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IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ERIC MCDAVID, Defendant.	CASE NO. 2:06-CR-0035 MCE EFB P GOVERNMENT'S OPPOSITION TO DEFENDANT'S SECTION 2255 MOTION AND REQUEST FOR DISCOVERY

United States of America, through its attorney of record, hereby respectfully files its opposition to petitioner's Motion.

I. INTRODUCTION

On July 31, 2012, petitioner-defendant Eric McDavid filed an amended motion pursuant to 28 U.S.C. § 2255 ("Section 2255 motion") in which he urges the court to vacate his conviction and sentence and seeks discovery pursuant 28 U.S.C. § 2255, Rule 6. As set forth below, this court should deny defendant's petition without a hearing because each of his claims can be disposed of based on the record before the court. All five claims of the claims of ineffective assistance of counsel may be resolved by reference to the Ninth Circuit opinion in this case where the substantive

claims supporting the ineffective assistance arguments were raised and rejected. The remaining to claims – Jenson's alleged recantation and alleged Brady violations - even if taken as true, would be insufficient to meet the standard for habeas relief.

This Memorandum of Points and Authorities includes a statement of the history of the case, the facts of the case, a discussion of the law applying to Section 2255 motions and claims of ineffective assistance, and a discussion of each of the defendant's arguments.

II. FACTS

A. Procedural History

Following a three week trial, McDavid was convicted of conspiracy to bomb one or more targets in the Eastern District of California, including a federal facility for tree genetics, a federal dam and fish hatchery, and cell phone towers. United States v. McDavid, 396 Fed.Appx 365, 2010 WL 3735791 (9th Cir. 2010). McDavid filed post-trial motions raising four of the seven claims that, in his current petition, are reconstituted as ineffective assistance of counsel claims. Each of those claims was rejected by the district court. McDavid appealed his conviction and sentence on numerous grounds, including the same four that he raises in his current petition. Each of those claims was rejected by the Court of Appeals which affirmed his conviction and sentence. Id.

B. Facts Adduced at Trial

1. Background

In Fall 2003, "Anna," who was then 17-years old, was a college sophomore in Florida. E.R. 676.[1] As an extra credit project for a political science class, she attended a protest of the Free Trade Agreement of the Americas that was then taking place in Miami. E.R. 677. Her purpose was to try to understand the protestors' motivations and to write a paper about it. E.R. 677. Although she tried

[1] "E.R." or "S.E.R." refers to the Excerpt of Record or Supplemental Excerpt of Record on appeal. If the court does not have ready access to these documents, the government can provide them.

to dress the part by obtaining "ratty" clothes from Goodwill, she was not accepted on the first day. E.R. 678. On the second day, after adjusting her wardrobe to more closely resemble that of the protesters, she was allowed into the meeting where protest plans were formulated. E.R. 679-80.

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

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

In August 2004, Anna was invited to attend a "Crimethinc Convergence" in Des Moines, Iowa. E.R. 688:25-690:2.[2] That is where she first met the defendant, Eric McDavid. E.R. 690:5. Other than reporting the fact that McDavid was there, Anna thought McDavid was "inconsequential" and of no interest to the FBI. E.R. 690:9-14.

[2] Crimethinc, which may derive from George Orwell's book 1984, is a group of small anarchist cells. A Crimethinc Convergence is an annual gathering of like-minded people who meet to discuss techniques and strategies for staging anarchist inspired protest activities. E.R. 643:11-645:18.

After attending the four above-described events, Anna believed that she was through working for law enforcement. E.R. 691:13.[3] Nevertheless, the Secret Service asked her to attend the 2005 Presidential Inauguration, and the FBI asked her to attend a meeting of the Organization of American States, both of which had planned protests. E.R. 692-93.

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

2. June 2005: Philadelphia Biotech Convention

In June 2005, Anna was asked to attend the Philadelphia Biotech Convention and to report on any planned illegal activities there. E.R. 694:14. After arriving in Philadelphia, Anna sought out Eric McDavid because she wanted to use him to build her credibility in order to gain access to the convergence center where the protest activities were planned. E.R. 697:3. McDavid was someone who could do this because he had seen Anna at the Crimethinc Convergence. E.R. 697:3.[4] McDavid was staying with co-defendant Zachary Jensen at co-defendant Lauren Weiner's apartment. E.R. 697:14.

Anna found a very different Eric McDavid than the person she had met at the Crimethinc Convergence in August 2004. This McDavid had become "radicalized" and "felt that protests were no longer working." E.R. 700:3-701:3. In lieu of protest activity, he was proposing "individual and small group-oriented direct action including property destruction, vandalism, and violence." E.R. 701:4. During one of the protests at the Biotech Conference, a police officer collapsed and died of a

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

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

heart attack. E.R. 701:8. Some of the protestors wanted to have a candlelight vigil for the officer. McDavid, however, expressed the view that the officer's death should be celebrated, that he wished he could have been there to witness it, and that he wished he could participate in killing more officers. E.R. 703:6. Later that night, McDavid again discussed the uselessness of mass protests and suggested engaging in property destruction at the homes of executives of the pharmaceutical company. E.R. 705:8-22. He also told Anna that he had "something big" to tell her but that there were "too many ears around." E.R. 706:12-24.[5]

Anna reported McDavid's statements to the FBI. E.R. 706-07. After running a criminal check, FBI Philadelphia determined that McDavid was a person of interest in Sacramento and asked Anna to follow him closely and report any comments he might make about criminal activity that had occurred in Sacramento the previous year. E.R. 707:7.[6]

3. 2005 Crimethinc Convergence

The next event that Anna attended was the annual Crimethinc Convergence in Bloomington, Indiana. E.R. 710. At McDavid's request, Anna picked him up at a protest in West Virginia and

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

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

drove him to Bloomington. E.R. 710. At the Convergence, McDavid told Anna about a workshop he and co-defendant Zachary Jenson had attended on "urban guerilla warfare." E.R. 711-12. McDavid told Anna that the workshop was about "armed resistence against the state ... overthrowing the government, overthrowing of certain commercial institutions ...." E.R. 713:6-16. He also told Anna that during the workshop the subject of attacking federal buildings came up and that one participant expressed the view that an attack on a federal building would sharply increase criminal punishment. As McDavid told the story to Anna, Jenson disagreed and stated that "[w]e really need to get things started," a statement with which McDavid agreed. E.R. 713:17-714:10.[7]

After the Convergence, Anna drove McDavid to Chicago at his request. E.R. 714:11. On the drive, Anna told McDavid that there were "no other ears present" and that they could freely talk about the subject he had raised in Philadelphia. E.R. 715:1. McDavid responded by telling her about his good friend, Ryan Lewis, who had set an apartment building on fire in the name of ELF and Crimethinc. E.R. 715:11-23. After denying involvement in the Lewis matter, McDavid then said that he had his own plans. E.R. 716:16-23. McDavid then said that he had a "bomb recipe for C4" and his plan was to make C4 bombs to be used with a remote garage door opener. E.R. 717:1-12.[8] McDavid then reeled off a list of targets including "banks, cell phone towers, a tree facility in Placerville, California, gas stations, and communist party facilities." E.R. 719:1.

Shortly after discussing these targets, McDavid lapsed into silence and then told Anna that he had something to get off his chest. He then said, "If you are a cop or you're working with law enforcement, I will fucking kill you." E.R. 720:3. He then elaborated by telling her that he would "go for the neck and then for the main artery in the leg" with the hunting knife that he carried with

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

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

him at all times. E.R. 720:11-21. Anna described that knife as an eight-inch long standard hunting knife. E.R. 720:11-21.[9]

Later in the drive, McDavid told Anna that he planned to start his bombing campaign in the winter and asked her to join him. E.R. 721:11-23. When they got to Chicago, Anna dropped McDavid off at the airport and immediately drove back to Bloomington. E.R. 721:24-722:6.

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

4. August 2005: Formation of the Conspiracy

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

Weiner testified that she first became involved in the conspiracy in August 2005 when she met McDavid and Jenson at a café in Philadelphia that was just down the street from her apartment.

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

E.R. 1200:25-1201:4. McDavid and Jenson were back in Philadelphia for Pointless Fest, a punk rock festival. E.R. 1416:13. According to Weiner, at the meeting they all agreed that protests were not working and that they should begin engaging in "direct actions," by which they meant criminal activity. E.R. 1202:12-19. McDavid raised the subject of using explosives, indicating that he knew how to make them. E.R. 1202:5-20. During the meeting, McDavid stated that he had discussed these ideas with Anna and that Weiner should get in touch with Anna and let her know they had talked. E.R. 1203:19.[10]

Weiner testified that following her meeting with McDavid and Jenson she called Anna "a bunch of times" to talk about what the trio had discussed. E.R. 1204:5-10. For security reasons, she did not want to discuss direct actions over the phone and wanted Anna to come to Philadelphia. E.R. 1204:11-21. Eventually, they met at Weiner's apartment and then went to a restaurant where Weiner told Anna about her meeting with Jenson and McDavid and their discussion about explosives. E.R. 1205:3. Weiner testified that Anna acknowledged having talked to McDavid about these things but seemed surprised that McDavid had talked to Weiner and Jenson. E.R. 1206:25. Anna testified that this meeting with Weiner occurred in October. Anna also testified that at this meeting Weiner told her that the day that Anna had talked to McDavid outside of Weiner's apartment was the same day that McDavid had invited Jenson and Weiner to join the bomb plot. E.R. 724:18. She also testified that Weiner seemed "very excited" about the group's plans and was looking forward to moving to California in the wintertime. E.R. 726:21-727:5.

Anna testified that when she reported these events to the FBI, the FBI was very interested that the bomb plot had now increased to three individuals plus herself, and they wanted her to gather

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

more information on what was occurring, including McDavid's current whereabouts and whether the group was still planning on winter for their bombing campaign. E.R. 725:13-726:2. Accordingly, Anna contacted McDavid by cell phone, indicated that she would be coming to California to visit a sick aunt, and asked if they could "meet up and discuss what we needed to discuss." E.R. 730:9-14. McDavid expressed excitement about that. E.R. 730:23.

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

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

5. November 2005: Foresthill, California

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

McDavid was also inspired by Jensen's suggestion of targets that included cell phone towers, fish hatcheries, and transit systems. E.R. 735:3-14; see S.E.R. Tab 3.

After having dinner, the group settled in around a fire pit to discuss the bomb plot. Among other things, the group discussed "the bomb plot in general, bomb recipes that McDavid had, his desire to get more bomb recipes for the different explosives[,] targets that the whole group had in mind[,] [a]nd how to claim responsibility or how to go about finishing the actions that they were planning. E.R. 736:1-7.[11]

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

a. Discussion About Targets

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

[11] In one of the recordings that the government played for the jury, McDavid explained to the group where he acquired his bomb recipe. He said he got it while he was protesting against the Massey coal company in West Virginia. S.E.R. Tab 4 at 44-45. This places the date of his acquisition of the recipe sometime after the Biotechnology Conference but before the Crimethinc Convergence. E.R. 710:4-11. It was, of course, after the Crimethinc Convergence that McDavid first approached Anna, Weiner and Jenson about forming a conspiracy. Supra, at 7-8.

Weiner confirmed that each of these targets was discussed, and she provided the conspirators' point of view as to why each had merit: oil tankers and gas stations because they contribute to global warming, cell phone towers because of their effect on bird migration, and the "tree factory" because "we all had an issue with genetically modified organisms." E.R. 1214:6-1217:17.[12] Weiner also testified that targeting the "tree factory" was McDavid's idea. E.R. 1217:18-1218:4.

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

b. Discussion About Use of Explosives

There was also a discussion that night about how the targets would be attacked. Anna testified that the discussion revolved around McDavid's planned recipe for the previously discussed C4 bombs. E.R. 743:15.[13] McDavid also mentioned wanting to get more explosives recipes because he did not think the C4 would cover all the targets that he had in mind. E.R. 743:15.

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

c. Claiming Responsibility

The group also discussed how to claim responsibility for their actions. That discussion involved whether they should claim responsibility on behalf of the Earth Liberation Front, with the

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

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

countervailing argument being that doing so would attract the attention of the FBI. E.R. 746:1-22 (Anna); 1221:21-1222:3 (Weiner).

d. Next Meeting

At the end of the weekend, everyone understood that the group would reassemble after the first of the year to begin the bombing campaign. E.R. 748:12-750:6 (Anna); 1223:3 (Weiner); 1424:24 (Jenson). They also agreed that: Weiner would obtain The Poor Man's James Bond; Anna was to find a cabin in a secluded location; and when the group reconvened they would start planning actions. E.R. 750:7-17 (Anna); 1223:8-20 (Weiner).

6. December 2005

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

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

During this interim period, Weiner purchased not only The Poor Man's James Bond but also The Survival Chemist, another book about explosives, both of which she provided to the group when they reconvened in January 2006. E.R. 1224:4.

7. January 2006: Dutch Flat, California

The group reconvened in January at a remote location in Dutch Flat, California. E.R. 768:5-18.[14] From January 8-13, 2006, the conspirators discussed plans to construct homemade explosive and incendiary devices, target commercial and government facilities with these destructive devices, and claim credit for these acts in a public communication that justified the group's actions.

a. January 8, 2006

The first night, there was no substantial discussion of the plot but the group did prepare a list of topics to be discussed the following morning. E.R. 770:7. Anna presented the group with a book that the group could use to record all of their ideas, targets, tactics, bomb recipes, and so forth, and then burn at the end. E.R. 770:18-771:5. There was some discussion about the wisdom of using the book, with Weiner initially being reluctant, but McDavid told her it would be safe because the book would ultimately be burned. E.R. 771:6-10; 1230:9-25. It thereafter became known as the Burn Book. E.R. 779:14. That night Anna wrote down the various topics raised by the group for the discussion the following day. The following morning she gave the book to McDavid who maintained control of it thereafter. E.R. 776:7-18; 1432:15.

b. January 9, 2006

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

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

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

> Anna: What are your feelings? You seem pretty okay with it talking right now?
>
> McDavid: Yeah.
>
> Anna: Yeah. Collateral damage?
>
> McDavid: I wouldn't call it that.
>
> Anna: What would you call it?
>
> McDavid: I don't know exactly what I'd call it. (Laughter)
>
> McDavid: I'd call it--
>
> Anna: Oops.
>
> McDavid: No, no. I wouldn't call it collateral damage though. I mean it's just like a guy died doing his job, apparently. Whatever he wants. Or, whatever they're gonna call it. They're gonna call it that.
>
> Anna: Yeah. Right.
>
> McDavid: They're gonna call it murder first of off, is what they're, what they're gonna call it.

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

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

> Jenson: That's like going a little bit too far for me. That, that, that's going into the area of like, I mean, we're already like technically going toward the area of terrorism, but that is like in the area of terrorism.
>
> McDavid: No we are, we in--
>
> Weiner: We are in the area of terrorism.
>
> Jenson: I know. But it's more extreme.

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

Jenson: Okay yeah.

Anna: Is it

McDavid: And legally speaking, your definition of terrorism doesn't matter for shit.

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

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

c. January 10, 2006

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

The group next went to the Nimbus Dam and Fish Hatchery, the Folsom Dam, and the IFG. E.R. 800:2-10; 1433-34. At the Nimbus Dam and Fish Hatchery, the group took a self-guided tour and discussed how to blow up the fish ladders so that the salmon could continue to swim in the river rather than be directed into the hatchery. E.R. 801:7-802:5; 1242:5-1243:4.

The group next drove to the IFG in Placerville. E.R. 807:12-18; 1244:19. The plan was to park away from the facility so that their car could not be observed and to pretend to be college students. E.R. 807:19-808:16; 1244:23; 1434.4. Once there, McDavid did most of the talking. E.R. 808:18. Following his lead, each member of the group gave a fake name, and McDavid signed the guest book using a fake name followed by "group." E.R. 808:17-810:1; 1434:22. The government

introduced the guest book at trial. E.R. 1566-67. As the group toured the facility, McDavid pulled out the Burn Book and began drawing a map of the facility, noting the location of surveillance cameras. E.R. 810:25-811:5; 1246:1-17. During the tour a USFS employee noted that there were scientists living on the premises, but McDavid was unphased and still considered the facility a viable target. E.R. 811:15-25.

d. January 11, 2006

On January 11, 2006, the group traveled to San Francisco to conduct further research and to buy materials for the explosives recipes. E.R. 815:2-13; 1246:18-25. The group felt that purchasing the components in different locations would make it more difficult for law enforcement to track them. E.R. 815:2-13; 1246:18-25. While in San Francisco, McDavid looked up the locations and phone numbers for several chemical supply stores and began calling them to see if he could purchase items for his explosives recipe. E.R. 817:12-16; 1247:9-12; 1436:11-16.

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

e. January 12, 2006

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

Immediately upon returning to the cabin, McDavid began mixing the ingredients for the explosives recipe. E.R. 830:15; 831; 1248:15-20. While he was waiting for the bleach to boil, he began breaking open the shotgun shells, extracting the black powder, and laying it down in lines. McDavid then scraped the wax off the trick candles and laid them at the end of the lines of black

powder. E.R. 830:20-831:17; 1248:21-1249:6. The purpose of this was to time how long it took for the fuse to burn from start to finish. E.R. 831:18; 1249:4-6.[15]

After McDavid finished the fuse timers, he checked the hydrometer in the boiling mixture, saw that it had reached the correct reading, and turned the hot plate off to allow the mixture to cool. E.R. 834:8. The mixture, however, cooled too fast for the glass bowl on the metal burner and the glass shattered, causing the bleach and ammonia mixture to spill all over the burner and onto the ground. E.R. 834:13-21. This caused some harsh words to be exchanged and some tension in the group.[16]

That night the group vented their frustrations and considered possibly taking things a bit slower. E.R. 837:1-8. Because her own stress level was running high, Anna left the group for a period of time. See supra, n.16. When she returned, the rest of the group seemed calmer and more welcoming. E.R. 841:7. They showed Anna the new entries they had made in the Burn Book during her absence that established a new schedule for going forward with the plot. E.R. 841:20-831:7.

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

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

[16] Three other events that day caused tension within the group as well as for Anna in particular. First, on the drive to Auburn that morning, a wire fell from the dashboard and when McDavid fiddled with the wire the recording device fell into his hand. Because Anna reacted quickly, McDavid did not realize what he was holding before she stuffed it back under the dashboard. E.R. 824:16. Second, as the group was leaving Auburn, Anna, who was driving, rolled through a stop sign and a CHP officer pulled her over. The group was very upset by this and Anna felt they were angry with her for allowing that to happen. E.R. 829:3-830:9. Third, that night there was a discussion about Anna's continued possession of her cell phone with Jenson in particular saying that it made him feel uncomfortable. The other members of the group did not carry one because they believed cell phones were a way for law enforcement to track them. E.R. 833:12-23. Because of these events and the shattering of the glass bowl, which caused Anna to believe that a great amount of evidence had been lost, her stress level was "sky high" and her undercover role was no longer secure. E.R. 835:20-836:8. That night, Anna excused herself from the group to take a walk but actually met with the FBI at their offsite location. She was very upset and did not believe she could continue in her undercover role much longer. She returned to the cabin with the understanding that the defendants would be arrested the following morning. E.R. 840:5-841:6.

f. January 13, 2006

The next morning, the group decided to return to Auburn to purchase more supplies for making an explosive. E.R. 843:1-5; 1249:18-1250:8. The Burn Book contained a shopping list of things they needed to buy for that purpose. E.R. 843:6-20.

After McDavid had purchased several items at a Kmart, including a mixing bowl, a respirator, bleach and ammonia, he was arrested in the parking lot along with the other defendants. E.R. 844:12-845:21. On the morning of January 14, 2006, the FBI Evidence Response Team conducted a search of the Dutch Flat residence. The team seized bomb-making literature, tools, and materials.

8. Lack of Evidence of Romantic Relationship

Although McDavid insinuated throughout the trial that there was a romantic relationship between himself and Anna, the evidence was to the contrary. First, Anna categorically denied any such relationship. E.R. 1099:19. Second, a tape recording that was played to the jury shows that on November 19, 2005, the defendant broached the subject with Anna and was shot down, Anna stating, "I don't not like you. I only like you," and that she wants to keep the relationship "professional".[1] S.E.R. Tab 7 at 63-64. Third, Anna told Lauren Weiner that, while she was aware of the defendant's attraction to her, she had no interest in the defendant and that Weiner was free to pursue her interest in the defendant.

Nor is there any objective evidence of a romantic relationship between Anna and McDavid. When the group met in November at the Foresthill home of McDavid's parents, Anna shared sleeping quarters with Jenson, while McDavid and Weiner slept downstairs. E.R. at 1211:4-22. At Dutch Flat, Jenson took the bedroom that had two small beds, McDavid and Weiner shared a

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

bedroom that had one large bed, and Anna slept on the couch. E.R. 1228:9-15. Further, while McDavid adduced no evidence that Anna ever came on to him, there is evidence that she discouraged - or at least did nothing to encourage - such a relationship.

C. Pre-Trial Motions

Defense counsel, who is now accused of rendering ineffective assistance, devoted considerable time and energy in the defense of this case. Among other things, he filed a motion and supplemental motion with numerous supporting declarations appealing the Magistrate Judge's order that McDavid be detained pending trial. C.R. 52-59, 64-66. Defense counsel filed multiple discovery motions seeking the production of various types of evidence, C.R. 84, 85, 124, 125, 141, 142, 145, 160; eight motions to dismiss the indictment on a variety of theories, C.R. 127, 128, 129, 136, 137, 138, 139, 150; six motions to suppress various types of evidence. C.R. 130, 131, 132, 133, 134, 135; two motions for a bill of particulars, C.R. 144, 159; and four motions to exclude various types of evidence, C.R. 147, 148, 149, 151.

D. Post Trial Motions

On October 4, 2007, McDavid filed a timely motion for judgment of acquittal or, in the alternative, new trial, pursuant to Fed.R.Crim.P 29 and 33. In support of his motion for judgment of acquittal, McDavid raised five separate claims. McDavid raised seventeen grounds in support of his motion for a new trial. On March 27, 2008, the district court issued a 35-page opinion addressing each of McDavid's claims and denying both motions. Four of the seven claims that are presented in the current petition in the form of ineffective assistance of counsel claims were rejected by the district court in its order.

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E. Appeal

McDavid raised nine arguments on appeal. This included four of the seven claims that he raises in the current petition. The Court rejected each of these claims. United States v. McDavid, 396 Fed.Appx 365, 2010 WL 3735791 (9th Cir. 2010).

III. LAW REGARDING SECTION 2255 MOTIONS

A. Requisite Showing for Relief

Section 2255 reads, in pertinent part,

> A prisoner in custody under sentence of a court established by an Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by the law, or is otherwise subject to collateral attack, may move the court which impose the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255, ¶ 1.

A defendant may not prevail on a Section 2255 motion merely by showing that some error occurred before the trial court; the standard of review is not the same as on appeal. "[W]e have long and consistently affirmed that a collateral challenge may not do service for an appeal." United States v. Frady, 102 S.Ct. 1584, 1593 (1982). "We reaffirm the well-settled principle that to obtain collateral relief a prisoner must clear a substantially higher hurdle than would exist on direct appeal." Id.

B. Limitation On New Claims

A Section 2255 motion is not a substitute for an appeal; generally, a defendant may not raise claims not raised on direct review. "Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that is he 'actually innocent.'" Bousley v. United

States, 118 S.Ct. 1604, 1611 (1998) (citations omitted) (applying standard in Section 2255 case). See also Murray v. Carrier, 106 S.Ct. 2639, 2643-44 (1986) (procedural default requires showing of cause and prejudice).

C. Cause and Prejudice

To show cause for procedural default, defendant must demonstrate that "something external to the petitioner, something that cannot be fairly attributed to him" prevented him from raising the issue on appeal. Coleman v. Thompson, 111 S.Ct. 2546, 2566 (1991). This requirement is "based on the principle that petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief . . . ." McClesky, 111 S.Ct. at 1472. A sufficient showing of ineffective assistance of appellate counsel can normally satisfy the cause prong. McMullen, 98 F.3d at 1157.

To satisfy the prejudice prong, defendant must show "not only that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Frady, 102 S.Ct. at 1596.

D. Requirement for a Hearing

A petitioner is not entitled to a hearing on a Section 2255 claim if "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." Frazer v. United States, 18 F.3d 778, 781 (9th Cir. 1994), quoting 18 U.S.C. § 2255 (1988). Specifically, "[t]he petitioner's opportunity to meet the burden of cause and prejudice will not include an evidentiary hearing if the district court determines as a matter of law that petitioner cannot satisfy the standard." McClesky, 111 S.Ct. at 1470.

When resolution of a claim requires reference to facts outside of the record, an evidentiary hearing is required. Frazer, 18 F.3d at 781. However, there is an exception to this requirement when the prisoner's credibility on the issue may be "conclusively decided on the basis of documentary

testimony and evidence in the record." Id.; United States v. Espinoza, 866 F.2d 1067, 1029 (9th Cir. 1988) (quoting Watts v. United States, 841 F.2d 275, 277 (9th Cir. 1988). See also Blackledge v. Allison, 97 S.Ct. 1621, 1630 (1977) (vague or palpably incredible or frivolous allegations warrant summary dismissal of a petition for habeas corpus).

IV. LAW REGARDING INEFFECTIVE ASSISTANCE OF COUNSEL

In order to prevail on an ineffective assistance of counsel claim, a defendant must show (1) that "counsel's representation fell below an objective standard of reasonableness", and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 104 S.Ct. 1052, 1068 (1984); McMullen, 98 F.3d at 1157. With respect to the first prong, defendant must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [claimant] must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 104 S.Ct. at 1068-69.

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or ommission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Id. at 2065 (citations omitted).

With respect to the second prong of the test, defendant must show not only that the outcome would have been different but for counsel's errors, but that the entire trial was fundamentally unfair or unreliable because of counsel's ineffectiveness. Lockheart v. Fretwell, 113 S.Ct. 838, 842 (1993). In other words, "the benchmark of a meritorious ineffective assitance of counsel claim is a

performance so poor that the trial cannot be relied on as having produced a just result." United States v. Cochrane, 985 F.2d 1027, 1030 (9th Cir. 1993).

Furthermore, defendant may not prevail merely by arguing that a judgement call had a bad result. A tactical decision cannot form the basis of a claim of ineffective assistance of counsel simply because defendant disagrees with it. Guam v. Santos, 741 F.2d 1167, 1169 (9th Cir. 1984). "Tactical decisions that are not objectively unreasonable do not constitute ineffective assistance of counsel." Hensley v. Crist, 67 F.3d 181, 185 (9th Cir. 1995) (given weight of evidence, decision to agree to stipulated facts trial in hopes of reversal was reasonable tactical decision). "[I]t is clear that the reviewing court is not free to engage in after-the-fact second-guessing of strategic decisions made by defense counsel." United States v. Claiborne, 870 F.2d 1463, 1468 (9th Cir. 1989). See also Hughes v. Borg, 898 F.2d 695, 703 (9th Cir. 1990); Morris v. California, 966 F.2d 448, 456 (9th Cir. 1991), cert. denied, 506 U.S. 831 (1992) (tactical decision not to call witness does not form the basis for an ineffective assistance claim); Denham v. Deeds, 954 F.2d 1501, 1505 (9th Cir. 1992) (glaring inconsistencies in alibi witness's proposed testimony justified tactical decision not to call witness); United States v. Harden, 846 F.2d 1229, 1231-32 (9th Cir. 1988) (decision whether to call witnesses is matter of trial strategy).

A predictable corollary to the Strickland two-prong test is that a counsel does not deliver a deficient performance by failing to make a meritless motion or claim simply because a defendant wants the claim to be raised. Baumann v. United States, 692 F.2d 565, 572 (9th Cir. 1982); Morrison v. Estelle, 981 F.2d 425, 429 (9th Cir. 1992), cert. denied, 113 S.Ct. 2367.

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ARGUMENT

V. INEFFECTIVE ASSISTANCE CLAIMS

A. Trial Counsel Did Not Render Ineffective Assistance By Failing to Make a Better Argument for a Lesser Included Offense Instruction

McDavid claims that his defense counsel's failure to provide a better argument for a jury instruction on the lesser-included offense constitutes ineffective assistance of counsel. This argument is foreclosed by the Ninth Circuit's Memorandum Opinion in this case. United States v. McDavid, 396 Fed. Appx. 365, 370 (9th Cir. 2010). By referencing the first half of the Court's holding on this point, but not the second half, McDavid asserts that he was entitled to such an instruction if only his trial counsel had made a better argument before the district court. Pet. at 26:1-3. But that is not what the Ninth Circuit said. The entire holding is set forth below with the omitted portion in **bold**:

> [McDavid] was entitled to [a lesser included offense] instruction only if the evidence would permit a rational jury to find him guilty of the lesser included offense, § 371, and acquit him of the greater, § 844(n). [citation omitted] **Here, a rational jury could not have done so because it would have had to find all of the elements necessary for a conviction under § 844(n) in order to convict McDavid under § 371. Section 371 requires a conspiracy to commit an offense against the United States. The 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. Thus, a rational jury would have had to find that McDavid conspired to bomb federal targets-a violation of § 844(n)-in order to find him guilty of conspiring to commit an offense against the United States for purposes of § 371.**

Consequently, no amount of better lawyering would have changed the result. McDavid's attempt to show that a rational jury could have concluded otherwise, Pet. at 26:5, is directly contrary to the Ninth Circuit's holding and simply evidences disagreement with that opinion.

Further, McDavid's argument in support of how a rational jury might have concluded that a lesser offense had been committed completely disregards the Court's reasoning and a separate conclusion reached by the Court. McDavid asserts that there was no agreement on any crime

involving targets charged in the indictment. Pet. at 27:2. The Ninth Circuit found otherwise. McDavid, 396 Fed.Appx. at 370. He then suggests that the conspirators also discussed "ideas" for many lesser crimes that did not include use of fire or explosives such as defacing billboards, blocking traffic, gluing the locks of banks, and stealing a truck of jam. Even if true, those are not lesser included offenses of the crime with which they were charged - namely, plotting to bomb federal targets. Nor would those "ideas" even constitute federal crimes, much less a violation of 18 U.S.C. § 371 which criminalizes conspiracy to commit an offense against the United States.

B. Trial Counsel Did Not Render Ineffective Assistance By Failing to Read a Jury Note Before It Was Delivered to the Jury

McDavid claims that his defense counsel rendered ineffective assistance by failing to ask to read a written jury note before the district court delivered it to the jury to make sure that it was consistent with the court's oral statement to the jury. After consulting with trial counsel for both parties, the district court orally answered the jury's question "yes," but in the written note that the court subsequently delivered to the jury which was electronically filed the following day, the court mistakenly said "no."

This argument is also foreclosed by the Ninth Circuit's Memorandum Opinion in this case. The Ninth Circuit determined 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. United States v. McDavid, 396 Fed. Appx. 365, 368-69 (9th Cir. 2010). McDavid's disagreement with that conclusion and his attempt to re-litigate the matter before this court is inappropriate.[17]

[17] McDavid's use of the declaration of a juror as evidence that the jury was confused by the written jury instruction is also inappropriate. Juror statements are inadmissible to show the jury would have acquitted if properly instructed. Fed.R.Evid. 606(b); United States v. Span, 75 F.3d 1383, 1390 n.8 (9th Cir. 1996). Further, as this court will note, the declarations are not new. They were procured in 2008 and were presented to both the district court and to the Court of Appeals. Appellant's brief at 38-39.

The argument fares no better repackaged as an ineffective assistance claim. First, as earlier noted, a defendant may not prevail on a Section 2255 motion merely by showing that some error occurred before the trial court. To obtain relief, the petitioner "must clear a substantially higher hurdle than would exist on direct appeal." United States v. Frady, 102 S.Ct. 1584, 1593 (1982).

Second, as earlier noted with respect to ineffective assistance claims in particular, a defendant must show (1) that "counsel's representation fell below an objective standard of reasonableness", and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 104 S.Ct. 1052, 1068 (1984); McMullen, 98 F.3d at 1157. McDavid cannot satisfy either prong. With respect to the first, McDavid must argue that it was objectively unreasonable for trial counsel to rely on the district court to correctly transcribe its one word response to the jury's question. The government submits that while hindsight demonstrates that the more prudent course would have been to request an opportunity to read the typed note, it was not objectively unreasonable to fail to do so.

With respect to the second prong, because the Ninth Circuit has already found that the error was harmless, this court is foreclosed from revisiting that issue.

C. Trial Counsel Did Not Render Ineffective Assistance By Allegedly Failing to Cite Appropriate Case Law in Support of Requested Jury Instructions

McDavid next claims that his trial counsel rendered ineffective assistance by failing to cite appropriate case law in support of his requested jury instructions on "first contact" and predisposition. This argument is also foreclosed by the Ninth Circuit's Memorandum Opinion which concluded that even if the argument was accepted any error would be harmless because "the evidence from August 2004 forward still demonstrates that McDavid was predisposed." McDavid, 396 Fed. Appx. 365 at 369-70.

Repackaging the argument as an ineffective assistance claim suffers from the further problem that McDavid's claims about his trial counsel's alleged inadequacies simply are not true. In re-

litigating the case in this court, McDavid claims that his trial counsel failed to cite appropriate case law. He 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). See Petition at 37-39. Trial counsel, in fact, did cite these cases and others in both support of his proposed jury instructions on entrapment and in a brief filed in support of these proposed instructions. Defense Special Instructions, Dkt. 251; Defense Briefing on Special Jury Instructions, Dkt. 252. He also vigorously argued his position before the district court. R.T. 1673-81.

Accordingly, McDavid can satisfy neither prong of Strickland and, once again, is simply trying to relitigate an already discredited claim.

D. Trial Counsel Did Not Render Ineffective Assistance By Allegedly Failing To Cite Appropriate Case Law in With Respect to Character Witnesses

McDavid next claims that his trial counsel rendered ineffective assistance by failing to cite appropriate case law in response to the government effort to restrict character evidence. Pet. at 41. The 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. Because McDavid "must clear a substantially higher hurdle than would exist on direct appeal," United States v. Frady, 102 S.Ct. 1584, 1593 (1982), he cannot prevail by repackaging the claim as ineffective assistance of counsel.

E. Defense Counsel Did Not Render Ineffective Assistance By Failing to Raise a Sixth Amendment Claim

In three sentences, McDavid asserts that he was penalized for the assertion of his Sixth Amendment right to trial by jury. The defendant does not elaborate on or provide facts supporting this claim. What is clear, however, is that this is a claim that could have been raised on direct

appeal. As previously noted, "Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that is he 'actually innocent.'" Bousley v. United States, 118 S.Ct. 1604, 1611 (1998). Because McDavid has made no attempt to demonstrate cause or prejudice, the cliam should be dismissed.

Alternatively, the court should reject the claim on the merits. In support of his claim, McDavid cites United States v. Medina-Cervantes, 690 F.2d 715, 716 (9th Cir. 1982). However, that case presented a completely different set of facts not present in this case. In Medina-Cervantes the district court sentenced the defendant to the statutory maximum penalty, but the Ninth Circuit reversed because it found that "the maximum statutorily permissible sentence was imposed not to punish him for the crime he committed but, rather, as a sanction for his assertion of the constitutional right to trial by jury." Id. In arriving at that conclusion the Court found, among other things, that in pronouncing sentence the district court judge had said, "It's obvious to be me that this man wanted a trial, with all his constitutional rights, and he insisted upon them and he had them. To the cost to the government. . . All I can see is he was just thumbing his nose at our judicial system." Id. The Court justifiable concluded that "the above quoted statements clearly give rise to the inference that Medina-Cervantes was punished more severely because of his assertion of the right to trial by jury." Id.

Such improper behavior is in stark contrast to the conduct shown to McDavid by the district court during the sentencing hearing. The Ninth Circuit determined that McDavid's sentence was within the sentencing guidelines and that the district court had adequately considered McDavid's arguments for a reduced sentence. McDavid, 396 Fed. Appx. at 372.

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VI. JENSON'S ALLEGEDLY FALSE TESTIMONY

McDavid argues that his conviction should be set aside because the prosecution procured and introduced the false testimony of codefendant Zachary Jenson at trial. Jenson's declaration can best be described as "buyer's remorse" for having testified against a close friend rather than a recantation of his trial testimony. Although he vaguely states that there was a "government version" of the facts to which he disagreed but to which he felt compelled to go along with, he never states what that version consisted of, nor does he identify a single fact in his trial testimony that he would now change. Nor was his testimony the sole or even the most damning evidence against McDavid. Almost all of the facts to which Jenson testimony were corroborated by Lauren Weiner and Anna, and those facts were also confirmed by McDavid's own voice in recorded conversations. Nevertheless, considering his declaration as a recantation of some portion of his trial testimony, the claim should be rejected.

Recantation of trial testimony does not render the earlier testimony false. Allen v. Woodford, 395 F.3d 979, 994 (9th Cir. 2005), citing Dobbert v. Wainwright, 468 U.S. 1231, 1233 (1984). Recantation testimony is properly viewed with "great suspicion" and as "exceedingly unreliable." Id. The length of time between the earlier testimony and the recantation – in this case, nearly five years – makes the recantation "especially unreliable." Christian v. Frank, 595 F.3d 1076, 1084 n.11 (9th Cir. 2010)(recantation more than a decade later). Another thing that makes recantation testimony unreliable is when the trial testimony implicating the defendant is consistent with other evidence while the recantation testimony is not. Allen, 395 F.3d at 994.

In this case, Jenson's trial testimony was consistent with the testimony of both Anna and Lauren Weiner. Lauren Weiner testified that McDavid invited her and Jenson to join his conspiracy at a café in Philadelphia. Jenson confirmed that. Weiner testified that over time McDavid had come to feel that protests no longer worked and that illegal action was needed, an observation that Anna also made. Jenson also testified to that. McDavid related to Anna how he and Jenson had attended an urban guerilla workshop where the subject of attacking federal buildings was raised. McDavid told Anna that he and Jenson both expressed agreement with that idea. Jenson corroborated these

facts. Anna testified that when the group first met around the fire pit at McDavid's parents' home in Forresthill in November, 2005, McDavid announced that they were meeting to discuss what they were about to do was a conspiracy for which they could go to jail. Weiner corroborated this remark and so did Jenson. Jenson also corroborated the testimony of Anna and Weiner regarding the potential targets they discussed. The list could go on but the foregoing should be sufficient to demonstrate that Jenson's testimony does not stand by itself. Moreover, Jenson's testimony is corroborated not simply by other witnesses but by recordings of the group planning their activities and by physical surveillance.

McDavid fails to meet the rigorous standard necessary to prove that the government committed a due process violation. A prosecutor commits misconduct by knowingly using perjured or false testimony to seek a conviction, or by failing to correct false testimony—either by suppressing evidence that would correct the testimony, failing to investigate whether the testimony might be false, or otherwise. United States v. Agurs, 427 U.S. 97, 112-13 (1976); Napue v. Illinois, 360 U.S. 264, 269 (1959); Mooney v. Holoham, 294 U.S. 103 (1935) (per curiam). "To prevail on a claim based on *Mooney-Napue*, the petitioner must show that (1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) that the false testimony was material." United States v. Zuno-Arce, 339 F.3d 886, 889 (9th Cir. 2003).

McDavid has not satisfied any of these three prongs. First, as noted, McDavid fails to show that Jenson's testimony at trial was actually false. This is not like a case where an eyewitness to a crime now claims that he did not see what he previously claimed to have seen. It is difficult to divine from Jenson's short declaration exactly what testimony he would now give that is different from hi trial testimony. Does he, for instance, now deny that McDavid invited him to join a conspiracy to bomb targets, that McDavid and the others performed reconnaissance on those targets, that McDavid himself drew the map of the IFG that appears in the Burn Book, or that McDavid talked about the acceptability of the loss of human life?

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Nor does McDavid show that the prosecution knew or should have known that his testimony was false. Noticeably absent from Jenson's declaration is any indication that he ever expressed to the prosecutors that he felt pressured to testify to a version of the facts that he did not believe or that his intention was to testify falsely. For its part, the government has attached a declaration of AUSA Ellen Endrizzi, the prosecutor who presented Jenson's testimony at trial. Declaration attached hereto as Exhibit 1. Ms. Endrizzi states that her practice is to always instruct a witness that "rule number one is to tell the truth." She recalls no meeting where anyone became upset with Jenson and, in fact, believes that such conduct is unprofessional, especially for a person as young as Jenson. She flatly denies pressuring Jenson in any manner, states that Jenson never expressed to her any feeling that he was being pressured, and states that if she had had any belief that Jenson was not telling the truth she would not have offered him as a witness.

Finally, even assuming that Jenson testified falsely, McDavid utterly fails to demonstrate materiality. This is partly due to the fact that he has failed to identify any fact as being false. It is impossible to judge the materiality of a falsehood if one does not know what that falsehood is. However, even assuming that portions of Jenson's testimony were false, the evidence against McDavid was overwhelming.

VII. THE GOVERNMENT DID NOT VIOLATE BRADY

McDavid argues that his conviction should be set aside because the government violated due process by failing to obtain and provide all materials and information required by Brady and its progeny. The government concedes that a relatively small amount of information pertaining to the case was apparently not disclosed to the defense. However, as detailed below and in the supporting declaration of Special Agent Nasson Walker, the omitted material was either inculpatory or benign. None of the omitted material was exculpatory. Declaration attached hereto as Exhibit 2. Further, the information contained in the omitted material was conveyed to McDavid in other forms such that the

government does not believe that the defendant can point to any fact in the undisclosed material that he was not aware of through other materials that were produced in discovery.[18]

McDavid fails to meet the rigorous standard required by Brady to show that the government violated his due process. The prosecution has a constitutional duty to disclose to the defense all favorable evidence material to guilt or punishment. Brady v. Maryland, 373 U.S. 83 (1963). The Supreme Court has explained that "there are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-82 (1999). In determining whether the evidence suppressed was material, the court looks at "the cumulative impact of all the evidence the government suppressed." Kyles v. Whitley, 514 U.S. 419, 436-38 (1995). This standard for a Brady violation requires McDavid to prove all three prongs. Even if he can successfully show that the evidence at issue was favorable to him, and even if he can show that the evidence was suppressed by the State, his claim fails if prejudice did not ensue. "As to the prejudice prong, the Supreme Court has stated that 'strictly speaking, there is never a real Brady violation unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.'" Smith v. Almada, 623 F.3d 1078, 1085-86 (9th Cir. 2010) (quoting Strickler v. Greene, 527 U.S. at 281).

McDavid's Brady violation argument fails because McDavid cannot show that he was prejudiced by the government's conduct. None of the omitted items were even remotely exculpatory. Even if the government did fail to turn over evidence that was favorable to the accused, there is no Brady violation because disclosure of the evidence would not have produced a different

[18] The Walker declaration summarizes the contents of the items in dispute. The government did not want to burden the court with these items but will provide them to the court if the court wishes to review the actual documents. The defense, of course, already has these documents.

verdict. United States v. Zuno-Arce, 339 F.3d at 891-92 ("even assuming that this evidence is both favorable and undisclosed, Zuno-Arce cannot show prejudice, because there is no reasonable probability that, had it been disclosed, the evidence would have made a difference to the outcome of the trial."

VIII

A CERTIFICATE OF APPEALABILITY SHOULD NOT BE ISSUED

On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996, Public Law 104-132 [S. 735]. Section 102 of the act amended 28 U.S.C. § 2253 to impose a precondition to appealing the denial of a motion under 28 U.S.C. § 2255. Section 102 provides, in relevant part:

> (C)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from --
>
> . . .
>
> (B) the final order in a proceeding under Section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

The Ninth Circuit has held that the district court determines whether the certificate issues. United States v. Asrar, 108 F.3d 217 (9th Cir. 1997).

Where a district court denies a petitioner's constitutional claims on the merits, the showing required to satisfy § 2253(c) - " a substantial showing of the denial of a constitutional right" - is straightforward:

> The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. . . When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at

> least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

United States v. Zuno-Arce, 339 F.3d 886, 889-90 (9th Cir. 2003), citing Slack v. McDaniel, 529 U.S. 473, 484 (2000). The Supreme Court has elaborated on what is required to make such a showing:

> The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

Miller-El v. Cockrell, 537 U.S. 322 (2003).

Here, the government respectfully submits that McDavid has failed to make a substantial showing of the denial of a constitutional right. None of his claims have any merit. Consequently, a certificate of appealability should not be issued.

VII

CONCLUSION

Based on the foregoing, the government respectfully requests that the court deny defendant's request for discovery and his Section 2255 motion and make a finding that a certificate of appealability is not warranted in this case.

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Respectfully submitted,

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