

1 MARK J. REICHEL, State Bar #155034
2 THE LAW OFFICES OF REICHEL & PLESSER
3 455 CAPITOL MALL, 8th FLOOR, SUITE 802
4 Sacramento, California 95814
5 Telephone: (916) 498-9258
6 FAX: (888) 567-2949
7 mark@reichellaw.com
8 www.reichellaw.com

9 Attorney for Defendant
10 ERIC TAYLOR MCDAVID

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

13 UNITED STATES OF AMERICA,)
14 Plaintiff,)
15 v.)
16 ERIC TAYLOR MCDAVID)
17 Defendant.)

Case No. CR-S-06-035 MCE

**DEFENDANT'S MOTION FOR ORDER
TO SHOW CAUSE REQUIRING THE
GOVERNMENT TO SHOW CAUSE HOW
AND WHY IT WITHHELD
DOCUMENTS FROM THE DEFENSE
WHICH IT SHOULD HAVE
PRODUCED PRIOR TO TRIAL;
DECLARATION OF COUNSEL**

18 Date : September 3, 2015
19 Time : 9:00 a.m.
20 Judge: HON. Morrison C.
21 England

22 **I. INTRODUCTION**

23 Defendant Eric McDavid, through his undersigned counsel,
24 hereby respectfully requests that the Court issue an **Order To**
25 **Show Cause** to the government to show cause how and why it
26 withheld approximately 3,000 pages of investigative documents
27 from him until long after he was convicted in 2007 -
28 documents which he did not begin to receive until a *third*
Freedom of Information Act Request bore fruit in 2010.

Mtn For Order Of OSC

1 Numerous documents which the FBI and the U.S. Attorney's
2 Office belatedly produced, and others it is still
3 withholding, bear so directly on Mr. McDavid's entrapment
4 defense and the informant's credibility as to make out per se
5 *Brady* violations by the FBI agents and/or the prosecutors
6 involved in the case. These include (but are not limited to):

7 (a) correspondence between Mr. McDavid and "Anna," the
8 paid informant¹;

9 (b) information pertaining to the FBI's decision to order
10 - then cancel - a polygraph examination of Anna;

11 (c) documents related to the FBI Behavioral Analysis
12 Unit's profile of Mr. McDavid and its purported instructions
13 to Anna how to rebuff his romantic overtures (which it now
14 appears may have involved instructions how to exploit his
15 romantic overtures).

16 The government's belated production of some (but still
17 not all) of these documents set the stage for Mr. McDavid's
18 brokered plea to a lesser charge, and his release, pursuant
19 to his 28 U.S.C. § 2255 motion and his *Brady* claims therein,
20 on January 8, 2015, after he had served nine years behind
21 bars. Deliberately or not, the government derived an unfair
22 advantage as a result of its withholding, and it pressed that
23

24 ¹ Such evidence could not be more central to the case. McDavid was the lead defendant of a multi
25 agency, million dollar investigation. All cars and houses were wiretapped, and the informant was wired.
26 Written letters from McDavid to Anna were actually written unbeknownst to the FBI, obviously. Why
27 weren't the audio tapes misplaced? The video tapes misplaced? It is indeed a sad state of affairs that the
28 federal law enforcement agents on the case would be so emboldened as to believe that letters written by
the main defendant (expressly stating in his own words his views of the plans) to the FBI themselves could
be shielded from production by stating that they "don't exist" and upon discovery to state that they were
"misplaced." Especially so more shocking because it was in the face of his attorney's written court
demands for their production.

1 advantage at every stage of the case, including well into Mr.
2 McDavid's § 2255 proceedings, by repeatedly deriding Mr.
3 McDavid's contention that he had a romantic relationship with
4 Anna the informant, which we now know she in fact
5 reciprocated. The references in this motion to "the
6 prosecutors" are to the Assistant U.S. Attorneys who tried
7 this case², and not to the members of the U.S. Attorney's
8 Office who were instrumental in resolving the matter in late
9 2014 and early 2015. It was not until three years later that
10 Mr. McDavid learned, via his third FOIA request, that the FBI
11 had ordered and then mysteriously cancelled a polygraph
12 examination of Anna at a critical juncture in the
13 investigation. To this day, however, the government has not
14 produced any information concerning its reservations about
15 Anna's credibility, or why it cancelled the polygraph. An
16 apparently improper "privacy" redaction still conceals the
17 name of the Assistant U.S. Attorney who approved the FBI's
18 polygraph request.

19 On September 27, 2007, the jury convicted Mr. McDavid
20 following two days of deliberations, during which the jury
21 asked pointed questions about entrapment. A number of jurors
22 later recanted their verdicts upon developing a fuller
23 picture of the case and reported that they had come close to
24 deciding that Mr. McDavid was entrapped. See, e.g., the two
25 Juror declarations at Dkt. Nos. 315 and 316; also available

27 ²Those prosecutors, like the trial judge in the case, might very well be considered "victims"
28 (although to a lesser degree than Mr. McDavid) if in fact *they* were misled by law enforcement agents who
must have withheld the evidence; the trial prosecutors have reputations to be concerned about and will be
caused to suffer if the truth does not reach the teaching light of justice.

1 at <http://supporteric.org/court-documents.>

2 During the hearing on January 8, 2015, which resulted in
3 Mr. McDavid's plea to a lesser charge and release with time
4 served, the government insisted repeatedly that its
5 withholding was "inadvertent." (1/8/15 Reporter's Transcript
6 ("RT") at 5:14, 11:13, 19:17, and 21:7.) To the news media,
7 the government has acknowledged only that "a mistake was
8 made." *"Another View: Mistake was made, but no misconduct in
9 eco-terror case,"* U.S. Attorney Benjamin Wagner, op. ed. in
10 The Sacramento Bee, January 16, 2015,
11 <http://www.sacbee.com/opinion/oped/soapbox/article7038389.html>.

13 But the government has never had to account to Mr.
14 McDavid, the Court, or the public for the it's alleged
15 "mistake." During the hearing, the Court repeatedly (and
16 rightly) expressed dismay and a desire to determine what went
17 wrong, stating, for instance:

18 This is something that needs to be dealt with, and I
19 want to know what happened. I mean, this is something I
20 never thought I would have to ask the question, how did
21 this happen?

22 This is something that I don't expect to have happen in
23 my courtroom.

24 I mean, we're talking *Brady* with a capital B. ...

25 (1/8/15 Reporter's Transcript ("RT") at 9:22-25; 10:11-13;
26 15:16.) The government responded:

27 Your Honor, unfortunately, we're not, the government is
28 not in a position to offer clarity to the court at this
point.

Disappointingly for all of the parties, Your Honor, I
can't provide an accurate explanation for that other
than to say that these documents were in the

1 [Sacramento] FBI file.

2 (Id. at 10:25 - 11:1, 18:18 - 19:3.)

3 Recently, Ninth Circuit (former) Chief Judge Alex
4 Kozinski warned: "*Brady* violations have reached epidemic
5 proportions in recent years, and the federal and state
6 reporters bear testament to this unsettling trend." *United*
7 *States v. Olsen*, 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski,
8 C.J., dissenting from the order denying the petition for
9 rehearing en banc). Mr. McDavid respectfully submits that the
10 government has now had sufficient time to "offer clarity" as
11 to how and why it withheld so many discoverable documents
12 from the defense, and should be ordered to do so, for the
13 sake of basic accountability, fairness, and the public's
14 confidence in the integrity of *their* justice system. As
15 Judge Kozinski also advised: "Only judges can put a stop" to
16 an epidemic of *Brady* abuses. Id. at 626.

17 **II. RELEVANT FACTS AND PROCEDURAL HISTORY**

18 Eric McDavid was arrested on January 13, 2006 following
19 a year and half long investigation, and indicted under 18
20 U.S.C. §844(n) on January 25, 2006 for conspiring to damage
21 or destroy property by fire or explosive. From the outset, he
22 maintained that he was not predisposed to commit the charged
23 offense and that he was entrapped by an overzealous FBI and
24 its misuse of the principal informant, "Anna," in an example
25 of the FBI creating and pretending to solve its own terrorism
26 case. He claimed that Anna manipulated him by, inter alia,
27 engaging in a romantic relationship with him. (See detailed
28 discussion in Amended Reply Memorandum, Dkt. No. 434 at 3-6.)

1 Throughout, the government ridiculed that notion, and nearly
2 succeeded in preventing Mr. McDavid from presenting an
3 entrapment defense at trial. They almost got away with it.

4 Despite the many hours of audio and video recordings
5 Anna and her FBI handlers made during the investigation, she
6 lacked corroboration in the electronic record for her most
7 inflammatory allegations against Mr. McDavid. Her
8 credibility, *vel non*, was thus *crucial* to the outcome of the
9 trial. (See, e.g., discussion in Amended Reply Memorandum,
10 Dkt. No. 434 at 15-16.)

11 Throughout the pretrial phase of the case, and into the
12 trial, the defense submitted numerous discovery demands,
13 including requests for all of Mr. McDavid's statements, and
14 for all evidence of his romantic interactions with Anna.
15 (See, e.g., Dkt. Nos. 124, 125, and 129.) The government
16 produced a solitary love letter/email. At trial, defense
17 counsel cross-examined Anna extensively about this letter,
18 and also got her to admit, grudgingly, that Mr. McDavid had
19 written her other love letters/emails (she admitted to only
20 three), which she claimed were lost, and which in any event
21 the government did not turn over until years later, and then
22 only partially. (9/12/07 RT at 418-419, 431, 606.) Anna
23 denied that Mr. McDavid's epistles were gushing with
24 sentiment (9/12/07 RT at 418:8-12) - though it turned out
25 they were - and she insisted she and Mr. McDavid had a "non-
26 romantic and non-intimate relationship." (9/12/07 RT at 614-
27 615.) The defense does not know whether the love
28 letters/emails Anna referred to on the stand are encompassed

1 within the correspondence which the government produced in
2 late 2014 during settlement negotiations, or are yet separate
3 from that. (See attached Declaration of Counsel.) Then, out
4 of the blue on redirect examination by the government, Anna
5 disclosed for the first time in the case that the FBI had
6 arranged a consultation for her with its Behavioral Analysis
7 Unit ("BAU") for the purpose, she said, of instructing her
8 how to rebuff Mr. McDavid's romantic overtures. She testified
9 further that she submitted a completed, several page
10 questionnaire to the BAU. (9/12/07 RT at 578-579, 614-615.)
11 Afterward, then-AUSA Steven Lapham informed defense counsel
12 that he too was surprised by Anna's revelations on the stand
13 concerning the BAU, and he produced the five-page, 240
14 question questionnaire. Although Anna testified that the BAU
15 requested it for the purpose of instructing her how to rebuff
16 Mr. McDavid's advances, the questionnaire itself was a
17 generic personality inventory. (See detailed colloquy,
18 9/24/07 RT at 1186-1198.) Defense counsel requested fuller
19 discovery of the BAU-related materials by letter to the
20 government on September 17, 2007, but received nothing
21 further. To this day, the government has not furnished any
22 BAU-related documents corroborative of Anna's testimony that
23 the FBI instructed her how to rebuff Mr. McDavid's romantic
24 overtures. Still missing are any memoranda or reports
25 concerning the FBI's decision to refer Anna to the BAU, the
26 BAU's analysis of Mr. McDavid, or the FBI's resulting
27 instructions to Anna. (Declaration of Counsel.) On the
28 contrary, we now know that she sent him flirtatious emails

1 (as discussed below).

2 After deliberating for two days - and submitting notes
3 to the Court inquiring specifically about the entrapment
4 defense - the jury convicted Mr. McDavid on September 27,
5 2007. On May 8, 2008, he was sentenced to 235 months in
6 prison. Early in the case, frustrated with the government's
7 responses to pretrial discovery requests, defense counsel
8 made a FOIA request for documents directly to the FBI in
9 Washington, D.C. on February 1, 2007. The FBI responded on
10 June 14, 2007 that "no records responsive to your FOIPA
11 request were located..." Then, in early 2008, after Mr.
12 McDavid was convicted, his supporters submitted another,
13 similar FOIA request to the FBI in Washington, D.C. The FBI
14 responded initially again that no documents were located.
15 Mr. McDavid's supporters administratively appealed. The FBI
16 responded that their appeal was untimely, but suggested they
17 submit separate requests to individual field offices, which
18 they did. Thereafter, the FBI field offices produced 2,449
19 redacted pages in several batches between May 7 and September
20 13, 2010, most of which the defense had never seen. The FBI
21 withheld another 868 pages it deemed "exempt from
22 disclosure." (See Declaration of Counsel, and partial FOIA
23 correspondence)

24 On July 14, 2014, in response to an order by Magistrate
25 Judge Brennan following the defense's submission of the §
26 2255 motion and related briefing, Mr. McDavid filed a
27 Supplemental 28 U.S.C. § 2255 Memorandum In Support Of Brady
28 Claims And Related Motion For Discovery (Dkt. No. 442). This

1 Supplemental Memorandum further discussed the materiality of
2 the 2010 FOIA production, which included FBI memoranda
3 requesting that the FBI's Behavioral Analysis Unit analyze
4 correspondence of Mr. McDavid for "behavioral insight."
5 (Dkt. No. 442-1 at 9-10; Declaration of Counsel; Exhibit 1).
6 And it included two pages comprising an FBI request for a
7 polygraph examination of Anna at a juncture in the case which
8 the Government deemed critical, just before Anna gathered the
9 codefendants together for a meeting and delivered them to the
10 doorstep of a reluctant Mr. McDavid, in November 2005. (Dkt.
11 No. 442-1 at 2-3; Declaration of Counsel; Exhibit 2). These
12 were the only documents the FBI produced in 2010 related to
13 the BAU analysis or the would-be polygraph examination.
14 Noticeably absent from the FOIA production were
15 (a) information concerning the FBI's decision to arrange a
16 consultation for Anna with the BAU; (b) Mr. McDavid's "one
17 handwritten note and ten Email communications" referenced in
18 the request to the BAU; (c) any other correspondence between
19 Mr. McDavid and Anna; (d) any information about what the BAU
20 and/or Anna's handlers advised her following the BAU's
21 analysis; (e) any discussion surrounding why the FBI
22 requested - then mysteriously cancelled - a polygraph
23 examination of Anna; The defense knows it was cancelled only
24 because FBI case agent SA Nasson Walker said so in his
25 declaration that accompanied the government's 10/12/12
26 opposition to defendant's § 2255 motion: "[A]fter receiving
27 this approval [for the polygraph examination], the source's
28 handler, SA Rick Torres, decided not to proceed. The source

1 was never administered a polygraph examination." (Dkt. No.
2 420-2 at 1; see also Declaration of Counsel.) or (f) the name
3 of the AUSA who approved the polygraph request, which is
4 redacted for claimed "personal privacy" reasons under FOIA
5 exemption code b6.

6 After obtaining additional time to respond to Mr.
7 McDavid's supplemental Brady memorandum, the government, in
8 late October 2014, contacted § 2255 counsel to discuss the
9 prospect of settlement.

10 In the course of the negotiations which followed, the
11 newly assigned AUSA swiftly produced to the defense 118 pages
12 of documents never produced previously. These included some
13 of Mr. McDavid's long missing correspondence with Anna which
14 the FBI had forwarded to the BAU, and a number of reports.
15 As discussed in detail below, the new production was directly
16 impeaching of Anna's trial testimony—seven years late.
17 At the same time, it appears from the correspondence
18 produced that the government may yet be withholding
19 additional correspondence, including particularly other
20 emails from Anna to Mr. McDavid, which are hinted at by the
21 correspondence the government did produce. (Declaration of
22 Counsel.)

23 When the case settled, the government was still in the
24 process of reviewing additional documents for production to
25 the defense, but no further documents have been produced³.

27 ³ The government is still withholding at least 770 documents related to the investigation, as
28 discussed below. The government appears to be relying on FOIA exemptions, and the argument that the
settlement of Mr. McDavid's § 2255 motion moots any further discovery obligation.

1
2 **III. WAYS IN WHICH THE GOVERNMENT DERIVED AN UNFAIR**
3 **ADVANTAGE FROM ITS VIOLATIONS OF RULES 16 AND**
4 **26.2, AND BRADY**

5 Deliberately or not, the government derived an unfair
6 advantage as a result of its violations of Rules 16 and 26.2,
7 and Brady, and it pressed this advantage at every stage of
8 the case by repeatedly belittling Mr. McDavid's contention
9 that he had a romantic relationship with Anna the informant,
10 which she nurtured. The following is a catalog of examples
11 of the Government's exploitation of its own withholding.

12 A. During Pretrial

13 On December 19, 2006, trial counsel filed motions
14 seeking all written statements or communications made by Mr.
15 McDavid during the time of the investigation, in whatever
16 manner they exist, be they emails, letters, phone calls, or
17 otherwise. (Dkt. Nos.124 and 125.) *Brady* aside, the
18 government was obligated to produce Mr. McDavid's statements
19 under F.R.Crim.P. 16(a)(1)(B)(i) and Anna's statements under
20 F.R.Crim.P. 26.2(a) & (b). A proper sanction for their
21 failure to do so would have been to strike Anna's testimony
22 or declare a mistrial. F.R.Crim.P. 26.2(e). Trial counsel
23 filed a motion to dismiss the charges if at any point the
24 government produced discovery which should have been provided
25 earlier. (Dkt. No. 150.) Trial counsel also moved to dismiss
26 the indictment based on the improper relationship between
27 Anna and Mr. McDavid. (Dkt. No. 129.) Mocking the assertion,
28 the government wrote in response:

The defendant's claim of a romantic relationship between

1 him and the informant is categorically untrue,

2 ...
3 The defendant carelessly cites *California v. Trombetta*,
4 467 U.S. 479 (1984) and the Local Rules as if the
5 government intentionally destroyed evidence or is
6 intentionally withholding evidence. Since the government
7 did neither, these cases are not applicable.

8 (Dkt. No. 169 at 28, 47-48 (emphasis added).)

9 On August 28, 2007, the government moved in limine to
10 preclude the defense from presenting an entrapment defense,
11 arguing:

12 In none of these motions does McDavid identify the
13 "special incentive" used to induce him to commit the
14 crime. The closest McDavid comes is the unsupported
15 allegation that Anna "worked her charms" on the
16 defendant, to influence him romantically, but McDavid
17 does not provide any evidence of this, video, audio, or
18 documentary. To the contrary, there is evidence that
19 "Anna" rebuffed McDavid's unwanted advances, which is
20 recorded on audio and video.

21 (Dkt. No. 209 at 3.) During the motions in limine hearing
22 on September 7, 2007, AUSA Ellen Endrizzi argued:

23 We can't start a trial and have the defendant, you know,
24 cross-examine our witnesses, make all sorts of
25 insinuations, bring on character witnesses, and then
26 decide at the end, well, we're not going to do
27 entrapment.

28 ...
29 There are thousands of pages of discovery. There are
30 countless hours of tapes, audio and video. The defendant
31 has not yet in any filing set forth specific evidence
32 that would overcome the law on inducement or to
33 demonstrate an absence of predisposition. If he can't
34 make those basic prima facie elements, he should not be
35 able to start and throw mud throughout the trial, and
36 then say, oh, well, maybe we don't have an entrapment
37 defense. This is why it's a motion in limine, and it
38 should be barred unless the defendant can present that
39 case.

40 ...
41 Your Honor, for instance, the defendant has throughout
42 his papers said there was a romantic relationship. He
43 has provided no facts of that. But he also ignores the
44 fact that that's not inducement. And case law states
45 that. If it were so egregious as to be considered
46 possibly inducement, then we would have found it. It
47 would have been brought forth, you know, with banners by

1 the defense.

2 (9/7/07 RT at 36:13 - 41:13 (emphasis added).) The Court,
3 being directly misled by the Government and without the
4 knowledge only now available, nearly granted the government's
5 request to bar the entrapment defense, stating, inter alia:

6 I am not going to let this case become a trial of the
7 FBI or the Department of Justice. I am also not going to
8 let this trial become a trial of Anna, as well, because
9 I have a very grave concern that that is where this is
10 going to go... So I'm just cautioning you that I'm going
11 to limit this down. If you want to bring this entrapment
12 defense, the slight evidence, however believable, it's
13 slight, and when I get into trying to parse the word
14 "slight," we have a problem.

15 (9/7/07 RT at 47:11-21.)

16 B. Anna's Trial Testimony

17 Trial counsel had to pry out of Anna the fact that she
18 had any romantic correspondence at all with Mr. McDavid.
19 Ultimately, she acknowledged receiving just "three" love
20 letters from Mr. McDavid, which she described as containing
21 only a "slight indication that he might have been interested
22 in me." (9/12/07 RT at 418:8-12.) It appears now that she was
23 fitting her testimony to the solitary letter which the
24 government had produced at the time. She testified that no
25 other letters/emails remained. (*Id.* at 606:10-14.) She
26 revealed - for the first time in the case, on redirect
27 examination by the government - that the FBI had arranged a
28 consultation between her and its Behavioral Analysis Unit, to
29 which she submitted a several page completed questionnaire
30 for the purpose of instructing her how to rebuff Mr.
31 McDavid's romantic advances, interjecting for good measure
32 that she was afraid of "spurning him so much that he would

1 have a violent or uncomfortable reaction.” (Id. at 578:10-
2 25.) She testified further:

3 I remembered what the Behavioral Analysis Unit had told
4 me. They said if he makes another advance at you, what
5 you need to say to him to calm him, to mollify him, is
6 that we need to put the mission first. We need to put
7 the mission first. There’s time for romance later.

8 (9/12/07 RT at 583:6-10.) And:

9 I was instructed to placate him as best I could, not to
10 shoot him down outright, that that might make him be
11 unstable, but to placate him as best I could while
12 denying all romantic interest.

13 (9/12/07 RT at 614:25 - 615:3.) Apart from Anna’s completed
14 questionnaire for the BAU, which the government provided to
15 the defense only after she testified, the government has not
16 produced any other BAU-related records with which defense
17 counsel might have impeached Anna. The government has not
18 produced any information concerning the FBI’s decision to
19 request a behavioral analysis of Mr. McDavid, the analysis
20 itself, nor the FBI’s and/or BAU’s resulting instructions to
21 Anna. (Declaration of Counsel.) That is, the government has
22 never produced any information to corroborate Anna’s
23 assertion that the BAU advised her how to rebuff Mr.
24 McDavid’s romantic overtures. Read in conjunction with the
25 flirtatious emails she sent him (newly produced), and her
26 testimony that she told him “there’s time for romance later,”
27 it appears the BAU may have advised her not how to rebuff Mr.
28 McDavid’s romantic overtures but how to exploit them.

We now know from the government’s shockingly tardy
production of correspondence that Anna didn’t just placate
Mr. McDavid, she flirted with him and dangled the idea of a

1 future together, writing, for example:

2 I think you and I could be great, but we have LOTS of
3 little kinks to work out. ... I hope in Indiana we can
4 spend more quality time together, and really chat about
5 life and our things. I think it will be better there -
6 more space, better atmosphere, less restrictive. I'm
7 looking forward to it. :)

8 [and]

9 I took out the braids. : (They were hurting my head SO
10 BADLY by the last night in philly that I was just
11 getting pissy. I'll do it again, but I think I want the
12 loose pink hair, like I told you about; and I can DIY
13 that. But pain isn't worth that much - besides, identity
14 is so fluid.. but that's another convo, hopefully for IN.
15 :)

16 Excerpted from correspondence produced by the government to
17 § 2255 counsel in late 2014. See coverage in articles:

18 "Role of FBI informant in eco-terrorism case probed after
19 documents hint at entrapment," *The Guardian*, January 13,
20 2015, [http://www.theguardian.com/us-news/2015/jan/13/fbi-](http://www.theguardian.com/us-news/2015/jan/13/fbi-informant-anna-eric-mcdavid-eco-terrorism)
21 [informant-anna-eric-mcdavid-eco-terrorism](http://www.theguardian.com/us-news/2015/jan/13/fbi-informant-anna-eric-mcdavid-eco-terrorism); "After nine years
22 in prison, accused eco-terrorist adjusts to sudden release,"
23 *Sacramento Bee*, January 17, 2015,

24 <http://www.sacbee.com/news/local/article7251650.html>.

25 Mr. McDavid's response was giddy concerning her overture
26 about a potential future together away from the "the scene,"
27 and his response certainly was not remotely 'violent' or
28 'unstable,' as Anna had testified she feared:

hey cheeka, so far as us B'n great, that i think is an
understatement ... along w/the 'LOTS' of little kinks 2 wk
out'... but if u aint learning, u aint live'n... & I do
think we could learn a lot from eachother... ido think
that indiana will B a good space 2 start some of that
but i'd like 2 look N2 do'n some independently from the
scene N the future 2, i think that it'd throw a
different light on the subject wich could B helpful... but
that's 4 a future discussion :) ... now so far as plans, u
know I don't have those things anymore, only ideas...

Id. (emphasis added); Declaration of Counsel.

1 Nevertheless, the prosecutors and the FBI case agent sat
2 idly by and never took any steps to correct Anna's deceitful
3 testimony, raising legitimate questions concerning what they
4 may have known about the actual record when they prepared her
5 to testify.

6 C. In Closing Argument

7 In closing argument, AUSA Endrizzi stated to the jury:

8 Romance? A bit of a red herring. There are supposedly
9 love letters. We've got evidence of one. Supposedly Mr.
10 McDavid is falling all over himself for Anna. But you
11 have testimony that Anna rebuffed him.... You remember
she had to go to the Behavioral Analysis Unit to get
instructions as to how to let him down.

12 (Dkt. No. 361; 9/25/07 RT at 1274:15-22.) AUSA Steven
13 Lapham followed up in rebuttal closing, stating to the jury
14 (in the final words from the attorneys in the case):

15 ...[Y]our mission is to decide if Anna is telling the
16 truth. And that's not something that Mr. Reichel really
17 addressed head-on. He suggested that you can view her
18 testimony with some caution, and that's certainly true.
19 If you think she got a benefit from this, you should
20 rightly view her testimony with caution. But the
21 question, the reason you are here in the first place is
22 to decide whether or not she's telling the truth.

23 (Dkt. No. 361; 9/25/07 RT at 1343:11-18.)

24 D. During the § 2255 Proceedings

25 In opposition to Mr. McDavid's *Brady* claim in the § 2255
26 proceedings, the government argued:

27 The government concedes that a relatively small amount
28 of information pertaining to the case was apparently not
disclosed to the defense. However, as detailed below and
in the supporting declaration of Special Agent Nasson
Walker, the omitted material was either inculpatory or
benign. None of the omitted material was exculpatory.

(Gov't Opp. to Defendant's § 2255 Motion, Dkt. No. 420 at
31:20-24.) In fact, the government withheld thousands of

1 pages pertaining to the case, and was still withholding key
2 documents at the time it made this argument. We now know, of
3 course, that some of the material withheld was directly
4 "helpful to the defense" under the standard and principles of
5 *Brady*, i.e., exculpatory and/or impeaching. Beyond that,
6 thousands of pages of "benign" reports and information
7 collected by Anna and apparently by at least one additional,
8 undisclosed informant, potentially would have further
9 bolstered Mr. McDavid's entrapment defense by helping to show
10 he was not predisposed to commit the charged offense. (See
11 detailed discussion in Defendant's 7/14/14 Supp. Memo re:
12 *Brady* Claims, Dkt. No. 442.)

13 Continuing to press an advantage derived from its then
14 ongoing withholding of the romantic correspondence and BAU
15 materials, the government wrote in opposition to Mr.
16 McDavid's § 2255 Motion:

17 Although McDavid insinuated throughout the trial that
18 there was a romantic relationship between himself and
19 Anna, the evidence was to the contrary. First, Anna
20 categorically denied any such relationship. E.R.
21 1099:19. Second, a tape recording that was played to the
22 jury shows that on November 19, 2005, the defendant
23 broached the subject with Anna and was shot down, Anna
24 stating, "I don't not like you. I only like you," and
25 that she wants to keep the relationship 'professional'.
26 1 S.E.R. Tab 7 at 63-64. ... Further, while McDavid
27 adduced no evidence that Anna ever came on to him, there
28 is evidence that she discouraged - or at least did
nothing to encourage - such a relationship.

(Gov't Opp. to Defendant's § 2255 Motion, Dkt. No. 420 at
18-19 (emphasis added).)

1 **IV. THE GOVERNMENT'S CONTINUED WITHHOLDING**

2 The government's position that it does not owe any
3 further production to Mr. McDavid since the case has settled
4 raises a number of questions, including (a) whether Mr.
5 McDavid, who remains convicted, should not still be entitled
6 to materials he should have received at the time of trial;
7 (b) whether and to what extent the documents the government
8 is still withholding are records which should have been
9 disclosed pursuant to FOIA; and (c) whether the 118 pages the
10 government produced in 2014 are part of, or separate from,
11 the 868 pages the government withheld in response to Mr.
12 McDavid's FOIA request.

13 **V. CONCLUSION AND PRAYER FOR RELIEF**

14 The belatedly produced materials discussed above, and
15 others the government is still withholding, were the subject
16 of such pointed and repeated discovery demands and laser
17 focus during pretrial proceedings and at trial that the
18 question begs to be answered how and why the government
19 failed to produce them. Revelations of the government's
20 egregious *Brady* violations in this case have arisen amid
21 judicial scrutiny of "an epidemic of *Brady* violations abroad
22 in the land," as Ninth Circuit (former) Chief Judge Alex
23 Kozinski has termed it. *United States v. Olsen*, supra, 737
24 F.3d at 626. Judge Kozinski expounded on the subject in a
25 recent law review article, offering a list of practical
26 solutions centered on judicial intervention and oversight.
27 He wrote, in part:

1 Prosecutorial misconduct is a particularly difficult
2 problem to deal with because so much of what prosecutors
3 do is secret. If a prosecutor fails to disclose
4 exculpatory evidence to the defense, who is to know? Or
5 if a prosecutor delays disclosure of evidence helpful to
6 the defense until the defendant has accepted an
7 unfavorable plea bargain, no one will be the wiser. Or
8 if prosecutors rely on the testimony of cops they know
9 to be liars, or if they acquiesce in a police scheme to
10 create inculpatory evidence, it will take an
11 extraordinary degree of luck and persistence to discover
12 it—and in most cases it will never be discovered.

13 ...
14 [T]here ingredients must be present before we can be
15 sure that the prosecution has met its Brady obligations
16 under the law applicable in most jurisdictions. First,
17 you must have a highly committed defense lawyer with
18 significant resources at his disposal. Second, you must
19 have a judge who cares and who has the gumption to hold
20 the prosecutor's feet to the fire when a credible claim
21 of misconduct has been presented. And, third, you need a
22 great deal of luck, or the truth may never come out.

23 ...
24 While most prosecutors are fair and honest, a legal
25 environment that tolerates sharp prosecutorial practices
26 gives important and undeserved career advantages to
27 prosecutors who are willing to step over the line,
28 tempting others to do the same.

29 ...
30 Entering [*Brady* compliance orders] holds prosecutors
31 personally responsible to the court and will doubtless
32 result in far greater compliance. Criminal Law 2.0,
33 Hon. Alex Kozinski, 44 Go. L.R. Ann. Rev. Crim. Proc.
34 (2015) at xxiii, xxvi, xxiv.

35 In the present case, the Court endeavored on January 8,
36 2015, to no avail, to get answers from the government about
37 its withholding. Defendant hereby entreats the Court to press
38 the government for those answers now, for the sake of basic
39 accountability, fairness, and public confidence in the
40 integrity of the judicial system. Only the government is in
41 a position to explain its actions and oversights, and until
42 it does, the public, this Honorable Court, and defendant and
43 his counsel, have a right and a veritable democratic duty to
44 question the official line that the FBI or the prosecutors'

1 withholding was a mere "mistake." An order to show cause
2 would give expression to the fundamental principles
3 articulated by Judge Kozinski and the public's right to know
4 what its government does in its name. As Judge Kozinski
5 counseled: "Only judges can put a stop" to rampant *Brady*
6 violations. *United States v. Olsen, supra*, 737 F.3d at 626.

7 WHEREFORE, Mr. McDavid, through his undersigned
8 counsel, respectfully requests that the Court:

9 (1) Order the government to show cause how and why it
10 withheld approximately 3,000 pages of investigative documents
11 from the defense which it should have produced prior to
12 trial, including (but not limited to):

13 (a) correspondence between Anna the informant and
14 Mr. McDavid (including correspondence which yet appears to be
15 missing);

16 (b) information concerning the FBI's decision to arrange
17 a consultation for Anna with the BAU (still never produced);

18 (c) Anna's completed questionnaire for the BAU (produced
19 only after Anna testified to its existence);

20 (d) the BAU's profile/behavioral analysis of Mr. McDavid
21 (still never produced);

22 (e) the BAU's and/or the FBI case agent's instructions
23 to Anna regarding how to handle Mr. McDavid romantically
24 (still never produced);

25 (f) all documents pertaining to the FBI's request for,
26 and the government's decision to order, then cancel, a
27 polygraph examination of Anna (only partly produced, with
28 redaction of the name of the Assistant U.S. Attorney who

1 approved the request); and

2 (2) Grant such further relief as the Court deems
3 appropriate in the premises of this important matter.

4 DATED: July ____, 2015 Respectfully submitted,
5 /s/ Mark Reichel
6 Attorney for Eric McDavid

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DECLARATION OF DEFENSE COUNSEL

I, Mark Reichel, declare that as follows:

I am an attorney licensed to practice law throughout the State of California and before this Court. If called as a witness in this matter, I would testify as follows based on my own personal knowledge and experience.

Throughout the pretrial phase of the case, and into the trial, I made numerous discovery demands of the government for all evidence of Mr. McDavid's romantic interactions with "Anna" the informant, including all correspondence. Examples of motions in this regard appear at Dkt. Nos. 124, 125, and 129. In response, the government produced a solitary love letter/email, while repeatedly deriding the notion, at every stage of the case, that Anna ever encouraged Mr. McDavid romantically. The documents which the FBI released to Mr. McDavid's supporters long after his conviction in 2010 pursuant to their follow up FOIA request, along with the documents the government produced to Mr. McDavid's § 2255 counsel in late 2014, appear to vindicate the defense position.

On February 1, 2007, frustrated with the government's less than forthcoming responses to my discovery requests, I submitted a FOIA request for documents directly to the FBI in Washington, D.C. The FBI responded on June 14, 2007 that "no records responsive to your FOIPA request were located..." Exhibit 3 attached hereto contains true and correct copies of this FOIA correspondence, redacted for privacy.

1 On September 12, 2007, Anna disclosed for the first time
2 in the case, on redirect examination by the government, that
3 the FBI had arranged a consultation for her with its
4 Behavioral Analysis Unit ("BAU") for the purpose of
5 instructing her how to rebuff Mr. McDavid's romantic
6 overtures - delicately, so as not to provoke an "unstable
7 reaction," she added editorially. She testified further that
8 she submitted a several page completed questionnaire to the
9 BAU. Afterward, then-AUSA Steven Lapham informed me that he
10 too was surprised by Anna's revelations on the stand
11 concerning the BAU, and he obtained and produced to me the
12 completed questionnaire. Contrary to Anna's testimony that
13 the BAU requested it for the purpose of instructing her how
14 to rebuff Mr. McDavid's advances, the questionnaire itself
15 was a mostly generic personality inventory.

16 On September 17, 2007 I sent a discovery letter to the
17 government requesting fuller discovery of the BAU-related
18 materials, but to my recollection I received nothing further.
19 The lack of any production by the government that is
20 corroborative of Anna's assertion that the BAU advised her
21 how to rebuff Mr. McDavid's romantic overtures, coupled with
22 the revelation of her flirtatious emails to Mr. McDavid,
23 raise the inference, in my view, that the BAU in actuality
24 may have advised Anna how to exploit Mr. McDavid's overtures,
25 not rebuff them. She testified, after all, that she carried
26 out the BAU's instructions. Absent production of any
27 documents corroborative of Anna's testimony that the BAU
28 advised her how to rebuff Mr. McDavid's romantic overtures,

1 and in light of her flirtatious correspondence, such
2 documents might actually impeach her assertion.

3 I am informed and believe that in 2008, after Mr.
4 McDavid's conviction, some of his supporters submitted
5 another FOIA request, similar to mine, to the FBI in
6 Washington, D.C. on Mr. McDavid's behalf. I am informed and
7 believe that the FBI responded initially again that no
8 documents were located, and that Mr. McDavid's supporters
9 then administratively appealed, upon which the FBI responded
10 that their appeal was untimely, but suggested they submit
11 separate requests to individual field offices, which they
12 did. I am informed and believe that in 2010, the FBI began
13 producing several thousand redacted pages to Mr. McDavid's
14 supporters in response to their FOIA request, most of which
15 were not produced prior to or during trial. Exhibit 3
16 attached hereto contains true and correct copies of the FBI
17 field offices' responses.

18 Among the previously undisclosed documents which the FBI
19 produced to Mr. McDavid's supporters in 2010 pursuant to
20 their FOIA request were two redacted pages reflecting that
21 the FBI was forwarding "one handwritten note and ten Email
22 communications" to its Behavioral Analysis Unit with the
23 request that the BAU analyze them for "behavioral insight
24 into ERIC MCDAVID." However, I am informed and believe that
25 the FBI did not produce the referenced correspondence in its
26 FOIA response. Exhibit 1 attached hereto contains true and
27 correct copies of the FBI's BAU request pages.

28

1 I am informed and believe that in late 2014, pursuant to
2 settlement negotiations between Mr. McDavid's § 2255 counsel
3 and the government, the government produced to § 2255 counsel
4 previously undisclosed correspondence among and between Anna,
5 Mr. McDavid, and codefendant Lauren Weiner. I have reviewed
6 this correspondence, which was not produced to the defense
7 prior to or during trial. The correspondence appears to me
8 to encompass the "one handwritten note and ten Email
9 communications" which the FBI forwarded to the BAU. However,
10 it also appears to me to constitute less than the complete
11 correspondence between Anna and Mr. McDavid, as revealed by
12 references in the documents themselves. For instance, in the
13 included emails Mr. McDavid appears to respond to other
14 emails written by Anna which were not included in the
15 government's 2014 production.

16 Part but not all of the newly produced correspondence
17 has been reprinted in news articles. I am informed and
18 believe that the government provided it to the Court for the
19 Court's review at the hearing on January 8, 2015, which
20 resulted in Mr. McDavid's release, and I am happy to provide
21 it again to the Court in camera if the Court so requests. I
22 warrant that a portion of an email from Mr. McDavid to Anna
23 which I quote in the Motion herein does not, from what I can
24 tell, appear in any articles, to wit: "ido think that
25 indiana will B a good space 2 start some of that but i'd like
26 2 look N2 do'n some independently from the scene N the future
27 2, i think that it'd throw a different light on the subject
28 wich could B helpful.. but that's 4 a future discussion :)

1 ...now so far as plans, u know I don't have those things
2 anymore, only ideas..."

3 At trial, Anna grudgingly admitted to me on the stand
4 that Mr. McDavid wrote her three love letters/emails, other
5 than the one which the government had produced. I do not
6 know whether or not the three love letters/emails Anna
7 referred to in her testimony are encompassed within, or
8 separate from, the correspondence which the government
9 produced to § 2255 counsel in late 2014.

10 Also among the previously undisclosed documents which
11 the FBI produced to Mr. McDavid's supporters in 2010 pursuant
12 to their FOIA request were two redacted pages comprising an
13 FBI request for a polygraph examination of Anna at what the
14 government maintained was a critical juncture in the case,
15 just before she gathered the codefendants together for a
16 meeting in November 2005. Exhibit 2 attached hereto contains
17 true and correct copies of these pages, as redacted by the
18 FBI. Prior to seeing these documents and reviewing the
19 government's opposition to Mr. McDavid's § 2255 Motion, I had
20 no idea that the FBI had ordered and then cancelled a
21 polygraph examination of Anna, and to this day I have seen no
22 other documents regarding the government's decisions to do
23 so.

24 To the best of my recollection and understanding,
25 neither the U.S. Attorney's Office nor the FBI has produced
26 any of the following material to the defense, at any stage of
27 this case: (a) any additional correspondence among and between
28 Anna the informant and Mr. McDavid; (b) information concerning

1 the FBI's decision to arrange a consultation for Anna with
2 the BAU; (c) the BAU's profile/behavioral analysis of Mr.
3 McDavid; (d) the BAU's and/or the FBI case agent's instructions
4 to Anna regarding how to handle Mr. McDavid romantically;
5 (e) all other BAU related documents; (f) all documents
6 pertaining to the FBI's request for, and the government's
7 decision to cancel, a polygraph examination of Anna; and
8 (g) an un-redacted copy of the FBI's polygraph request,
9 disclosing the name of the Assistant U.S. Attorney who
10 approved said request.

11 I am informed and believe that to this day neither the
12 U.S. Attorney's Office nor the FBI has offered a substantive
13 explanation for its withholding of thousands of pages of
14 discoverable documents from the defense, including the above-
15 listed items which were central to Mr. McDavid's entrapment
16 defense and the informant's credibility, and which I clearly
17 and repeatedly demanded in numerous written and unwritten,
18 formal and informal discovery requests. I believe that for
19 the sake of basic accountability and fairness, and to
20 discourage such future "mistakes," the government should be
21 ordered to show cause how and why it withheld thousands of
22 *Brady* and Rule 16 and 26.2 materials from the defense.

23 I swear under penalty of perjury under the laws of the
24 United States that the foregoing is true and correct, except
25 as to those facts stated on information and belief, and as to
26 those facts, I believe them to be true.

1 Sworn and subscribed to at Sacramento, CA on this date,
2 the 30th of July, 2015.

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/s/ *Mark Reichel*
Mark Reichel