBI's snares and she was stressed out, as discussed further below.

1. January 8, 2006

During their first night at the cabin, Anna presented the group with the "Burn Book," which she had pre-filled with "recipes" and "inspirational sayings." (E.R. 771:17-775:13.) She then wrote down topics for the group to discuss the following day. (E.R. 776:10-12.) Her primary focus was pinning the group down on targets and entering this information in the Burn Book, but she did not write McDavid's name down that evening next to any of the subjects listed. (E.R. 1511:18-1512:8.)

2. January 9, 2006

In its Opposition, the government quotes from a recorded conversation which it claims shows McDavid considered the death of human beings acceptable. (Gov't Opp at p. 14-15.) This insinuation is utterly false and misleading, and it is belied by the evidence. McDavid

expressed just the opposite sentiment, namely his concern that even in a scenario proposed by Weiner to avoid harming people, the risk still existed.

> [Anna to Weiner]: ... are you saying that like blowing up a factory's a great idea but blowing up a factory next to a school not so great an idea.
>
> [Weiner]: Exactly.
>
> [Anna]: Yeah, okay.
>
> [McDavid]: What about the factory workers and security guards in the factory?
>
> [Weiner]: Huh?
>
> [McDavid]: What about if there's still a factory worker or a factory security guard that we've missed?

(S.E.R. at 47-48.) Anna, not McDavid, is the one who attached the dismissive and trivializing term "collateral damage" to the loss of human life, and McDavid was the one who rejected it:

> [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.

(S.E.R. at 50.) McDavid was explicit that the group should take every possible precaution to avoid injuring any living being.

> [McDavid]: That's why I was like talking about the ELF guidelines that they state here. I mean take all necessary precautions to [inaudible] the animal. That's where I am, that's where I stand right now.

(S.E.R. at 53)[4] Weiner confirmed at trial that this was the group consensus:

> Q. BY MR. LAPHAM: ... Did the defendant voice an opinion regarding the subject of accidental death?
>
> [Weiner]: It was, you know, *you take all necessary precautions* and *make sure it doesn't happen*. There was talk about, you know, what if there's a security guard in a factory, and he is walking around, how do you let him know, how do you get him out, and, you know, what happens if you do that. We basically just talked through that. How, you know, to make sure to get a message or note to the security guard, or to make sure that everybody is out of the building. I don't recall him ever saying exactly what he would do if that happened or how he would feel if that happened.

(E.R. 1233:3-15 (emphasis added).)

In his declaration submitted with this 2255 Motion, Jenson states clearly that he does not believe McDavid was capable of violence towards human beings: "I did not believe that Eric was a dangerous person and based on the many conversations we had in our year and a half of friendship, I did not believe Eric would have taken action that would have harmed or killed another human being." (Ex. 1 at 3.)

The government has sought throughout the case to demonize McDavid by making wild and unsubstantiated claims that he threatened violence against Anna or others. Tellingly, the government could never scare up actual evidence to corroborate the scare tactics – in a case brimming with audio and video recordings. Rather, the alleged recordings or physical evidence either was favorable to McDavid, or it was mysteriously missing or never existed. Specific examples follow:

- The government asserts, without corroboration, that McDavid "expressed the view that [the death of an officer at the BioTech Conference in Philadelphia] 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." (Gov't Opp. at 5.) The alleged statement, however, is taken almost verbatim

[4] Although the recording was partly inaudible, McDavid appears to be reading from ELF/ALF guidelines which require "tak[ing] all necessary precautions against harming any animal, human and non-human." http://www.start.umd.edu/start/data_collections/tops/terrorist_organization_profile.asp?id=41

from Anna's unrecorded and completely uncorroborated testimony.[5] McDavid was not present when officer Paris Williams suffered a heart attack and later died in the hospital.[6]

• Anna testified that McDavid planned to start a bombing campaign. But the government produced no recording of the alleged conversation, and on cross examination, Anna conceded the alleged conversation (if it occurred) was at her prompting and urging. (E.R. 714:25-715:6.)

• Anna claimed McDavid threatened to kill her if he discovered she was a cop, with "an eight-inch long standard hunting knife" he allegedly carried on him at all times. (E.R. 720:25 - 721:1.) But no such knife was found on McDavid at the time of his arrest, or ever. (RT 09/12/2007 at 619.)

• Anna claimed fancifully that on the eve of the bust, she awoke to a frantic text message from SA Torres warning her that McDavid was standing over her with a knife while she slept on the couch. The government could not produce the alleged video or even the alleged text message. Jurors found this fabrication by the government particularly troubling.[7]

3. January 10, 2006

The government goes to great lengths to describe the supposedly nefarious reconnaissance missions undertaken on January 10, 2006. But they fail to mention that Jenson

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[5] Another of the government's unsubstantiated claims arises during this time period, but the government's own accounts of it vary dramatically. In the criminal complaint, the government claims McDavid offered training "to other anarchists" on how to make Molotov cocktails. (E.R. 283:23-25.) But FBI Agent Ricardo Torres testified McDavid merely watched a movie at the Lost Film Festival about how to make them. (E.R. 1105:20 – 1106:14). And Anna testified McDavid watched a video (at the Lost Film Festival) in which people were using them. (E.R. 703:17-704:4.)

[6] Philadelphia Inquirer June 22, 2005 http://articles.philly.com/2005-06-22/news/25438524_1_fatal-heart-attack-father-figure-raucous-protest

[7] A recent article in *Outside Magazine* discusses jurors' reaction to this apparent ruse by the government: "The surveillance tape for that part of the night is missing, as are any handwritten surveillance notes. There's no record of the text message. Several jurors pointed to this possible concoction as the most egregious foul in the case. 'There were things like that that some of us just didn't really believe,' juror Diane Bennett told me." "Honey Stinger," *Outside Magazine* (December 2012) (http://www.outsideonline.com/outdoor-adventure/Honey-Stinger.html?page=all).

and Weiner testified that the group did not select any of these places as targets, and that the codefendants all scoffed at the idea of doing any damage to the Nimbus Dam; according to both Jenson and Weiner, the only thing the group could agree on was that the Nimbus Dam was NOT a target. (E.R. 1335: 7-13, E.R. 1543: 6-10.) Although the government makes much ado about McDavid's alleged selection of the Institute of Forest Genetics as a target (Gov't Opp. at 10:19-23), Weiner testified the group did not agree to make the IFG a target. (E.R. 1338:24-1339:2.) Even Anna admitted that the group was unable to decide upon time frames and targets, testifying further that they were unable to get anything done in general. (E.R. 1039:4-23.)

4. January 12, 2006

On January 12, 2006, at Anna's behest, the group began mixing chemicals (using the chemistry set Anna brought to the cabin, following the recipe she had provided). Weiner participated grudgingly, haltingly, and only at Anna's insistence. (E.R. 1328:7-1329:12.) Surveillance tapes show McDavid sticking up for Weiner, telling Anna she was being pushy and should leave Weiner alone. This is supported by Weiner's testimony at trial. Weiner also testified that Jenson was having a panic attack during this episode and that "It was kind of a little fight there" (E.R. 1328:18-19.) While the group was mixing chemicals, the bowl they were using broke. This prompted a long, revealing argument with Anna in the Dutch Flat cabin. During the argument, Anna became extremely upset and excoriated the group for failing to set any goals, pick any targets, or "stick to a damned plan." (E.R. 1317:17-1318:25.) Jenson was voicing a desire to slow down and pull back, and McDavid and Weiner explicitly supported his desire. (E.R. 1516:1-22.)

Frustrated by the group's lack of progress and failure to move forward, Anna stormed out of the cabin and down the road to the FBI command post, and told her handlers the scheme wasn't working and she was done. They assured her the group would be arrested the next day. (E.R. 1049:13-17.)

The government states that when Anna returned to the cabin, the group seemed calmer and more welcoming. (Gov't Opp. at 17:11-12.) However, inferably, this was only because

Weiner and McDavid smoked marijuana while Anna was gone. (E.R. 1317:4-16.) The government also claims that in her absence, the group had "established a new schedule for going forward with the plot." (Gov't Opp. at 17:12.) But this "new schedule," such as it was, was crafted by intoxicated people trying to mollify their irate benefactor, Anna, on whom they depended for food and shelter, and to prevent further outbursts. Regarding the supposed schedule, Weiner testified:

> [Weiner]: It was a very loose description of like kind of how we could take our days, so, you know, that we would have time to be alone, and we would, you know, actually talk things through with one another and all come to agreements before we did anything. Things like that.

(E.R. 1334:1-5.) Plainly, this was not a "schedule for going forward with the plot," but an attempt by the group to structure their days in a way that would appease Anna. Weiner continued:

> Q. Was it for -- to make Mr. Jenson happy, and make Zach happy? Who was the most concerned about keeping on schedule?
>
> [Weiner]. Anna was most concerned about keeping on schedule.

(E.R. 1334:10-12.) Jenson's testimony on the subject reinforced Weiner's:

> [Jenson]: I remember that we had a discussion about setting a schedule for every day, so that people can have their space, so things can go a little bit more smoothly.

(E.R. 1440:14-16.)

Likewise, both Jenson and Weiner testified they were "acting" to please and impress Anna. (E.R. 1488:17 - 1490:5, E.R. 1357:4-19.) Jenson re-stated the assessment in his declaration filed in these proceedings, writing: "Anna was very influential over the group and the three of us were acting to impress her, Eric most of all." (Ex. 1 at p. 3.)

The government admits Anna informed her FBI handlers the night of the big argument that she did not believe she could continue in her role much longer. (Gov't Opp. at 17:26.) This makes the timing of the arrest the next day suspect, and supports the inference that the trio were arrested not because they had cemented a plan, but the opposite: because the effort to entrap them had failed, and the informant was on the verge of quitting.

III. GENERALLY APPLICABLE LAW REGARDING SECTION 2255 MOTIONS

The Court must grant a motion to vacate, set aside, or correct a federal prison sentence when "the sentence was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255. Relief under § 2255 is available if an error is "jurisdictional, constitutional, or is a fundamental defect which inherently results in a complete miscarriage of justice." *Jennings v. United States*, 461 F.Supp. 2d 818, 822-23 (S. D. Ill. 2006) (additional citations omitted). Claims of ineffective assistance of counsel may be brought for the first time on a § 2255 motion. *See Massaro v. United States*, 538 U.S. 500, 504 (2003); *United States v. Span*, 75 F.3d 1383, 1386 (9th Cir. 1996).

Normally, when the Circuit Court has decided an issue on direct appeal, the "law of the case" doctrine would bar courts from reconsidering those issues in further post-conviction proceedings. *See United States v. Scrivner*, 189 F.3d 825, 827 (9th Cir. 1999). But this is not always so, as made clear very recently by the Circuit in *United States v. Manzo*, 675 F.3d 1204 (9th Cir. 2012):

> However, "[a] court may depart from the law of the case if . . . the first decision was clearly erroneous." *See Scrivner*, 189 F.3d at 827 (citing *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997)); *see also United States v. Van Alstyne*, 584 F.3d 803, 813 (9th Cir. 2009) (stating that the law of the case doctrine is "not an inexorable command"); *White* [*v. United States*], 371 F.3d [900,] 903 [7th Cir. 2004] (stating that the law of the case "must be followed . . . on a later appeal . . . unless . . . the prior decision was clearly erroneous and would work manifest injustice.") (internal quotation marks and citation omitted); *United States v. Maybusher*, 735 F.2d 366, 370 (9th Cir. 1984) (stating that the law of the case doctrine "expresses only the practice of courts generally to refuse to reopen questions formerly decided, and is not a limitation of their power.").

Manzo, 675 F.3d at 1211 n.3.

Under the doctrine of cumulative error, the aggregated errors in a trial may lead to reversal, even if none of the errors would have done so standing alone. *See United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996) ("In some cases, although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant."); *see also Boyde v. Brown*, 404 F.3d 1159, 1176

(9th Cir. 2005) (in evaluating ineffective assistance of counsel claims, "prejudice may result from the cumulative impact of multiple deficiencies") Both issues that were preserved and those that were not are to be considered in a cumulative-error analysis. *See United States v. Fernandez*, 388 F.3d 1199, 1257 (9th Cir. 2004) (holding that "errors not rising to level of plain error are to be considered in assessing cumulative error"); *United States v. Wallace*, 848 F.2d 1464, 1476 n.21 (9th Cir. 1988) (same). The question is ultimately whether "the aggregated error so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Jackson v. Brown*, 513 F.3d 1057, 1085 (9th Cir. 2008) (internal quotation marks omitted).

IV. GENERALLY APPLICABLE LAW REGARDING INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

The Sixth Amendment guarantees a criminal defendant's right to the effective assistance of counsel. *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (per curiam). This right is violated when defense counsel's performance falls below an objective standard of reasonableness under prevailing professional norms, and counsel's errors seriously prejudice the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Thus, in order to demonstrate ineffective assistance of counsel, a defendant "must show that counsel's performance was deficient" and "must show that the deficient performance prejudiced the defense." *Id*. Deficient performance is established when "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Prejudice is established when "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

The Ninth Circuit has repeatedly held that counsel has a duty to conduct reasonable investigations and introduce evidence at trial that either demonstrates his client's factual innocence or "that raises sufficient doubt as to that question to undermine confidence in the verdict." *Avila v. Galaza*, 297 F.3d 911, 919 (9th Cir. 2002), *quoting Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999). The failure to do so constitutes deficient performance. *Id.*

Claims of ineffective assistance of appellate counsel are reviewed according to the same standard for trial counsel set forth in *Strickland,* requiring counsel's performance to be both deficient and prejudicial. *See Turner v. Calderon,* 281 F.3d 851, 872 (9th Cir. 2002).

While the Court should analyze each of defendant's ineffective assistance of counsel claims separately to determine whether his counsel was deficient, "prejudice may result from the cumulative impact of multiple deficiencies." *Boyde*, 404 F.3d at 1176; *Killian v. Poole*, 282 F.3d 1204, 1211 (9th Cir. 2002), *cert. denied*, 537 U.S. 1179 ("even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal.'") (quoting and citing *United States v. de Cruz*, 82 F.3d 856, 868 (9th Cir.1996)); *Alcala v. Woodford*, 334 F.3d 862, 893 (9th Cir. 2003) (same); *Galloway v. Adams*, 2007 U.S. Dist. LEXIS 9775 (N.D. Cal. 2007).

ARGUMENT

For the Court's convenience, in this reply, defendant McDavid has preserved the structure and numbering of the issues set forth in the Government's Opposition .

V. INEFFECTIVE ASSISTANCE CLAIMS

A. Counsel Failed To Argue Effectively For A Jury Instruction On The Lesser-Included Offense Of 18 U.S.C. § 371 (General Conspiracy To Commit An Offense Against The United States)

The government does not dispute that Mr. McDavid's counsel failed to make a good argument for a lesser included offense jury instruction. Rather, the government argues that because the jury had to find all of the elements necessary to convict Mr. McDavid under 18 U.S.C. § 844(n) (conspiracy to damage or destroy property by fire or explosive), a rational jury could not have convicted him of the lesser included offense of 18 U.S.C. § 371 (general conspiracy) and that counsel's failure to make a better argument therefore is moot. The government points to the Ninth Circuit's decision on appeal, reasoning that "[t]he only type of offense against the United States *described in the indictment and at trial* was the group's plan to use bombs against the federal targets." (Gov't Opp. at 24, quoting *United States v. McDavid*, 396 Fed. Appx. 365, 370 (9th Cir. 2010) (emphasis added)).

First, the government's substantive argument is incorrect as a matter of law. It is "beyond dispute that the defendant is entitled to an instruction on a lesser included offense if *the evidence* would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater" irrespective of what is presented in the indictment. *Keeble v. United States*, 412 U.S. 205, 208 (1973) (emphasis added)); *see also Bashor v. Risley*, 730 F.2d 1228, 1240 (9th Cir. 1984) (failure to instruct on lesser-included offenses consistent with defendant's theory of the case constitutes a cognizable habeas claim); *United States v. Kenny*, 645 F.2d 1323, 1337 (9th Cir. 1981) ("jury must be instructed as to the defense theory of the case"). If a defendant's fate at trial hung only on the language in an indictment, this would invite the prosecutor to overcharge in hopes that a jury would opt for conviction over complete acquittal.

This is exactly the sort of harm the Supreme Court sought to prevent in the seminal case of *Beck v. Alabama*, 447 U.S. 625 (1980). In *Beck*, the defendant was convicted of murder committed during the course of a robbery and sentenced to death. The Supreme Court reversed because the jury was not permitted to consider the lesser included offense of noncapital felony murder. The Court reasoned that a lesser included offense instruction "affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal." *Id.* at 633-34. "[P]roviding the jury with the 'third option' of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard." *Id*. (citing *Keeble*, 412 U.S. at 213).

In this case, the evidence presented at trial amply showed that while defendants discussed potential actions and targets at length, they never cemented a specific plan or reached agreement on any particular target or timeframe. While many potential crimes were discussed, *none were agreed upon, including any crime involving the targets charged in the indictment*. For instance, although defendants visited the Nimbus Dam together, they explicitly rejected it as a potential target. Many of the crimes defendants discussed did not involve the disputed element ("fire or an explosive"). Potential other actions and targets included billboard alterations, blocking traffic, gluing the locks of banks, and stealing a truck of jam to spill on the road to create a

"traffic jam." (See detailed discussion in Def's Am'd Memo at 11:13-22, 13:4-17, 14:18 – 15:8, and 27:14 – 28:25.)

The evidence of these other potential actions or means of damage was introduced at trial by the government's own witnesses, the cooperating co-defendants. The government's contention that these other ideas would not "even constitute federal crimes, much less a violation of 18 U.S.C. § 371" (Gov't Opp at 25:7-7), is simply false. Numerous federal statutes reach such offenses, including explicitly 18 U.S.C. § 1361, involving damage to property of the United States or an agency thereof, and 18 U.S.C. § 1366, involving damage, interruption, or impairment to an energy facility. In addition, the government's own cooperating witness, Lauren Weiner, testified the group considered damaging smaller dams, not by fire or explosive, but "the possibility of even just hitting them with a sledgehammer." (Def's Am'd Memo at 13:6-10; E.R. 1337:4-5.)

Critically, it is important to note that the government in fact allowed co-defendants Jenson and Weiner to plead guilty to 18 U.S.C. § 371 in exchange for dismissal of the 18 U.S.C. § 844(n) charges against them, *even though they stipulated to the same facts in their plea agreements which the government claims supported McDavid's conviction under 18 U.S.C. § 884(n)*. (*See* Weiner and Jenson Plea Agreements, Docs. 81 and 102, respectively.)[8] Axiomatically, the government cannot dispute it believes these codefendants conspired to take the same actions as Mr. McDavid because the government was required to prove that McDavid conspired with them, as the special verdict form in fact reflects. (See page 2 of special verdict form, Doc. 273.) Obviously, the fact that the government allowed the codefendants to plead guilty to 18 U.S.C. § 371 establishes that the government recognizes there was a factual basis for such a plea and conviction. The same is no less true of McDavid, and the government's efforts to avoid that truism now are unavailing.

That the Ninth Circuit found on direct appeal that "[t]he only type of offense against the United States described in the indictment and at trial was the group's plan to use bombs against

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the federal targets" (*McDavid*, 396 Fed. Appx. at 370) does not undermine McDavid's IAC claim, but reinforces it. The Ninth Circuit's finding was factually erroneous, as discussed above. Ample evidence introduced at trial showed that the group considered other plans which did not involve the use of bombs against federal targets. Just as trial counsel failed effectively to argue for a lesser included offense before the District Court, he failed to present the issue effectively to the Ninth Circuit and to make the Circuit aware that the trial record did in fact support conviction for the lesser included offense of general conspiracy under 18 U.S.C. § 371 to commit one of the offenses listed above.

That trial counsel fundamentally failed his client in this regard is further reinforced by the fact that the District Court initially stated it was inclined to give a lesser included offense instruction, unless the government could provide authority to the contrary:

> THE COURT: What I'm going to do is I'm going to include the instruction, and if you provide me authority, prior to me coming in, showing that this is not a lesser-included, or 371 is not applicable here, then I'll deal with that at that time. But as of right now, I find that a rational jury could find Mr. McDavid guilty of the lesser crime but not of the greater because ... there were a number of things that were discussed and talked about. They weren't all about explosives and bombs, etcetera, that were in fact or could be considered illegal and could be federal crimes for which these 12 people may have all agreed upon one of those but not of the greater.

(E.R. 82:3-20.)

Later, the District Court reiterated its point by saying:

> I'm going to look at this again, but <u>it would be a greater error to not give a lesser-included than to give one. And I believe under the circumstances I'm going to give this</u>…

(E.R. 83:19-21 (emphasis added).)

The government failed to provide any authority, but nevertheless convinced the Court to reverse itself, simply by rearguing the point.

> MR.LAPHAM: Your Honor, if I could take one more stab at it. The comment says, the instruction is appropriate where a lesser offense is identified within the charged offense, and a rational jury could find the defendant guilty of the lesser offense but not guilty of the greater offense. And my argument would be that there is no circumstance I can think of

> where that could apply...

(E.R. 83:23-84:4.)

Soon thereafter, the Court reversed itself:

> THE COURT: All right. Having reviewed my previous decision on the lesser-included, I don't find it's appropriate, and I will not be giving 37 – 3.15.

(E.R. 90:7-9.)

Throughout this discussion, defense counsel failed to adduce any evidence or authority to support the Court's initial decision, despite the existence of ample evidence and authority, and despite the fact that the Court's initial decision was the only correct one, as a matter of law. Again in the words of the District Court,"… it would be a greater error to not give a lesser-included than to give one." (E.R. 83:19-21.)

Where, as here, the evidence presented at trial supports a lesser included offense instruction, and the defendant requests it and the Court refuses to give it, the error is prejudicial and reversible, not harmless. *See, e.g.*, *Vujosevic v. Rafferty*, 844 F.2d 1023, 1027 (3rd Cir. 1988) (since evidence supported an instruction on aggravated assault in addition to homicide, and since such an instruction was requested, trial court committed reversible error by refusing to give instruction; jury may have convicted just to avoid setting defendant free). "Under these circumstances, it is pure speculation to forecast what verdict the jury would have returned if properly instructed based on the jury's verdict of aggravated manslaughter after an incomplete instruction. Accordingly, we cannot say that the trial court's constitutional error was harmless beyond a reasonable doubt." *Id* at 1028.

At sentencing, the Court even noted some of the evidence which defense counsel could have presented in support of a lesser included offense instruction:

> THE COURT: In addition, there was also discussion regarding destruction of or damage to property that was not federal property, such as the highjacking trailers and putting some type of honey or jam on the freeways to disrupt traffic, putting sugar or other substances into gas station storage tanks to ruin the fuel. And a number of different items that

> were discussed by the group with respect to how to disrupt the government and the economy.

(E.R. 1978:21-1979:3.)

For the foregoing reasons, trial counsel plainly rendered ineffective assistance to defendant both at trial and on appeal. Alternatively, even if the Court were to find this did not constitute ineffective assistance of counsel, the failure to give a lesser included offense instruction deprived defendant of fundamental fairness, entitling him to relief under 28 U.S.C. § 2255.

B Defense Counsel Provided Ineffective Assistance By Failing To Read And Catch The District Court's Erroneous Instruction That "Anna" Was Not A Government Agent, And Then Again By Failing To Argue Effectively On Appeal Why This Was Prejudicial Rather Than Harmless Error

McDavid's defense centered on the fact that he was entrapped, i.e., that he was not predisposed to commit arson before Anna, the government agent contacted him in August 2004 and spent the next year and a half, under the supervision of the FBI, painstakingly inducing him and his reluctant young codefendants to commit a crime. The government carried the burden of showing that he was not entrapped. *See* Ninth Circuit Model Criminal Jury Instruction No. 6.2 (Entrapment), reprinted in Def's Am'd Memo at p. 34.

Not only did McDavid stake his defense on the contention that he was entrapped, the jury focused keenly on this defense, and appeared poised to acquit before the Court mis-instructed the jury that Anna was not acting as a government agent in August 2004 when, the defense claims, she first contacted and began monitoring and molding McDavid for the FBI. All parties agreed that in response to the jury's two-part question ("Was Anna a government agent in August 2004? If not, when did she become one?"), the answer to the first part was "yes," so the second part did not need to be answered. (E.R. 160:23-161:1.) The Court in fact so instructed the jury, verbally, the next morning, together with answering a number of other questions/requests. (E.R. 226:12-14.) Juror No. 11 then remarked that this was a lot of information to absorb, upon which the Court assured the jury: "I will prepare the instruction and the responses and provide that to you

in writing." The Court then admonished the jury to "*read* all of the instructions again, as a whole." (E.R. 227:14-25 (emphasis added).) For reasons which remain a mystery, however, the Court's follow-up written instructions to the jury changed the correct "Yes" answer to an incorrect "No." (E.R. 248-249.) The jury resumed deliberations at 10:45 a.m. and, constrained by the written charge, returned a guilty verdict at 3:08 p.m.

The Court's erroneous instruction thus obliterated McDavid's defense and effectively directed a prosecution verdict in two key ways:

First, because the law and the instructions required, as a *sine qua non* of entrapment, that McDavid be entrapped by a *government agent*, the jury was duty-bound to acquit once the Court instructed, erroneously, that Anna was *not* a government agent. Thus, the fact that the jury convicted McDavid despite this shockingly erroneous instruction is not proof of harmless error in the face of abundant alternative evidence, but obviously the exact opposite: it is quintessential evidence that the error in these circumstances was prejudicial, where the jury, after deliberating for two days, and asking questions focused intently on defendant's entrapment defense, convicted only a few hours (less, subtracting their lunch break) after receiving the devastatingly erroneous instruction. Put simply, there can be no entrapment without a government agent. In case after case, courts have found error was harmless because it was followed by a curative instruction. In this case, no curative instruction was ever given. The jury followed its final and only written charge on the subject. (*See* detailed discussion in Def's Am'd Memo, at 32-37, explaining why the evidence shows the jury most likely interpreted the District Court's mis-instruction to mean that Anna was not a government agent.)[9]

Second, because both lack of predisposition and inducement were relevant to McDavid's entrapment defense, the Court's erroneous advancement of the date of first contact by an entire year, from August 2004 to June 2005, robbed McDavid of a wealth of inducement evidence during that time – including evidence that Anna both offered and withheld romantic intimacy in

[9] The Ninth Circuit speculated differently, but acknowledged that "...the jury may have been confused as to when [Anna] became an agent." *McDavid*, 396 Fed. Appx. at 368.

exchange for his proof of dedication to her criminal plan.

The government argues, with surface appeal, that defendant's assignment of error is "foreclosed by the Ninth Circuit's Memorandum Opinion ... determin[ing] that, under the circumstances, the District Court's error was harmless beyond a reasonable doubt because a rational jury would have rejected an entrapment defense even if a correct answer had been given." (Gov't Opp, at 25:19-22, citing *McDavid*, 396 Fed. Appx. at 368-69.) This, however, fails to consider that McDavid's ineffective assistance of counsel claim encompasses not only his lawyer's performance at trial, but also on appeal. *Turner v. Calderon*, 281 F.3d at 864. Counsel's ineffectiveness at trial was compounded by his ineffectiveness on appeal, and relief is appropriate now. There can be no reasonable expectation jurors or a judge will reach conclusions favorable to a defendant if defense counsel fails to present good arguments supported by law and fact. *Strickland*, 466 U.S. at 687-90.

In this case, as defendant explained in his Motion (without response on this point by the government), his counsel failed, on appeal, to cite or argue the striking similarities between the present case and *Morris v. Woodford*, 273 F.3d 826 (9th Cir. 2001). In both *Morris* and the present case, the trial judge gave correct instructions verbally and provided erroneous written instructions. In both cases the confused jury asked questions of the court but did not point out the erroneous instruction. While Morris's counsel reviewed the written instruction before it was given to the jury and missed the mistake, McDavid's counsel wholly failed to review the written instruction. Additionally, whereas in *Morris*, the jury already had convicted the defendant and was deliberating over what penalty to impose, here, the jury had not yet reached a verdict but, rather, was at a pivotal point in its deliberations, focused on the entrapment defense, as the jurors' questions reveal. The Ninth Circuit in *Morris* reversed based on the error in the instruction and remanded for a new penalty phase trial.

Here, the Court cannot just accept the Ninth Circuit's harmless error determination because the Ninth Circuit did not cite *Morris* in its opinion, nor did it discuss *Morris*' clear application to this case. And it did not do so because defense counsel was ineffective based on

his failure to present and argue *Morris* to the District Court and the Ninth Circuit. In his opening brief on appeal, he even remarked, "There do not appear to be many cases on 'all fours' with the case at bar." AOB at 39. He was therefore unprepared when, during oral argument, Judge Graber, author of *Morris v. Woodford*, repeatedly asked defense counsel about the similarities between McDavid's case and *Morris*. Unfamiliar with the case, counsel was unable to respond, and the Ninth Circuit's opinion contains no discussion of *Morris*, despite its striking similarities to the present case.[10]

The simple, inescapable fact is that by inadvertently mis-instructing the jury that Anna was not a government agent, when everyone agreed she was, the District Court eviscerated McDavid's entrapment defense and, as a practical matter, directed a verdict for the prosecution. The jury was clearly and keenly focused on the issues surrounding McDavid's entrapment defense. Without a government agent there can be no entrapment. Instructed that Anna was not a government agent, the jury followed its new charge and convicted. (See Def's Am'd Memo at 30:26-36:28 (detailed discussion explaining why this was material and prejudicial).) Sadly, legal innocence may not have the intrinsic force of argument it once did, obscured now, as it is, by layers of abstract procedural rationalization. But that does not mean the law is without a remedy to requite an obvious wrong. Relief based on defense counsel's ineffective assistance is that mechanism. And it is not a mere technicality. But for counsel's oversight in failing to catch the mistake in the first place, and failing to argue why it was prejudicial not harmless, the courts could have, and presumably would have, intervened sooner to reverse this manifest injustice. It can be done now.

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[10] The oral argument can be heard on the Ninth Circuit's website at http://www.ca9.uscourts.gov/media/view.php?pk_id=0000005995

C. Defense Counsel Provided Ineffective Assistance In Failing To Present Appropriate Case Law And Facts To The District Court Or On Appeal Regarding Defendant's Requested Instructions On "First Contact" and Predisposition

It is undisputed that the District Court instructed the jury that Anna, the government agent, first contacted McDavid in June 2005, a year after she in fact first contacted him, in August 2004:

> JUROR 2: The timeframe. When does the evidence start? June 2005 or prior to that?
>
> THE COURT: Can you be more specific than when does the evidence start. There's been evidence of a lot of things that have occurred during the course of the trial.
>
> JUROR 2: It's one of our biggest questions is where we start looking at it.
>
> JUROR 12: In the entrapment portion, do we consider entrapment from June of '05 or back to August of '04?
>
> THE COURT: You don't have this in front of you, but, again, the instruction that I've given today regarding contact, I think will give you the answer if you reread when you receive it.
>
> JUROR 12: Can you read that again?
>
> THE COURT: Yes. Again, not putting any undue influence on it, but if you'll listen to what the instruction is, I think it may help you answer the question. "Contact as used in the instruction is the time that you determine was the first time that there was some communication between the defendant and a government agent about the crime charged in the Indictment." Hopefully, that will help define what you are asking. ...

(E.R. 228:1-22.) The foregoing instructions were erroneous as a matter of law. The distinction between 2004 and 2005 was crucially significant because it robbed McDavid of the right to argue extensive evidence that he was not predisposed. The government simply presented no evidence McDavid was predisposed before Anna first contacted him in August 2004 and began inducing him to commit a crime, including by both offering and withholding romantic affection in exchange for his commitment to doing an action with and for her. (Def's Am'd Memo at 2:15-3:2; 6:21-7:2; 8:13-9:7; 20:4-20:20.)

There can be no dispute that the jury recognized and focused on the importance of this year long period. As the Ninth Circuit observed,

> ...the jury expressed particular confusion over whether the appropriate time frame for assessing entrapment was in August 2004, when McDavid first met Anna, or in June 2005, when McDavid and Anna first discussed the bombing plan. Among other questions about entrapment, the jury asked "Was Anna considered a government agent in Aug. 2004? If not, when did she become one?

McDavid, 396 Fed. Appx. at 368.[11] Even the government does not dispute that the District Court's instruction regarding the date of first contact was erroneous. (See Gov't Opp., Section C, at 26-27.) Rather, the government argues that that no ineffective assistance of counsel can be shown, and that this court's further review is foreclosed by the Ninth Circuit's harmless error determination in any event. The government is wrong on both fronts.

First, McDavid's trial attorney, who was also his attorney on appeal, plainly rendered ineffective assistance by failing to cite and argue the proper authorities to either court – authorities which establish both that the District Court's instruction was erroneous and that error is reversible, not harmless.

Second, because the Ninth Circuit's decision was erroneous as a matter of law, it can and should be re-reviewed by this Court. *See United States v. Manzo*, 675 F.3d 1204, 1211 n. 3 (9th Cir. 2012) ("[T]he law of the case 'must be followed ... on a later appeal ... unless ... the prior decision was clearly erroneous and would work manifest injustice.'" (citing and quoting *White v. United States*, 371 F.3d 900, 903 (7th Cir. 2004)). Here, the breakdowns in process worked in tandem. That is, McDavid's attorney failed to effectively cite and argue appropriate authority to both the District Court and the Ninth Circuit, and the Circuit therefore unsurprisingly failed to apply the controlling authorities. Either one or both grounds together entitle McDavid to relief.

1. IAC At Trial

McDavid stands on the detailed argument in his earlier filing explaining why his counsel's assistance was ineffective (Def's Am'd Memo at 38-42), except to refute the

[11] As noted in Defendant's Amended Memorandum (at 4, n. 3), the government's only source for the contention that Anna and McDavid first discussed a bombing plan in 2005 was Anna's uncorroborated testimony, as the Government could not present a recording of the alleged conversation – one of the few times the Government lacked a recording.

government's short argument in opposition. The government argues that McDavid "does not specifically indicate what that case law is but it can be inferred from the argument in his petition that it is principally *Jacobson v. United States*, 503 U.S. 540 (1992), *United States v. Poehlman*, 217 F.3d 692 (9th Cir. 2000) and *United States v. Jones*, 231 F.3d 508 (9th Cir. 2000)." (Gov't Opp at 27:2-4.) No inference is necessary, though, for McDavid cited clearly to the key cases his earlier counsel failed to cite, addressing the timing of first contact for purposes of considering the entrapment defense in a *conspiracy case* such as this one:

> While he cited *Jacobson* and *Poehlman*, counsel failed to respond to the Court's request to support his proposed definition of "first contact" with entrapment cases that involved conspiracy, despite clear Ninth Circuit authority on this issue. *See, e.g., United States v. Montero-Morlotti*, 141 F.3d 1182 (9th Cir. 1998) ("The government must show evidence of predisposition before any contact with the law enforcement."); *United States v. Thickstun*, 110 F.3d 1394, 1396 (9th Cir.), *cert. denied*, 522 U.S. 917 (1997) ("At trial, the government bore the burden of proving beyond a reasonable doubt that *Thickstun* [the defendant] was predisposed before Hysom [the informant] met her."); *United States v. Davis*, 36 F.3d 1424, 1430 (9th Cir.1994) ("The prosecution must prove beyond a reasonable doubt that the defendant was predisposed to commit the crime prior to first being approached by government agents."); *United States v. Sbrocca*, 996 F.2d 1229 (9th Cir. 1993) ("Regarding predisposition, the government must prove that the defendant was disposed to commit the crime before the government agent approached him.") Had counsel followed the Court's request and supported his arguments with entrapment cases that involved conspiracy, the Court would have seen that they rely on a definition identical to that in *Poehlman*.

(Def's Am'd Memo at 42:1-15.) Defense counsel did not cite or argue any of these conspiracy-related entrapment cases to the District Court. Had he done so, he would have prevailed on the Court that its attempt to distinguish *Jacobson* was erroneous, because the bright line first contact rule applies in cases of conspiracy every bit as much as it applies to cases like *Jacobson* which charge only commission of a substantive offense. (See discussion, below.)

The government ignores this aspect of McDavid's argument and instead relies on the unremarkable fact that defense counsel cited *Jacobson*, *Poehlman*, and *Jones*. While those three cases helped shape the general, modern definition of predisposition, they provided an insufficient rebuttal, by themselves, to the Court's ruling that first contact begins only when the informant

explicitly starts discussing specific targets with the defendant, and not before then. But the law, which counsel failed to cite, is crystal clear that "first contact" in a conspiracy case means the moment the government agent first has contact with the defendant. This is not a situation where the government recruits a preexisting friend or associate of the defendant's after the conspiracy has begun to develop. The FBI specifically fielded Anna to hunt for anarchists, and directed her in all her inducing actions from Day One of her involvement with McDavid.

Defense counsel's ineffective assistance, and the Court's resulting mistake in fixing June 2005 as the date of first contact, is most evident from the colloquy outside the presence of the jury on day 7 of the trial. Relying only on *Jacobson* and *Poehlman*, counsel argued that defendant should be allowed to put on character evidence addressing his lack of predisposition prior to Anna's first contact with him in August 2004. The District Court denied the request, taking the firm position that first contact occurred a year later, in or about June 2005(the date Anna stated was the date that she and McDavid first explicitly discussed the indicted offense).[12] This erroneous ruling propagated its way through and infected the whole trial, by (1) depriving McDavid of his right to put on favorable character evidence regarding predisposition during the critical period prior to Anna's first contact with him; (2) leading to the Court's erroneous instruction depriving him of the ability to argue inducement during that period even based on evidence which came in at trial; and (3) actually befuddled the jury, as the Ninth Circuit acknowledged.

The District Court "distinguished" *Jacobson* on the grounds that the initial contact in that case involved immediate efforts by the agent to induce the defendant to buy child pornography, whereas in the present case, Anna testified she did not broach the subject of committing the indicted offense until June 2005. According to the Court, *Jacobson* involved

> contact with a government agent over a specific type of conduct. The contact that we have with the government agent in this case does not involve conduct that's even remotely similar to what is the basis of the

[12] Anna, alone, testified that they had this conversation. There was no corroboration as there were no witnesses and no recording – one of the few times the government could not produce a recording.

> original -- or the actual conspiracy. It's not there yet. In June [sic – should say, "August"] of 2004 it wasn't there.

(E.R. 68:19-24.) In seeking to distinguish *Jacobson* on the grounds that it involved a substantive offense not a conspiracy, the Court further observed:

> In this case, there is nothing that says that they were talking about anything other than trying to be -- how to secure e-mails, how to do other things that were -- that had nothing to do with this particular conspiracy.

(E.R. 70:19-71:1.) But as discussed above, nothing in *Jacobson* limits its application to a substantive offense rather than a conspiracy case. And in a conspiracy case, the inchoate steps -- like securing e-mail – are everything.

Worse even than barring McDavid from arguing he was not predisposed to commit the offense prior to Anna's actual first contact with him in August 2004, the District Court would not even allow McDavid to introduce or argue evidence showing he lacked predisposition prior to the erroneous June 2005 date fixed by the Court:

> THE COURT: June 2005. That's my ruling.
>
> MR. REICHEL: And backward at all or just from that day on?
>
> THE COURT: *From that day*. ...

(E.R. 73:5-8 - emphasis added.) This is a *double* mis-reading and misapplication of *Jacobson*, *Poehlman*, and related authority. As the Ninth Circuit instructed in *Poehlman*:

> Quite obviously, by the time a defendant actually commits the crime, he will have become disposed to do so. However, the relevant time frame for assessing a defendant's disposition comes before he has any contact with government agents, which is doubtless why it's called *pre*disposition.

Poehlman, 217 F.3d at 703 (emphasis in original), citing *Jacobson*, 503 U.S. at 549.

There is no question but that the District Court erred. The Ninth Circuit has underscored this bright line timing rule numerous times since first announcing it in *Jacobson*. *See, e.g.*, *United States v. Kim*, 176 F.3d 1126, 1128 (9th Cir. 1999) (noting that the Circuit has "frequently invalidated instructions" that invite the jury to consider whether, after first contact, a defendant was "already willing to commit a crime"). The problem with such an instruction is that the term 'already' is ambiguous. As the Circuit has held:

> "Already" does not necessarily mean "before the government intervened"; indeed, it could mean, for example, that even "if [a defendant] was not initially disposed to [commit the crime], he could . . . develop such a disposition during the later course" of interacting with [the informant].

United States v. Mkhsian, 5 F.3d 1306, 1311 (9th Cir. 1993) (citing and quoting *United States v. North*, 746 F.2d 627, 630 (9th Cir. 1984)). But that inference is forbidden under the bright line rule of *Jacobson*. "When a defendant asserts an entrapment defense, "the jury must examine the defendant's criminal disposition *prior to any contact with government agents*." *Kim*, 176 F.3d at 1128 n.1 (emphasis added).

Contrast *United States v. Hart*, 963 F.2d 1278 (9th Cir. 1992). In *Hart*, the Circuit affirmed a conviction for conspiring to distribute cocaine on the grounds, *inter alia*, that the District Court properly instructed the jury under *Jacobson* that it must consider whether defendant was predisposed "before encountering the law enforcement officers or their agents." *Id*. at 1283 n.1. The Circuit found that "the jury could have concluded from [the] evidence of prompt acquiescence that [defendant] was 'predisposed to violate the law *before* the Government intervened.'" *Id*. at 1283, quoting *Jacobson*, 503 U.S. at 1540, n. 2 (emphasis in original). In stark contrast, as a result of the faulty instruction and limitations in this case, McDavid was *deprived* of the jury's consideration whether he was predisposed to violate the law *before the Government intervened*.

Relatedly, trial counsel also missed the chance to adduce case law in support of defendant's fundamental right to put on evidence of his good character and lack of predisposition during the critical period before Anna contacted him. The government has argued that "[t]he Ninth Circuit considered and rejected McDavid's claim that the District Court abused its discretion by limiting favorable character evidence to June 2005 forward. *McDavid*, 396 Fed. Appx. 365 at 371-72. McDavid is therefore foreclosed from re-litigating that issue." Gov't Opp. at 27. The government is mistaken, as the Ninth Circuit has neither considered nor rejected the claim presented here, and the government offers no further opposition to McDavid's arguments of ineffective assistance on this issue.

2. IAC On Appeal

Defense counsel also failed to render effective assistance on appeal, an issue not addressed by the government. It is settled that ineffective assistance of counsel on appeal also provides a basis for relief under 28 U.S.C. § 2255. *See Turner v. Calderon*, 281 F.3d at 872. In this case, the claim is reinforced by the fact that defendant's trial and appellate counsel were one in the same person.

As a threshold matter, the Ninth Circuit's Memorandum Opinion did not spend any time addressing the question whether the District Court erred in fixing June 2005 rather than August 2004 as the date of first contact by the government agent. Rather, the Circuit accepted, at least *arguendo*, that the District Court erred, and held that any error was harmless. *See McDavid*, 396 Fed. Appx. at 369 ("Even if we accepted McDavid's contention, the error would be harmless). However, as discussed in the next section, the error was in fact reversible as a matter of law. For purposes of evaluating defendant's IAC claims, however, what is instructive is that the Circuit too did not consider the gamut of proper authorities because again, defense counsel did not cite or argue them in his briefing or at oral argument.

Most importantly, counsel failed to argue effectively a litany of critical cases which establish, as a matter of law, that the District Court's error was reversible, not harmless, and failed to adduce sufficient record evidence in support of that argument. The Ninth Circuit came close to acknowledging outright that counsel provided ineffective assistance, stating:

> McDavid contends that the district court erred in refusing to give an instruction that adequately defined inducement. *McDavid, however, does not allege how the model instruction given by the court was inadequate to cover his entrapment defense, and, at trial, failed to proffer a separate inducement instruction*.

McDavid, 396 Fed. Appx. at 370 (emphasis added).

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///

a. Defense counsel rendered IAC by failing to make clear to the Court of Appeal that mis-instructing the jury as to the date of first contact constituted reversible error as a matter of law

On appeal, the Ninth Circuit started from the premise that the District Court erred in instructing the jury regarding the date of first contact:

> McDavid contends that the district court erred by defining June 2005 as the relevant time frame for the jury to decide whether he was predisposed. Even if we accepted McDavid's contention, the error would be harmless. The evidence from August 2004 forward still demonstrates that McDavid was predisposed.

McDavid, 396 Fed. Appx. at 369. The Circuit did not undertake a *Jacobson*/*Poehlman* analysis regarding the date of the first contact. Thus, the Circuit's only basis for dismissing McDavid's appeal on this issue appears to be its finding that the error was harmless.

As a matter of law, however, the error was not harmless but reversible. In conducting its harmless error analysis, the Ninth Circuit found: "[t]he evidence from August 2004 forward still demonstrates that McDavid was predisposed." *McDavid*, 396 Fed. Appx. at 369. But this is exactly the wrong test. The Circuit has abjured this form of analysis in numerous published cases post *Jacobson*. The question emphatically is *not* whether the jury could have found McDavid was already predisposed to commit the offense by examining the period after Anna first contacted him, but whether he was predisposed *before* she ever contacted him in the first place. As the Circuit noted in *United States v. Kim*, "we have frequently invalidated instructions" that invite the jury to consider whether, after first contact, a defendant was "already willing to commit a crime." *Kim*, 176 F.3d at 1128.

The discussion in *Mkhsian*, 5 F.3d 1306, is instructive. In *Mkhsian*, the Circuit addressed the question of whether a government informant had entrapped defendants into participating in a conspiracy to distribute cocaine. The district court erroneously failed to instruct the jury that the government was required, as a matter of law, to prove predisposition by defendant prior to any contact with law enforcement. Instead, the court instructed the jury to the effect that "it is not possible to entrap a person who *already* has the readiness and willingness to break the law." *Id.*

at 1311 (internal quotations and brackets omitted; emphasis added). The Circuit found that district court's qualifier, "already," interfered with the bright line new rule announced in *Jacobson*. The problem with the term 'already' is that it is ambiguous. "'Already' does not necessarily mean 'before the [g]overnment intervened'; indeed, it could mean, for example, that even 'if [defendant] was not initially disposed to [buy] drugs, he could ... develop such a disposition during the later course' of interacting with [the informant]. ... *So interpreted, the instruction does not correctly state the law*." *Id*. at 1311 (emphasis added). The Circuit went on to conclude that such error is reversible, not harmless:

> The instruction as given permitted the jury wrongly to reject [the codefendants'] entrapment defense. Given [defendant's] testimony that he never sold cocaine and that he decided to join [informant] in a drug partnership only after several meetings with the government informer, and then because he trusted [informant] and [informant] encouraged [defendant] to regard him as a father figure, a properly instructed jury might have found that [defendant] was not predisposed to break the law prior to encountering [informant]. [Codefendant's] testimony raises a similar possibility. **Thus, the jury instruction was not harmless error**. See [*United States v.*] *Montoya*, 945 F.2d [1068,] 1074 [(9th Cir. 1991)] (omission of essential element from jury instructions not harmless).

Mkhsian, 5 F.3d at 1311. Finally, the Circuit observed: "The instruction in this case was an arguably accurate explanation of this circuit's *North*-era law of what constitutes predisposition. The Supreme Court's holding in *Jacobson*, however, changed that law. Accordingly, the convictions of [defendants] must be reversed. See *Montoya*, 945 F.2d at 1073–74." *Mkhsian*, 5 F.3d at 1311.[13]

Mkhsian bears other important similarities to the present case, further compelling the finding that the error here to is reversible, not harmless. Both cases require the examination of predisposition, *vel non*, not only prior to the discussion and hatching of a plot, but prior even to the period when trust and ties are being established – i.e., *prior to first contact*. And in both cases, the government appealed through the informant to the emotions of the targets, in *Mkhsian*

[13] The Circuit's reference to "*North*-era law is to *United States v. North*, 746 F.2d 627, 630 (9th Cir. 1984). "The [*North*] instruction ... regarding predisposition, is no longer to be given." *United States v. Lessard*, 17 F.3d 303, 306 (9th Cir. 1994).

encouraging defendant to regard the informant as a father figure, and in this case, stoking McDavid's romantic hopes for Anna, and codefendant Lauren Weiner's regard for her as a big sister. (Ex. 1 at pp. 2-3; E.R. 1356:24-1357:9.)

But even if the cases did not bear these material similarities, the law in the Circuit has been clear for years that instructional error which reduces the government's burden, including by omitting an essential element of the government's proof, is reversible error. Because the government had the burden of proving both generally that McDavid was not entrapped, and specifically that he was predisposed, *Mkhsian* should also be read as making clear that the District Court's mis-instruction reduced the government's burden of proof, constituting *per se* reversible error.[14]

In *United States v. Lessard*, 17 F.3d 303 (9th Cir. 1994), the Ninth Circuit reversed defendants' conviction, on appeal, for possession and transfer of explosives to a person who turned out to be a government informant, based on a faulty predisposition instruction, similar to the one rejected by the Circuit in *Mkhsian*. The problematic instruction in *Lessard* read, "were [sic] a person is already willing to commit a crime, it is not entrapment if government agents merely provide an opportunity to commit the crime." *Lessard*, 17 F.3d at 305. Because "the instruction as given violated [defendant's] right to have the jury instructed that the government had to prove each substantive element of its case against him beyond a reasonable doubt ... [it] 'seriously affect the fairness, integrity or public reputation of judicial proceedings,'" requiring reversal of the conviction. *Lessard*, 17 F.3d at 306, quoting *United States v. Olano*, 507 U.S. 725, 726 (1993).

In *United States v. Sterner*, 23 F.3d 250 (9th Cir. 1996), the Ninth Circuit reversed defendant's conviction for conspiring to sell and for delivery of stolen treasury checks. Defendant claimed that he was entrapped, based on evidence that government informants on both

[14] While defense counsel cited *Mkhsian* in his reply brief on appeal, he did so only for the general proposition that the government must prove predisposition prior to contact. He did not emphasize or tie together the fact that *Mkhsian* also stands for the proposition that mis-instructing the jury regarding the relevant predisposition time period, in a conspiracy case such as this one, is reversible error.

the supplying and buying side of the transaction had induced his behavior. The district court gave an instruction identical to the one in *Mkhsian*, i.e. "where a person already has the readiness and willingness to break the law, the mere fact that government agents provide what appears to be a favorable opportunity is not entrapment." *Id*. at 252. The Circuit reaffirmed its decision in *Mkhsian*, calling this instruction "plain error." *Id*. The Circuit reasoned: "Because the instructions failed to inform the jury that the government had to prove [defendant's] predisposition prior to his initial contact with the informant, they violated [defendant's] right to have the jury instructed that the government must prove each substantive element of its case beyond a reasonable doubt." *Id*. The Circuit concluded by stating:

> Nor can we say that this error was harmless. Indeed, the essence of Sterner's defense was that he had been lured into criminal activity by two government informants. A properly instructed jury might have found that Sterner was not predisposed to break the law prior to encountering [informant #1].

Id.

Although defense counsel touched on some of the foregoing authorities in the appeal, he did not cite or emphasize them for their most critical, collective point, namely that mis-instructing the jury regarding the date of first contact is per se reversible error. Defense counsel's failure to effectively argue these authorities is relevant to analyzing defendant's IAC claims. However, the persistent underlying error itself constitutes a separate, cognizable basis for relief under 28 U.S.C. § 2255, notwithstanding the fact that the Ninth Circuit has spoken once (such as it did, in a short, unpublished opinion, lacking the effective assistance of counsel). The Ninth Circuit itself has made clear that the courts can and should revisit on habeas decisions which were "clearly erroneous," where failure to do so would work a "manifest injustice." *See Manzo*, 675 F.3d at 1211 n. 3, and the cases cited therein.[15]

[15] Like this case, *Manzo* arose following an unpublished decision on direct appeal which appeared at first blush to foreclose the district court's reconsideration of an issue previously decided against the defendant by the Circuit, namely, whether the Government had breached defendant's plea agreement. However, the Circuit reasoned: "Having so decided, normally, the 'law of the case' doctrine would bar us from reconsidering Manzo's breach claim here. *See United States v. Scrivner*, 189 F.3d 825, 827 (9th Cir. 1999).... However, '[a] court may depart

b. Defense counsel also rendered IAC by failing to present sufficient exculpating facts to the Court Of Appeal

Finally, the Ninth Circuit's harmless error analysis was flawed in that it presented several highly selective and disputed inculpating facts, while it omitted numerous exculpating facts. This was unsurprising, given defense counsel's lack of effective assistance on appeal. As the Supreme Court explained in *Neder v. United States*, 527 U.S. 1, 15 (1999) for a constitutional error to be harmless, it must appear "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Where error occurs, evidence of guilt must be "overwhelming." *United States v. Haywood*, 280 F.3d 715 (6th Cir. 2002). "[T]he government bears the burden of showing that the error had no effect on a defendant['s] substantial rights." *United States v. Stewart*, 306 F.3d 295, 322 (6th Cir. 2002), citing *United States v. Vonn*, 535 U.S. 55 (2002). "Error cannot be harmless where it prevents the defendant from providing an evidentiary basis for his defense. "*United States v. Saenz*, 179 F.3d 686, 688 (9th Cir. 1999). Because so much of defendant's evidence was ruled out by the District Court's advancement of the date of first contact by the government agent, deciding how the jury would have evaluated such evidence is really pure speculation.[16] What we know for sure is that the jury was 7-5 favorably disposed toward McDavid's entrapment defense prior to their asking several pointed questions about this defense, and that they rendered a guilty verdict only several hours (counting their lunch break) after receiving the District Court's mis-instructions.

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from the law of the case if ... the first decision was clearly erroneous.'" *Manzo*, 675 F.3d at 1211 n. 3, quoting *Scrivner*, 189 F.3d at 827, in turn citing *United States v. Van Alstyne*, 584 F.3d at 813 (the case doctrine is "not an inexorable command"); *White*, 371 F.3d at 903 (law of the case "must be followed ... on a later appeal ... unless ... the prior decision was clearly erroneous and would work manifest injustice.") (internal quotes and cites omitted); *Maybusher*, 735 F.2d at 370 (law of the case doctrine "expresses only the practice of courts generally to refuse to reopen questions formerly decided, and is not a limitation of their power.").

[16] As discussed in Def's Am'd Mem, the District Court's erroneous instruction prejudiced defendant both by dramatically limiting the scope of his favorable character evidence, and preventing the jury from considering evidence which did come in showing lack of predisposition any time prior to June 2005. (Def's Am'd Memo at 38:9 – 45:22.)

3. The Error Is Plain Enough To "Seriously Affect The Fairness, Integrity, Or Public Reputation Of Judicial Proceedings," Further Requiring Reversal

In both *Lessard* and *Sterner*, the Ninth Circuit reversed not only on the grounds that the district court's erroneous predisposition instruction was prejudicial *per se* because it lowered the government's burden of proof by allowing it to short-circuit the proof of an essential element (predisposition), but on the grounds that such error is of the type which "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Lessard*, 17 F.3d at 306; *Sterner*, 23 F.3d at 252-53 (quoting *United States v. Olano*, 507 U.S. at 26 (itself quoting *United States v. Young*, 470 U.S. 1, 15 (1985)). Such is true in this case as well.

Entrapment/lack of predisposition was the linchpin of McDavid's defense, and the evidence in fact overwhelmingly shows that he was not criminally bent before he met Anna, or for a time after he met her (as she herself reported to her handlers), until she systematically went to work goading him and his codefendants into planning an action, under the direction and supervision of the FBI. This is not a case, for example, where the FBI converted an existing associate into an informant. Quite the contrary, the FBI fielded Anna to spy on anarchist gatherings and protests, and attach herself to anarchists. Even after she reported to her handlers that McDavid was "gentler" than others, "non-threatening," "inconsequential," "a college student and not of interest to the FBI" (E.R. 690:9-12; E.R. 890:5-23), they bade her to stay on him. This, combined with voluminous evidence that McDavid was infatuated with Anna; that she exploited this power by both offering and withholding romantic affection in exchange for his expressions of commitment to her to do an action; his express reluctance and actual efforts to detach himself from the group; the great lengths Anna went to in order to herd them back together when they drifted and to keep them focused on potential targets and time frames; the fact, despite that, that they never agreed on any specific target or time frame; Anna's constant plying of the impecunious bunch with food, shelter, drink, and cash; her provision of transportation which they lacked; her provision of all the things needed to actually start hatching a plan (a cabin, a recipe, a chemistry set, chemicals, computers, etc.) – is the very epitome of

inducement and lack of predisposition. Indeed, it is hard to imagine a clearer cut case. That McDavid remains convicted, in the face of the flatly erroneous jury instructions – where the jurors plainly stated they were intently focused on his entrapment defense, whether Anna was a government agent, and when first contact occurred – is a manifest injustice.

Had these breaches of due process befallen a defendant in another undemocratic country and remained uncorrected for years, we would have no hesitation in labeling it a clear miscarriage of justice. Magazine articles to this effect continue to appear (see, most recently, "Honey Stinger," in the December 2012 issue of *Outside Magazine*) and at least one documentary film is in the works. This aberrant case quite literally undermines the fairness, integrity, and public reputation of judicial proceedings, and therefore cries out for review by this Honorable Court.

D. Counsel Rendered Ineffective Assistance By Failing To Effectively Advocate For The Admission Of Valuable Testimony From Character Witnesses

It is well-settled that character evidence is admissible under F.R.E. 404(b) and 405(b), as a key component of an entrapment defense, to establish defendant's state of mind and lack of predisposition. *United States v. Thomas*, 134 F.3d 975 (9th Cir. 1998). "For the jury to find predisposition beyond a reasonable doubt, it *must* consider the defendant's character." *Id.* at 980 (emphasis added). "Error cannot be harmless where it prevents the defendant from providing an evidentiary basis for his defense." *Saenz*, 179 F.3d at 689.

Related to the previous argument (I.C., *ante*), McDavid asserts that the erroneous time period deemed relevant to the issue of "first contact" also prejudicially affected the defense's ability to present other aspects of its case, including favorable character witness testimony regarding predisposition, and that trial counsel failed to provide the Court with relevant legal authority that supported his position. (*See* Def's Am'd Memo at 42:16 – 45:22). In response, the Government argues that "[t]he Ninth Circuit considered and rejected McDavid's claim that the district court abused its discretion by limiting favorable character evidence to June 2005 forward," that "McDavid is therefore foreclosed from re-litigating that issue," and that "he

cannot prevail by repackaging the claim as ineffective assistance of counsel." (Gov't Opp. at 27:12-22, citing *McDavid*, 396 Fed. Appx. 365 at 371-72). The government incorrectly frames the issue and the government is incorrect in its analysis.

The issue addressed by the Ninth Circuit in this regard was as follows:

> 7. Cumulative Error
>
> McDavid asserts as cumulative error that the district court abused its discretion by (1) admitting testimony from Officer Bruce Naliboff regarding "eco terror" groups and the anarchist movement, and (2) admitting bad act and unfavorable character evidence while limiting favorable character evidence to June 2005 forward. [Discussion of Officer Naliboff's testimony omitted here.] Moreover, McDavid has not identified bad act or character evidence that was admitted or excluded, and, even if he had, "[o]ne error is not cumulative error." *United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir. 2000).

McDavid, 396 Fed. Appx. at 371-72. That ruling in no way addresses or precludes the ineffective assistance of counsel claim raised in these § 2255 proceedings for several interrelated reasons.

First, and most simply, since the IAC claim (rightly) was not presented on appeal, it must be addressed here. Second, in analyzing an IAC claim, the Court must undertake a cumulative error analysis, aggregating the deficiencies in counsel's performance and all other trial errors to determine whether these errors had a substantial and injurious effect on the verdict and deprived the defendant of a fundamentally fair trial. *Alcala v. Woodford*, 334 F.3d 862 (9th Cir. 2003).[17] For this reason, too, the Court must consider and address the claim as presented. Third, if the Ninth Circuit's ruling were as claimed by the Government, that ruling is clearly erroneous and it can have no effect on these § 2255 proceedings. *Manzo*, 675 F.3d at 1211 n.3.

Moreover, the substance of the current claim (i.e., that counsel was prejudicially ineffective for failing to provide the District Court and the Circuit Court with relevant legal authority and argument that would have allowed the admission of crucial evidence of lack of

[17] Cumulative error analysis in the context of this § 2255 motion is, obviously, fundamentally different than the "cumulative error" analysis that appears in the Ninth Circuit's decision on appeal.

predisposition) is demonstrated amply by the argument and citations presented by in Def's Am'd Memo. at 42:16 – 45:22, which the government does not address. The authority is clear and persuasive in demonstrating that trial/appellate counsel was prejudicially ineffective and that McDavid's rights were violated. *See* discussion, section I.C., *ante* (addressing authority that trial/appellate counsel failed to cite and address properly re: this issue including, *inter alia*, *Kim*, 176 F.3d 1126; *Mkhsian*, 5 F.3d 1306; *Hart*, 963 F.2d 1278; *Montero-Morlotti*, 141 F.3d 1182; *Thickstun*, 110 F.3d 1394; *Davis*, 36 F.3d 1424; *Sbrocca*, 996 F.2d 1229; *Lessard*, 17 F.3d 303; *Sterner*, 23 F.3d 250); *see also* Def's Am'd Memo. at 44:25-46:11 (citing *United States v. James*, 169 F.3d 1210 (9th Cir. 1999); *Thomas*, 134 F.3d 975; *Rock v. Arkansas*, 483 U.S. 44 (1987); *Wardius v. Oregon*, 412 U.S. 470 (1973); *Washington v. Texas*, 388 U.S. 14 (1967)).

Defense counsel offered virtually no arguments supported by law in opposition to the restrictions on defense character witness testimony sought by the government and ordered by the Court. McDavid thus was deprived of his right to have critical evidence of his lack of predisposition considered by the jury. McDavid requests an evidentiary hearing to consider the favorable character witness testimony he was barred from presenting. Both as a stand-alone claim, and under appropriate cumulative error analysis, counsel was prejudicially ineffective in this regard and McDavid did not receive a fundamentally fair trial.

E. Counsel Was Ineffective In Failing To Raise And Effectively Argue In Connection With Sentencing

McDavid claims that he received ineffective assistance of counsel by previous counsel's failure to raise and effectively argue that he was unjustly subjected to severe, disparate punishment because he exercised his right to stand trial. Def's Am'd Memo. at 45-46. The government asserts that the defense fails to provide supporting facts, that the claim is procedurally defaulted, and that the claim should be rejected on its merits. (Gov't Opp. at 27-28.)

In McDavid's sentencing memorandum, trial counsel urged the Court to avoid sentencing disparity between similarly situated defendants. (Doc. 313 at 17-18.) In the government's sentencing memorandum, it responded by claiming that *U.S. v. Patterson*, CR. S-99-551 EJG

(E.D.Cal.) was a comparable case that the Court should use in determining McDavid's sentence. (Doc, 325 at 10-11.) In the defense's reply sentencing memorandum, counsel did not respond to this assertion. (Doc. 321.)

At the sentencing hearing, the government addressed the disparity issue, reiterating and strengthening its emphasis on *Patterson*: "I don't want to repeat what I put in the Government's Sentencing Memorandum, but I do want to talk about the case that I think if we're going to start comparing cases, the propane tanks case is actually the closest case." (E.R. 1956:12-15.) Again, defense counsel failed to dispute this claim or to distinguish Patterson's case from McDavid's.

In imposing sentence, the Court expressly relied on the sentence in *Patterson* for its disparity assessment, stating:

> And before I go on, I do also want to indicate that the Court has considered the need to avoid any disparity of defendants who have engaged in similar conduct. And Mr. Lapham referred to the propane tank case [*Patterson*], and I think that that's also been considered and weighed by the Court as well. And there were substantially longer sentences that were provided in that particular case, but we are in a very similar situation.

(E.R. 1981:23-1982:4.)

Counsel continued to fail to address this issue on appeal, and the Ninth Circuit explicitly relied on the inapt comparison in upholding McDavid's sentence, stating: "The district court also considered similarly situated defendants and found that there were comparable, and even substantially longer, sentences." *McDavid*, 396 Fed. Appx at 372.

In fact, the *Patterson* case is not comparable to McDavid's and trial counsel provided ineffective assistance in failing to address and distinguish it. Patterson was convicted at trial of four serious felonies (conspiracy to use a weapon of mass destruction, conspiracy to use a destructive device, possession of a destructive device, and conspiracy to violate federal firearms laws), which carried a maximum sentence of life in prison. McDavid was convicted of a single count (18 U.S.C. § 844(n), conspiracy to damage and destroy property by fire or explosive), which carried a maximum of 20 years in prison. In *Patterson*, in addition to the defendant's discussing, in detail, plans to blow up the propane tanks and to trigger a second device to ignite

the leaking gas, "bomb-making materials were found at Patterson's home, including detonators and what he himself described as 'Timothy McVeigh quality' ammonium nitrate." *United States v. Patterson*, Memorandum Disposition, No. 02-10478 (9th Cir. Nov. 17, 2003) at 2. In McDavid's case, McDavid and his co-conspirators failed in the early stages of trying to test the informant's recipe for explosives by shattering a small bowl while trying to boil bleach.

Defense counsel's failure to address *Patterson* clearly falls below an objectively reasonable standard of conduct. If not for counsel's unprofessional errors, it is extremely probable that the district court would not have relied on the *Patterson* case, which made a long sentence for McDavid seem reasonable and masked the actual disparity that it created between similarly situated defendants.

This is all the more prejudicial and egregious because trial counsel also failed to apprise the Court of a case much more comparable to McDavid's: *United States v. Cottrell*, No. 2:04-cr-00279-RGK (C.D. Cal.). In 2005, Cottrell went to trial for activities connected to an action by the Earth Liberation Front ("ELF"). He was convicted of seven counts of arson and one count of conspiracy to commit arson, and he was sentenced to 100 months imprisonment (100 months for each count, to be served concurrently) and restitution totaling $3,583,544.[18] Like McDavid, Cottrell was convicted at trial and, like McDavid, he was convicted of violating 18 U.S.C. § 844(n). Yet Cottrell receive a sentence of 100 months, less than half the 235-month sentence meted out to McDavid.

This is further supported by the significant disparity between McDavid's sentence and those imposed in significantly more egregious cases involving other defendants. For example, in the recent case of U.S. v. Alexander Piggee, CR No. S-11-0055 JAM (E.D.Cal.), the defendant pled guilty to two separate arsons of public spaces resulting in over $1.3 million in damage and

[18] On appeal initially, the Ninth Circuit vacated Cottrell's seven arson convictions, affirmed the conviction for conspiracy, vacated the sentence, and remanded to the district court for further proceedings. *United States v. Cotrell*, Amended Memorandum Disposition, No. 05-50307 (9th Cir. Sep. 8, 2009). On remand, the district resentenced Cottrell to 100 months and $3,583,544 in restitution for the conviction under § 844(n). *United States v. Cottrell*, No. 2:04-cr-00279-RGK (C.D. Cal.), Doc. 219.

significant danger to the public. He was sentenced to 180 months. In *United States v. Douglas Wright, Brandon Baxter, and Connor Stevens*, No. 1:12 CR 238 (N.D. Ohio), the defendants pled guilty to conspiracy to use a weapon of mass destruction, attempt to use a weapon of mass destruction, and malicious use of explosives to destroy a structure used in interstate commerce. These convictions were brought about through the activities of an informant over several months time, during which the defendants plotted to blow up bridges (including discussion of specific bridges and "limiting the number of casualties and the potential for killing possible supporters"), "strapping C-4 explosives to an armored car and blowing a chunk out of the federal reserve at the DHS Fusion Center," and eventually agreeing to blow up the Northfield-Brecksville High Level Bridge. *See* Case No. 1:12-cr-00238-DDD, Docs. 205-1, 206-1, & 207-1 (*Memorandum Opinions* by the district court). Further, the defendants placed two explosives at the base of a support column of the Northfield-Brecksville High Level Bridge and attempted to detonate the improvised explosive devices (IEDs), which turned out to be inert (unbeknownst to the defendants). *Id.* Defendant Wright's sentencing range was 324 to 405 months; he was sentenced to 138 months imprisonment. *Id.* (Doc. 205-1). Defendant Baxter's sentencing range was 262 to 327 months; he was sentenced to 117 months imprisonment. *Id.* (Doc. 206-1). Defendant Stevens's sentencing range was 188 to 235 months; he was sentenced to 97 months imprisonment. *Id.* (Doc. 207-1).

McDavid's sentence of nearly 20 years (235 months) for a one count violation of 18 U.S.C. § 844(n) also stands in strikingly sharp contrast to those of his codefendants.[19] While the evidence showed that the codefendants played no lesser role in any conspiracy than McDavid, the codefendants were allowed to plead guilty to general conspiracy under 18 U.S.C. § 371 in exchange for cooperating, and they were released with time served (six months for one, two weeks for the other).[20] While some disparity is expected between sentences for those who

[19] McDavid's sentence also is significantly greater than the 156-month sentence recommended by the Probation Office.

[20] These extremely lenient sentences were, of course, not known by the jury at the time of McDavid's trial, as the sentences had not yet been imposed.

provide assistance and those who do not, the exponential disparity present here cannot be accounted for by simply cooperation.

Further, while the government argues that the District Court considered McDavid's argument for a reduced sentence, this fails to consider that many of the factors the District Court used to justify the disparity between McDavid and his co-defendants (such as McDavid's alleged leadership and indifference to human life) were based on testimony now recanted in a declaration by government witness Zachary Jenson.

This assistance provided by defense counsel clearly falls below an objectively reasonable standard of conduct. If not for counsel's errors it is extremely probable that the District Court would not have relied on the Patterson case, which made a long sentence for McDavid seem reasonable and masked the actual disparity that it created between similarly situated defendants. In light of the above and other comparable cases in which significantly more proportionate sentences were imposed, and in light of the errors addressed in this § 2255 motion, McDavid's sentence of 235 months imprisonment resulted from previous counsel's constitutionally ineffective assistance, and the sentence is manifestly unjust.

VI. JENSON'S DECLARATION

In an attempt to refute the claims in Mr. Jenson's declaration, the government has filed a declaration from AUSA Ellen Endrizzi. In her declaration, Ms. Endrizzi describes typical interview methods and speculates about what she might have done in her interviews with Jenson. But Ms. Endrizzi is also very clear that she does not remember what actually happened in her meetings with Mr. Jenson. It is not surprising that Ms. Endrizzi does not remember. In her seven years as an AUSA she has no doubt conducted many such interviews. For Mr. Jenson, on the other hand, this was a unique experience that has been much more difficult to forget. Clearly his declaration of explicit recollections has considerably more value than Ms. Endrizzi's confession of understandable forgetfulness.

The government claims in its opposition that Jenson failed to identify any facts in his trial testimony that he would change. (Gov't Opp. at 29:7-8.) This is not true. First, Jenson's

declaration in fact is a refutation of the entire premise of his trial testimony (the premise being that he and McDavid were guilty of conspiracy). For example, Jenson states, "I believe he [McDavid] is actually innocent of the charge for which he was convicted." (Ex. 1 at p. 1.) Moreover, numerous specific facts in Jenson's declaration are contrary to his trial testimony. While Jenson testified at trial that McDavid was never reluctant about engaging in the alleged conspiracy (E.R. 1418:17-20), he states in his declaration that neither the meeting in November 2005 in Foresthill nor in January 2006 at Dutch Flat would have happened without Anna's pushing, and he states that McDavid didn't want to meet at all in November and would have been traveling with him in January, if not for Anna. (Ex. 1 at p. 2.) Jenson also testified at trial that Eric did not seem influenced by Anna during the meeting in November in Foresthill. (E.R. 1425:4-7.) His declaration, however, contradicts this claim:

> It was clear to me that Anna was the leader of the conspiracy and not Eric. Anna was very influential over the group and the three of us were acting to impress her, *Eric most of all*. It is clear to me that Anna was aware of Eric's romantic interest in her and used it to secure his involvement in her plans. We all knew that Eric was romantically interested in Anna and therefore was deeply interested in her approval.

(Ex. 1 at p. 3 (emphasis added).)

The government asks in their opposition whether Jenson now denies that "McDavid talked about the acceptability of the loss of human life." (Gov't Opp. at 30:25-26.) The answer is yes. At trial, Jenson testified that while he himself did not want to be a part of anything that could result in the death of other people, he thought that McDavid felt differently. (E.R. 1433:4-17.) His declaration makes clear otherwise:

> I did not believe that Eric was a dangerous person and based on the many conversations we had in our year and a half of friendship, I did not believe Eric would have taken action that would have harmed or killed another human being.

(Ex. 1 at p. 3.) Jenson's recantation is corroborated by the testimony of Weiner and the recording of their conversation regarding the loss of human life, discussed in Part II.G, above.

Jenson claimed during his testimony that McDavid was "the brains of the operation" and that Anna asked questions more than she made demands. (E.R. 1438:8-19.) This is in stark

contrast to Jenson's declaration, in which he describes Anna as "very pushy about her radical agenda," and as having "persuasive powers" and using "interpersonal manipulation" to make things happen. (Ex. 1 at p. 2.) Jenson declares further that "It was clear to me that Anna was the leader of the conspiracy and not Eric." (Ex. 1 at p. 3) Again, this is corroborated by Weiner's testimony that it was Anna who was pushing for a plan – and who stormed out of the cabin the night before their arrest because such a plan didn't exist. (E.R. 1317:17-23.)

The government argues that McDavid has not proven that the government knew or should have known that Jenson's testimony was false, saying that Jenson did not tell prosecutors he was testifying falsely. (Gov't Opp. at 31:1-4.) But Jenson did not need to proclaim to the government that his testimony was false in order for the government to know this. As Jenson explains in his declaration, he told the government the truth, and without any evidence to contradict him, they argued with him until he changed his account and conformed it to their version of events. Througout this process, the threat of 20 years in prison hung over Jenson's head. The fact that Jenson kept giving the government a different "version of events" during his interviews made it obvious he was telling them what they wanted to hear, not what he believed. (Ex. 1, pp 1-2.) He states in his declaration:

> On several occasions, when the issue was 'debated' in our meetings, it became very clear that the government was very aware of what I believed to be the truth of things. As well, they did not appear to have any facts which ever contradicted what I was saying, nor could they prove I was actually not telling the truth. Despite this, they persisted in me telling them a version of what happened with Eric and Anna and myself and Lauren Weiner which made it sound like Eric McDavid was in fact guilty of the charges against him, and that he was not entrapped into committing the crime by Anna.

(Ex. 1 at p. 2.) The government's insinuation that Jenson should have told them expressly he would be lying on the stand is rather preposterous on its face. As Jenson noted,

> I became very aware that if I did not testify to the facts that the government felt occurred, which I did not believe occurred, that my plea bargain would be taken away and I would be charged with the major federal charges and would very likely receive a 20 year sentence. This was a lot of pressure for me to handle.

(Ex. 1 at p. 2.) Jenson knew that any chance he had at freedom was contingent upon his testifying to the government's version of the facts. The government did not have to tell him this – their negative reactions to his truthful testimony were enough to convey to him the reality of the situation. If Jenson had told them he would be lying on the stand, at least in his eyes, they would have slammed the door on his chance at freedom. He states:

> I felt that Anna induced us to commit a crime that we weren't predisposed to commit. I knew that I couldn't testify to this or else the government would rescind my plea agreement, which would have disastrous results for me.

(Ex. 1 at p. 3.)

The government claims McDavid has failed to demonstrate the materiality of Jenson's declaration by identifying any facts Jenson testified to falsely. Yet Jenson's declaration deals with major factual elements of the government's case. Throughout this case, the government has made the baseless claim that McDavid found human casualties acceptable a centerpiece of its prosecution. The government has used this allegation to portray McDavid, a naïve young man with no criminal history or history of violence, as a heartless would-be killer. The District Court explicitly noted that it took this into consideration in imposing the nearly 20 year sentence. (E.R. 1967:14 - 1968:1.) Jenson flatly contradicts this claim in his declaration. Jenson also contradicts the government's claim that McDavid was "the brains" of the operation, which the government and the Court used to justify the extraordinarily disparate sentences among the codefendants.

These facts undermine the integrity of McDavid's sentence, and they also support his argument that he was not predisposed to commit the crime charged in the indictment. Jenson's statements regarding McDavid's reluctance also speak to his lack of predisposition. In his declaration, Jenson describes how Anna was able to overcome McDavid's lack of predisposition and induce him to be involved in her conspiracy. (Ex. 1.) These issues are clearly material because they are essential elements of McDavid's defense. It is highly likely that if the jury had heard Jenson's truthful testimony it would have reached a different outcome.

The government describes Jenson's declaration as buyer's remorse and says it should be ignored because he has recanted his testimony. (Gov't Opp. at 29:3-5.) Although the

government argues that recanted testimony should be assigned less value than original testimony, the government does not actually dispute any of Jenson's claims in his declaration. Jenson's statements are more than adequate to support the need for an evidentiary hearing and ultimately, to overturn McDavid's conviction and grant him a new trial.

VII. BRADY VIOLATIONS

A. Basic Legal Framework

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. The Court has subsequently explained that "[t]here are three components of a true *Brady* violation: (1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82, (1999). *Brady* applies not only to information known to the prosecutor, but also to "evidence 'known only to police investigators and not to the prosecutor.'" *Id.* at 280-81 (quoting *Kyles v. Whitley*, 514 U.S. 419, 438 (1995)).

In *Napue v. Illinois*, 360 U.S. 264 (1959), the Court held that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue*, 360 U.S. at 269. "A claim under *Napue* will succeed when '(1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) the false testimony was material.'" *Jackson v. Brown*, 513 F.3d 1057, 1071-72 (9th Cir. 2008) (quoting *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005) (en banc)). It is "irrelevant" whether the defense knew about the false testimony and failed to object or cross-examine the witness, because defendants "c[an] not waive the freestanding ethical and constitutional obligation of the prosecutor as a representative of the government to protect the integrity of the court and the criminal justice system." *N. Mariana*

Islands v. Bowie, 243 F.3d 1109, 1122 (9th Cir. 2001); *see also Belmontes v. Brown*, 414 F.3d 1094, 1115 (9th Cir. 2005) ("Whether defense counsel is aware of the falsity of the statement is beside the point."), *rev'd on other grounds sub nom., Ayers v. Belmontes*, 549 U.S. 7 (2006).

A jury's finding should be overturned as a result of *Brady* and *Napue* violations if and only if those violations are material.[21] The fundamental question in the materiality analysis is whether, despite the prosecution's errors, the defendant "received ... a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434. Because each additional *Napue* and *Brady* violation further undermines confidence in the jury's decision, the errors must be analyzed "collectively." *See id.* at 436. In *Jackson*, the Ninth Circuit set forth how this analysis ensues:

> "…[W]e first consider the *Napue* violations collectively and ask whether there is "any reasonable likelihood that the false testimony *could* have affected the judgment of the jury." *Hayes*, 399 F.3d at 985 (emphasis added). If so, habeas relief must be granted. However, if the *Napue* errors are not material standing alone, we consider all of the *Napue* and *Brady* violations collectively and ask whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding *would* have been different." [*United States v.*] *Bagley*, [473 U.S. 667, 682 (1985)] (emphasis added) (internal quotation marks omitted); *United States v. Zuno-Arce*, 25 F.Supp.2d 1087, 1117 (C.D. Cal. 1998) (applying a two-step materiality analysis to combined *Brady* and *Napue* claims), *aff'd*, 339 F.3d 886 (9th Cir. 2003). At both stages, we must ask whether the defendant "received . . . a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434.

Jackson, 513 F.3d at 1076 (emphasis in original).

B. Documents Obtained Through the Defense's FOIA Request

The government concedes that documents in its possession, relevant to McDavid's case, were not turned over to the defense. The government defends this *Brady* violation by asserting that "a relatively small amount of information pertaining to the case was apparently not disclosed to the defense." (Gov't Opp. at 31:20-21.) To the contrary, the Freedom of Information Act ("FOIA") request filed on behalf of McDavid produced a very large amount of information:

[21] Once *Brady* or *Napue* claims are deemed material, there is no need for further harmless error analysis under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). *Kyles*, 514 U.S. at 436; *Hayes*, 399 F.3d at 984-85.

3,317 pages, much of which was not turned over in discovery. Of these 3,317 pages, only 2,449 pages have been released to McDavid; the other 868 pages have been deemed "exempt from disclosure" and McDavid therefore has no way of knowing what those pages contain. The Court should order that the entire file be turned over, including un-redacted copies of the 2,449 pages released in the earlier FOIA request, as large portions of the file received were redacted, resulting in hundreds of pages that are virtually blank.[22]

It is not enough that the government argues that there is no exculpatory evidence in these documents. What is exculpatory is not so clear cut in a case such as this, where the defendant presented an entrapment defense rather than arguing that he did not participate in the alleged crime. A determination of what evidence is exculpatory in this case requires a more nuanced analysis of issues involving McDavid's predisposition and the nature of the informant's inducement, concepts that are ultimately subjective. McDavid's counsel is in the best position to conduct this analysis and he is entitled to any documents with information that could be broadly construed as being exculpatory or impeaching of witnesses, even if that is not the government's final analysis.

While the government frequently argues that the documents in question contain no exculpatory information, they do not deny that there is impeaching evidence that has not been disclosed. A number of files uncovered by the FOIA request make mention of government informants other than Anna, who were reporting on McDavid. The defense was never provided material about other informants in McDavid's case. It is important for McDavid to see the statements of these other informants to ascertain if they contradict the reporting of the government's star witness, Anna. The reports of other informants also could provide information about McDavid's predisposition, an essential element of his defense.

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[22] If a protective order is necessary concerning the un-redacted copies, one can easily be put in place.

C. Documents Described by SA Walker

The government has argued that all of the information contained in the documents in question is either inculpatory or benign, through the submission of a declaration by FBI SA Nasson Walker, who discusses the documents he reviewed after receiving a copy of McDavid's 2255 motion. (*See* Doc. 420-2 - *Declaration of Nasson Walker* (hereinafter "Walker Decl.")). In his declaration, SA Walker frequently notes (in very brief descriptions) that documents contain "no derogatory information" regarding McDavid and/or they contain "no discussion of politics or violent action." (*See* Walker Decl. at 5, 7-9, referencing the page number at the bottom of the page). Even on their face, these descriptions mark the documents as containing *Brady* information favorable to the defense in that they support McDavid's lack of predisposition. McDavid used an entrapment defense at trial and his predisposition is an essential element of that defense. Any information that indicates that McDavid did not engage in or was not inclined towards illegal or violent activity is indicative of his lack of predisposition to commit the crime charged in the indictment. Thus, "benign" information is actually exculpatory information under *Brady*; it supports McDavid's theory of the case and it is inconsistent with the government's theory of the case.

For example, a number of these favorable references are to multiple interviews of Sarah Strayer regarding McDavid. Walker Decl. at 7-8. Government witnesses at trial testified that Strayer was at one point in time considered as a possible participant in the group (E.R. 1552:10-12), and that McDavid had a relationship with Strayer. (E.R. 1065:22-1066:5.) This would certainly indicate that Strayer provided information about McDavid, his predisposition, and the likelihood that he would participate in the alleged conspiracy. Given this, the interviews with Strayer (characterized as devoid of derogatory information and lacking discussion of violent actions) constitute *Brady* material, providing favorable evidence of McDavid's lack of predisposition.[23]

[23] The documents also appear to indicate that Strayer testified before the grand jury, and McDavid should be provided with these materials, as well.

The government also claims that information that McDavid argues was not included in discovery, was communicated to the defense in other forms. (Gov't Opp. at 31:24-32:2.) Without the government specifying what communications it is referring to, counsel and the Court have no way to determine whether this is so. What is clear is that many of the documents obtained by McDavid through FOIA were never provided to the defense at the time of McDavid's trial. By way of specific example, the newly disclosed information includes the government's attempt to conduct a polygraph examination of their main witness (Anna), which was not included in the discovery, and which is discussed below.

SA Walker discusses particular groups of documents under headings in his declaration. Those groups of documents are discussed here, using the same headings as those in SA Walker's declaration.

1. Polygraph

SA Walker references one page regarding a request for a polygraph examination of its informant, Anna. (Walker Decl. at 1-2.) A different document referencing the polygraph states, "The purpose of the requested polygraph examination is to confirm veracity of CW reporting prior to the expenditure of substantial efforts and money based on source's reporting." (Exhibit 4, part 1: 00023-00024.) As noted by SA Walker, the polygraph examination was requested in early November 2005. This was right before the group met at McDavid's parent's house in Foresthill and a little over a month before Anna was permitted to engage in OIA (Otherwise Illegal Activity). (Walker Decl. at 1.) In fact, the request for the polygraph exam asked that it be completed by November 17 (the day before the group met in Foresthill) to "facilitate investigation." (Exhibit 4, part 1:00024.) Even from the redacted version of this document it is clear that both the FBI and the AUSA considered this polygraph examination to be urgent and necessary, coming at a time crucial to the investigation, and the request for a polygraph examination of the informant (and all other related documents) certainly is *Brady* material.

SA Walker also notes that the request for a polygraph examination was approved (and the document itself shows that the AUSA concurred), but he states that for some unexplained reason

Anna's handler (SA Torres) then decided to call off the polygraph examination. (Walker Decl. at 1-2.) SA Torres later testified as a witness for the government in McDavid's trial, testifying about his role as Anna's handler and the supervision and direction he offered her. If McDavid's attorney had been provided this information he could have cross-examined SA Torres about why others in the FBI questioned the veracity of Anna's reporting and why he precluded her from the polygraph examination. This information could have been used to impeach both Anna and SA Torres. Depriving the jury of this information was deeply prejudicial.

McDavid is entitled to un-redacted versions of all documents and electronic communications related to the original decision to give Anna a polygraph test and the later decision not to give Anna a polygraph test. McDavid additionally is entitled to all documents related to the veracity of Anna's reporting. No information about the polygraph examination was provided to McDavid at the time of his trial. Even the redacted version of the document regarding the polygraph examination makes clear that the reliability of Anna's reporting was in question. (Exhibit 4 Part 1:000023-24.) McDavid also should be provided all emails/communications between and among the FBI field offices in Philadelphia and Sacramento and the US Attorney's Office regarding the proposed polygraph examination, as well as all other documentation regarding the approval or denial of the request.

2. Miami Source Reports

According to SA Walker, in preparation for McDavid's trial, FBI Miami provided FBI Sacramento with 51 reports containing information provided by Anna. (Walker Decl. at 2.) SA Walker claims that only 16 of these documents mention McDavid, and that 5 of these 16 were produced in discovery. (Walker Decl. at 2.)

The first four documents that SA Walker reviews – which were not turned over to McDavid during the discovery process – concern the Des Moines Crimethinc gathering and the Republican National Convention in 2004. (Walker Decl. at 2-4, items nos. 1-4). The defense was provided almost no discovery from this time period. The defense has always maintained that the event in Des Moines constituted McDavid's "first contact" with Anna, and any

documentation relevant to this time period would speak to McDavid's lack of predisposition at that time. This material could potentially contain impeachment material about Anna, as well.

Additionally, in his review of the second document (item 2), SA Walker describes McDavid as "a leader/organizer of event" (referring to Crimethinc Des Moines). (Walker Decl. at 3.) It is undisputed that McDavid was merely an attendee at the Crimethinc gathering in Des Moines, Iowa. He was, in fact, never a resident of Iowa and he was traveling in the time leading up to that event. The claim that he was a "leader/organizer" is completely baseless and false. The fact that Anna reported him as such casts doubt on the truth of her various claims about McDavid. This information could have been used on cross examination to impeach her.

3. Redacted McDavid FOIA Reports

SA Walker claims that all of the documents produced in response to the FOIA request contain only inculpatory information about McDavid or do not mention him at all. (Walker Decl. at 4-5.) The search parameters for McDavid's FOIA request from the FBI were for all documents about McDavid in their possession. Therefore, by the FBI's own admission in producing the documents, all 2,449 pages that McDavid obtained through FOIA must mention him or at least are relevant to him. And although SA Walker characterizes the rest of the documents as inculpatory, the defense contends otherwise. The table provided by SA Walker discloses that a number of the remaining documents are investigative reports from Anna, other informants and other witnesses, and the defense anticipates that these investigative reports will contradict Anna's testimony and they therefore could have been used on cross-examination to impeach Anna, or that they will otherwise be favorable to the defense.

What follows are a couple of examples to highlight the government's failure to provide the defense with all relevant discovery in the case.

SA Walker describes one of the documents dated 9/30/05 as "Philadelphia request for BAU [Behavior Analysis Unit] analysis of 1 letter and 10 emails from McDavid." (Walker Decl. at 6 (item 4 part 1).). The next document is described as "Philadelphia EC enclosing 1 letter and 10 emails to CHS [confidential human source] from McDavid." *Id.* It is very unclear exactly

which emails and letters the government is referring to. The FOIA file did not contain the letters or emails, and it seems they also were not included in the discovery in the case. The government did turn over a number of emails between the defendants and the informant in this case, but only seven of them could be described as "from McDavid." Five of those emails are actually to Jenson (only two of which are dated prior to 9/30/05 – when the above document was filed), and only two of them are addressed to Anna. *Neither* of the emails addressed to Anna were written prior to 9/30/05. If the government has 10 emails from McDavid to Anna which were written prior to 9/30/05, the defense has not seen *any* of them. And the defense certainly has not seen any analysis from the BAU about McDavid. Further, as stated elsewhere, the government continues to claim that McDavid wrote Anna letters, but to this day has not been able to produce any of them. They must provide the defense with this evidence. Both the letters/e-mails and the BAU analysis are material under *Brady* because they can shed light on McDavid's predisposition and they can provide impeachment information regarding Anna. The letters/emails are material under *Brady* additionally because they can provide information about the nature of the inducement Anna used to get McDavid to participate in her schemes. McDavid has argued that Anna used his attraction to her and the possibility of romance in the future to induce him to participate in the conspiracy, and it is highly likely that these letters/e-mails contain evidence of that romantic inducement.

The FOIA files (as described by SA Walker) also contain a number of CHS reports that did not involve Anna. This is the first that the defense has heard of other informants being used in McDavid's case. One report dated 11/7/05 indicated that the unnamed source provided the government with "items" (although the description of the items was not included in the FOIA file). (Exhibit 4, part 2:000013.) There are also several pages of the exhibit (and thus the FOIA file) which SA Walker fails to account for.

4. Redacted Crimethinc FOIA Reports

SA Walker also discusses the redacted Crimethinc FOIA reports. *See (*Walker Decl. at 10-11.) Much like the FOIA documents referenced above, the Crimethinc FOIA documents the

defense has obtained are heavily redacted. While the government claims that the documents contain no exculpatory information, it is clear from the portions of the documents the defense has been able to read that they very likely contain information material under *Brady*, including but not limited to Anna's first impression of McDavid (which would speak to his predisposition) and possible impeachment material for the government's main witness, Anna.

VIII. MCDAVID IS ENTITLED TO AN EVIDENTIARY HEARING

McDavid has presented colorable claims sufficient to grant an evidentiary hearing so that he may prove them up. "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief," a hearing must be granted. 28 U.S.C. § 2255(b); *Baumann v United States,* 692 F2d 565 (9th Cir. 1982) (hearing on § 2255 motion is mandatory whenever record does not affirmatively manifest factual or legal invalidity of petitioner's claims); *Dukes v United States,* 492 F2d 1187 (9th Cir. 1974) (before district court may deny motion under 28 U.S.C. § 2255 without hearing, files and records of case must conclusively show that prisoner is entitled to no relief). However, if the Court finds otherwise, a certificate of appealabilty should be granted as to each of the claims.

IX. THE GOVERNMENT IS NOT ENTITLED TO A CERTIFICATE OF NON-APPEALABILITY

Courts are to issue a certificate of appealability "if the applicant has made a substantial showing of the denial of a constitutional right." 18 U.S.C. § 2253(c)(2); *see also Doe v. Woodford,* 508 F.3d 563, 567 (9th Cir. 2007); *Slack v. McDaniel,* 529 U.S. 473, 478, 483 (2000) (applying the certificate of appealability provision when the district court denies a post-conviction petition on procedural grounds; rejecting any narrower interpretation because of its obviously deleterious effect on the writ's ability to fulfill its "vital role in protecting constitutional rights.") While this "substantial showing" language appears to be fairly stringent on its face, the Ninth Circuit has actually described the standard as "lenient." *Hayward v. Marshall,* 603 F.3d 546, 553 (9th Cir. 2010). Under the controlling standard, one must "show that reasonable jurists could debate whether ... the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed

further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). This showing requires "something more than the absence of frivolity," but "something less than a merits determination." *Miller-El*, 537 U.S. at 338 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)). "All a prisoner needs is an issue debatable by reasonable jurists." *Hayward*, 603 F.3d at 554; *Miller-El*, 537 U.S. at 338 ("a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail"). The courts have recognized the appropriateness of taking into account the severity of the sentence when deciding whether to issue a certificate of appealability. *See, e.g., Graves v. Cockrell*, 351 F.3d 143, 150 (5th Cir. 2003), *cert. denied*, 541 U.S. 1057 (2004) (capital case; "Any doubt regarding whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination."); *Petrocelli v. Angelone*, 248 F.3d 877, 884 (9th Cir. 2001) (capital case).

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, and based on his previous filings and any further evidence to be adduced in these proceedings, defendant Eric McDavid prays that this Honorable Court order the production of the materials requested herein, permit further discovery and expansion of the record as needed, and order an evidentiary hearing (including to present further evidence and testimony by codefendants Zachary Jenson and Laura Weiner, as well as the favorable character witness testimony McDavid was barred from presenting at trial, and to further examine the significance of the withheld *Brady* matrial discussed above), so that McDavid may prove up his claims. McDavid further prays that the Court grant such further relief as the Court deems just and proper.

Dated: March 5, 2013

Respectfully submitted,

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ERIC MCDAVID