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4  
5 Attorney for Defendant  
ERIC MCDAVID

6  
7 IN THE UNITED STATES DISTRICT COURT  
8 FOR THE EASTERN DISTRICT OF CALIFORNIA  
9

10 UNITED STATES OF AMERICA, )  
11 Plaintiff, )

12 v. )

13 )  
14 )  
15 ERIC MCDAVID, )  
16 Defendant. )

Case No. CR.S-06-0035-MCE

**DEFENDANT ERIC MCDAVID'S  
MOTION TO DISMISS THE  
INDICTMENT**

DEFENDANT'S NOTICE OF MOTION  
AND **MOTION TO DISMISS THE  
INDICTMENT BASED UPON  
VIOLATION OF THE DUE PROCESS  
CLAUSE/OUTRAGEOUS GOVERNMENT  
MISCONDUCT IN THE FBI AND  
THEIR INFORMANT URGING,  
TEACHING, EXPLAINING AND  
PAYING FOR THE MAKING OF A  
DANGEROUS EXPLOSIVE DEVICE;**  
MEMORANDUM OF POINTS IN  
AUTHORITIES IN SUPPORT  
THEREOF; REQUEST FOR  
EVIDENTIARY HEARING.

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18  
19  
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21  
22 Date: February 6, 2007  
Time: 8:30 A.m.  
23 Judge: Hon. Morrison C.  
England

24 To: McGregor W. Scott, R. Steven Lapham, attorneys for  
25 plaintiff: PLEASE TAKE NOTICE that on the above date in the  
26 above entitled action, defendant, through counsel Mark J.

27 Mot Dism indictment based upon informant and FBI  
28 making a dangerous explosive device

1 Reichel, will move this Honorable Court to issue an order  
2 dismissing with prejudice the indictment in this matter.

3 This motion is made upon the grounds that the due  
4 process clause prevents the prosecution of the defendant in  
5 the instant matter.

6 This motion is based on the United States Constitution,  
7 the Federal Rules of Criminal Procedure, the Points and  
8 Authorities submitted in support, and such argument and  
9 evidence of counsel at the hearing on the motion.

10 Respectfully submitted

11 DATED: December 19, 2006.

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13 MARK J. REICHEL  
14 ATTORNEY AT LAW  
Attorney for defendant

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16 /S/ Mark Reichel

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 SUPPORTING FACTS<sup>1</sup>

3 In or about June of 2005, CS "Anna" began discussions  
4 with all 3 defendants in this case about "direct action,"  
5 which Anna urged must include the manufacture of an explosive  
6 device, such as is charged in the criminal complaint and  
7 indictment in this case.

8 Anna then proceeded, over the course of the following 6  
9 month period ending on January 13, 2006, to (1) urge the  
10 manufacture of such a device; (2) provide the only financial  
11 means by which the plan could even begin to occur; (3)  
12 provided the means to communicate between the group for the  
13 period that they were apart following June of 2005; (4)  
14 continued to encourage the group to "stay connected" and in  
15 contact when they separated after June of 2005; (5) paid for  
16 the air travel of a co defendant to fly to California to  
17

18 <sup>1</sup> This factual background comes from the discovery  
19 provided by the government, defense investigation conducted  
20 to date, and the anticipated testimony and evidence to be  
21 submitted at the hearing of the motion. The criminal  
22 complaint also sets forth the government's version of events  
23 in detail.

24 A succinct account is that the defendant Eric McDavid  
25 first met "Anna," not her real name, who was an untrained  
26 full time government informant in or about the Summer of  
27 2004. Defendant was at that time traveling in Des Moines  
28 Iowa and was committing no crime but was actually "targeted"  
for contact and infiltration by Anna as part of a "profile"  
she used for the FBI to meet, maintain contact with, provide  
information on and collect data about. From 2004 until June  
of 2005, defendant McDavid and Anna kept in contact via e  
mail and otherwise. At some time, but at least by June of  
2005, Anna informed the FBI that McDavid was involved in a  
conspiracy to commit certain crimes. McDavid was arrested in  
Anna's presence in January 2006 and charged in the instant  
case.

1 attend a "planning session;" (6) paid monies to the  
2 defendants to keep them contacted (7) drove 2 of the  
3 defendants in her own car across country to reside in a place  
4 in California that she provided for their residence; (8)  
5 provided lap top computers for their education on how to make  
6 explosive devices; (9) provided books and literature on how  
7 to make explosive devices; (10) provided room and board for  
8 the defendants, providing all of their food and all  
9 necessaries of life; (11) provided the money to buy the  
10 supplies for the device; (12) drove the defendants in her own  
11 car to the store to buy the supplies; (13) encouraged, urged  
12 and cajoled the defendants to attempt a dangerous chemical  
13 experiment in an attempt to make such a device; (14)  
14 participated in and directly caused the attempted manufacture  
15 of the device.

#### 16 LEGAL ARGUMENT

17 United States v. Barrera-Moreno, 951 F.2d 1089, 1091  
18 (9th Cir. 1991) holds that a district court may dismiss an  
19 indictment either to remedy outrageous governmental conduct  
20 amounting to a due process violation, or under the court's  
21 supervisory powers to remedy a constitutional violation, to  
22 protect judicial integrity, or to deter future illegal  
23 conduct.

24 It is best articulated that outrageous misconduct occurs  
25 when "...the challenged conduct violates commonly accepted  
26 norms of fundamental fairness and is shocking to the  
27 universal sense of justice." United States v. Russell, 411  
28 U.S. 423, 431-432 (1973). As such, Anna's conduct must be

1 judged according to "commonly accepted norms..."

2 Commonly accepted norms undoubtedly include the  
3 sentiments of the Department of Justice in San Diego and the  
4 United States Attorney's Office in the Southern District.

5 There, the following press release was published

6 NEWS RELEASE SUMMARY -February 22, 2006 United States  
7 Attorney Carol C. Lam announced today the unsealing of a  
8 one-count indictment charging Rodney Adam Coronado, a  
9 self-proclaimed member of the Earth Liberation Front  
10 ("ELF"), with the felony charge of **demonstrating the use  
11 of a destructive device**. Coronado was arrested earlier  
12 today in Tucson, Arizona, by agents of the Federal  
13 Bureau of Investigation and Alcohol, Tobacco, Firearms,  
14 and Explosives. According to the indictment, on August  
15 1, 2003, at a public gathering in the Hillcrest  
16 neighborhood of San Diego, Coronado taught and  
17 **demonstrated the making and use of a destructive device**,  
18 with the intent that the device be used to commit arson.  
19 Hours earlier, a fire had destroyed a large apartment  
20 complex under construction in the University Towne  
21 Center (UTC) area of San Diego. United States Attorney  
22 Lam stated, "Teaching people how to build explosives in  
order to commit violent crimes is unacceptable in  
civilized society. There is no excuse for it." Daniel R.  
Dzwilewski, Special Agent in Charge, San Diego Division  
of the Federal Bureau of Investigation, commented,  
"America will not tolerate terrorists. Whether you were  
born here or abroad, we will not stand back and allow  
you to terrorize our communities under the guise of free  
speech." John T. Torres, Division Director, Special  
Agent in Charge, Los Angeles Field Division, Bureau of  
Alcohol, Tobacco, Firearms & Explosives, stated, "When  
organizations such as ELF/ALF engage in these senseless  
acts of violence, it threatens us all. ATF will continue  
to aggressively pursue these types of cases, and bring  
this type of criminal activity to a halt." Coronado is  
scheduled to be arraigned on the indictment before a  
United States Magistrate Judge in Tucson, Arizona.

23 DEFENDANT Case Number: 06CR0298JM Rodney Adam Coronado.  
24 (Emphasis added). The press release may be obtained on line  
25 at [www.cldc.org/pdf/Rod\\_C.\\_USAA\\_PR.pdf](http://www.cldc.org/pdf/Rod_C._USAA_PR.pdf)

26 There can be no doubt that this is exactly what Anna  
27 did, although Anna did it in a much more "**involved**" manner.  
28 The now indicted Mr. Coronado was at a lawful and peaceful

1 public gathering, organized for political speech, whereby he  
2 demonstrated -largely with words only- how he had made a  
3 device for which he was convicted in 1992. Anna, on the other  
4 hand, performed the numerous acts described herein above,  
5 purchased real products and supplies, and caused the  
6 attempted manufacture of such a device. Her conduct,  
7 unquestionably, far exceeds the now indicted Mr. Coronado.

8 18 U.S.C. § 842, which Anna violated, provides in  
9 relevant part

10 Unlawful acts

11 (a) It shall be unlawful for any person-

12 (B) to teach or demonstrate to any person the making or  
13 use of an explosive, a destructive device, or a weapon  
14 of mass destruction, or to distribute to any person, by  
15 any means, information pertaining to, in whole or in  
16 part, the manufacture or use of an explosive,  
17 destructive device, or weapon of mass destruction,  
18 knowing that such person intends to use the teaching,  
19 demonstration, or information for, or in furtherance of,  
20 an activity that constitutes a Federal crime of  
21 violence.

22 The commission of this act, in accord with U.S. Attorney  
23 Lam's sentiments in San Diego, is clearly violative of the  
24 "common norms of decency."

25 Along this line, it is to be noted that the discovery  
26 alleges that Anna received authority, in December 2005, to  
27 engage in "Otherwise Illegal Activity." Presumably, this was  
28 the manufacture of the device in January of 2006.

"Otherwise illegal Activity" is governed -purportedly-by  
the Attorney General's Guidelines on Use of Confidential  
Informants, available on line

[www.usdoj.gov/olp/dojguidelines.pdf](http://www.usdoj.gov/olp/dojguidelines.pdf). The very big problem  
presented for the government in the present case is that  
Mot Dism indictment based upon informant and FBI  
making a dangerous explosive device

1 there has never been any judicial approval of such a  
2 "guideline." While there is nothing stopping the Attorney  
3 General from directing FBI agents that they may allow agents  
4 working for them to engage in illegal activities, that is  
5 simply the executive branch telling the executive branch what  
6 is legal and what is not legal. It doesn't work that way. The  
7 judicial branch states what the law is. Has been that way for  
8 some time. Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 2 L.  
9 Ed. 60 (1803). As such, the first point here is that in all  
10 instances, allowing an informant -at the behest of the FBI--  
11 to engage in serious "Otherwise Illegal Activity" is illegal  
12 and violates the due process clause, requiring dismissal of  
13 charges.

14 Assuming without conceding that the activity is actually  
15 allowed by the courts, the conduct herein was even outside of  
16 the boundaries of the Attorney General Guidelines.  
17 Specifically, paying for, teaching, explaining, and helping  
18 to make an explosive device is not something for which an FBI  
19 Agent and an informant can get "OIA" authorization. A CI is  
20 never permitted to participate in **an act of violence**, nor  
21 perform an act which the agent could not do themselves. See  
22 The Attorney General's Guidelines on Use of Confidential  
23 Informants at page 20, Chapter III C.

24 Defense counsel has not been able to find one reported  
25 case where an FBI Agent and/or informant actually purchased  
26 the supplies and then assisted in the making of an explosive  
27 device which then resulted in prosecution of a defendant for  
28 entering into such a conspiracy.

1 This Circuit teaches the district courts that Federal  
2 courts have supervisory powers to formulate procedural rules.  
3 A court may exercise its supervisory powers to dismiss an  
4 indictment in response to outrageous government conduct that  
5 falls short of a due process violation. The supervisory power  
6 may be used to prevent parties from reaping benefit or  
7 incurring harm from violations of substantive or procedural  
8 rules (imposed by the Constitution or laws) governing matters  
9 apart from the trial itself. To justify exercise of the  
10 court's supervisory powers, prosecutorial misconduct must (1)  
11 be flagrant and (2) cause "substantial prejudice" to the  
12 defendant. United States v. Ross, 372 F.3d 1097, 1109-1110  
13 (9<sup>th</sup> Cir. 2004).

14 This criteria is met in the case at bar.

15 **CONCLUSION.**

16 For the reasons stated above, defendant respectfully  
17 asks that the Court grant his motion to dismiss the  
18 indictment with prejudice.

19 Respectfully submitted

20 DATED: December 19, 2006.

21  
22 MARK J. REICHEL  
23 ATTORNEY AT LAW  
24 Attorney for defendant

25 /S/ Mark Reichel  
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