CA 08-10250

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

PETITION FOR REHEARING *EN BANC*

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

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I. Introduction and Statement Of Purpose:

Appellant respectfully petitions this Court for rehearing en banc. Pursuant to Federal Rule of Appellate Procedure 35(a) and Ninth Circuit Rule 35-1, rehearing en banc is appropriate because the panel's decision conflicts with a number of decisions of this Court as well as the Supreme Court, and consideration by the full court is thus necessary to maintain uniformity of its decisions.

Although the panel's Memorandum Decision is unpublished, it may still be cited to this Court and other courts in the circuit under Ninth Circuit Rule 36-3.

The panel's decision is in error as follows:

1. The trial court's incorrect written instruction to the jury, in response to their written question, advising (by mistake) that the informant was not an "Agent" for the entrapment defense, was in conflict with a decision of this court in Morris v. Woodford 273 F.3d 826 (9th Cir. 2001) and overlooked important and clearly stated material facts to the contrary.

2. The trial court's instruction to the jury that predisposition is to be evaluated at the time of the offense, and not before, is in conflict with United States v. Poehlman 217 F.3d 692 (9th Cir. 2000) and United States v. Jacobson 503 U.S. 540, 553 (1992).

3. The trial court's ruling allowing evidence obtained by the warrantless audio and videotaping of the defendant's residence for a week was in conflict with this Circuit's decisions in United States v. Neder 222 F.3d 597 (9th Cir. 2000).

4. The trial court's sentencing of the defendant to the statutory maximum of twenty (20) years while sentencing the exactly similarly situation co defendants to no time in prison was an illegal sentence.

Rehearing en banc is thus appropriate to maintain uniformity of this Court's decisions. Further, rehearing should be granted because the panel overlooked material issues of fact in its ruling in the four areas set forth herein.

II. The Court Should Grant Rehearing En Banc Because The Panel's Holding That The Incorrect Written Answer To The Jury By The Judge That The Agent Was Not An Agent Was Not Harmless Error And It Conflicts With Morris V. Woodford.

The entire trial was about whether the defendant was entrapped by the FBI informant who put the case together over a 17 month period. Her name was "Anna." Anna and the defendant first began associated, and sleeping together, in August 2004. The indictment alleged the conspiracy occurred between June 2005 and January 2006. During deliberations, the jury had a written question which questioned whether "Anna" was an government agent in August 2004, and if not, when did she become one? On the record, in answering numerous questions at a later time, the judge advised the answer was "yes." He also advised to not write down the answers he was orally providing because the jury would get written complete answers at a later time, once prepared. When the written response went in to the jury, it stated "No" to that question, with no further explanation. Soon thereafter, the jury convicted.

The panel found that there were three possible explanations to what the jury was left with at that point. First, a clerical mistake, in light of the oral pronouncement; secondly, a partial response which stated she was not an agent in 2004 but leaving unanswered when she became one, and thirdly, a complete

response advising she was not an agent. Memorandum Opinion at p. 3. The panel noted that "...we are unpersuaded that the jury was led to believe that Anna was never an agent, although the jury may have been confused as to when she became an agent." Memorandum Opinion at p. 4.

The panel first found the jury could not have thought Anna was never an agent. They support the point with reference to how much evidence there was of what she did in the time frame for the FBI. What the panel completely overlooked is that her FBI "handler," the only FBI Agent who testified at the trial about Anna's "role" and "status", Agent Ricardo Torres, denied repeatedly that she was a government agent; he labeled her as "co-operating witness" repeatedly. Significantly, his testimony– -but just his cross examination, which is the area where he repeatedly stated she was not an "agent" for the FBI-- was requested to be read back by the jury and was so read back. Clearly, the jury wanted to know what her "definition " was," and sought that out from Agent Torres and the court.

The panel issued further support by noting that the trial court responded correctly orally in court with "yes." It is just as likely that the jury wold assume this was a mistake, as the court told the jury to await the written responses and not take notes of the oral answers to jury questions. Based upon this reasoning, the panel decision concludes by agreeing that "the jury may have been confused as to

when *she* became an agent.”“

The panel then found that even with this confusion as to “when” she became one, any such error as harmless, based upon the defendant’s predisposition and then listed the evidence of predisposition. This is glaringly erroneous in light of the fact that the district court instructed the jury to look at *only* evidence for the time period *after the conspiracy began in June 2005*, and disallowed any defense attempt at good character or character at all for the time *period prior to the conspiracy*, June 2005.

Against these errors, the panel decision overlooked extremely important material issues of fact.

The panel decision also conflicts with Morris v. Woodford. 273 F.3d 826 (9th Cir. 2001). In Morris, during the penalty phase, the court gave an instruction concerning the jurors' sentencing responsibilities. That instruction -- special instruction 60 -- contained a typographical error. As written, the instruction read:

> If you have a reasonable doubt as to which penalty to impose, death or life in prison without the possibility of parole, you must give the defendant the benefit of that doubt and return a verdict fixing the penalty of life in prison *with the possibility* of parole. (Emphasis added.)
>
> The emphasized word in the instruction should have been "without" -- not "with"; life without parole and death are the only two sentences that California law authorized for aggravated murder under special circumstances. The trial court read the instruction, including the error, to

> counsel, during discussions about the penalty-phase instructions. Unfortunately, neither counsel nor the court noticed the mistake.
>
> The court agreed to give special instruction 60. When reading that instruction aloud to the jury, the court corrected the mistake, apparently unconsciously, stating:
>
> If you have a reasonable doubt as to which penalty to impose, death or life in prison without the possibility of parole, you must give the defendant the benefit of that doubt and return a verdict, fixing the penalty of life in prison with the possibility of -- *without the possibility* of parole.
>
> (Emphasis added.) Unfortunately, the court did not correct the written instruction before submitting it to the jury for their use during deliberations.

Id at p.

This Circuit instructed that "We must decide whether 'there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.' Morris at p. 833. Despite applying the more rigorous standard applied for habeas review of state court convictions, this Circuit reversed and held that

> The trial court's responses to those questions, while not improper, unfortunately made it more likely that some or all of the jurors would misapply the incorrect instruction. In the circumstances, it is impossible to state confidently that the error did not prejudice Petitioner's substantial rights. If we are in grave doubt as to whether the error had such an effect, the petitioner is entitled to the writ. Coleman, 210 F.3d at 1051.

Id at p. 842.

This case is no different.

II. The Court Should Grant Rehearing En Banc As The Trial Judge's Entrapment Instructions That Predisposition Is Evaluated At Not Prior To The Crime But Once The Crime Has Begun Were In Conflict With United States V. Jacobson And United States v. Poehlman.

The panel ruled that "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 accept McDavid's contention, the error was harmless. The evidence from August 2004 forward still demonstrates that McDavid was predisposed." Memorandum Opinion at p. 7.

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

omitted).[1] (Accord see United States v. Williams 547 F.3d 1197, 1198 (9th Cir. 2008)).

Without being able to tell if the panel agrees with the defendant-appellant's point that the trial court was at grave odds with the Supreme Court and this Circuit, the panel found the error harmless. "The evidence from August 2004 forward still demonstrates that McDavid was predisposed." The defendant was not allowed to put on any such evidence by the trial court, (AOB at p. 31), and the

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

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

Id. (Italics and bold added.)

government evidence, through their main witnesses-- Anna[2] and testifying co defendants Weiner and Jenson–all testified that he was not predisposed until well into June 2006. (See testimony of co defendant's Weiner and Jenson, AOB 14-24 with that description of McDavid.) In light of this, not only does the panel decision fail to enforce the law of this Circuit and the Supreme Court, but the material facts are at odds with the panel's Memorandum.

III. Rehearing En Banc Should Be Granted Because The Panel Decision Allowing For The Warrantless Video And Audio Taping Of Defendant's Home Conflicts With This Circuit Precedence And Yielded The Most Crucial Evidence For The Government And Was Used At Trial And Before Trial As Evidence And For All Government Witness Preparation Prior To Testifying.

The panel found that appellant "...and the others were at the safe house to plan and implement the bombing campaign and bore the risk that Anna, who arranged for the safe house, was an informant. ...McDavid also claims that the government taped conversations while Anna was not in the room; however, there

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

is no indication that any such evidence was introduced at trial or reflected in witness testimony. Accordingly, the court did not err in denying McDavid's motion to suppress. Memorandum Opinion at p. 10.

The FBI rented a cabin and installed full time and complete audio and video surveillance equipment. The cabin was for the four to live in as long as they wanted. Anna testified at trial, when asked who paid for it, that all of the four did, everything was done together, it was "all of their" house.

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

audio surveillance of the motel room as violative of the Fourth Amendment's warrant protection. Id. at 599.[3]

Not addressing either of these cases, the panel cited to United States v. Shyrock, 342 F.3d 948 (9th Cir. 2003.) . Shyrock, a motel case, when evaluated, does not add anything to the discussion. That Court stated that

> ...Nerber turns on the fact that the defendants in that case came to the hotel room to conduct a drug transaction and bore the risk that the other parties were informants. Here, Appellants were present at the hotel rooms to conduct the criminal business of the Mexican Mafia, and they bore the risk

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

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

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

> that one of their members was an informant. In addition, the videotape only recorded while the informant, E. Castro, was present.
>
> Nerber, however, left open the novel issue of whether defendants had an objectively reasonable expectation of privacy where an informant consented to the video recording, but the hotel room was rented by one of the defendants. It is not necessary to decide this constitutional issue because assuming the videotape was unconstitutional, the error is clearly harmless beyond a reasonable doubt as to Shyrock and Barela, the Appellants who rented the rooms on two occasions and thus had standing. Any evidence flowing from this error was inconsequential when reviewed in light of the overwhelming evidence of their guilt.

Shyrock at p.979.

Here, it was a house to live in, rented equally by all four, including the informant, exactly what Nerber warned against. A video and audio system was set up without a warrant in a suspect's home, not a motel room. Unlike Shyrock, the video was not turned off when Anna left, it kept rolling, viewed by teams of FBI Agents in trucks down the hill from the cabin.

The record also reveals *quite extensively* that the video and audio evidence was introduced at trial and reflected in witness testimony, contrary to the panel's holding. [4]

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[4] Anna testified that the house was wired so that every room and every corner of the house could be heard by the agents listening in. ER 782. Prosecutors told the court about instructions to agents to "minimize" when Anna was not present; like wiretap procedures. (Wiretaps require warrants.) It is inconceivable how one "minimizes" video taping, other than turning down the lighting? Despite this, Anna

IV. Rehearing en banc should be granted because the panel decision affirming the sentence of 20 years contrasted to the co defendants's sentences of no prison time is in conflict with while.

The panel was incorrect that the district court adequately considered the 3553(a) factors at appellant's sentencing. Two jurors submitted declarations for sentencing purposes, advising the district court that they were astonished and "embarrassed" by the FBI's actions and that they believed that Eric had been entrapped. These jurors explained that a typographical error in a jury instruction from the court which instructed the jury that "Anna" was not a government agent in the case was fatal to their deliberations. Eric's testifying and cooperating co defendants were sentenced to no time in prison in the face of his 19.5 years.

This Circuit teaches from United States v. Bussell, 504 F.3d 956, 963 (9th Cir. 2007) a disparity in sentencing among co defendants can be challenged with a

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acknowledged watching portions of the tapes where she was not present in the home, when she was out, and she watched tapes of Eric and Zachary in the house discussing her in her absence. Zachary Jenson also testified to watching this portion of one of the video tapes. ER 1514-1515.

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

showing that it was the result of incorrect or inadmissible information, or an incorrect application of the Sentencing Guidelines. In this case, that was clearly shown by the juror declarations, submitted for sentencing purposes.

CONCLUSION

For the foregoing reasons, Eric McDavid requests this Court issue an Order directing that this matter be reheard en banc.

Dated: November 5 2010

Respectfully submitted,

/s/ Mark J. Reichel

MARK J. REICHEL
Attorney At Law

CERTIFICATE OF RELATED CASES

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

DATED: November 5, 2010 *Mark J. Reichel*

MARK J. REICHEL
Attorney At Law

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 40-1, the attached Petition For Rehearing En Banc is proportionally spaced, has a typeface of 14 point new times roman, and is 15 pages.

DATED: November 5, 2010 *Mark J. Reichel*

MARK J. REICHEL
Attorney At Law

CERTIFICATE OF SERVICE

I hereby certify that on November 5 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: November 5, 2010

s/ *Mark J. Reichel*