

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

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

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

No. 2:06-cr-0035

VOLUME X

ERIC McDAVID,

Pages 1432 to 1478

Defendant.

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REPORTER'S TRANSCRIPT

COURT PROCEEDINGS

VERDICT

THURSDAY, SEPTEMBER 27, 2007

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Reported by: DIANE J. SHEPARD, CSR #6331, RPR

APPEARANCES

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For the Government:

McGREGOR W. SCOTT
UNITED STATES ATTORNEY
501 I Street, Suite 10-100
Sacramento, California 95814
BY: R. STEVEN LAPHAM
ELLEN ENDRIZZI
Assistant U.S. Attorneys

For Defendant, Eric McDavid:

MARK J. REICHEL
Attorney at Law
555 Capitol Mall, Suite 600
Sacramento, California 95814

1 SACRAMENTO, CALIFORNIA

2 THURSDAY, SEPTEMBER 27, 2007

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4 (Jury out.)

5 THE CLERK: Calling criminal case 06-00035, United
6 States v. Eric McDavid. On for jury trial, day 10, Your Honor.

7 THE COURT: Thank you. Good morning. We're outside
8 the presence of the jury. Counsel for the Government are
9 present. Mr. Reichel is present along with his client,
10 Mr. McDavid.

11 We're here, first of all, to determine a couple of
12 issues. One, when was contact first established for the
13 purposes of the entrapment instruction, and also to determine
14 what a definition of predisposition would be with respect to
15 that issue as well.

16 You've both had an opportunity to review the case
17 law, and I've received proposed instructions from the
18 Government, also a memorandum and instruction from Mr. Reichel.
19 The issues are pretty clear.

20 And let me ask you first, counsel, have you been able
21 to determine or find case law that has facts that are similar
22 to this particular case?

23 And the reason why I'm asking is -- and I think this
24 is where we're running into a problem -- and as was stated so
25 adeptly yesterday, entrapment/conspiracy don't really mix,

1 especially in the case where the conspiracy timeframe is one
2 that is on a continuum and is actually moving along on
3 different levels at the time.

4 The cases that I've been able to review tend to
5 indicate the crime that is the subject of the criminal action
6 is one that can be ascertained very specifically.

7 Normally, it's a conspiracy to purchase pornography,
8 and when that purchase occurs, you know when the crime occurs.
9 It's a conspiracy to purchase drugs, illegal drugs. You know
10 when it happened because the buy took place at a particular
11 time.

12 In this case the facts are, it seems to me, very
13 different from any cases that we've been able to come up with
14 that show where there's movement along a continuum. And this
15 is a very difficult position. So have you found anything
16 specifically?

17 MR. LAPHAM: I have not, Your Honor. But there is
18 another distinction, too, and that is in most of the cases I've
19 looked at, if not all of them, there is an initial Government
20 contact that suggests the crime. Here it's just the opposite.

21 THE COURT: It relates to the crime at hand.

22 MR. LAPHAM: Well, all the evidence in this case
23 shows that the contact or the suggestion for the crime came
24 from the defendant, not from the Government.

25 THE COURT: All right.

1 MR. LAPHAM: And I think that's very important.

2 THE COURT: And also if you look at Mr. Reichel's
3 position which is the case law is very clear that it's any
4 contact.

5 MR. REICHEL: Your Honor, my point would be that
6 Anna's testimony was that she did not just go to lawful or
7 political dissent groups. That she couldn't do that. She
8 thought it was illegal, whatever. But where she went was
9 individuals they suspected of criminal activity. And she was,
10 for the FBI, to go with suspicion to only individuals she
11 thought was engaged in criminal activity.

12 That's why she went to all of these things. She met
13 him at CrimethInc in Des Moines. And at the RNC she replies
14 back to the FBI the second time. First time says he has got a
15 clean bill. The second time she replies back that he is
16 someone who would be involved in illegal protest activity,
17 which was her job. Her job was to ferret out and --

18 THE COURT: The second time that she made that
19 response to the Government was when?

20 MR. REICHEL: In August of 2004. At the end of
21 August 2004. She testified that was the RNC. And it's on page
22 42 of her transcript that I have. She said she contacted the
23 FBI, and she told them to list him as someone who would engage
24 in illegal protest activity after the RNC. In other words, the
25 future. Because during the RNC he had made comments about

1 engaging in some sort of illegal protest.

2 THE COURT: Are we here about conspiracy for illegal
3 protest activity?

4 MR. LAPHAM: Your Honor, we have to keep in mind what
5 entrapment is. Entrapment is the Government intentionally
6 inducing a person, who would otherwise be unwilling to commit a
7 crime, giving them such a high benefit or reward, that an
8 otherwise innocent person would do something that's out of
9 their character.

10 We don't even get there if there is no Government
11 inducement, and if there's predisposition, and that's exactly
12 the case we have here.

13 THE COURT: But also -- and I understand what you are
14 saying -- but I also hear what Mr. Reichel is saying. But I
15 don't agree with you. I'll be honest with you. Because
16 advising the FBI that there was talk of illegal protest
17 activity is in a totally different context than why we're here
18 at this trial.

19 She could have advised them that he was attempting to
20 buy pornography, and she was going to help him -- which is the
21 cases we continue to read -- and if we were here for conspiracy
22 to purchase pornography, or he purchased it, as in the facts of
23 the cases that you are citing, I think we're talking about a
24 different situation.

25 In this case, the conspiracy that is being referred

1 to in the Indictment is specific, and that's not what she was
2 talking about when she was referring to illegal protest
3 activity.

4 MR. REICHEL: I understand, Your Honor. She talked
5 about Molotov cocktails at the RNC.

6 THE COURT: But that's still part of the protest
7 activity at the RNC. We're talking about allegedly planning to
8 use explosives regarding Nimbus Dam, the Fish Hatchery, and the
9 Institute for Forest Genetics and cell phone towers.

10 How do you connect those two to the RNC and the
11 protest activity?

12 MR. REICHEL: Because, first of all, we took that
13 away. Your Honor, what the Court just stated we took away
14 shortly before instructions. The Government said they were not
15 obligated in any fashion to prove that those were the targets,
16 just those types of targets, Government facilities and those
17 that received -- affect interstate commerce.

18 THE COURT: What they have to prove. That's not what
19 you are looking for for the defense of entrapment. That's part
20 of their case-in-chief. The two are not synonymous. They are
21 different.

22 MR. REICHEL: Part of their evidence of his guilt in
23 this case, for this conspiracy, is the talk, the production,
24 the working-on discussion of Molotov Cocktails. She reports
25 that he says this in August of 2004, and thereafter she

1 contacts him. She is trying to find him and Zach to bring them
2 to Philadelphia.

3 She testifies that, yes, she was looking for them on
4 the e-mail system, was planning to get them out there. I asked
5 her questions about it. She said she wanted them to get out
6 there, to come out there. That's, by the way, what they
7 allege, which we do not agree with, that the discussions were
8 about this conspiracy.

9 So you have somebody who is undercover capacity, does
10 all of these things, wants to bring Mr. McDavid out there to
11 continue her investigation, and they say that's when he first
12 proposes some of these things.

13 THE COURT: Investigation does not equal entrapment.

14 MR. REICHEL: Your Honor, investigation -- she did
15 nothing illegal. The Court, I hope -- you know got me wrong
16 yesterday when I said she -- it's not illegal for her to do
17 those things. It is not.

18 It wasn't illegal in Jacobson for the officers to do
19 what they did. The question is when is contact. Contact can
20 be extremely legal, which hers was. Let's say, in August in
21 Philadelphia, you name it where it is, it was legal. It
22 doesn't mean it wasn't contact.

23 THE COURT: But Jacobson is not on all fours with
24 this case.

25 MR. REICHEL: That's correct.

1 THE COURT: There wasn't -- there isn't a conspiracy
2 case that fits the facts of this case. And this is going to go
3 on appeal, and this is going to be a published opinion --

4 MR. REICHEL: I hope not.

5 THE COURT: And there is going to be a determination
6 either way. Either way. Because this is a situation where we
7 have a new set of facts, that is, you are trying to put a round
8 peg in a square hole. Because any contact does not fit a
9 situation where you are talking about a conspiracy, number one,
10 and when there has been contact over an extended period of
11 time. But all of the contact doesn't apply to the facts at
12 hand in the case.

13 Again, Jacobson, Poehlman, and all of the cases
14 regarding entrapment all look to a specific act, a particular
15 criminal act. Here, you are looking at a conspiracy. That's a
16 criminal act, but when do you start to talk about that, that he
17 is on trial for. He is not on trial for illegal protesting.
18 He is not on trial for talking about any activities at the RNC.

19 MR. REICHEL: Then, Your Honor, why --

20 THE COURT: So any contact by a Government informant
21 is really a misnomer. It turns everything upside down, because
22 that means that any time there's a governmental contact with
23 anyone, it starts your clock ticking, if you follow your
24 rationale.

25 MR. REICHEL: No.

1 THE COURT: It has to.

2 MR. REICHEL: No, Your Honor. My rationale would be,
3 my point would be that when they are there to investigate only
4 criminal activity, and they are in an undercover investigation
5 capacity, they discuss things including criminal activity, and
6 that agent reports back to the FBI, who makes notations on it,
7 files on it, and then the agent then says -- the undercover
8 employee says that this is someone to watch now because they
9 discussed illegal activity.

10 THE COURT: But there's got to be a nexus to the
11 crime that we're here in trial for, not just any criminal
12 activity. You can't induce someone to commit any kind of
13 criminal activity. That's not the context of this case.

14 Mr. Reichel, I've tried very hard, and I have
15 listened to you for three days on this, and I've reviewed the
16 cases. I've spent as much time as I can thinking about this.
17 But I cannot find that any contact as defined in Jacobson and
18 Poehlman means when there is the first contact between the
19 informer and the defendant that does not have a nexus to the
20 crime charged in the trial.

21 MR. REICHEL: Okay.

22 THE COURT: It doesn't make any sense. And if I read
23 what you are saying literally, as you said, any contact, then I
24 would have to go with where you're going. But to do that, it's
25 just irrational, and it's just something that's not been dealt

1 with by the circuits that we can find. You can't find one.
2 The Government can't find one. We can't find one.

3 So it appears that this may be -- or maybe there's
4 some obscure case somewhere -- but it appears to be a case of
5 first impression as far as a conspiracy -- an alleged
6 conspiracy where there have been a number of potentially
7 criminal acts that may have been discussed during the contact,
8 but only one, which occurs farther down in the realm of
9 contact, is what's applicable to the facts of this case.

10 MR. REICHEL: How are we going to answer it then?
11 The Court's overruled my objection, but I don't think the exact
12 language of the Government's proposed instruction is -- I mean,
13 has the Court reviewed the Government's proposed instruction?

14 THE COURT: Yes.

15 MR. REICHEL: I think it may go a little too far if
16 it says it can be no earlier than the first time there was
17 communication.

18 And it is -- it's for the jury to determine this fact
19 as well. I want that to be very clear for them, that they are
20 not going to get direction from the Court that contact means
21 this exact date or something like that.

22 THE COURT: I understand. They may agree that it's
23 June 5th, it could be January, whatever the date is, that's up
24 to them to decide.

25 MR. REICHEL: If they think it's August of '04?

1 THE COURT: They could think it's August of '04.

2 MR. REICHEL: Thank you.

3 THE COURT: But by saying that the contact occurred
4 on June 5th I think would be improper for the Court to make
5 that determination.

6 MR. REICHEL: Can we put in there that it's for them
7 to determine contact. This is a fact they are to determine.

8 THE COURT: I think that maybe an explanatory, maybe,
9 addition to this because if they are asking the Court to give a
10 specific date, the Court cannot give a specific date as to
11 that. That is for them to decide, unanimously, as to when it
12 is. But as far as what contact in general terms means, contact
13 can be no earlier than the first time that you agree there was
14 a communication between --

15 MR. REICHEL: Want to make it "means" instead of "can
16 be earlier." Can be no earlier. If it says contact as used in
17 these instructions means the first time that there is some
18 communication between the defendant and a Government agent.

19 MR. LAPHAM: Your Honor, I don't think that changes
20 the subject, but I think it makes it more confusing to
21 understand.

22 MR. REICHEL: I think "can be no earlier" puts a
23 dividing line there. I think it's a demarcation point.

24 MR. LAPHAM: That's what they are asking for.

25 MR. REICHEL: It gets close to a date in my opinion.

1 THE COURT: All right. My proposed response as far
2 as contact would be as follows: Contact as used in the
3 instructions is the time that you determine was the first time
4 that there was some communication between the defendant and the
5 Government agent about the crime charged in the Indictment.

6 MR. REICHEL: Other than my prior objections to it,
7 that's -- the language is fine.

8 MR. LAPHAM: That's fine.

9 THE COURT: I want to make certain that they
10 understand that it's for them to determine. If there was
11 contact and when there was contact, they must determine it, but
12 the Court cannot give that date.

13 MR. REICHEL: Thank you.

14 THE COURT: No objections?

15 MR. LAPHAM: No objection.

16 THE COURT: All right. That will be the response as
17 to the question as to when there was contact.

18 Predisposition.

19 MR. LAPHAM: Your Honor --

20 MR. REICHEL: I have no objection to the five
21 factors. You know, I gave the Poehlman one, but --

22 THE COURT: The case law is clear that the five
23 factors are the factors that the Court -- the jury, pardon me,
24 is to use to determine with the emphasis on the reluctance
25 portion being the most important.

1 MR. REICHEL: And here's the problem, is it's
2 confusing where it's says, the fact of his reluctance to engage
3 in criminal activity. To be consistent don't we have to
4 instruct them the criminal activity charged in the Indictment
5 because contact is right above that.

6 MR. LAPHAM: That would be fine.

7 THE COURT: That would be appropriate.

8 MR. REICHEL: Thank you, Your Honor.

9 THE COURT: All right.

10 MR. LAPHAM: Your Honor, I'll just put this out for
11 the Court. After we submitted this jury instruction, we came
12 across the 10th Circuit pattern instructions for entrapment,
13 and the 10th Circuit -- the comment to that indicates that
14 they've chosen to dispense with the word "predisposition" as it
15 sounds overly technical, and thus, may be confusing to the
16 average juror. I think that may be the situation we have here.
17 I printed out the 10th Circuit pattern instruction, if you'd
18 like to take a look at it.

19 MR. REICHEL: Just briefly. I might be running out
20 of appellate issues if we're going to leave the Ninth Circuit
21 manual of jury instructions on entrapment, Your Honor, to the
22 10th Circuit one. At some point I'm going to run out of paper
23 on the appeal if we go there.

24 THE COURT: I appreciate the 10th Circuit pattern
25 instruction. But, I think, as you know, I'm going to rely upon

1 the Ninth Circuit instruction until such time as they decide
2 that that's not going to be the pattern instruction.

3 MR. LAPHAM: That's fine. I merely point out there's
4 nothing inconsistent in the 10th Circuit instruction, nothing
5 inconsistent with Ninth Circuit law. It's simply dispenses
6 with the word "predisposition."

7 THE COURT: Mr. Reichel has got enough to work with
8 now.

9 MR. LAPHAM: All right.

10 MR. REICHEL: There is going to be no appeal, Your
11 Honor. Trust me.

12 Okay. They asked about the relevant time period for
13 predisposition yesterday. He said August of '04 or June of
14 '05. That was the last question from the juror.

15 MR. LAPHAM: I think we have to say that the
16 instruction we're going to give them --

17 THE COURT: I think the contact instruction states it
18 because to say August of '04 or --

19 MR. REICHEL: No. I agree. I think the Court has to
20 instruct them that -- pursuant to Jacobson that it's -- they
21 have to look at predisposition prior to any contact as contact
22 is defined in these instructions. You don't look at
23 predisposition at the date that -- the day they engage in the
24 conspiracy.

25 THE COURT: I understand. But the contact

1 instruction that the Court will give them will define what
2 their responsibility is with respect to when there was contact,
3 and I believe that the question that they asked at the end of
4 the day will be -- could very well be responded to once they
5 make this determination regarding contact.

6 Because I'm concerned about starting to put in a
7 specific date or time period or even making reference to it to
8 have the possibility of injecting a particular timeframe into
9 their deliberations, which will not be appropriate.

10 MR. REICHEL: But I think --

11 THE COURT: That was the question. Was contact -- it
12 was specific dates, and the way to actually respond to the
13 question as written -- or as stated here in open court would be
14 to give one of the dates.

15 MR. REICHEL: I think the answer to them would be
16 predisposition is the defendant's willingness to commit the
17 offense prior to first being contacted by Government agents,
18 period. And that's from Jacobson.

19 THE COURT: He asked, when do we start? August of
20 '04 or June of 2005. My intended response is to say that the
21 Court cannot give you a particular date, the date is one that
22 you have agreed upon as defined in the Court's previous
23 instruction regarding contact.

24 The jury can make that determination. They have to
25 make that determination without the Court interjecting what it

1 believes would be a relevant time period.

2 If they have another question regarding that, then
3 they can come back and ask another question. But the question
4 as posed on the record was very specific.

5 MR. REICHEL: His question was about predisposition,
6 and he was specific about the dates.

7 But I think to not instruct them that it has to be
8 prior to contact -- you look at predisposition prior to
9 contact, which you've defined -- if you don't instruct them
10 that it's predisposition prior to contact that has to be
11 evaluated, it's not answering the question. You look at
12 predisposition. That's why it's predisposition.

13 THE COURT: I'm responding to his question
14 specifically. And if they have another question, or he does or
15 anyone else, they can make a further response.

16 I think to start getting into additional instructions
17 which are not specific to the question asked, we're running
18 into a real problem. So I'm not going to give another
19 instruction on that. I'm going to advise him or the jury that
20 the Court cannot give them a specific date, and refer them back
21 to the instruction regarding contact.

22 Just so you know, also I'm going to give a further
23 instruction that by responding to the particular instruction
24 regarding predisposition and entrapment, the Court is not
25 putting any undue influence on a particular instruction. They

1 are to view the instructions as a whole, which is the standard
2 instruction that you should give whenever there is a read back
3 or anything else, and the same with the testimony, the
4 transcript. They are not to give undue influence to any
5 particular instruction that may be further defined.

6 Okay. We have the issue with respect to the read
7 backs. The court reporter has gone through and made
8 non-certified draft transcripts of the testimony from Ricardo
9 Torres. The portions that are relevant to the question asked
10 by the jury have been put in bold so that you can look at them
11 and see what would be read back.

12 And so I want to give these to you with the
13 understanding that these are not certified, and that you will
14 return them before the end of the day sometime. Hopefully it
15 will be this morning.

16 Actually, one more, Mr. Reichel, for your client.

17 Is there anything else at this time?

18 MR. LAPHAM: Your Honor, this maybe my own failing
19 memory. I remember talking about the read backs. I don't
20 remember about getting the defendant's personal consent to
21 giving the jury recording or play-back devices in the jury
22 room, and I think --

23 THE COURT: Honestly, I don't recall us talking about
24 play-backs until I received this case this morning about having
25 a video play-back. Did we discuss that yesterday?

1 MR. LAPHAM: I discussed it with your courtroom
2 deputy. She indicated that there had been a note, and that
3 they had wanted play-back equipment. That's all I remember.

4 MR. REICHEL: We consent to it. The defense does,
5 Your Honor.

6 THE COURT: But it would have to be with your
7 client's consent.

8 MR. REICHEL: Yes, he consents, Your Honor.

9 THE DEFENDANT: I do consent.

10 THE COURT: And you understand what we're referring
11 to?

12 THE DEFENDANT: Yes.

13 THE COURT: And that is providing the jury during
14 their deliberations with video/audio play-back equipment.

15 THE DEFENDANT: As long as that's it.

16 THE COURT: Just the equipment and you are consenting
17 specifically to not being present during the actual play-back,
18 Mr. McDavid; is that correct?

19 THE DEFENDANT: Yes.

20 THE COURT: Thank you.

21 MR. REICHEL: They had a question about whether she
22 was a Government agent, too, which we agreed we were going to
23 answer.

24 THE COURT: Yes.

25 MR. LAPHAM: Your Honor, I think we dealt with that

1 yesterday when we agreed that for the purpose of these
2 instructions she is a Government agent.

3 THE COURT: Yes. In August of '04. We did discuss
4 that.

5 MR. REICHEL: So we're going to advise them of that?

6 THE COURT: Yes.

7 MR. REICHEL: Thank you.

8 THE COURT: My concern is, once again, we're in that
9 term "agent." I think we've had enough discussion about
10 whether or not, as you recall, you refer to her, Mr. Reichel,
11 as an undercover FBI agent, and that's not the case. She was
12 not an undercover FBI agent as a sworn agent, but she was an
13 agent in the -- I guess the legal sense of responsible to a
14 superior.

15 That's the only concern that I have using the term
16 "agent." Did you wish to be heard on that particular term? I
17 just want to clear it up because that was something that we've
18 had to deal with in the past.

19 MR. REICHEL: What was their exact question?

20 THE COURT: The question is: Was Anna considered a
21 Government agent in August '04? If not, when did she become
22 one?

23 MR. REICHEL: We did decide that yesterday.

24 THE COURT: We did, and the answer was "yes," but I
25 just wanted to clarify that there is no objection to using the

1 term "agent," since it had been used in various terms
2 throughout the course of the trial and also during argument.

3 MR. LAPHAM: Well, that's the term that's used in the
4 instruction.

5 MR. REICHEL: Yes.

6 MR. LAPHAM: Government agent.

7 THE COURT: All right. I just wanted to put it on
8 the record that we've discussed that particular use.

9 MR. LAPHAM: Thank you.

10 MR. REICHEL: Thank you, Your Honor.

11 THE COURT: Thank you.

12 (Pause.)

13 THE COURT: Counsel, I want the record to reflect
14 with respect to when Anna was an agent to be that the Court
15 knows that there is a pattern instruction, Ninth Circuit,
16 number 6.3, as to when a witness is acting as a Government
17 agent as an instruction.

18 That, I believe, is not applicable to this particular
19 case because it's been made clear throughout the course of the
20 trial that she was, in fact, acting on behalf of the FBI, and
21 has made complete reference to that throughout the trial.

22 The 6.3 instruction would be one that would be
23 applicable in a case where, for example, it was a friend of the
24 defendant who actually was not necessarily being paid or
25 actually considered as such. And the jury was to determine

1 whether or not that person was an agent, quote, unquote, for
2 the purposes of the entrapment defense. So it does not apply
3 in this particular case.

4 Does the Government wish to be heard on that?

5 MR. LAPHAM: No, Your Honor.

6 THE COURT: Mr. Reichel?

7 MR. REICHEL: No. Thank you.

8 THE COURT: Thank you.

9 (Jury deliberating.)

10 (Back on the record. 10:32 a.m.)

11 (Jury out.)

12 THE COURT: All right. We're going to go back on the
13 record in the matter of United States versus McDavid. The jury
14 is not present in the courtroom at this time.

15 Let me just kind of put it all in a nice order, how
16 this is going to work. As soon as we're through here, we're
17 going to bring the jury in. There was two requests yesterday.
18 The first at 2:13 p.m. was to have the testimony -- actually,
19 the cross-examination of Anna regarding the FBI rules for
20 informants, and then the testimony of Ricardo Torres regarding
21 confidential witness and confidential informant guidelines.

22 As far as Anna, you have been previously given, both
23 of you, a certified copy of the transcript, and so -- and you
24 are aware of what will be read back; is that correct?

25 MR. LAPHAM: Yes.

1 MR. REICHEL: Yes.

2 THE COURT: All right. The second one was the
3 Ricardo Torres testimony, which you received this morning in
4 the form of a non-certified draft transcript with the portions
5 relating to the request that were placed in bold.

6 It's the Court's intention at this time to have the
7 court reporter read back those bolded portions, which will be
8 in direct response to the jury's request.

9 Have you had an opportunity to review that from the
10 Government?

11 MR. LAPHAM: Yes.

12 THE COURT: Have you had an opportunity to review it
13 for the defense?

14 MR. REICHEL: Yes.

15 THE COURT: Is there an objection that you have to
16 the court reporter giving the read back of the bolded portions
17 of the transcript of Agent Torres?

18 MR. LAPHAM: No.

19 MR. REICHEL: No, Your Honor.

20 But maybe a comment. That if there's -- you know, I
21 think -- the problem with that question from Mr. Torres is I
22 think that was almost the entire cross-examination of him was
23 about his knowledge of the guidelines and so forth. But there
24 is a lot that's highlighted, and I think it's probably fair to
25 say that if there's something they thought they heard and

1 didn't hear, they may call for another read back, but --

2 THE COURT: Which?

3 MR. REICHEL: We'll let them do.

4 THE COURT: Which may happen.

5 I intend then, if there is no objection, to have
6 those two portions of transcript read back with the instruction
7 that they are not to give any undue influence to either of
8 those read backs. That it's to be taken in conjunction with
9 all of the evidence that they've heard.

10 MR. LAPHAM: Agreed.

11 THE COURT: Very well. That portion is done. The
12 second request was on jury instruction 18. What does
13 predisposition mean?

14 MS. ENDRIZZI: Mark has it. No, we have it.

15 THE COURT: The Court would intend to give an
16 instruction which basically utilizes the five factors which
17 have been set forth in the comment to Ninth Circuit Instruction
18 6.2 regarding entrapment. And let me put it on the record
19 here.

20 MR. REICHEL: Briefly, Your Honor. That's not in the
21 Ninth Circuit comments that --

22 THE COURT: I'm sorry. It's not. Well, the five
23 factors are as part of the commentary to 6.2.

24 MR. REICHEL: Which have I no problem with, unless
25 I'm looking at a different book. The one the Government has

1 just provided to you doesn't track that language, Your Honor.

2 MS. ENDRIZZI: Correct. That's what we said
3 yesterday when we asked to look at Thickstun, which is why I
4 provided such a lengthy list of cases that use that exact
5 language, and have both parts -- both the reluctance and the
6 fact that the lack of reluctance is most important. So that
7 was in the file.

8 MR. REICHEL: What you have before you is not from
9 the comment. It's put together from a few cases from the
10 Government.

11 But my problem is that it omits number five, which is
12 in the comment states: Anything or any other evidence
13 regarding predisposition that you find.

14 It also -- it substitutes a new number four where
15 there was not in the comments. And that's actually not --

16 THE COURT: Well, they are not the exact comments,
17 but that's the starting point, which is what I was trying to
18 refer to. And also when you start to then read the cases in
19 the comments, it refers you specifically to the language that's
20 in this instruction.

21 So poor choice of words that it's exactly from the
22 comments. It is the starting point from the five factors set
23 forth in 6.2 entrapment, with the language that is clear
24 throughout all of the case law as to what factor is to be the
25 most important.

1 And there have been modifications to that, even as of
2 today and even as of the last time we were on the record in
3 this case this morning. So I understand your position. That's
4 not exactly, but that's a starting point.

5 MS. ENDRIZZI: Your Honor, and I should say in my
6 reviewing all those cases for the five factors, I did not see a
7 single case where it tracked the exact comment of -- I mean,
8 that any other factor related to predisposition.

9 MR. REICHEL: I can't imagine why the Ninth Circuit
10 has it in their manual. It's clearly --

11 THE COURT: It's also a comment.

12 MS. ENDRIZZI: Right.

13 MR. REICHEL: But, Your Honor, the comment section
14 provides that the Government must prove the defendant was
15 disposed to commit the crime prior to being approached by the
16 Government; however, evidence gained after contact can also be
17 used to prove the defendant was predisposed before the contact.

18 It says that this new instruction is there because
19 the prior instruction was erroneous because it failed to state
20 clearly the Government's burden of establishing beyond a
21 reasonable doubt the defendant was disposed to commit the
22 criminal act prior to being first approached by Government
23 agents. Citing Jacobson. That's in the comment section.

24 And I don't think this instruction clearly identifies
25 that. And I think it's clear error under the Ninth Circuit

1 text book law that they must be instructed for predisposition
2 that the defendant was disposed to commit the criminal act
3 prior to first being approached by the Government agents.

4 THE COURT: We're going over the same thing again,
5 Mr. Reichel.

6 MR. REICHEL: Contact is fine. I understand when the
7 contact is. But this instruction the Court is giving does not
8 say prior to.

9 MS. ENDRIZZI: Your Honor, I think the problem is
10 that our jury seems to be very confused about dates, when they
11 can start, when they can stop, when they can think about things
12 and apply the facts that they've got.

13 That instruction that you have up there, where it
14 says before and after, is a revision of comment here in 6.2.
15 But of the cases that I had brought with me today to court,
16 there is also Ninth Circuit guideline -- guidance for the same
17 proposition, and I can provide those.

18 THE COURT: I've reviewed the cases, and I believe
19 that the instruction as modified today is the appropriate
20 instruction, and I'm going to give this instruction, and I'm
21 going to put it on the record what I'm going to give.

22 With respect to what does predisposition mean, there
23 are five factors to consider when determining predisposition:
24 One, the character or reputation of the defendant; two, whether
25 the Government made the initial suggestion of criminal activity

1 charged in the indictment; three, whether the defendant engaged
2 in the activity for profit; four, whether the defendant showed
3 any reluctance before or after agreeing to commit the criminal
4 activity charged in the Indictment; and five, the nature of the
5 Government's inducement. Although none of these factors alone
6 controls, the most important is the defendant's reluctance to
7 engage in the criminal activity charged in the Indictment.

8 That is the instruction or response that will be
9 given to number one.

10 As to number two of the question, it was: Was Anna
11 considered a Government agent in August of '04?

12 The answer that was agreed upon yesterday is, "yes."

13 As to number three, what does contact mean? Contact
14 means, as used in the instruction, is the time that you
15 determine -- is the time that you determine was the first time
16 there was some communication between the defendant and a
17 Government agent about the crime charged in the Indictment.

18 Now, we have received a new communication from the
19 jury. If you wait one second. Let me make sure everything is
20 straight.

21 The final communication was regarding the conjunction
22 "or" in jury instruction 18. And it must mean the "or" between
23 paragraph number one and paragraph number two.

24 Question: Is the jury to read the instruction as
25 meaning that if the first case, i.e., predisposed is not

1 influenced by the Government, then the second case, inducement,
2 need not be considered, or does the jury need to consider both
3 definitions of entrapment i.e., that the Government must prove
4 both criteria for entrapment not to be present.

5 MR. REICHEL: My comment is I don't think they
6 understand the instruction at that point but --

7 THE COURT: Well, the "or" --

8 MR. REICHEL: The "or" I have no dispute. That's
9 clear. And I know the law on that but.

10 THE COURT: And so you believe that it's "or," the
11 Government must prove one or two.

12 MR. REICHEL: Yes.

13 THE COURT: A reading.

14 MR. REICHEL: I'm sorry?

15 THE COURT: Is that what you are saying?

16 MR. REICHEL: Well, the law is -- they have to prove
17 beyond a reasonable doubt that he was not predisposed, or they
18 have to prove beyond a reasonable doubt it was not inducement.

19 MR. LAPHAM: Agreed.

20 THE COURT: Ms. Endrizzi?

21 MS. ENDRIZZI: I was just thinking. But if there's
22 predisposition, you don't get to the question of inducement.
23 That's what I want to make real clear to them in there.

24 MR. LAPHAM: Which is what they're asking.

25 THE COURT: But that's "or." I think they understand

1 the word "or." If they find one, they don't have to find two.

2 MR. LAPHAM: Well --

3 MS. ENDRIZZI: If they find predisposition, then they
4 don't have to look at --

5 THE COURT: Correct.

6 MS. ENDRIZZI: -- entrapment.

7 THE COURT: No.

8 MR. REICHEL: Inducement.

9 THE COURT: Inducement.

10 MS. ENDRIZZI: Inducement.

11 MR. LAPHAM: But at least someone is apparently
12 confused about that, and they want a definite answer on whether
13 they need to go further and consider inducement, even though
14 they've eliminated predisposition, which is why we submitted
15 the language from the McClelland case.

16 THE COURT: And that language that you are requesting
17 is: If the defendant is found to be predisposed to commit the
18 crime, an entrapment defense is unavailable regardless of the
19 inducement.

20 MR. LAPHAM: Correct.

21 THE COURT: I understand that. But in light of fact
22 that we're hung up on the word "or," I think that there may be
23 a simpler way to even say that for the jury, so that it's clear
24 what the responsibility is.

25 MR. REICHEL: It's just 6.2 -- it couldn't be more

1 clear for them.

2 THE COURT: Well, for someone it's not clear. And I
3 think it's very clear.

4 MR. REICHEL: And this is the Ninth Circuit model
5 jury instruction, and to craft something where we leave this
6 language, which couldn't be more clear, causes me concern.

7 MS. ENDRIZZI: But they've received that instruction,
8 they are confused by it, and now we're making it even more
9 simple. I think you are protected by having the instruction
10 there in the first place.

11 THE COURT: Proposed response: If you find beyond a
12 reasonable doubt that the defendant was predisposed to commit
13 the crime charged in the Indictment, you do not need to
14 consider inducement.

15 MR. LAPHAM: That's acceptable.

16 THE COURT: I think that's a cleaner, simpler way to
17 say what the law is, utilizing the McClellan case, and
18 following the instruction itself. I think it answers what the
19 question is without getting too far down the road into --

20 MR. REICHEL: Your Honor, I think you have to put the
21 time of the contact, and you defined contact already.

22 THE COURT: But that's already in another
23 instruction.

24 MR. REICHEL: No. The time of contact is in the
25 instruction. Not the relevant timeframe for predisposition.

1 THE COURT: That's not their question. The question
2 is: Do you have to have both one and two? And the response
3 is, no, you do not. That's their question. They didn't ask
4 when the relevant timeframe would be. They asked do you have
5 to consider paragraphs one and two.

6 MR. REICHEL: So it is beyond a reasonable doubt,
7 predisposed --

8 THE COURT: To commit the crime charged in the
9 indictment --

10 One more time. If you find beyond a reasonable doubt
11 that the defendant was predisposed to commit the crime charged
12 in the Indictment, you do not need to consider inducement.

13 That's a direct response to their question.

14 MR. REICHEL: And then, Your Honor, I'll submit it.
15 I'll be done with it. It is -- couldn't be, in my opinion, a
16 misapplication of clear law that they must know in an
17 entrapment instruction that the defendant was disposed to
18 commit the crime prior to being approached by the Government.

19 I have no problem with that being the contact the
20 Court has described. There is no instruction to these people
21 in there that it's prior to the time of contact. They have no
22 instruction as to prior. They have instructions as to
23 everything else. Predisposition has to be defined as
24 disposition prior.

25 THE COURT: And I will stand pat with the Ninth

1 Circuit instruction on that particular issue.

2 MR. REICHEL: Okay.

3 THE COURT: All right. And I think that to go any
4 further, and we are once again going into pinpoint
5 instructions, which are going to be a problem. And I believe
6 that we take the most general and give -- respond only to the
7 question.

8 MR. REICHEL: Are they instructed that predisposition
9 is disposition prior to the contact we've defined? Is it
10 anywhere on the record for them that it's prior to? No where.

11 MR. LAPHAM: I think you've made your record.

12 MR. REICHEL: That is a clear misapplication of the
13 phrase predisposition. Okay.

14 THE COURT: Noted.

15 MR. REICHEL: Thank you, Your Honor.

16 THE COURT: Thank you. Let's bring the jury in, so
17 we can give the responses, please.

18 (Jury in.)

19 THE COURT: Good morning, ladies and gentlemen, and
20 welcome back. I'm going to respond to all of the questions at
21 one time that we've received both yesterday and today.

22 And for the record, all 12 jurors are present, seated
23 in the jury box.

24 First of all, with respect to your request that was
25 received at approximately 2:13 p.m. yesterday regarding the

1 cross-examination of Anna regarding the FBI rules, as well as
2 the testimony of Agent Torres regarding the rules on
3 confidential witnesses and confidential informants, you will
4 have the read back of that by the court reporter as soon as we
5 get through with this proceeding right now.

6 One thing that I want to advise you as far as hearing
7 read back, please do not give any undue influence to the
8 portion of testimony that you hear during the course of the
9 read back. That testimony that's being read back is to be
10 viewed in the context of all of the evidence that you've
11 received during the course of the trial.

12 The concern is during the read back that you may put
13 undue influence on that particular part of the trial testimony.
14 Please do not do that.

15 Second of all, I'll remind you that during the course
16 of the read back, you are not to deliberate or have any
17 discussions until after the court reporter has finished the
18 entire read back of both portions of testimony and has left the
19 deliberation room.

20 The second question received was approximately 3:05
21 yesterday regarding jury instruction number 18, part one.

22 The first question is: What does predisposition
23 mean?

24 The response is as follows: There are five factors
25 to consider when determining predisposition. One, the

1 character or reputation of the defendant; two, whether the
2 Government made the initial suggestion of criminal activity
3 charged in the Indictment; three, whether the defendant engaged
4 in the activity for profit; four, whether the defendant showed
5 any reluctance before or after agreeing to commit the criminal
6 activity charged in the Indictment; and five, the nature of the
7 Government's inducement.

8 Although none of these factors alone controls, the
9 most important is the defendant's reluctance to engage in the
10 criminal activity charged in the Indictment.

11 That is the response to question number one.

12 Question number two: Was Anna considered a
13 Government agent in August '04?

14 The answer: Yes.

15 Question number three: What does contact mean?

16 Contact as used in the instruction is the time that
17 you determine the defendant -- strike that. Repeat. Start
18 over again.

19 Contact as used in the instruction is the time that
20 you determine was the first time that there was some
21 communication between the defendant and a Government agent
22 about the crime charged in the Indictment.

23 Finally, the question today, received just a few
24 moments ago regarding the conjunction "or" in the jury
25 instruction 18.

1 Your question: Is the jury to read this instruction
2 as meaning that if the first case, i.e. predisposed, is not
3 influenced by the Government, then the second case, inducement,
4 need not be considered, or does the jury need to consider both
5 definitions of entrapment i.e. that the Government must pass
6 both criteria for entrapment not to be present.

7 The response is as follows: If you find beyond a
8 reasonable doubt that the defendant was predisposed to commit
9 the crime charged in the Indictment, you do not need to
10 consider inducement.

11 That will conclude the responses to the questions
12 that the Court has received up to this point. Are there any
13 other questions that I have not received yet? Yes.

14 Juror 11: Your Honor, that was a whole lot of
15 information for us to write down in that big of a hurry.

16 THE COURT: I will prepare the instruction and the
17 responses and provide that to you in writing, but I wanted to
18 give those to you now.

19 JUROR 11: Thank you.

20 THE COURT: Again, when I have given additional
21 instructions to those that were given previously, you are not
22 to give any undue influence to what I've said today. You are
23 to read all of the instructions again, as a whole, and not give
24 any undue influence on these responses as to any particular
25 instruction. All right. Yes, ma'am?

1 JUROR 2: The timeframe. When does the evidence
2 start? June 2005 or prior to that?

3 THE COURT: Can you be more specific than when does
4 the evidence start. There's been evidence of a lot of things
5 that have occurred during the course of the trial.

6 JUROR 2: It's one of our biggest questions is where
7 we start looking at it.

8 JUROR 12: In the entrapment portion, do we consider
9 entrapment from June of '05 or back to August of '04?

10 THE COURT: You don't have this in front of you, but,
11 again, the instruction that I've given today regarding contact,
12 I think will give you the answer if you reread when you receive
13 it.

14 JUROR 12: Can you read that again?

15 THE COURT: Yes. Again, not putting any undue
16 influence on it, but if you'll listen to what the instruction
17 is, I think it may help you answer the question.

18 Contact as used in the instruction is the time that
19 you determine was the first time that there was some
20 communication between the defendant and a Government agent
21 about the crime charged in the Indictment.

22 Hopefully, that will help define what you are asking.
23 Anything else?

24 JUROR 11: Will that be in the information that
25 you're going to give us?

1 THE COURT: This will all be in response to your
2 questions. It will be signed by me and given to you just as
3 the other response was given.

4 It's just that this has been a work-in-progress up
5 until just a few moments ago, and I don't think you could
6 follow what I've just read to you without me cleaning it up a
7 little bit. But you should have it within the next ten to
8 fifteen minutes at the latest.

9 MR. REICHEL: Your Honor, may we have a brief sidebar
10 on the question that was asked?

11 THE COURT: No. We'll dismiss the jury first.

12 Ladies and gentlemen, you've heard the responses. If
13 you would please now return to your deliberations. Thank you.

14 (Jury out.)

15 THE COURT: All right. The jury has left the
16 courtroom. Mr. Reichel.

17 MR. REICHEL: Thank you, Your Honor.

18 I was going to ask the Court to instruct the jury
19 that the instructions you gave just now, I think, there was
20 more than just the contact one which explained for them what
21 evidence to focus on.

22 Fortunately, the instruction they got from the
23 Government cited, as one of the factors for predisposition,
24 reluctance before and then after contact with the Government.

25 Now, they clearly asked, clearly asked about the

1 relevant evidence time period. I don't know why we even spent
2 a moment of anyone's time in the trial about anything from June
3 of 2005 forward.

4 I believe they have been instructed that the relevant
5 time period -- they've just been instructed the relevant time
6 period for evidence consideration is from when they determine
7 there was communication between the defendant and the
8 Government agent about the commission of this crime charged in
9 the Indictment, which under the Government's theory, and the
10 evidence there is clearly June or July of 2005. They've been
11 told that they are not to consider the predisposition of the
12 defendant prior to June of 2005.

13 And I would renew my request for the brief
14 instruction under Jacobson and Ninth Circuit manual that
15 predisposition is the Government's burden to prove beyond a
16 reasonable doubt prior to contact. And you may consider
17 evidence after contact. But they must prove beyond a
18 reasonable doubt prior to contact that he was predisposed.

19 They were just instructed to begin their
20 deliberations about predisposition from June of 2005.

21 THE COURT: No, they weren't. No, they were not.
22 That's what they were asking initially. The first juror said:
23 When do we start to view the evidence? Well, first of all,
24 that is probably a lay person's terminology trying to focus.
25 The next juror said, we're trying to figure out is it this time

1 or this time.

2 The point is they have to determine the contact
3 relative to the charges in the Indictment. Once they figure
4 that out, all of the questions, I think, will fall into place.
5 The Court does not and cannot give an instruction as to when
6 they are to begin looking at the timeframe. And that's what
7 you are wanting to do, and, again, it's not going to happen.

8 MR. REICHEL: I think we just did, Your Honor. We
9 told them to consider evidence after the date that there's
10 contact. And contact is defined as communication about this
11 crime in this Indictment. And as a result, we told them
12 expressly what contact -- what timeframe to start looking at
13 the evidence. All of the character evidence, everything else
14 about prior to June of 2005 is to be -- will not be considered
15 by them.

16 THE COURT: No, it won't. This is relevant to
17 entrapment. Okay. Mr. Lapham.

18 MR. LAPHAM: I have nothing further to submit. I
19 think my position is clear.

20 THE COURT: All right. Nothing else?

21 MR. REICHEL: That's it. Thank you, Your Honor.

22 As far as timing, the read back is going to take
23 place in the jury room, correct?

24 THE COURT: That was the stipulation by yourself and
25 Mr. McDavid. Is that still your agreement, sir?

1 THE DEFENDANT: Yes.

2 THE COURT: Is that "yes".

3 THE DEFENDANT: Yes.

4 THE COURT: Thank you.

5 MR. REICHEL: I have to run to Woodland just quickly
6 to do a court appearance that's been hanging for a while.

7 THE COURT: Well, it's 11:00 now. I'm assuming that
8 it's going to take some time to read this back, and they are
9 going to have their lunch break, so it may continue on after
10 just for the read back.

11 MR. REICHEL: Call my cell.

12 THE COURT: Woodland is 15 minutes from here.

13 MR. REICHEL: It's actually just an arraignment.
14 Thank you, Your Honor.

15 THE COURT: Thank you. Court's in recess.

16 (11:00 a.m. Jury deliberating.)

17 (3:33 p.m. Jury in.)

18 THE CLERK: Calling criminal case 06-00035, United
19 States v. Eric McDavid.

20 THE COURT: Thank you. Good afternoon, ladies and
21 gentlemen. And for the record, all 12 jurors are present.
22 Counsel for the Government is present. Also counsel for the
23 defendant, and the defendant is also present here as well.

24 The jury foreperson, Mr. Gisler, I have received
25 written communication that you have reached a unanimous verdict

1 in this case. Is that correct, sir?

2 Juror 11: Yes, Your Honor, we have.

3 THE COURT: Thank you. In a few moments, ladies and
4 gentlemen, the Clerk is going to read the verdicts aloud here
5 in open court. I'm going to ask that you pay close attention
6 as she reads the verdict because in the event either side
7 requests that the jury be polled, that means that you will be
8 asked individually if the verdict as read is your true and
9 correct verdict. You will need to make sure that everything
10 that you hear is your true and correct verdict.

11 Madam Clerk, will you please publish the verdict at
12 this time.

13 THE CLERK: Yes, Your Honor.

14 Ladies and gentlemen of the jury, listen to your
15 verdict as it shall stand recorded:

16 In the case of United States of America versus Eric
17 McDavid, criminal number 06-0035-MCE.

18 We, the jury, unanimously find as follows:

19 As to Count One of the Indictment, charging defendant
20 Eric McDavid with a violation of Title 18, United States Code,
21 Section 844(n), Conspiracy to Violate 18 U.S.C. Sections 844(f)
22 and (i): Guilty.

23 If your response is not guilty, please sign and date
24 this form and return it to the Clerk.

25 If your response is guilty, please answer the

1 following question:

2 Please state the names of the persons you agree
3 conspired with the defendant. Your decision as to any person
4 must be unanimous.

5 Lauren Weiner and Zachary Jenson.

6 Dated September 27, 2007, by the jury foreperson,
7 Mr. Gisler, Your Honor.

8 THE COURT: Thank you. Does Government wish to have
9 the jury polled?

10 MR. LAPHAM: No, Your Honor.

11 THE COURT: Does the defense?

12 MR. REICHEL: Yes, Your Honor.

13 THE COURT: Thank you. Madam clerk, will you please
14 poll the jury as to the verdict.

15 THE CLERK: Ladies and gentlemen of the jury, as I
16 call your name, please answer "yes" or "no" to the following
17 question:

18 Ms. Runge, is the verdict as read your verdict?

19 JUROR 1: Yes.

20 THE CLERK: Ms. Gerdin, is the verdict as read your
21 verdict?

22 JUROR 2: Yes.

23 THE CLERK: Mr. Holmquist, is the verdict as read
24 your verdict?

25 JUROR 3: Yes.

1 THE CLERK: Mr. Page, is the verdict as read your
2 verdict?

3 JUROR 4: Yes.

4 THE CLERK: Ms. Wheeler, is the verdict as read your
5 verdict?

6 JUROR 5: Yes.

7 THE CLERK: Mr. Parnell, is the verdict as read your
8 verdict?

9 JUROR 6: Yes.

10 THE CLERK: Mr. Schmidt, is the verdict as read your
11 verdict?

12 JUROR 7: Yes.

13 THE CLERK: Ms. Sotelo, is the verdict as read your
14 verdict?

15 JUROR 8: Yes.

16 THE CLERK: Mr. Regan, is the verdict as read your
17 verdict?

18 JUROR 9: Yes.

19 THE CLERK: Ms. Bennett, is the verdict as read your
20 verdict?

21 JUROR 10: Yes.

22 THE CLERK: Mr. Gisler, is the verdict as read your
23 verdict?

24 JUROR 11: Yes.

25 THE CLERK: And Mr. Doolan, is the verdict as read

1 your verdict?

2 JUROR 12: Yes.

3 THE COURT: The verdict has been unanimously verified
4 as being that of the jury at this time.

5 Madam Clerk, will you please file and record the
6 verdicts.

7 Ladies and gentlemen, this will conclude your service
8 as jurors in this case. And on behalf of all of the members of
9 the United States District Court for the Eastern District of
10 California, I want to thank you for your time. And I'm sure I
11 speak on behalf of both Government's counsel and also defense
12 counsel. We appreciate your time that you put in and the
13 effort that you put in in your service as jurors in this case.

14 In just a few moments, I am going to discharge you
15 officially as jurors. Once you have been discharged, your
16 obligation and responsibility of not discussing the case will
17 be lifted. You will be free to discuss the case with anyone.
18 By the same token, you are free not to discuss the case with
19 anyone.

20 You will be given the opportunity to pick up your
21 personal effects in just a moment as you leave. I generally
22 invite the jurors back to my chambers for a short moment to say
23 thank you personally for your time. I cannot discuss the case
24 with you obviously. There may be other issues that I have to
25 deal with. But I know that that is something that I do on a

1 normal basis.

2 In addition, I know that the attorneys generally like
3 to speak to the jurors, if you would like to do so, regarding
4 particular issues you saw or didn't see. And they will, I'm
5 certain, be present for that if they wish.

6 MR. REICHEL: Yes.

7 THE COURT: All right. Again, but you are not
8 required to do anything. You are free to go about your
9 business as soon as I have discharged you, or you're free to
10 stay. That is entirely up to you.

11 Again, I want to thank you very much for your time.
12 Is there any reason why this jury should not be discharged on
13 behalf of the Government?

14 MR. LAPHAM: No, Your Honor.

15 THE COURT: Any reason behalf of the defense?

16 MR. REICHEL: No, Your Honor.

17 THE COURT: Ladies and gentlemen, thank you very
18 much. You are now discharged.

19 (Jury out.)

20 THE COURT: I'm going to set this matter for Judgment
21 and Sentence to be heard on December 6, 2007, that will be at
22 9:00 a.m. in this courtroom.

23 Mr. McDavid, you are going to be asked to give
24 information to the Probation Officer for a preparation of a
25 Presentence Evaluation and Report. I'm going to advise you at

1 this time that you are permitted to have your attorney present
2 if you so desire.

3 At the time of your Judgment and Sentencing, you will
4 be given an opportunity, as well as your attorney, to address
5 the Court prior to that being pronounced. The same will also
6 apply to the Government.

7 Mr. McDavid is formally referred to the Probation
8 Office for the preparation of the Presentence Report.

9 Pending the Judgment and Sentence in this matter, I'm
10 going to order that Mr. McDavid remain in the custody of the
11 United States Marshal pending the Judgment and Sentence.

12 Is there anything else, Mr. Reichel?

13 MR. REICHEL: Nothing further right now, Your Honor.

14 MR. LAPHAM: No, Your Honor.

15 THE COURT: Thank you very much. Court's adjourned.

16 THE COURT: Counsel -- did the Government already
17 leave?

18 May I get a stipulation to return the exhibits at
19 this time --

20 MR. REICHEL: Yes.

21 THE COURT: -- to the party that offered them?

22 MR. REICHEL: Yes.

23 MS. ENDRIZZI: Yes.

24 THE COURT: Thank you.

25 (Court adjourned.)

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CERTIFICATION

I, Diane J. Shepard, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/S/ DIANE J. SHEPARD
DIANE J. SHEPARD, CSR #6331, RPR
Official Court Reporter
United States District Court