

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

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BEFORE THE HONORABLE MORRISON C. ENGLAND, JR., CHIEF JUDGE

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

No. Cr. S-06-0035

ERIC MC DAVID,

Defendant.

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION HEARING,

CHANGE OF PLEA AND SENTENCING

THURSDAY, JANUARY 8, 2015

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Reported by: KATHY L. SWINHART, CSR #10150

1 APPEARANCES

2 For the Plaintiff:

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14 BY: MARK R. VERMEULEN

15 and

16 LAW OFFICES OF BEN ROSENFELD  
17 115 1/2 Bartlett Street  
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19 BY: BENJAMIN TARN ROSENFELD

20 Also Present:

21 ERIC MC DAVID, Defendant  
22  
23  
24  
25

1 SACRAMENTO, CALIFORNIA

2 THURSDAY, JANUARY 8, 2015, 10:03 A.M.

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4 THE CLERK: Calling case 06-35, the United States v.  
5 Eric McDavid, on for status regarding defendant's motion to  
6 vacate, set aside or correct sentence, Your Honor.

7 MR. VERMEULEN: Good morning, Your Honor. Mark  
8 Vermeulen with Eric McDavid, who is present at my side.

9 THE COURT: Good morning.

10 MR. ROSENFELD: Good morning, Your Honor. Ben  
11 Rosenfeld, also for Eric McDavid.

12 MR. ESPINOZA: Good morning, Your Honor. Andre  
13 Espinoza for the United States.

14 THE COURT: This is on for what I consider to be an  
15 extremely unusual hearing. And I know what the hope is and  
16 the intent is on the part of the parties, and that is, the way  
17 I see it, is that the Court just basically step out of the way  
18 and allow this agreement to be formulated.

19 As you know, I was involved in this trial. I took a  
20 great deal of time. It was a very hotly contested trial. I  
21 spent a great deal of time determining what the sentence was  
22 going to be for Mr. McDavid. There were the parties that went  
23 back and forth, and to now come and say basically, Court, no  
24 harm, no foul, we've just convicted someone and you sentenced  
25 him to 20 years of imprisonment, but now we want to set it all

1     aside and let it go because someone was wrong -- is that what  
2     it is? I need to know.

3             I know what you want, and I can sign this off in one  
4     second and be done with it, but there are some other issues  
5     that I need to find out as to why, after there was a FOIA  
6     request made prior to the trial, and I was informed that there  
7     were no documents whatsoever that needed to be discovered, be  
8     it Brady or otherwise, and now in the last six months,  
9     including the last month, there's not just documents, there's  
10    thousands of pages of documents that are flowing in.

11            Why?

12            MR. ESPINOZA: Well, Your Honor --

13            THE COURT: I really want to know this because this is  
14    extremely troubling to me, to think that I've gone through  
15    this entire trial, Mr. McDavid has gone through this entire  
16    trial, and now it turns out that there is all of this  
17    information that's been sitting out there somewhere that no  
18    one knew about. Which I think the best thing you could say is  
19    that no one knew about it.

20            MR. ESPINOZA: Your Honor, first, yes, it is the  
21    expectation and hope of the parties today that the Court will  
22    agree with an executed -- the final settlement agreement and  
23    other procedures, ah, that the parties have presented to the  
24    Court. But with respect to the Court's question, the answer  
25    is this.

1           The parties litigated over the last two years the  
2 various claims in Mr. McDavid's 2255 petition. Those claims  
3 included ineffective assistance of counsel claims, claims that  
4 the government elicited and suborned perjured testimony at  
5 trial, and claims related to the failure to disclose certain  
6 documents that the defense characterized as exculpatory under  
7 Brady.

8           That litigation was ongoing. The government responded  
9 to the petition by Mr. McDavid and opposed his motion on all  
10 the grounds in his petition.

11           During the course of those proceedings -- I should  
12 take a step back.

13           As the Court is aware, Mr. McDavid's petition  
14 included, in the Brady argument, information that he obtained  
15 pursuant to two FOIA requests. Those FOIA requests went to  
16 the FBI, and the FBI in response to those requests produced,  
17 as the Court mentioned, several thousand documents, 2,400  
18 pages, 2,500 pages of documents that the defendant --

19           THE COURT: That were in the possession of the FBI at  
20 the time of the trial?

21           MR. ESPINOZA: Your Honor, those documents were in the  
22 possession of the FBI, but without -- this is all a matter of  
23 public record in the government's opposition to the 2255  
24 motion.

25           The government reviewed each and every one of the

1 documents produced in the FOIA request or by the FOIA request.  
2 There were approximately 75 documents and then another 35  
3 otherwise from the Florida branch of the FBI. The government  
4 and FBI agents reviewed each and every one of those documents  
5 and prepared a draft -- a summary of each document, ah, which  
6 was then compiled into a declaration sworn by an FBI agent,  
7 who was the case agent in the original underlying prosecution.  
8 That declaration was attached to the government's opposition  
9 to the 2255.

10 In the argument and in the declaration, the government  
11 took the position that all of the documents that were produced  
12 pursuant to the FOIA request were not exculpatory. That is,  
13 they did not tend to include any information that might have  
14 been of impeachment value or which might have been  
15 affirmatively exculpatory; that is, which might have shown  
16 that the defendant was actually not guilty --

17 THE COURT: This begs the question, though. If that's  
18 the case and it contained nothing, why are you coming in now  
19 and asking me to give him time served? There must have been  
20 something in there. You would not be in here saying that  
21 we're ready to cut his sentence more than in half if there was  
22 nothing there. If there was nothing there, I can't even  
23 imagine this even happening.

24 MR. ESPINOZA: That's right, Your Honor.

25 It is not the case that there was -- there was nothing

1 there. By that I mean, after the government filed its  
2 opposition to the defendant's 2255 petition and took the  
3 positions that it did in that opposition, at least one of the  
4 documents summarized in the declaration by the FBI agent  
5 caught the interest of all of the parties. That document  
6 referred to certain additional correspondence between  
7 Mr. McDavid and the government informant who assisted the FBI  
8 and participated in the investigation which led to the  
9 original trial and conviction.

10 Those correspondence included certain documents that  
11 contained information that the government determined was  
12 likely exculpatory or could be characterized as such. That  
13 is, the government took the position that it was conceivable  
14 that a court might find that the inadvertent failure to  
15 produce those documents in the underlying prosecution was  
16 grounds for a new trial in this case.

17 The parties have not engaged in direct litigation over  
18 the merits of those specific documents. Indeed, once the  
19 government turned those documents over in November of 2014,  
20 almost immediately after it obtained those documents, that is,  
21 the U.S. Attorney's office obtained them, we began  
22 negotiations over potential resolution because it became clear  
23 to the government that, as I stated, it was conceivable this  
24 court or a reviewing court might determine that those  
25 documents were a sufficient basis to warrant a new trial.

1 THE COURT: Must have been some pretty interesting  
2 documents.

3 MR. ESPINOZA: Well, Your Honor, the --

4 THE COURT: Mr. Espinoza, you're relatively new to  
5 this office.

6 MR. ESPINOZA: That's true.

7 THE COURT: And you were not here when trial took  
8 place.

9 MR. ESPINOZA: That's right.

10 THE COURT: And you are here, you're like the young  
11 associate that got told to go in and file the motion.

12 MR. ESPINOZA: I will say, Your Honor, that in working  
13 on this matter, I have read the complete trial record. I have  
14 consulted with members of the office who were present during  
15 the trial and members of the office who are no longer present  
16 but who participated in the trial.

17 I understand the issues involved. I understand --

18 THE COURT: You understand this is extremely unusual.

19 MR. ESPINOZA: Of course, Your Honor. I've been --

20 THE COURT: This is one of the most unusual things  
21 I've had to deal with, if not the most unusual, since I  
22 started on the bench in 1996 and on this court since 2002.  
23 I've never seen or heard anything like this.

24 MR. ESPINOZA: Your Honor, in my eight years as a  
25 prosecutor, I have not -- nor have I participated in a



1 proceeding like this. But the fact that this proceeding is  
2 extraordinary is a reason for the Court to move forward and  
3 agree to the proposed resolution.

4 It -- the resolution seeks to, with one global  
5 settlement, end the civil litigation of the 2255 claims and  
6 preserve a criminal conviction that captures the  
7 responsibility and culpability that the jury found at the  
8 original trial.

9 The plea agreement includes a robust factual statement  
10 of this case, which --

11 THE COURT: But is the jury's finding even valid at  
12 this point in time? Because if the information that you've  
13 now come up with and apparently given over to Mr. McDavid's  
14 counsel had been given, would there still have been a  
15 conviction at that time?

16 MR. ESPINOZA: Well, Your Honor, that's a matter  
17 that is maybe subject to debate between the parties. Of  
18 course, if we were to litigate the matter, the government  
19 would take the position that even if these documents had been  
20 turned over in the underlying trial, the result would not have  
21 been different.

22 Without litigating the matter today before the Court,  
23 I will offer that certain of the content of the documents was  
24 known by the defendant and produced in the original discovery.  
25 But, nevertheless, these documents, this collection of

1 documents weren't produced, and the government has taken the  
2 position that it has with respect to their potential impact on  
3 both the -- on the 2255 litigation, which is where we are  
4 today.

5 MR. VINCENT: Your Honor, if I may. John Vincent on  
6 behalf of the United States.

7 Your Honor, the correspondence we're talking about or  
8 these documents was correspondence between Mr. McDavid and the  
9 government informant. And so when you say, you know, what it  
10 was, that's what it was.

11 And it had to do -- if --

12 MR. ESPINOZA: Sure.

13 Your Honor, as the Court surely remembers, Mr. McDavid  
14 offered an entrapment defense in the original trial. And  
15 among the arguments that he asserted was that he had become  
16 romantically attracted to the informant, and that that  
17 romantic attraction was early in their interaction and that,  
18 as a result of that romantic attraction, he was induced by the  
19 informant, a government agent, to undertake the actions that  
20 he did which formed the basis of the conspiracy.

21 The documents at issue, which we've not included in  
22 any public filing but which we've turned over to the defense,  
23 include a handwritten letter and certain electronic  
24 correspondence, e-mails, which advance that theory, which show  
25 the defendant's expressions of affection for the informant.

1           If the matter were to continue in litigation, the  
2 government would take the position that this information was  
3 information that was presented to the jury, and that it would  
4 not have affected their outcome. But, as I've stated, it is  
5 certainly conceivable that this court or a reviewing court  
6 might find the opposite, that those -- that the content of  
7 those non-disclosed communications are a sufficient basis to  
8 warrant a new trial in this matter.

9           THE COURT: Again, I'll say, where were those  
10 non-disclosed communications? Who had custody of them?

11           MR. ESPINOZA: Your Honor, the government broadly had  
12 custody of those documents. They were in the FBI file in this  
13 case.

14           THE COURT: That raises another question, then. If  
15 you say the government broadly had control of them, what do  
16 you mean by that? The U.S. Attorney's office had control  
17 because they were working with the FBI? Or was it the FBI had  
18 them separately in their control?

19           I mean, this -- I mean, we're dancing around this  
20 whole Brady issue, but this is huge.

21           (Government counsel conferring.)

22           THE COURT: This is something that needs to be dealt  
23 with, and I want to know what happened. I mean, this is  
24 something I never thought I would have to ask the question,  
25 how did this happen?

1 MR. ESPINOZA: Well, Your Honor --

2 THE COURT: Especially when I'm the one that was in  
3 charge of this trial and was told that there were no more  
4 documents after the FOIA request, and I wanted to make sure,  
5 and I had to rule as to whether or not this entrapment defense  
6 would be permitted, what went on and ultimately ended up in  
7 the conviction of someone, which is now being told to me in so  
8 many words, or maybe just directly, was inappropriate. And I  
9 sentenced this person to an inordinate amount of time when I  
10 shouldn't have done so.

11 So am I little upset right now? Yes, I am. Because  
12 this is something that I don't expect to have happen in my  
13 courtroom.

14 MR. ESPINOZA: Well, first, Your Honor, I want to  
15 emphatically say the government isn't taking the position that  
16 the conviction was unjust or that the sentence was unjust. In  
17 all the papers that the government has filed with the Court in  
18 this matter, the parties agree that the parties disagree about  
19 the underlying merits of the 2255 litigation. But, as I've  
20 said, because the parties agree that it's conceivable a new  
21 trial could be ordered, we have pursued the negotiated  
22 resolution that we have.

23 With respect to the Court's earlier question  
24 concerning the precise location of these documents in 2007,  
25 Your Honor, unfortunately we're not, the government is not in

1 a position to offer clarity to the Court at this point.

2 I can say this. The documents at issue were not in  
3 the discovery file in this case. They were in the FBI file in  
4 this case. And when they, in the course of the 2255  
5 litigation, became the subject of interest and discussion  
6 between the parties, I reached out to the FBI. I asked  
7 specifically that we find these documents. They were attached  
8 to an internal FBI e-mail, and the FBI was able to locate  
9 those documents and produce them to me in short order.

10 I can't explain why those documents were not included  
11 in the case file, were not included in the discovery file. I  
12 am -- it is our position that any failure to disclose those  
13 documents was inadvertent, but I can't offer any further  
14 explanation about why they weren't turned over and why they  
15 weren't in the discovery file.

16 MR. VINCENT: Your Honor, also, if I may.

17 I believe Mr. Espinoza has spoken to both of the  
18 attorneys that prosecuted the case for the United States at  
19 that time. They do not recall ever seeing these items. And  
20 so I know this is not what the Court wants, but we have -- we  
21 don't know exactly why they were not turned over because the  
22 prosecutors are saying they never saw them. They were in the  
23 FBI files.

24 MR. ESPINOZA: In light of those complications, Your  
25 Honor, the government has thoroughly considered the possible

1 arguments it might assert in further litigation of the 2255  
2 matter, gauged the strength of those arguments, and has come  
3 to the conclusion that while this court may find that no Brady  
4 violation resulted sufficient to warrant the 2255 relief that  
5 Mr. McDavid seeks, a reviewing court could take a different  
6 position, and certainly this court might take a similar  
7 position that a new trial is warranted.

8 In an effort to avoid the expense, the litigation risk  
9 of that endeavor, the parties have agreed to this outcome  
10 which does capture some valuable equities, Your Honor.

11 I mean, the government is not taking the position, nor  
12 is the defendant, that he is innocent of the crime charged or  
13 he would not be pleading guilty today. He's agreed to execute  
14 a plea agreement to a superseding information charging a  
15 conspiracy in violation of 18 --

16 THE COURT: And he would then be sentenced by me to  
17 time served.

18 MR. ESPINOZA: That's right, time served, which would  
19 encompass a period of three days short of nine years.

20 And the Court did impose a 19 and a half year  
21 sentence, but Mr. McDavid's release date, assuming continued  
22 good behavior, is in eight years. So he will have served more  
23 than 50 percent of the sentence that the Court imposed.

24 THE COURT: I'm sorry. I haven't allowed you to  
25 respond or say anything, counsel.

1 MR. VERMEULEN: No apology necessary.

2 We've all put a lot of effort into this. This is a  
3 compromise for both sides, and I say that not in a disparaging  
4 way. It's a compromise that we've worked out given the risks,  
5 given our cost-benefit analysis in the global resolution,  
6 given the terms of the resolution that we have presented to  
7 the Court for approval.

8 We differ, the government and the defense differs on  
9 the significance and the scope and the importance of the  
10 materials that have been produced. But we acknowledge that  
11 disagreement, we acknowledge that difference expressly. And  
12 given all of the facts and circumstances of the history of the  
13 case, given all of the facts and circumstances as we know them  
14 now, and given our perspectives, we come to the Court with the  
15 very unusual -- I will acknowledge, I've never been a part of  
16 a proceeding like this either -- we present to the Court a  
17 very unusual global resolution, a proposal for a global  
18 resolution of the case.

19 THE COURT: Do you wish to be heard?

20 MR. ROSENFELD: No. Thank you, Your Honor.

21 THE COURT: So you're asking this court at this  
22 time -- I know there's a little bit more things here, but you  
23 want to have a plea to a superseding information alleging  
24 conspiracy. And then after that plea of guilty is made to  
25 that allegation of conspiracy, there would then be an

1 immediate sentencing, and the sentencing would basically  
2 short-cut to simply say time served. And then at that time,  
3 once there had been a plea and a sentencing, there would be a  
4 granting of the 2255?

5 MR. ESPINOZA: That's right, Your Honor. That's the  
6 procedure that we would propose to the Court.

7 THE COURT: And so that basically just wipes out  
8 everything that took place from 2007, the trial --

9 MR. ESPINOZA: Your Honor --

10 THE COURT: -- the allegations, the witnesses.

11 Everything that was done during that time period and  
12 was said is just going to be gone as soon as the 2255 is  
13 granted, correct?

14 MR. ESPINOZA: Well, Your Honor --

15 THE COURT: In essence, I mean, that's what's going to  
16 happen.

17 MR. ESPINOZA: As a procedural matter, Your Honor,  
18 yes. But as a substantive matter, the plea does capture the  
19 essence of all of that effort in that Mr. McDavid admits in  
20 the plea all of the -- all of the essential components found  
21 by the jury that resulted in the conviction. The plea -- the  
22 factual basis for the plea is robust and includes each and  
23 every -- it includes facts sufficient to support each and  
24 every element of the conspiracy as alleged and as proven to  
25 the jury.



1 THE COURT: I understand that, but I'm still having a  
2 problem with where these documents were and what happened.  
3 This is just -- this is -- I've never heard of anything like  
4 this.

5 And, again, I'm sorry, but when I read this, it has  
6 taken me back to a point that I never thought I would ever be  
7 in, in the Eastern District of California, sitting here and  
8 having to listen to this and realize that there was opposition  
9 to the 2255 until about two months ago. Then it changed.

10 MR. ESPINOZA: That's right.

11 THE COURT: Then it became a joint agreement. It  
12 changed in just the last couple of months. And that tells me,  
13 when I see that happen, boy, there must have been some really  
14 good things in those documents that weren't discovered or  
15 weren't turned over.

16 I mean, we're talking Brady with a capital B. If  
17 you're going to oppose and then all of a sudden agree to it,  
18 there's got to be something in there.

19 MR. ESPINOZA: If the Court --

20 THE COURT: And that's where I'm having the problem,  
21 is that I'm not getting the comfort that I know exactly what  
22 it was. I know you say there was correspondence between the  
23 defendant and the informant, but --

24 MR. ESPINOZA: Your Honor, I can describe the  
25 documents to the Court. You know, we've made an effort --

1 part of the goal of this resolution is to avoid additional  
2 litigation in which, you know, these documents would become  
3 public record. But I'm prepared today to describe the  
4 documents to the Court and/or provide copies of the documents  
5 to the Court, ah, for its review.

6 As I said, the universe of documents that is the  
7 subject of this discussion, that is the post-November  
8 documents, are comprised of, first, a handwritten letter by  
9 Mr. McDavid authored in approximately September or October of  
10 2004, which would have been only a month after or a month and  
11 a half after he first encountered the government informant.

12 In that handwritten letter, he expresses strong  
13 affection for the informant, including describing physical  
14 sensations, butterflies in his stomach and other strong  
15 indicia of his personal feelings of attraction to the  
16 informant. He talks about hoping to see her in the future and  
17 engage in what activities may follow.

18 Thereafter, a series of e-mails includes similar  
19 affirmations of his affection for the informant, and those  
20 e-mails encompass a period from approximately June 16th,  
21 2005 -- so later, once the interaction between them became  
22 more regular. Because in August or September of 2004, when  
23 they encountered one another at certain protest activities at  
24 or about the end of the Republic National Convention in 2004,  
25 they parted and did not see each other again until

1 approximately summer of 2005. And that's when the  
2 correspondence resumes, and it spans a period of between  
3 approximately June of 2005 through the end of September of  
4 2005.

5 Now, the conspiracy is alleged to begin in our  
6 superseding information in August of 2005. In the original  
7 indictment, the conspiracy is alleged to have begun in  
8 November of 2005. So these original letters fell outside of  
9 the period charged in the conspiracy, which might be one  
10 reason why, if they were reviewed -- and I can't definitively  
11 state to the Court that they were because, as I said, they  
12 were not in the government's -- in the prosecuting attorneys'  
13 files.

14 If they were reviewed, it's possible that the  
15 government attorney saw the dates, saw that they were outside  
16 the scope of the charged conspiracy, and concluded on whatever  
17 other basis that they weren't appropriate for disclosure.  
18 That's pure conjecture, Your Honor. I don't know whether the  
19 prosecuting attorneys in the underlying trial ever saw these  
20 documents. And they stated to me each in -- and I'll  
21 represent to the Court that I spoke to both, and both said --  
22 I described the documents, gave them the dates and other  
23 relevant information about the documents, and both said that  
24 they had never seen the documents; and that if they knew of  
25 the content as I described it, in light of the defense

1 asserted at trial, that they would have turned the documents  
2 over.

3 There are -- there is one handwritten letter and then  
4 there are approximately ten e-mails that follow during the  
5 period I described. One of those e-mails is from the  
6 informant to Mr. McDavid. All of the other e-mails are from  
7 Mr. McDavid to the informant.

8 In the e-mail from the informant to Mr. McDavid, there  
9 is what could be perceived as a reciprocation of Mr. McDavid's  
10 affection. It's not explicit, but it's subject to  
11 interpretation, and this court or another court could  
12 interpret it as --

13 THE COURT: Yes, it could very well.

14 So how did it come about that you were able to locate  
15 these documents in the last two to three months or relatively  
16 short period of time? What happened? What changed between  
17 2006 and 2014? What happened?

18 MR. ESPINOZA: Disappointingly for all of the parties,  
19 Your Honor, I can't provide an accurate explanation for that  
20 other than to say that these documents were in the FBI file.

21 And when I requested them, the --

22 THE COURT: When you say in the FBI file, physically,  
23 geographically where is that located? I mean, the FBI file  
24 could be what you call something, but it could be held here,  
25 it could be held in Stockton, it could be held in San

1 Francisco. Where physically was that file?

2 MR. ESPINOZA: It was in Sacramento at the FBI offices  
3 there.

4 THE COURT: So when the request came in for FOIA, and  
5 you would, I would assume, routinely make that -- present that  
6 to the FBI?

7 MR. ESPINOZA: Well, Your Honor, in the FOIA request,  
8 these documents were nearly produced. And when --

9 THE COURT: What produced?

10 MR. ESPINOZA: Nearly. And by that I mean this. They  
11 were attachments, the letters were attached to an e-mail sent  
12 by one FBI agent to another, and it say attached please read  
13 or please find this correspondence between McDavid and the  
14 informant.

15 So the FOIA request produced the e-mail cover letter  
16 transmitting the documents, but it did not include the  
17 attachments. And so that failure was surely also inadvertent.  
18 And it was when the attachments were identified that we  
19 pursued those documents themselves and were able to recover  
20 them from the FBI file.

21 MR. VINCENT: Your Honor, I think it would be best for  
22 you to review them, if you wished, so that you could see -- it  
23 might make more sense.

24 THE COURT: I think so, I need to look at these. I  
25 need to take a 10-minute recess anyway so I can come back out

1 here. We'll take 10 minutes.

2 MR. VINCENT: Your Honor, if I may.

3 These were attached to a memorandum -- well, we'll  
4 just give them to --

5 THE COURT: Just give them to my clerk and have them  
6 come back.

7 (Recess taken.)

8 THE CLERK: Please be seated. Come to order. Court  
9 is again in session.

10 THE COURT: So I've read the e-mails that were given  
11 to me and other documentation during the break.

12 So just so I'm clear, from the government's  
13 perspective, is this a Brady violation?

14 MR. ESPINOZA: Your Honor, it's the government's  
15 position that this court could find that these e-mails --

16 THE COURT: I'm going to ask you directly, not what  
17 the Court is going to do. Is this a Brady violation?

18 MR. VINCENT: Your Honor, if these -- if I may answer  
19 that this way.

20 If these documents -- if these documents had come to  
21 the attention of the prosecutors, we believe they would have  
22 been turned over as Brady material.

23 THE COURT: And so since they were not turned over and  
24 they were in the possession of, in essence, the government, it  
25 would be a Brady violation, correct?

1 MR. VINCENT: Ah, it --

2 THE COURT: And I'm sorry, Mr. Vincent, that I keep  
3 pushing you to answer the question, but that's what I'm going  
4 to do.

5 MR. VINCENT: Our concern is that a court would  
6 conclude that it was a Brady violation. Our argument would be  
7 it was inadvertent. Our argument would be that these things  
8 did not -- were not such that they would have made a  
9 difference and they were cumulative, but we would have turned  
10 them over.

11 And that -- does that answer the Court's question?

12 THE COURT: Not directly, but I'm sure that's about as  
13 far as I'm going to get.

14 I mean, this is -- I mean, as I told you, as I said  
15 initially, this is extremely troubling to me.

16 MR. VINCENT: I understand, Your Honor. It's  
17 troubling to you. If it makes any difference, the United  
18 States isn't happy about this result either. This is not --  
19 you know, we would prefer not to be in this situation.

20 THE COURT: Have you put into place any type of  
21 procedure so that something such as -- I mean, you say that  
22 the reason why they weren't turned over is that they were  
23 attachments to e-mails. Well, everybody attaches something to  
24 an e-mail, that's automatic, and the first thing you do is  
25 look to see if there's an attachment.

1 MR. VINCENT: Your Honor, I don't want to -- I  
2 don't -- I don't know why it happened. You know, we look at  
3 these things, we look at them after the fact, we look at them  
4 and wonder how did this happen, how did this get missed. But  
5 I can tell you from years of doing this, things -- it's not --  
6 it's not intentional. It's not -- it's not with a malicious  
7 purpose. It's not even negligent. It's -- it's things get  
8 missed.

9 Something that is looked at perhaps -- and I don't  
10 mean to suggest this is what happened, but things can be  
11 looked at early in an investigation, and the significance of  
12 it is not seen, it's not recognized, and then it's forgotten.  
13 Or an agent sees something and fails to let the prosecutor  
14 know. Or -- but it isn't -- it's not intentional. It's  
15 just -- it's an imperfect system.

16 We do the very best we can. We are very cognizant of  
17 our obligations under discovery under Brady. When these came  
18 to our attention, we immediately turned them over. We just --  
19 so I'm not sure if that answers the Court's concerns.

20 THE COURT: Well, it does. I guess -- and I will say  
21 that the reason why -- I don't know if you know, but this  
22 is -- I am very sensitive to this issue. I don't know if you  
23 know, but I've been on the Criminal Rules Committee for the  
24 United States for seven years now. And after the Senator  
25 Stevens issue with Rule 16, I was put on the subcommittee on



1 Rule 16 and spent three years investigating, taking public  
2 hearing about this exact type of thing. And it was always --  
3 I heard it from all over the country, but I said it never  
4 happens here, we don't have to worry about that. And now I'm  
5 sitting right in the middle of it, and it just -- I'm  
6 disappointed on top of everything else.

7 But then on the other side is what do I do with the  
8 defendant. I mean, at one point in my thought process -- I'm  
9 not going anywhere with it right now -- was why even deal with  
10 taking a plea? I'll just grant the 2255, and just let it go  
11 and --

12 MR. VINCENT: Your Honor --

13 THE COURT: -- be done with it, and you can do  
14 whatever you want.

15 But then it puts him in the position of saying, well,  
16 is he going to get tried again? I mean, what happens?  
17 There's no finality to it.

18 Nothing here is going to be final unless I go along  
19 with this settlement agreement today. And you obviously have  
20 to know that putting a district judge in a position where he  
21 or she has to do something or else it's not going to work is  
22 not something that makes him happy.

23 MR. VINCENT: I --

24 THE COURT: And that's where I am. I'm being put in a  
25 position that, to be fair -- and I'll say that even though I

1 sat through the 10 days of trial with Mr. McDavid, I heard  
2 what was said, I know he's not necessarily a choir boy, but he  
3 doesn't deserve to have to go through this either. That's not  
4 fair.

5 And so there is something that needs to be -- there  
6 needs to be something to happen, and this would allow that to  
7 happen if I go through this procedure.

8 MR. VINCENT: Your Honor, if I may. I understand the  
9 Court's concerns.

10 If I may, this -- as I say, this is -- we're -- the  
11 United States is dealing with reality now. There is  
12 litigation risk for both sides. We believe that there was  
13 sufficient evidence to convict Mr. McDavid. He is willing to  
14 admit guilt today. And so what this does is it brings  
15 finality.

16 Otherwise, then we both -- we both bear litigation  
17 risk. We go through a trial. Maybe he's convicted, maybe he  
18 isn't. If he is, then what is his sentence? And so this is  
19 an effort by the parties to resolve the case, both recognizing  
20 that there is litigation risk.

21 THE COURT: Do you have anything else?

22 MR. VERMEULEN: Nothing further, Your Honor.

23 THE COURT: All right. After considering all of the  
24 potential possibilities, the down sides, the up sides for both  
25 parties -- and there are down sides, very much so, to both

1 parties if I don't accept this agreement -- I am going to go  
2 ahead and accept the settlement agreement at this time.

3 May I have the document, please.

4 MR. ESPINOZA: Yes, Your Honor. May I approach?

5 THE COURT: Yes.

6 All right. Madam Clerk, please administer the oath.

7 THE CLERK: Yes, Your Honor.

8 (Oath administered.)

9 THE DEFENDANT: I do.

10 THE CLERK: Thank you.

11 THE COURT: All right. Counsel, first of all, have  
12 you reviewed a copy of the superseding information with your  
13 client?

14 MR. VERMEULEN: Yes.

15 THE COURT: And you have advised him of the nature of  
16 the charge in that superseding information?

17 MR. VERMEULEN: Yes, we have.

18 THE COURT: And, Mr. McDavid, are you prepared today  
19 to proceed by waiving your right of prosecution by indictment  
20 and entering a plea of guilty to the superseding information?

21 THE DEFENDANT: I do.

22 THE COURT: And have you fully discussed the nature of  
23 this charge and your decision to waive grand jury with your  
24 attorney?

25 THE DEFENDANT: I have.

1           THE COURT:  And are you satisfied with the advice  
2 given to you by your attorney regarding your waiver of  
3 indictment?

4           THE DEFENDANT:  I am.

5           THE COURT:  I want to advise you that the crime set  
6 forth in this superseding information is a felony offense.  
7 Before you could be charged with such an offense, you have the  
8 right to have that matter presented before a federal grand  
9 jury.  And if it were presented to a federal grand jury, you  
10 might or might not be indicted.

11           Do you understand that?

12           THE DEFENDANT:  I do.

13           THE COURT:  A federal grand jury is composed of at  
14 least 16 and not more than 23 persons, and at least 12 of  
15 those grand jurors must find that there is probable cause to  
16 believe that you committed the crime before you could be  
17 indicted.

18           Do you understand that?

19           THE DEFENDANT:  I do.

20           THE COURT:  Has anyone made any promises to you of any  
21 kind to try to force -- or induce you, rather, to waive your  
22 right of indictment?

23           THE DEFENDANT:  No, they haven't.

24           THE COURT:  Has anyone threatened you in any way to  
25 try to force you to waive your right of indictment?

1 THE DEFENDANT: No, they have not.

2 THE COURT: Is it your desire today to waive your  
3 right of indictment by a grand jury and enter a guilty plea to  
4 the superseding information?

5 THE DEFENDANT: It is.

6 THE COURT: I have received an executed -- a written  
7 executed waiver of indictment. I will now sign that as well  
8 and order that it be filed and made part of the records in  
9 this case.

10 Do you waive a full and formal reading of this  
11 superseding information?

12 MR. VERMEULEN: We do.

13 THE COURT: All right. It alleges in the superseding  
14 information that there is a charge of conspiracy in violation  
15 of 18 United States Code Section 371.

16 Do you understand that, Mr. McDavid?

17 THE DEFENDANT: I do.

18 THE COURT: All right. I do have a written plea  
19 agreement that has been submitted to the Court. It appears to  
20 have been executed by all parties concerned.

21 Was there any other prior agreement that was fully  
22 rejected before this agreement was entered into?

23 MR. VERMEULEN: Not to my knowledge. And my  
24 hesitation, Your Honor, is I understand that there were  
25 settlement negotiations. I don't believe it ever got to the

1 point of a written plea agreement.

2 THE COURT: Is that correct?

3 MR. ESPINOZA: That's correct, Your Honor. And the  
4 settlement negotiations that Mr. Vermeulen is referring to are  
5 settlement negotiations in the original prosecution in 2006  
6 and 2007.

7 THE COURT: All right. Mr. McDavid, you took an oath  
8 to tell the truth earlier. I'm going to ask you a series of  
9 questions now. That oath that you took means that the answers  
10 you're going to give to my questions are being made under the  
11 penalty of perjury.

12 Do you understand that?

13 THE DEFENDANT: I understand that.

14 THE COURT: If there's ever a time you do not  
15 understand a question or for any reason at all you need to  
16 speak to your attorney before you answer a question, you let  
17 me know, and I'll give you time to do so.

18 Do you understand that?

19 THE DEFENDANT: I do.

20 THE COURT: Please state your full name.

21 THE DEFENDANT: Eric Taylor McDavid.

22 THE COURT: Your date of birth?

23 THE DEFENDANT: October 7th, 1977.

24 THE COURT: Your highest level of formal education?

25 THE DEFENDANT: Some college courses.

1 THE COURT: And your most recent occupation?

2 THE DEFENDANT: That would be college student or  
3 framing houses before that.

4 THE COURT: Have you ever been treated for any type of  
5 mental illness?

6 THE DEFENDANT: No.

7 THE COURT: Have you ever been treated for an  
8 addiction to drugs or alcohol?

9 THE DEFENDANT: No.

10 THE COURT: Are you under the influence of any drug or  
11 alcohol today?

12 THE DEFENDANT: No, I'm not.

13 THE COURT: Have you taken any drug or alcohol in the  
14 last 24 hours?

15 THE DEFENDANT: No, I have not.

16 THE COURT: Do either counsel know of any reason why  
17 this defendant is not competent to enter a plea today?

18 MR. VERMEULEN: I have no knowledge of such a reason.

19 MR. ESPINOZA: No, Your Honor.

20 THE COURT: And are you fully satisfied with the  
21 advice and representation given in this case by your attorney?

22 THE DEFENDANT: Fully.

23 THE COURT: And is it your understanding that your  
24 attorney has met with the government's attorney and that's  
25 what led to the preparation of this written plea agreement

1 that you've signed and submitted to the Court today?

2 THE DEFENDANT: I am.

3 THE COURT: Will you be entering your plea of guilty  
4 today pursuant to the express terms of this written plea  
5 agreement?

6 THE DEFENDANT: I will.

7 THE COURT: Are you entering your plea of guilty  
8 voluntarily?

9 THE DEFENDANT: Yes.

10 THE COURT: Are you entering your plea of guilty  
11 because you are in fact guilty of the crime as set forth in  
12 the superseding information?

13 THE DEFENDANT: Yes.

14 THE COURT: May I have the terms, please.

15 MR. ESPINOZA: Yes, Your Honor.

16 The material terms of the plea agreement are as  
17 follows, Your Honor.

18 First, the defendant's obligations. The defendant  
19 will waive indictment and plead guilty to the superseding  
20 information charging him with a violation of 18 United States  
21 Code Section 371. In this case, the underlying conduct  
22 charged in the conspiracy is contrary to 18 United States Code  
23 Sections 844(f) and (i).

24 The defendant agrees that he is in fact guilty of that  
25 charge, and that the facts set forth in the factual basis for



1 the plea attached -- excuse me -- and that the facts set forth  
2 in the factual basis for the plea attached to the agreement as  
3 Exhibit A are accurate.

4 The defendant also agrees that in consideration of the  
5 promises exchanged between the parties in the plea agreement,  
6 the defendant will waive the right to assert any statute of  
7 limitations as an affirmative defense to the charge in the  
8 superseding information until January 9, 2017 or until entry  
9 of a judgment and commitment by this court pursuant to this  
10 agreement, whichever is sooner.

11 The defendant further agrees that if he breaches the  
12 plea agreement or ever attempts to vacate his plea, dismiss  
13 the underlying charge or modify or set aside his sentence on  
14 the count to which he is pleading guilty today, his waiver of  
15 the statute of limitations in the plea agreement shall extend  
16 through those proceedings and until final judgment is entered  
17 after a trial or otherwise on the offense charged in either  
18 the original indictment filed on January 25th, 2006, or the  
19 superseding information to be filed in connection with this  
20 agreement today.

21 The defendant also agrees to pay a special assessment  
22 of \$100 as imposed by the Court.

23 The government's obligations are as follows:

24 The government will recommend to this court, after  
25 imposition of sentence today, that the Court accept, file and

1 order the relief recommended by the parties in the final  
2 settlement agreement that's incorporated into the plea  
3 agreement which the parties have presented to the Court. The  
4 government will further join the defendant in recommending to  
5 the Court a sentence of time served with a two-year period of  
6 supervised release to follow with standard conditions.

7 The government's agreed to recommend an acceptance of  
8 responsibility reduction of three levels to the stipulated  
9 guideline calculation. Further, the government's agreed and  
10 the defendant has agreed to stipulate to the guideline  
11 calculations set forth on page 9 of the plea agreement. I  
12 won't go through those specific stipulations, Your Honor.

13 Finally, the defendant has agreed to waive fully his  
14 right to appeal or collaterally attack the conviction and  
15 sentence today except for those -- except for those collateral  
16 attacks that may be non-waivable.

17 Finally -- or excuse me.

18 In addition, the defendant has agreed to waive all  
19 rights under the Hyde Amendment and, as set forth in the final  
20 settlement agreement, the defendant agrees to waive, to the  
21 full extent permitted under law, any and all civil claims he  
22 might assert against the United States, its agents, servants  
23 or employees arising out of the incidents and facts that gave  
24 rise to the original criminal investigation and prosecution in  
25 this case.

1           The plea agreement and the final settlement agreement  
2           are the total agreement between the parties in this case, and  
3           there are no other agreements beyond those documents.

4           Of course, this agreement doesn't bind the Court and  
5           is limited to the Eastern District of California. And the  
6           Court is not bound by the particular agreements within the  
7           plea agreement between the parties.

8           THE COURT: All right. Mr. McDavid, did you  
9           understand everything that was just said?

10          THE DEFENDANT: I did.

11          THE COURT: And do you agree with everything that was  
12          said by the government's attorney?

13          THE DEFENDANT: I do.

14          THE COURT: And those are the terms of your plea  
15          agreement with the government as you understand them?

16          THE DEFENDANT: Yeah.

17          THE COURT: Has anyone made any other promises to you  
18          of any kind that were not just recited here today to try to  
19          induce you to enter a plea of guilty today?

20          THE DEFENDANT: No, they have not.

21          THE COURT: Has anyone threatened you in any way to  
22          try to force you to enter a plea of guilty in this case?

23          THE DEFENDANT: No, they have not.

24          THE COURT: Are you a citizen of the United States?

25          THE DEFENDANT: I am.

1           THE COURT: Have you ever been convicted of a felony  
2 offense before?

3           THE DEFENDANT: Not prior to this.

4           THE COURT: Are you on probation or parole for any  
5 other offenses today?

6           THE DEFENDANT: No, I'm not.

7           THE COURT: The maximum penalty provided by law for a  
8 plea of guilty to conspiracy, in violation of 18 United States  
9 Code Section 371, is five years of imprisonment, a fine of up  
10 to \$250,000, a special assessment of \$100, and a period of  
11 supervised release of up to three years.

12           In the event you are released from prison and placed  
13 on supervised release and you violate any terms of that  
14 supervised release, you could be sent back for up to two  
15 additional years.

16           Do you understand that?

17           THE DEFENDANT: I do.

18           THE COURT: If there's been any economic loss suffered  
19 by a victim as a result of your criminal conduct, the Court is  
20 going to order that you pay restitution unless it determines  
21 that restitution is not appropriate in your case.

22           Do you understand?

23           THE DEFENDANT: I do.

24           THE COURT: Under the Sentencing Reform Act of 1984,  
25 the United States Sentencing Commission has issued certain

1 advisory guidelines for courts to consider in determining the  
2 sentence in a criminal case. In addition, there are certain  
3 statutory factors set forth in 18 United States Code Section  
4 3553(a), which require the Court look to the nature and  
5 circumstances of the offense and the history and  
6 characteristics of the defendant.

7 Have you and your attorney discussed both the advisory  
8 sentencing guidelines and statutory sentencing factors?

9 THE DEFENDANT: Yes.

10 THE COURT: And do you understand how those would  
11 apply to your case?

12 THE DEFENDANT: I do.

13 THE COURT: Do you understand this court will not be  
14 able to determine the precise sentence you're going to  
15 receive, except in this particular case I do know because it's  
16 part of the plea agreement, but generally speaking until after  
17 it's reviewed the advisory guidelines, the statutory factors  
18 and the presentence report, and after you've had a chance to  
19 speak at your judgment and sentencing hearing?

20 In this particular case, once again, there has been a  
21 settlement agreement, and the Court has indicated its  
22 intention to follow the terms of that settlement agreement.

23 And also by entering your plea today pursuant to the  
24 terms of your written plea agreement, you are waiving or  
25 giving up your right to collaterally attack and/or appeal

1 basically the plea, the conviction and the sentence today.

2 Do you understand that?

3 THE DEFENDANT: I do.

4 THE COURT: Counsel, are you satisfied there's been a  
5 voluntary, knowing and intelligent waiver of the right to  
6 collaterally attack and/or appeal?

7 MR. VERMEULEN: I am.

8 THE COURT: All right. Before I can take your guilty  
9 plea, I need to make sure that you understand all of your  
10 constitutional rights and are willing give them all up today.  
11 I'm going to list them all for you in just a moment. Please  
12 listen to them carefully, and then I'll ask you two questions,  
13 the first being whether you understand your rights, and the  
14 second being whether you give them all up today.

15 Do you understand the procedure?

16 THE DEFENDANT: Yes, I do.

17 THE COURT: You have the right to have a trial by  
18 jury; the right to be presumed innocent; the right to have the  
19 government prove your guilt beyond a reasonable doubt. You  
20 have the right to have an attorney at all times and, if you  
21 cannot afford one, to have one appointed at no cost to you.  
22 You have the right to present a defense to this charge. You  
23 have the right to see and hear all witnesses and evidence that  
24 will be presented against you as well as to cross-examine  
25 those witnesses at trial. You have the right to use the power

1 of this court to bring in witnesses and evidence on your  
2 behalf in order for you to present your defense. You have  
3 right to remain silent, and you have the right not to have  
4 your silence or decision to not present evidence at trial used  
5 against you.

6 Do you understand your constitutional rights?

7 THE DEFENDANT: I do.

8 THE COURT: And do you give them up today?

9 THE DEFENDANT: I do.

10 THE COURT: Counsel, do you join?

11 MR. VERMEULEN: I do.

12 THE COURT: May I have the elements of the offense of  
13 conspiracy so I can be assured Mr. McDavid understands them  
14 all, please.

15 MR. ESPINOZA: Yes, Your Honor.

16 If this matter proceeded to trial, the United States  
17 would have to prove beyond a reasonable doubt the following  
18 elements of a violation of 18 United States Code Section 371:

19 First, that beginning in or about August 2005 and  
20 ending on or about January 13th, 2006, there was an agreement  
21 between two or more persons to commit at least one of the  
22 crimes charged in the superseding information, namely arson in  
23 violation of 18 United States Code Sections 844(f) and (i).

24 Second, that the defendant became a member of the  
25 conspiracy knowing of at least one of its objects and

1 intending to help accomplish it.

2 And, third, one of the members of the conspiracy  
3 performed at least one overt act for the purpose of carrying  
4 out the conspiracy.

5 THE COURT: Do you understand the elements of the  
6 offense?

7 THE DEFENDANT: I do.

8 THE COURT: Attached to your plea agreement is an  
9 Exhibit A. It apparently has your signature at the bottom.  
10 Is that your signature?

11 THE DEFENDANT: It is.

12 THE COURT: Did you read that in its entirety?

13 THE DEFENDANT: I did.

14 THE COURT: Is everything contained here true and  
15 correct?

16 THE DEFENDANT: Yeah.

17 THE COURT: And are you willing to stipulate that this  
18 Exhibit A will be the factual basis for your guilty plea  
19 today?

20 THE DEFENDANT: I do understand that.

21 THE COURT: Counsel, do you join in that stipulation?

22 MR. VERMEULEN: Yes.

23 MR. ESPINOZA: Yes, Your Honor.

24 THE COURT: Okay. How do you now plead to conspiracy  
25 in violation of 18 United States Code Section 371, guilty or



1 not guilty?

2 THE DEFENDANT: Guilty.

3 THE COURT: It is the finding of this court in the  
4 case of the United States versus Eric McDavid that this  
5 defendant is fully competent and capable of entering an  
6 informed plea. The Court also finds that there's been a  
7 factual basis established for his plea and that he has made a  
8 voluntary, knowing and intelligent waiver of all of his  
9 constitutional rights. His plea is accepted, and he is now  
10 adjudged guilty of that offense.

11 Are we prepared to proceed with immediate sentencing?

12 MR. VERMEULEN: We are.

13 MR. ESPINOZA: We are, Your Honor.

14 THE COURT: Is there any legal reason why judgment and  
15 sentencing should not proceed at this time?

16 MR. VERMEULEN: No.

17 MR. ESPINOZA: No, Your Honor. The parties have  
18 agreed to proceed to immediate sentencing without the  
19 preparation of a new PSR and have submitted a copy of the PSR  
20 prepared in the original prosecution for the Court's review.

21 THE COURT: What is the original offense level that  
22 we're talking about?

23 MR. ESPINOZA: The offense level stipulated in the  
24 plea agreement, Your Honor?

25 THE COURT: Yes.

1 MR. ESPINOZA: Well, Your Honor, the parties agreed,  
2 pursuant to the particular stipulations in the plea agreement,  
3 that the enhancement under United States Sentencing Guideline  
4 Section 3A1.4, the terrorism enhancement, applies in this case  
5 with the caveat set forth in the plea agreement. In that  
6 case, the base offense level is a 32. And by operation of  
7 that enhancement, the criminal history category applicable is  
8 category VI. That results in a sentencing range in excess of  
9 the maximum penalty in this case, 210 to 262 months.

10 THE COURT: You agree with that, counsel?

11 MR. VERMEULEN: Yes.

12 THE COURT: And notwithstanding that fact on the  
13 range, it is still part of the settlement that he would be  
14 sentenced to total time served as of -- today is January 8th,  
15 2015; is that correct?

16 MR. VERMEULEN: That's our joint recommendation.

17 MR. ESPINOZA: Yes, Your Honor. And that as of today,  
18 the defendant has served three days short of nine years in  
19 prison, approximately 109 months.

20 THE COURT: And the original -- and the actual maximum  
21 for conspiracy is five years?

22 MR. ESPINOZA: That's right, Your Honor.

23 THE COURT: All right. I don't think I need to go any  
24 farther. I'm going to go ahead and just simply incorporate  
25 and adopt the settlement agreement as it's written and go

1 ahead at this time and sentence Mr. McDavid to the amount of  
2 time served, which is three days short of nine years. That's  
3 effective today.

4 MR. ESPINOZA: Your Honor, with respect to supervised  
5 release and any term --

6 THE COURT: Two years?

7 MR. ESPINOZA: The parties recommended two years and  
8 recommended standard conditions recognizing that --

9 THE COURT: I am going to go along with the -- at this  
10 point, I am going to go along with the settlement agreement  
11 and order that there be a two-year period of supervised  
12 release to commence forthwith and with all standard conditions  
13 contained therein.

14 I don't see any reason to waive drug testing or  
15 anything else at this time, I don't have any information  
16 regarding that, so I'm going to allow that to be put into  
17 place as a standard condition. If there is some other issue  
18 that comes up after the fact, that can be brought back to the  
19 Court to deal with a further change in supervised release  
20 conditions.

21 MR. ESPINOZA: Finally, Your Honor, the parties  
22 contemplate that the sentence imposed by the Court today will  
23 result in Mr. McDavid's release. To effectuate that release,  
24 I believe the Court will be required to complete a release  
25 order. And the Bureau of Prisons, with whom I've consulted,

1 has asked that, if possible, the parties deliver to them a  
2 judgment and commitment as soon as the Court makes it  
3 available.

4 (Off-the-record discussion with Courtroom Deputy.)

5 THE COURT: All right. Apparently we have a release  
6 order and will be able to have the judgment and commitment  
7 order done today.

8 MR. ESPINOZA: Thank you, Your Honor.

9 And then with respect to the 2255 petition and that  
10 litigation, the parties have proposed and submit to the Court  
11 an order which would, if signed by the Court, complete the  
12 litigation and memorialize the settlement agreement entered by  
13 the Court today.

14 THE COURT: Yes. I will go ahead and execute the 2255  
15 release order to vacate.

16 MR. VERMEULEN: Thank you, Your Honor.

17 MR. ESPINOZA: Thank you, Your Honor.

18 THE COURT: All right. There being no other matters  
19 on calendar, court is adjourned.

20 (Proceedings were concluded at 11:22 a.m.)

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1 I certify that the foregoing is a correct transcript  
2 from the record of proceedings in the above-entitled matter.

3  
4 /s/ Kathy L. Swinhart  
5 KATHY L. SWINHART, CSR #10150  
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