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

10 UNITED STATES OF AMERICA,
11
12 v.
13 ERIC MCDAVID,
14 Defendant.

CASE NO. 06-CR-0035-MCE
JOINT STATUS REPORT
COURT: HON. CHIEF DISTRICT JUDGE
MORRISON J. ENGLAND, JR.

15 The United States of America, by and through its counsel of record, André M. Espinosa,
16 Assistant United States Attorney, and defendant, Eric McDavid (“McDavid”), by and through his
17 counsel of record, Mark R. Vermeulen and Ben Rosenfeld, hereby stipulate and agree to this Joint Status
18 Report, which sets forth a substantive justification for the procedural requests the parties propose the
19 Court execute during the Status Hearing currently scheduled for January 8, 2015, and a detailed list of
20 those proposed procedures.

21 **I. RELEVANT PROCEDURAL AND FACTUAL HISTORY**

22 **A. McDavid’s Trial and Direct Appeal**

23 1. The petitioner in this matter, Eric McDavid (“McDavid”) and two co-defendants were
24 charged with conspiring, between June 2005 and January 13, 2006, to destroy by fire or explosives one
25 or more targets in the Sacramento area, including the United States Forest Service Institute of Forest
26 Genetics, the Nimbus Dam, and local cellular telephone towers, in violation of 18 U.S.C. § 844(n).

27 2. McDavid’s two co-defendants pled guilty, cooperated with the United States, and
28 testified against McDavid at trial. After a 10-day trial, the jury rejected McDavid’s entrapment defense

1 and convicted McDavid of the crimes charged in the Indictment. The Court sentenced McDavid to 235
2 months in custody, and the Ninth Circuit affirmed McDavid's conviction and sentence. United States v.
3 McDavid, 396 Fed. Appx. 365 (9th Cir. 2010), cert. denied, 131 S.Ct. 2469 (May 16, 2011).

4 3. McDavid is scheduled to be released from custody on or about February 10, 2023.

5 **B. McDavid's Motion Under 28 U.S.C. § 2255**

6 4. On or about May 15, 2012, McDavid filed a motion under 28 U.S.C. § 2255, seeking
7 collateral review of his conviction and sentence and alleging: (a) five claims of ineffective assistance by
8 his trial and appellate counsel; (b) that the United States procured and used false testimony at trial; and
9 (c) that the United States violated his due process rights by failing to disclose during discovery in the
10 underlying criminal prosecution all favorable evidence material to guilt or punishment, as required under
11 Brady v. Maryland, 373 U.S. 83 (1963). On or about July 2, 2012, McDavid filed an amended
12 memorandum in support of his § 2255 motion. On or about July 31, 2012, the Court ordered the United
13 States to respond to McDavid's § 2255 motion within 30 days. Thereafter, the Court granted the United
14 States' motion for an extension of time to file a response in opposition to McDavid's § 2255 motion,
15 which the United States filed on or about October 12, 2012.

16 5. On or about February 22, 2013, McDavid filed a reply to the United States' opposition.

17 6. On or about March 6, 2013, the Court granted McDavid's motion to file an amended
18 reply to the United States' opposition, which McDavid had filed a day earlier on March 5, 2013 (with an
19 accompanying request for an order permitting the filing of the amended reply).

20 7. On or about January 30, 2014, McDavid filed a supplemental memorandum in support of
21 his § 2255 motion, in which he raised claims based on the decisions in Alleyne v. United States, 133
22 S.Ct. 2151 (2013) and Peugh v. United States, 133 S.Ct. 2072 (2013).

23 8. Following a hearing on May 15, 2014 before the Honorable Edmund F. Brennan ("Judge
24 Brennan"), the Court ordered McDavid to file a supplemental memorandum in support of his Brady
25 claim and any related motion for discovery. On or about July 14, 2014, McDavid filed an amended
26 memorandum in support of his § 2255 motion and the Brady claims, along with a related motion for
27 discovery.

28 9. On or about September 19, 2014, the Court granted the United States' request for an

1 extension of time to file a response to the supplemental memoranda in support of McDavid's § 2255
2 motion, and ordered the United States to file such response by November 17, 2014. The Court also
3 ordered McDavid to file any reply by December 8, 2014.

4 10. On or about November 6, 2014, the United States disclosed to McDavid certain
5 documents that were not disclosed to him during the criminal proceedings that preceded this matter.

6 11. On or about November 13, 2014, the Court accepted a stipulation between the parties,
7 vacated the pending briefing schedule, and set a status conference on December 15, 2014.

8 12. On or about December 12, 2014, the United States disclosed to McDavid certain
9 additional documents that were not disclosed to him during the criminal proceedings that preceded this
10 matter.

11 13. On or about December 15, 2014, the parties appeared before Judge Brennan and
12 presented the outline of a proposed settlement to the claims asserted in McDavid's § 2255 motion.

13 **II. JUSTIFICATION FOR THE PROCEDURES REQUESTED BY THE PARTIES**

14 14. Beginning at least as early as November 2014, the parties have engaged in negotiations
15 toward a joint settlement of the claims asserted by McDavid in his § 2255 motion. While the parties
16 disagree about the merits of the individual claims McDavid asserts, the parties agree that, under the
17 controlling legal authority governing collateral attacks pursuant to 28 U.S.C. § 2255, it is conceivable
18 that this Court or a reviewing court might find that relief is warranted.

19 15. Thus, the parties have agreed to enter into a Final Settlement Agreement for the purpose
20 of compromising the disputed claims in McDavid's § 2255 motion, to avoid the expenses and risks of
21 further litigation and to advance the interests of justice. To that extent, the parties stipulate and agree
22 that, in the interest of justice, this Court can and should grant McDavid relief pursuant to 28 U.S.C. §
23 2255, as set forth in the Final Settlement Agreement and herein.

24 16. The parties stipulate and agree that, given the absence of contest between the parties
25 regarding whether relief is warranted under 28 U.S.C. § 2255 and regarding the appropriate remedy, no
26 evidentiary hearing is necessary pursuant to Rule 8(a) of the Rules Governing Section 2255 Cases in the
27 United States District Courts (the "§ 2255 Rules"). The parties stipulate and agree that, for the same
28 reasons, no Report and Recommendation is necessary pursuant to Rule 8(b) of the § 2255 Rules. The

1 parties stipulate and agree that, instead of the procedures contemplated under Rules 8(a) and (b) of the §
2 2255 Rules, this Court can and should accept, file, and order the relief recommended by the parties in
3 the Final Settlement Agreement concerning the Judgment and Commitment entered by the Court on
4 May 19, 2008 and McDavid's pending § 2255 claims.

5 17. A recitation and explanation of the precise procedural steps proposed by the parties for
6 the hearing on January 8, 2015 follows.

7 **III. PROCEDURAL STEPS PROPOSED BY THE PARTIES**

8 18. *First:* Pursuant to the Final Settlement Agreement and in the interest of justice, the parties
9 jointly propose that the Court accept McDavid's waiver of indictment and plea of guilty, pursuant to a
10 written plea agreement, to a Superseding Information charging McDavid with conspiracy to destroy by
11 fire or explosives one or more targets in the Sacramento area, contrary to 18 U.S.C. §§ 844(f) and (i), in
12 violation of 18 U.S.C. § 371.

13 19. *Second:* Pursuant to the Final Settlement Agreement and in the interest of justice, the
14 parties jointly propose that, after accepting McDavid's waiver of indictment and plea of guilty to the
15 Superseding Information, the Court proceed to an immediate sentencing hearing and sentence the
16 defendant to time already served in custody.¹ The parties also jointly propose that the Court impose no
17 more than a two-year period of Supervised Release to follow the expiration of McDavid's custodial
18 sentence. The parties stipulate and agree that the Court can and should rely on the Pre-Sentence
19 Investigation Report ("PSR") filed by the United States Probation Office for the Eastern District of
20 California on February 21, 2008, in the underlying criminal prosecution of this matter, and that no new
21 PSR is necessary.

22 20. *Third:* Pursuant to the Final Settlement Agreement and in the interest of justice, the
23 parties jointly propose that, after the Court has imposed sentence on McDavid's plea of guilty to the
24 Superseding Information, the Court should grant McDavid's motion under 28 U.S.C. § 2255 to the
25 extent stipulated by the parties in the Final Settlement Agreement, and vacate the conviction and
26 sentence finalized by the Judgment and Commitment entered by the Court on May 19, 2008, in the
27

28 ¹ On January 8, 2015, McDavid will have served approximately 108 months, or 9 years, in custody.

1 underlying criminal prosecution.

2 21. *Fourth*: The parties jointly propose that following the above proceedings, the Court
3 should accept, file, and order the relief recommended by the parties in the Final Settlement Agreement.

4 22. *Fifth*: The parties jointly propose that following the above proceedings, the Court should
5 execute and file a new Judgment and Commitment memorializing the new conviction and sentence. The
6 parties agree and stipulate that a time-served sentence will result in McDavid's eligibility for immediate
7 release from custody, and the parties thereafter will deliver to Bureau of Prisons officials a copy of the
8 new Judgment and Commitment as soon as it is filed.²

9 IT IS SO STIPULATED.

10
11 MARK R. VERMEULEN
12 BEN ROSENFELD
Attorneys for Defendant

13 Dated: January 5, 2015

14 By: /Mark R. Vermeulen
15 MARK R. VERMEULEN

16 BENJAMIN B. WAGNER
17 United States Attorney

18 Dated: January 5, 2015

19 /André M. Espinosa
20 ANDRE M. ESPINOSA
21 Assistant United States Attorney

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26 ² Prior to McDavid's transfer from FCI – Terminal Island (where he has been in custody) for the
27 January 8, 2015 hearing, the government informed Bureau of Prisons (“BOP”) officials that if the Court
28 approves the proposed resolution of this matter, McDavid will be eligible for release and will likely not
return to FCI – Terminal Island. The parties are informed and believe that BOP officials at FCI –
Terminal Island thereby began processing McDavid in anticipation of his release from custody on
January 8, 2015.