

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,)
) File No. CR-08-291
) (MJD/FLN)
Plaintiff,)
)
vs.) Minneapolis, Minnesota
) May 21, 2009
(1) David Guy McKay,) 10:05 a.m.
)
Defendant.)
)

BEFORE THE HONORABLE MICHAEL J. DAVIS
UNITED STATES DISTRICT COURT JUDGE

(SENTENCING)

APPEARANCES

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Proceedings recorded by mechanical stenography;
transcript produced by computer.

1 Honor.

2 THE COURT: All right. The Court will adopt the
3 factual statements contained in the presentence
4 investigation report as its own.

5 We'll move to the advisory guideline calculations.
6 In the advisory guideline calculations the Probation Office
7 gave an enhancement for obstruction of justice and then gave
8 a reduction for acceptance of responsibility. I think both
9 of you have arguments on this issue.

10 Let the Government go first, so why don't you be
11 seated.

12 MR. PAULSEN: Your Honor, since there is an
13 objection to the enhancement for obstruction of justice, I
14 believe it's the Government's burden to support that
15 enhancement and I'm relying on the trial testimony of
16 Mr. McKay and, with the Court's permission, I intend to play
17 some additional calls today that bear on obstruction of
18 justice.

19 Also the Government's position is that there
20 should be no reduction for acceptance of responsibility for
21 two reasons:

22 One, generally speaking, if there is an
23 enhancement for obstruction of justice, that's inconsistent
24 with acceptance of responsibility and acceptance would be
25 granted only in an extraordinary case.

1 Two, factually I do not think, even though this
2 defendant pled guilty, he has yet accepted responsibility
3 for his criminal conduct and I expect -- I would ask
4 permission to play one or more calls on that issue as well.

5 So let me start first with the enhancement for
6 obstruction of justice. As set forth in my detailed
7 sentencing memorandum, there was testimony by this defendant
8 at trial that it was Brandon Darby's idea to make the
9 Molotov cocktails. That testimony influenced at least one
10 or more jurors because after sending out questions
11 indicating that they were having trouble on the issue solely
12 of entrapment, they eventually ended in a hung jury. So if
13 that testimony was false, then that testimony was material
14 and it affected the outcome of the trial.

15 Following the hung jury, with the help of the FBI
16 I reviewed five months' worth of Mr. McKay's jail calls from
17 September through the end of the first trial at the end of
18 January and as a result of that review found several calls
19 that are inconsistent with his trial claim of entrapment or
20 inducement by Brandon Darby and I would like to play some of
21 those calls right now.

22 The first one is denoted as Attachment 3 to the
23 Government's sentencing memorandum. It's a call on
24 September 20, 2008, about three weeks after Mr. McKay was
25 arrested. He's having a recorded call with his father.

1 And I should state for the record that inmates at
2 these local jails know that their calls are being recorded.
3 Not only are there signs up, but every call, every single
4 call, begins with a warning that this call is subject to
5 recording and monitoring.

6 (Audio recording played.)

7 MR. PAULSEN: That call was on September 20, 2008.

8 The next call, Attachment 4 to the Government's
9 sentencing memorandum, is about a week later on
10 September 26, 2008 and again Mr. David McKay is speaking
11 with his father.

12 (Audio recording played.)

13 MR. PAULSEN: The salient point is he is asked
14 flat out, Whose idea was it to make the Molotov cocktails?
15 Brandon? And his answer is, "I can't say." The reason he
16 can't say is because he knows his call is being recorded and
17 if he were to tell the truth he would be incriminating
18 himself.

19 So that was the state of the affairs as of
20 September 26, 2008 and something happened over the next few
21 months. Mr. McKay started off the case confessing to the
22 FBI, implicating his co-defendant Crowder, never claiming to
23 the FBI that Darby had anything to do with it, and on early
24 jail calls with his father admitted he was guilty, there was
25 nothing more to look into, I'm guilty of possession, I am

1 going to plead guilty.

2 Something changed and by the eve of trial,
3 January 23, 2009, the next two calls you'll hear depict what
4 changed. This is a call on January 23, 2009, three days
5 before the start of trial, between David McKay and his
6 father.

7 (Audio recording played.)

8 MR. PAULSEN: The next one, Attachment 6 to the
9 Government's brief, is the day before trial, January 25,
10 2009, David McKay and his father.

11 (Audio recording played.)

12 MR. PAULSEN: So what we see in these two calls,
13 from the Government's perspective, is a defendant who
14 started off the case accepting responsibility and then
15 decided to try to beat the case by falsely accusing another
16 person of wrongdoing; and that's what he did at trial.

17 So when Mr. McKay says on Attachment 5, Yeah, Dad,
18 I am going to go up there and tell the truth, the word
19 "truth" should be in quotation marks. It was a truth that
20 he had invented in preparation for trial.

21 And in Attachment 6 when he's talking -- his dad
22 is asking, "Did you get a hold of Brad, did Brad get your,"
23 I know from previous calls that Mr. McKay was desperate to
24 get a message to Brad Crowder. He had written out some
25 message, he doesn't say over the phone what it was, but he

1 was desperate to get it to Brad Crowder.

2 At trial David McKay described a three-way secret
3 meeting where only he, Brad Crowder, and the informant were
4 present and it was supposedly at this three-way secret
5 meeting on August 31st, after the seizure of the shields,
6 that Darby, Brandon Darby, came up with the idea to make
7 Molotov cocktails. Darby, of course, testified at trial
8 there was no secret three-way meeting. There's a call here
9 where Brad Crowder says the same thing. This is Attachment
10 7.

11 (Audio recording played.)

12 MR. PAULSEN: That was a call between Brad Crowder
13 and his girlfriend Lauren on January 23, 2009, three days
14 before David McKay's trial.

15 And, Your Honor, the reason Mr. McKay invented a
16 secret three-way meeting where only three people were
17 present and one of them was Brad Crowder is because he knew
18 that Brad Crowder wasn't going to testify at his trial and
19 his lawyer, Mr. Mohring, had already written a letter to the
20 Court saying that Brad Crowder is not going to testify for
21 either side. He had been offered a chance to cooperate with
22 the Government and testify against Mr. McKay and he said,
23 No, I am going to keep my mouth shut; and he did. Mr. McKay
24 knew that.

25 He knew that he could say that there was a

1 three-way meeting because it would come down to McKay's word
2 against Darby's. And Mr. McKay, having practiced his
3 recitation, was very convincing and he convinced at least
4 one juror that there was a reasonable doubt whether
5 Mr. Darby induced him.

6 Well, what did the Government do in the wake of
7 the mistrial? As you heard, we went back and reviewed five
8 months' worth of jail calls and we found these incriminating
9 conversations which show that his trial testimony was made
10 up.

11 The other thing we did is we got permission to
12 immunize Brad Crowder, who now had pled guilty, no longer
13 had a privilege against self-incrimination. We got
14 permission to immunize Brad Crowder and we came to this
15 Court and this Court ordered that he would have to testify
16 at Mr. McKay's trial. At that point Mr. McKay knew the jig
17 was up, we had all this new evidence, Brad Crowder was not
18 going to back up his story, and he finally pled guilty.

19 But even then it took two days to get his guilty
20 plea in because he still clung to the fiction that
21 Mr. Brandon Darby had something to do with making the
22 Molotov cocktails, and it's not true and he still clings to
23 it. He was given opportunities on the record to tell the
24 truth and he didn't. He still clings to that fiction.

25 And in his acceptance of responsibility statement,

1 which I am told his lawyer wrote, Mr. -- I'm told that
2 Mr. McKay never even sat down with the probation officer and
3 told him orally what happened. He wouldn't talk to the
4 probation officer, but his lawyer wrote a nice long
5 statement in which he still claims to the fiction that
6 Mr. Darby had something to do with this. It's false and
7 it's wrong and it's unfair.

8 So that brings us to the question of acceptance of
9 responsibility. Because there's obstruction of justice,
10 that should rule out acceptance of responsibility. If this
11 were an extraordinary case he could get both, but this isn't
12 an extraordinary case because the facts are clear he's not
13 entitled to acceptance beyond the legal argument.

14 And that brings me to the last call I want to
15 play.

16 THE COURT: Before you get to that call, in what
17 circumstances do you feel that he could get obstruction and
18 acceptance?

19 MR. PAULSEN: I can't think of a case. I really
20 can't think of a case. I don't know of a case that I have
21 ever had where both were given. I could be wrong about
22 that.

23 But I suppose if -- well, let me posit one. If at
24 the change of plea hearing when he was given the chance to
25 come clean and say -- all right. You want to accept

1 responsibility. Let's talk about not only the crime you
2 committed at the RNC. Did you also commit a crime at your
3 trial? Did you lie? He had said, Yes and I am sorry, I
4 regret that, it was a mistake. It might be a different
5 story.

6 He didn't do that. He was under oath and he
7 continued to cling to the fiction that Mr. Darby had
8 something to do with making the -- having him make the
9 Molotov cocktails.

10 So Attachment 8 is a jail call on March 18, 2009.
11 Now, this is the day after he entered his guilty plea. And
12 on one of those two days, I believe it was the first day
13 when he tried to plead, Mr. Crowder was in the courtroom
14 with him because you had him here to compel him to testify
15 in Mr. McKay's trial. He was here. Mr. McKay was there.
16 It's the first time, apparently, they'd seen each other for
17 a while.

18 On this call, the day after Mr. McKay pleads
19 guilty, he says that he entirely has not accepted
20 responsibility for his criminal conduct.

21 (Audio recording played.)

22 MR. PAULSEN: So when David McKay says in the
23 first paragraph that Brad Crowder "completely
24 single-handedly destroyed my entire case and ability to
25 fight it," what he's really saying is that because Brad

1 Crowder wouldn't come in and lie for me, I had to plead
2 guilty. That's not acceptance of responsibility.

3 He goes from falsely blaming Brandon Darby for his
4 problems; and when that's exposed as a lie, he switches and
5 now he falsely blames his former best friend, Brad Crowder,
6 for all his problems. And the rest of it is just more of
7 the same. I mean, he talks in there about if I had known
8 that Brad was going to testify, I'd have taken that plea
9 offer.

10 And there was a plea offer, as I say, in my
11 affidavit. Right after trial, before we had gone to all the
12 trouble of reviewing five months' worth of jail tapes,
13 before we had gone to all the trouble of immunizing Brad
14 Crowder, there was an offer in the wake of the mistrial.

15 But Mr. McKay knew then we didn't have any new
16 evidence, so he turned down that offer and he was determined
17 to go to trial and try to lie his way out of it a second
18 time.

19 It was only after we did all that extra work and
20 showed him evidence that was going to blow his defense out
21 of the water that he agreed to plead guilty, and even then
22 he didn't tell the truth.

23 Now, there's one other attachment --

24 THE COURT: What was the plea negotiation?

25 MR. PAULSEN: May I say?

1 THE COURT: Yes.

2 MR. PAULSEN: The offer in the wake of the
3 mistrial was a stipulated range of 24 to 32 months, which
4 reflected my view, not having any additional evidence beyond
5 what I had at the first trial, knowing the outcome of the
6 first trial, that reflected my view that there should be a
7 discount because of the litigation risk.

8 He turned that offer down. We went and got more
9 evidence. That offer was not extended after we found out
10 that he had been lying at trial, after we had proof that he
11 had been lying at trial.

12 There is one other lengthy transcript attached to
13 the Government's sentencing memorandum. It is the secretly
14 tape-recorded conversation on September 1, 2008, the first
15 day of the convention, with an informant named Darst.

16 And it's very hard to hear in the courtroom, Your
17 Honor, and I don't think it's worth taking the time, but
18 Mr. DeGree told me he doesn't dispute the transcript or the
19 foundation for it, so --

20 THE COURT: Is that correct, Counsel?

21 MR. DeGREE: That is correct, Your Honor. Just
22 for the record, I don't dispute the foundation of
23 [inaudible].

24 THE COURT: You can turn your microphone on.

25 MR. PAULSEN: And that transcript really goes more

1 to the request for a variance because there is an argument
2 made here that whatever guidelines this Court computes,
3 there ought to be a variance because this conduct is out of
4 character or maybe Mr. McKay was swept up in somebody else's
5 activities and there ought to be a variance.

6 Well, on this transcript Mr. McKay, not knowing he
7 was being recorded, makes several admissions and one of them
8 is he admits that on the day he was arrested at that violent
9 demonstration on September 1st, he admits that he was
10 throwing rocks at the police.

11 And he says later on that -- this is his quote.
12 McKay says, "We had some tactics that got shot down by our
13 affinity group," and I believe when he said that he was
14 referring to the Molotov cocktails. He intended to use --
15 he and Brad Crowder intended to use Molotov cocktails. The
16 reason they didn't is because those tactics got shot down by
17 other members of the affinity group. In other words, it
18 wasn't a voluntary decision on their part. It was a
19 decision that was caused by the views of other people.

20 Later on in that same transcript, at page 19, he
21 talks about -- McKay talks about how during that violent
22 demonstration on September 1st, quote, "I can't tell you how
23 many times I had to stop the crowd from running." And that
24 was seen on that videotape played at trial. Mr. McKay
25 wasn't just passively walking along. He was one of the

1 organizers. He was getting other people to do reckless and
2 illegal things.

3 At one point the informant tells Mr. McKay that a
4 cop car got burned up during the demonstration that day and
5 McKay's response is, quote, "Awesome." Then McKay in turn
6 tells the informant about Mr. Crowder throwing the highway
7 sign off the freeway overpass and Mr. McKay, far from
8 disapproving of that conduct, expresses satisfaction that,
9 quote, "The cops are freaking the fuck out when that started
10 happening." And then he goes on to add that the people who
11 did it got away because the cops, quote, "don't make a move
12 unless they know they have numbers."

13 So the Government's position, Your Honor, is that
14 there should be an enhancement for obstruction of justice,
15 no reduction for acceptance of responsibility. And whether
16 there should be a variance, I guess I will wait to hear
17 Mr. DeGree's arguments on that.

18 THE COURT: All right. Mr. DeGree, let's hear
19 your arguments dealing with the obstruction and --
20 obstruction of justice and acceptance of responsibility.

21 MR. DeGREE: Thank you, Your Honor. Your Honor, I
22 guess the first place I'd like to start was what I would
23 characterize as a pretty significant mischaracterization by
24 the Government of some facts.

25 With regards to the plea agreement and plea

1 discussions -- and first of all I just want to express my
2 disappointment that the Government has chosen to air plea
3 negotiations in public. I think that those, from our
4 perspective, were undertaken in good faith. We all felt
5 after the jury was unable to come to a verdict that an
6 appropriate thing to do would be to resolve the case and
7 that both parties had some merits to their case.

8 And I'm -- if the spirit -- if the letter of
9 Rule 408 and Rule 410 of the rules of evidence haven't been
10 broken by disclosing the contents of plea negotiations,
11 certainly the spirit has.

12 And for the Government to come in and then ascribe
13 all these sinister motives for why a defendant or why
14 Mr. McKay, a 23-year-old, who had at one point wanted to
15 plead guilty and then not plead guilty under certain terms
16 and conditions I think is inappropriate.

17 As far as factually what was represented about
18 those plea negotiations, the Government as late as ten days
19 before the trial offered the plea range that the Government,
20 Mr. Paulsen, spoke of, the 24 to 32 months.

21 Any suggestion that that was naively done by the
22 Government after a trial, after -- all of a sudden the
23 Government just discovered this smoking gun evidence and now
24 they're outraged at what a manipulative liar Mr. McKay is, I
25 suggest, should fall on deaf ears.

1 The Government sat through the trial in this case.
2 It had been pending for six months before that offer was
3 extended and it was a completely appropriate offer under the
4 circumstances. And I believe that Mr. Paulsen just
5 represented to you that that happened right after the jury,
6 and it did not. It happened within ten days of the trial.

7 Your Honor, I would first like to --

8 THE COURT: Of the second trial?

9 MR. DeGREE: Of the second trial, correct, Your
10 Honor.

11 Your Honor, I would first like to address the
12 acceptance issue. And, again, the Government is extremely
13 cynical in its portrayal of Mr. McKay and, frankly, my
14 advice to him and his decisions about whether to go to trial
15 or not.

16 It is clear that he accepted responsibility and
17 wanted to accept responsibility from day one in this case.
18 He knew that he had gone to the store, he knew that he had
19 bought the ingredients to make a Molotov cocktail, and he
20 knew that he and Mr. Crowder did that and there was no
21 question about it.

22 He put them in the basement of that house and he
23 left them there and he felt terrible about it. He felt
24 terrible about it from day one, he feels terrible about it
25 now, and he has never stopped feeling terrible about it.

1 He sat down with the police and he told them that
2 that's what he did and he has never, ever denied or
3 minimized his role in going to the store and buying and
4 making and possessing Molotov cocktails.

5 He told that to the police the first time they
6 talked to him. Apparently he was telling everybody on the
7 phone that. And he came into court and he testified in a
8 very candid manner about that. He didn't have to testify
9 that way, but he did because it was the truth.

10 Your Honor, I would suggest, and I suggested this
11 to you at the time that the plea was done, entrapment and
12 inducement and persuasion and predisposition are not black
13 and white issues that are easily solved.

14 What we have is a set of facts and then everybody
15 gets to -- or the law is applied and then we draw
16 conclusions based on the facts. The Government's argument
17 is that Mr. McKay lied about the facts.

18 Entrapment, again, inducement, persuasion are all
19 pretty gray areas, I would suggest. This isn't a situation
20 of somebody who pulled a gun and if he pulled the gun he did
21 it and he killed a person. It's a much grayer area.

22 What happened in the trial is that Mr. McKay
23 testified in a way that has been corroborated significantly
24 by Mr. Darby and later by Mr. Crowder. I would respectfully
25 suggest to this Court that Mr. Crowder spoke to the Court a

1 week ago and it was the first time that anybody had heard
2 his testimony or his statement about what happened, and he
3 would have corroborated 99.99 percent of what David McKay
4 testified to.

5 There is no question and there is no doubt in this
6 case, and the Government has refused to acknowledge this
7 from the start, Brandon Darby was 32 years old, had a
8 significant history of activism, and these two young men
9 looked up to him.

10 And we heard that from Brandon -- I'm sorry --
11 from Mr. Crowder, from Brad Crowder, and Brad Crowder for
12 the first time talked about how that influenced him and how
13 he looked up to Brandon Darby and how he wanted to please
14 this person.

15 Brandon Darby talked about the things that were
16 said, and I won't go through those. The Court is well aware
17 of those, having heard them several times from me and in my
18 arguments to the jury. But there's no question that that's
19 what happened here and it happened over a long period of
20 time.

21 There's also no question from Mr. Crowder,
22 Mr. McKay, and Brandon Darby that on the evening of the 31st
23 there was a meeting that happened in Minneapolis at the
24 house -- in the basement of the house that Brandon Darby was
25 staying at. All six months leading up to that are

1 consistent, that that meeting occurred is consistent. What
2 happened in the basement then is where there's a bit of a
3 divergence.

4 And I would suggest to Your Honor that -- again,
5 the Government has talked almost exclusively about that one
6 issue, whose idea was it. I'm not going to suggest to the
7 Court it's not significant because it is a significant
8 issue, but taken as a whole and looking over the whole of
9 his testimony, that is the only part that's inconsistent
10 with what anybody has ever said about what happened.

11 He told the Court at the time of the plea that he
12 didn't recall whose idea it was, and I don't think there's
13 any question it either came from Brad or it came from
14 Brandon. We're not suggesting it came from Brandon, so it
15 must have come from Brad. Mr. McKay told you he doesn't
16 remember and he told you that he embellished at the trial
17 because he wanted to believe that it came from Brandon.

18 And the Government just played for you another --
19 there are a lot of parts about this case that are
20 heartbreaking, Your Honor, but I would suggest to you that
21 Attachment 5 and Attachment 6 in which -- it seems pretty
22 clear that David's father is telling him that he has to say
23 that this idea came from Brandon Darby. And for a
24 23-year-old to be in prison and to have his father telling
25 him these things, I think had an impact on him, Your Honor.

1 It doesn't excuse what happened, but I would suggest to you
2 that it explains what happened.

3 So my suggestion to you, Your Honor, again, is
4 that as a whole from the beginning David McKay has accepted
5 responsibility. He's always accepted responsibility and
6 wanted to accept responsibility.

7 Note 2 to the obstructing provision of the
8 guidelines indicates that obstructing is not appropriate
9 when inaccurate testimony results from confusion, mistake,
10 or faulty memory. And I suggest to you, again, taken as a
11 whole, that that's what this situation is.

12 The Court asked Mr. Paulsen if this was an
13 extraordinary case. It may be. If the Court is inclined to
14 apply one of these provisions but not the other, it may be
15 an extraordinary case.

16 It's a situation of a hung jury. It's a situation
17 of a plea after a hung jury and an entrapment defense, which
18 is pretty rare. And I would suggest to you that those are
19 pretty extraordinary circumstances.

20 I don't think I have anything further, Your Honor.
21 Thank you.

22 THE COURT: Let's go to Attachment 8 of the
23 Government's papers dealing with the call on 3-18-09 at
24 4:50, the day after Mr. McKay's plea of guilty, and your
25 client says, "He completely single-handedly destroyed my

1 entire case and ability to fight it."

2 MR. DeGREE: Your Honor, two comments. One is I
3 don't know how he could know that. We didn't know what Brad
4 Crowder was going to say. We had very little information
5 about what his testimony was going to be. Second of all --

6 THE COURT: Well, this is coming out of the mouth
7 of your client. Maybe he didn't tell you what he knew and
8 that goes to what the Government is saying, that he
9 essentially made up this conversation between Darby and
10 himself and Crowder about the making of the Molotov
11 cocktails --

12 MR. DeGREE: The other thing, Your Honor --

13 THE COURT: -- and he knew that Crowder was not
14 going to back him up on that.

15 MR. DeGREE: Well, Your Honor, in the context in
16 which this happened -- and, again, we're talking about why
17 somebody would enter a guilty plea; and those are very
18 complex decisions and they involve legal advice and there's
19 privileges that apply to those things.

20 But we didn't know what he was going to testify to
21 and, quite frankly, another heartbreaking part of this case
22 was listening to Brad Crowder talk for the first time and
23 talk about the effect that Brandon Darby had on him.

24 So the other thing, Your Honor, clearly we had
25 gone to trial, clearly we had argued entrapment, we did that

1 vigorously, as we have every right to do, and no doubt
2 family members were aware of that and of that impression.

3 And this is a conversation that literally happened
4 on the night that the decision was made to enter a guilty
5 plea and, again, it's, you know, a 10-, 15-second clip of a
6 conversation with his girlfriend right after that. And the
7 fact that he may not want to tell her that he's guilty or
8 that he lied or any of those things, I think, is probably
9 not so surprising. And to take that and say that he doesn't
10 accept responsibility, I think, is not the proper way to
11 take that and it's taken out of context.

12 THE COURT: Well, if it doesn't apply to
13 acceptance of responsibility, it certainly goes to
14 obstruction of justice, doesn't it?

15 MR. DeGREE: I don't see how, frankly, Your Honor.

16 THE COURT: Well, if the reasonable interpretation
17 is that he concocted a story and lied on the stand, isn't
18 that obstruction of justice?

19 MR. DeGREE: Well, I think another --

20 THE COURT: Dealing with the main issue that Darby
21 influenced him and entrapped him into this situation of
22 making Molotov cocktails.

23 MR. DeGREE: I think another interpretation, Your
24 Honor, is that he's disappointed that he knew what the truth
25 was and that he felt that --

1 THE COURT: And the truth was --

2 MR. DeGREE: Again, I'm not -- I'm trying to
3 focus --

4 THE COURT: The conversation is so important.

5 MR. DeGREE: I appreciate that.

6 THE COURT: We can't dance around the
7 conversation.

8 MR. DeGREE: Understood.

9 THE COURT: If your client hadn't said that Darby
10 had a conversation about Molotov cocktails, your case would
11 have been extremely weak.

12 MR. DeGREE: I don't agree with that.

13 THE COURT: Well --

14 MR. DeGREE: I mean, I think there --

15 THE COURT: I can understand that.

16 MR. DeGREE: -- were six months that led up to
17 that that I think were, frankly, more important, but
18 obviously reasonable minds can differ about that.

19 And I guess one of the other ways to take that
20 comment, Your Honor, is that, you know, this was his buddy
21 and his buddy was being squeezed by the Government and his
22 interpretation was that his buddy was going to protect
23 himself.

24 THE COURT: But he got on the witness stand and
25 made a statement.

1 MR. DeGREE: Mr. McKay did, yes.

2 THE COURT: Mr. McKay got on the stand and made a
3 statement about a conversation that as you stand here today
4 know is false.

5 MR. DeGREE: I wasn't there, Your Honor, but
6 there's no question there's a contradiction between what he
7 testified and what he told you at the plea hearing and what
8 he is going to tell you today. There's no question about
9 that. There's no question about that. I guess our only
10 suggestion is that that's not -- that piece is just one
11 piece.

12 THE COURT: Anything else?

13 MR. DeGREE: No, Your Honor. Thank you.

14 THE COURT: Thank you.

15 Anything further from the Government? I have a
16 question for the Government.

17 MR. PAULSEN: Yes.

18 THE COURT: Mr. McKay pled guilty, he gave the
19 requisite factual basis for the plea, and you have a
20 conversation of him talking to his girlfriend right after
21 the plea and he's upset. But does that take away from him
22 accepting responsibility?

23 He pled guilty. He gave a factual basis.
24 Remember I went through it in some length to make sure that
25 there was no wiggle room dealing with whether or not there

1 was entrapment involved in this case, because it was just
2 easier to try the case than have someone plead guilty and
3 then say I was entrapped and I shouldn't be sentenced. And
4 we had a lengthy plea. So my question to you is: Why isn't
5 that the requisite amount of acceptance to get the points?

6 MR. PAULSEN: For three reasons: One, because he
7 lied at the first trial. Two, because he --

8 THE COURT: Well, but he changed his story. It
9 happens all the time. You have -- we have people that have
10 lied to the agents when they give their statements saying,
11 Oh, I had nothing to do with it and then all of a sudden
12 when you bring the evidence to them and their lawyer talks
13 to them they say, Okay, I'm guilty. They come in and they
14 plead guilty and they get acceptance.

15 MR. PAULSEN: Sometimes we go for obstruction of
16 justice in those cases.

17 THE COURT: Well, I'm talking about acceptance.

18 MR. PAULSEN: I have three reasons. One is the
19 legal reason, you don't usually get it if you're found to
20 obstruct justice.

21 Number two, why did he plead guilty, because he
22 really felt bad and wanted to accept responsibility or
23 because he knew the Government now could prove his defense
24 was false?

25 And so he was -- Your Honor, he called me at

1 3:30 p.m. on the Sunday before the trial to say that I am
2 going to plead guilty, Mr. DeGree did. Why did it take that
3 long? Because it wasn't until then that he knew and
4 appreciated all this new evidence that we had, including the
5 fact that Brad Crowder was going to be compelled. That
6 didn't happen -- we didn't make that motion until the Friday
7 before trial.

8 And when they say that, Oh, we didn't know what
9 Mr. Crowder was going to say, that's baloney because that
10 Attachment 7 was attached to our motion to compel and so
11 they knew from Brad on tape saying there was no three-way
12 conversation, they knew that Brad wasn't going to back up
13 the story; and that is when Mr. McKay decided to plead
14 guilty.

15 And number three --

16 THE COURT: Well, doesn't that happen in
17 practically every case, where a defendant has to come to a
18 realization that the Government has got the goods and they
19 can't wiggle out of it and they have to admit?

20 And Mr. McKay was under oath and I questioned him
21 extensively, you questioned him extensively. And I asked
22 you whether or not you felt that he had sufficient facts for
23 a plea of guilty. You said, Yes. I was satisfied and so I
24 accepted the plea of guilty.

25 MR. PAULSEN: I never agreed, however, that he had

1 accepted responsibility and there was no part of any plea
2 agreement -- there was no written plea agreement because it
3 was never the Government's belief that he had accepted
4 responsibility because he continued to lie about Darby's
5 role even during his change of plea hearing. And I was very
6 disappointed in that and we took a time-out and we gave him
7 a chance to come clean and he wouldn't.

8 And then you took a time-out overnight so that we
9 could go downstairs to my office and I sat with Mr. DeGree
10 and Mr. McKay and the case agent for a couple of hours that
11 night and the next morning he still came back and clung to
12 the fiction that Darby had something to do with it in this
13 three-way conversation that we now know never happened.

14 And then to top it all off, I get this jail call
15 the day after he pleads where he's blaming Brad for all his
16 problems and saying that, you know, if Brad hadn't -- if
17 Brad had continued to be a standup guy, I could have gone to
18 trial again and tried to fool a jury the second time. Now,
19 to me that's not acceptance of responsibility. If it is, I
20 mean, so be it, but it isn't to me.

21 And this idea that, well, it shouldn't be
22 obstruction because he only lied about one fact at trial,
23 out of all the other facts he only lied about one, I mean,
24 it's like the murderer who says, okay, I killed him, but
25 then falsely claims self-defense. You only lie about one

1 fact, but it's the whole fact that makes all the difference
2 in the world.

3 And that was what Mr. McKay lied about at trial.
4 It wasn't just one little fact. It was the dispositive
5 factor which, if believed, would mean the difference between
6 conviction, years in prison, and walking out of the
7 courtroom a free man. That's not a little, minor fact, Your
8 Honor.

9 THE COURT: All right. Step forward. The Court
10 has heard arguments dealing with the two-level enhancement
11 for obstruction of justice and also received the submissions
12 of the parties and have heard the tapes of -- out of the
13 jail involving Mr. McKay and other parties.

14 The Court finds that the Government has met its
15 burden dealing with the two-level enhancement for
16 obstruction of justice and the Court will give Mr. McKay the
17 two-level enhancement dealing with obstruction of justice.

18 The next issue involves whether or not the
19 defendant has accepted responsibility and the Probation
20 Office has recommended for a two-level reduction for
21 acceptance of responsibility. The Government has argued
22 that the defendant should not receive a two-level reduction
23 for acceptance of responsibility.

24 The Court has received the papers and arguments of
25 counsel and the Court will grant the Government's position

1 and not give the defendant a two-level reduction for
2 acceptance of responsibility.

3 Therefore, the defendant's advisory guideline
4 calculations are as follows: Total offense level of 26,
5 criminal history points of 2, Category II. There's an
6 argument dealing with whether or not his criminal history
7 score is overstated. The Court has reviewed his criminal
8 history and I don't need to hear any further arguments on
9 this point. The Court finds that his criminal history is
10 overstated and will move the defendant down to a Category I.

11 Therefore, his imprisonment range for Category I
12 instead of Category II is 63 to 78 months, supervised
13 release of two to three years, fine range of \$12,500 to
14 \$125,000, and a special assessment of \$300.

15 Now we'll move to further arguments dealing with
16 sentencing and variance. Mr. DeGree.

17 MR. DeGREE: Thank you, Your Honor. I'll be
18 relatively brief, I think, in this regard. The Court is
19 very well aware of the facts of this case and I think is
20 also very well aware of Mr. McKay's background and his
21 personality.

22 I did want to express to the Court on behalf of
23 David's Aunt Dianna Colton, who testified before the Court,
24 obviously somebody who had a big impact on his life,
25 essentially raised him and is his employer -- she's not able

1 to be here today. She had a previously scheduled trip out
2 of the country and she was very disappointed that she
3 couldn't be here, but did want me to mention that and I
4 wanted to point that out to the Court.

5 Judge, we do suggest for a number of reasons that
6 a variance from the guideline range that the Court has just
7 found is appropriate. The factors under 18 U.S.C. 3553(a) I
8 think appropriately applied in this case would militate or
9 would suggest that a variance is appropriate.

10 With regards to Mr. McKay's character, I think the
11 Court has had a chance on numerous occasions to see him and
12 to hear enough about his character, but he has always --
13 this is obviously the first time he's ever been in any type
14 of serious trouble in front of a court, first time he's ever
15 been in jail for any length of time other than a couple of
16 hours. He has learned quite a lesson from this. I think
17 the Court can appreciate that. He's hardworking. He's got
18 tremendous support from his family and friends. And I think
19 he's somebody that I think the Court can anticipate will not
20 be in trouble again.

21 The offense I think the Court is also very well
22 aware of. I would suggest to the Court again, and there was
23 a lot of discussion about this at Mr. Crowder's sentencing,
24 but there was no intention after a very brief time period to
25 use the Molotov cocktails.

1 This is something that happened in a relatively
2 quick time period. I think the time in which the decision
3 was made to make them, to buy the ingredients, and put them
4 together was probably somewhere in the neighborhood of six
5 to eight hours. And then after that, very quickly they
6 decided not to use them and they were put in a basement and
7 they weren't used.

8 I do appreciate that the Government hasn't sought
9 a four-level enhancement for possession with intent to use
10 and I appreciate that that is reflected in the guidelines,
11 but I would also suggest to the Court that that is a
12 relevant consideration with regards to both the character
13 of -- Mr. McKay's character and also to the offense itself,
14 that there really was not a significant danger posed of use
15 of the Molotov cocktails.

16 Your Honor, I would also suggest and the Court is
17 well aware, again, of the information with regards to
18 Mr. Darby and the Court is well aware that they were young,
19 23 -- 22-, 23-year-old men who looked up to Mr. Darby, who
20 had a long history of activism and effectively helping needy
21 people.

22 And as I mentioned before, it was hard to hear
23 Mr. Crowder explain the impact that that had on him. And I
24 would suggest to the Court that that's exactly what
25 Mr. McKay said and how it affected Mr. McKay. You have

1 heard Mr. McKay testify about that as well.

2 He challenged them. He told them they needed to
3 do things. They needed to not be a bunch of hippies, that
4 they actually needed to accomplish something, called them
5 tofu eaters, and all those things that the Court is very
6 well aware of. And they were not appropriate and I think
7 they had a large impact on what happened here.

8 We're not suggesting he was entrapped, not
9 suggesting that he didn't go out and buy those things. As
10 the Court is well aware of, he did and he is guilty of
11 possessing a Molotov cocktail. But our suggestion to the
12 Court very strongly, as we've suggested from the beginning
13 of these proceedings, is that this informant's role is
14 something that the Court should consider very strongly and
15 we think it's an appropriate reflection on the offense and
16 of the factors under the statute for a variance, a downward
17 variance, with regards to the sentence.

18 The Government talked about Mr. McKay clinging to
19 his position in this regard. The Government has clinged to
20 their position that Mr. Darby did absolutely nothing wrong
21 or that he didn't influence these folks in any way. And I
22 would suggest -- and that there's absolutely no gray.

23 This is not a case of gray for the United States
24 Government, never has been. He didn't do anything wrong,
25 didn't put anybody in the wrong spot, or didn't -- the fact

1 that there's a difference in age and they looked up to this
2 individual has no gray whatsoever.

3 And we respectfully disagree with that and
4 respectfully suggest to the Court that this is a very gray
5 case. These were two young impressionable men who wanted to
6 make a difference in the world. They saw someone who had
7 done that in the past and they wanted to be like him.

8 They made bad decisions. They made mistakes.
9 Mr. McKay made a bad decision. Mr. McKay made a bad
10 mistake. But, quite frankly, that sentence range that we're
11 talking about does not adequately reflect Mr. McKay's
12 character or what actually happened here.

13 Finally, Your Honor, I would point out U.S. --
14 18 U.S.C. 3553(a)(6), which talks about the need to avoid
15 unwanted sentencing disparities. Obviously Mr. Crowder got
16 a sentence of 24 months.

17 I appreciate greatly the Court's concern and the
18 Government's concern with regards to Mr. McKay's testimony
19 and I think the Court, based on its findings today, is
20 inclined to give him a larger sentence for that and I
21 appreciate that and I think we anticipated that, quite
22 frankly. So the question for the Court is how much more.

23 And I would respectfully suggest that it
24 shouldn't -- that these two defendants really are very,
25 very, very, very, very similar in their situations. The way

1 that they were influenced, the way that they got involved in
2 this, and the activities that they undertook are almost
3 identical. They have very similar criminal histories.

4 Mr. Crowder obviously has another case pending. Mr. McKay
5 does not.

6 But these two should have been treated the same.
7 And the Government has decided to air our plea negotiation
8 laundry in public. The facts of life are is Mr. McKay, I
9 think, probably would have pled guilty had the Government
10 treated him the same that they chose to treat Mr. Crowder at
11 the beginning.

12 The four-level reduction that the Government ended
13 up -- or the enhancement that they chose not to seek was all
14 we ever wanted, that's all we ever wanted, and that's all
15 Mr. McKay ever wanted.

16 And so we made decisions and made mistakes after
17 that and that's unfortunate, it's unfortunate for Mr. McKay,
18 but we would suggest to the Court that they should be
19 treated similar or as similar as possible.

20 Thank you.

21 THE COURT: Mr. McKay, step forward. Sir, you
22 have a constitutional right to speak to me. You have an
23 absolute right to tell me anything that you want to tell me
24 about yourself, about this offense, or anything else that
25 you think you should tell me.

1 I am not going to ask you any questions. This is
2 your time to talk to me. And you've heard my questions of
3 both attorneys, so you know what the issues are. So let's
4 hear from yourself.

5 THE DEFENDANT: I don't know if it's through this
6 that I explain a couple of things that have been presented
7 to you today.

8 I wanted to -- my belief is that Brad was going to
9 say something that was a lie to protect himself. I felt
10 like I was at points protecting Brad and that's where my
11 frustration with him comes. He's not my former friend. He
12 is still my good friend.

13 And when Mr. Paulsen told me that he was going to
14 testify that this three-way meeting never happened, I was
15 very upset about that because I knew that he had -- he was
16 trying to get a minor role in his sentencing guidelines and
17 I thought that maybe that was a way that he was avoiding
18 taking equal responsibility for the action and I was very
19 upset about that.

20 I embellished and, I guess, factually lied that
21 Brandon Darby came up with the idea about the Molotov
22 cocktails, but when we were coming up with the idea he was
23 there.

24 I should have never been up here. I should have
25 never left my home. I should have never left the people who

1 love me. I don't think that sorry is good enough. I was
2 never taught that your words are good enough to fix a
3 problem, only your actions.

4 And I just hope that Your Honor sees that that is
5 my want and my will, to be more than my mistakes and to
6 become something greater than this. I just hope you can see
7 that.

8 It was never our intent to hurt anybody. We never
9 came up here with that purpose whatsoever. And the fact
10 that we went down that road was I guess -- I don't know. I
11 don't have any reason why we did it.

12 I just -- I'm willing to take responsibility for
13 what I've done and I'm willing to move past this, and I hope
14 you can see that as well.

15 THE COURT: Anything else, sir?

16 THE DEFENDANT: No, sir.

17 THE COURT: Mr. Paulsen.

18 MR. PAULSEN: Well, with respect to the argument
19 that Mr. McKay immediately decided not to use these Molotov
20 cocktails, they were still in his possession two days later
21 on the night of September 2nd. They were hidden in the
22 basement. They were still in his possession.

23 He says, Well, I couldn't get rid of them because
24 I didn't want to pour them down the drain. Well, that's
25 nonsense. He made them by pouring gas out of a gas

1 container and that gas container is still in the apartment
2 when the police find it on the morning of September 3rd. It
3 would have been very easy to dismantle those Molotov
4 cocktails if he had actually abandoned an intent to use
5 them.

6 No, we didn't go for the four-level enhancement.
7 If we had -- and I'm not saying it wouldn't be provable. We
8 didn't go for it because then his guidelines would be 97 to
9 121 months and a sentence of eight to ten years, despite how
10 bad he has made it for himself, is not appropriate in this
11 case, but that doesn't mean I don't stand by the facts of
12 what happened on September 2nd and those text messages he
13 sent saying that, Well, we're not going to go do the action
14 because there's too many ants around the candy bars, serious
15 concern, too hot.

16 And then the argument is made, well, there should
17 be some discount because he looked up to Mr. Darby. That
18 was an argument that his lawyer made at least. And I heard
19 that from Mr. Crowder the other day too.

20 You know, if you want to be like Brandon Darby,
21 then go to New Orleans and save people's lives in the
22 aftermath of a flood. Don't come to Minneapolis to
23 interfere with a national political convention, to do battle
24 with the police, to make Molotov cocktails that you are
25 going to use to destroy a jumbotron.

1 So we're starting at a guideline range of 63 to 78
2 months and what should the sentence be. Well, it obviously
3 should be higher than Crowder. I also think it should be
4 higher than Bradley DePalma, who got 42 months. He pled
5 guilty, owned up right away -- I don't think he even had a
6 motions hearing, if I recall correctly, but that's beside
7 the point -- and he got 42 months, which was his guideline
8 range or I think it was a couple of months below his
9 guideline range. I think Mr. McKay's sentence should be
10 higher than that.

11 It could have been lower. He had options. The
12 idea that all they ever wanted was for the Government to not
13 go after the four-level enhancement is refuted, completely
14 refuted by the fact that we offered a better deal than that
15 after the first trial and he turned that down.

16 But whatever sentence the Court gives, I do hope
17 that Mr. McKay starts reevaluating his priorities and really
18 starts thinking about what he did that makes him guilty and
19 why it's his fault, not Darby's, not Crowder's, not his
20 father's, it's his fault, because when he comes out he is
21 going to have to be a grown-up and he is going to have to
22 stop blaming everybody else for things that he's done.

23 Nothing further.

24 THE COURT: Mr. McKay, step forward. Mr. McKay,
25 on March 17, 2009 you pled guilty to Counts 1, 2, and 3 of

1 the indictment.

2 Count 1, possession of an unregistered firearm, in
3 violation of Title 26, United States Code, Section 5845,
4 5861(d), and 5871; and Title 18, United States Code,
5 Section 2.

6 Count 2, illegal manufacture of a firearm, in
7 violation of Title 26, United States Code, Sections 5822,
8 5845, 5861(f), and 5871; and Title 18, United States Code,
9 Section 2.

10 Count 3, possession of a firearm with no serial
11 number, in violation of Title 26, United States Code,
12 Sections 5845, 5861(i), and 5871; and Title 18, United
13 States Code, Section 2.

14 To each and every count it is considered and
15 adjudged that you are guilty of that -- those counts. The
16 advisory guideline calculations have been stated. They are
17 a range of 63 to 78 months with a fine range of \$12,500 to
18 \$125,000 and a special assessment of \$300.

19 Now, before I sentence you, Mr. McKay, I will
20 spend a few minutes with you. We have spent a lot of time
21 together and certainly I've heard quite a bit about what
22 happened and I spent time with you dealing with the plea of
23 guilty to make sure that you were, in fact, pleading guilty
24 because you were, in fact, guilty of the crime. And I am
25 satisfied of that, that we have a complete and full plea of

1 guilty here.

2 I have gone through your testimonials for you. In
3 that first conversation that you had with your dad, the
4 taped conversation, your dad was saying, you know, you're a
5 good person. What craziness are you doing doing this? He
6 was confused because that was not the person he knew. And
7 all the people that have given testimony for you, that's not
8 the person that they knew.

9 So the question is who is this anarchist, why have
10 you become an anarchist during a very short period of time
11 and to really get involved in activities that are outside
12 the character that your family and friends have known.

13 Certainly people have influences over individuals
14 and certainly when you send your children off to school, the
15 people that they hang around with have an influence on them,
16 but hopefully the training and the education that you have
17 at home builds a moral fiber so you know what is right and
18 what is wrong.

19 It would have been one thing if you came up here
20 just to demonstrate peacefully and carry a sign and chant it
21 or scream it or whatever, but your activities took a
22 different range. It was one of anarchy, of causing chaos
23 and causing harm. Remember I saw you on videotape. You
24 were leading the charge. And part of my job is to try to
25 figure out what caused that and is that going to continue

1 and are you going to cause harm once you get out of jail.

2 And it's not like you were involved in a frat
3 house drunken fire and throwing beer bottles and everybody
4 is drunk and get caught up in the mob scene, but it was sort
5 of coming and -- you and Crowder, you were coming up to do
6 anarchy against the system.

7 Now, I've gone through the guidelines. I found
8 that you have obstructed justice and I found that you have
9 not accepted responsibility and that's reflected in the
10 advisory guidelines. Now I have to look at the 3553(e)
11 factors and make sure that I sentence you to the appropriate
12 sentence, and I will do that now.

13 David Guy McKay, you are hereby sentenced to the
14 care and custody of the Bureau of Prisons for a term of 48
15 months. I will recommend to the Bureau of Prisons that you
16 be housed at the facility at Big Spring, Texas, which is a
17 low security facility.

18 The Court will not impose a fine.

19 The defendant is sentenced to a term of three
20 years supervised release. The mandatory -- the following
21 mandatory conditions are applicable:

22 The defendant must report to the United States
23 Probation Office in the district to which the defendant is
24 released within 72 hours of release from the custody of the
25 Bureau of Prisons.

1 The defendant shall not commit any crimes,
2 federal, state, or local.

3 The defendant shall not illegally possess a
4 controlled substance. The defendant shall refrain from any
5 unlawful use of a controlled substance. The defendant shall
6 submit to one drug test within 15 days of release from
7 imprisonment and at least two periodic drug tests thereafter
8 as determined by the Court.

9 Next, the defendant shall not possess a firearm,
10 ammunition, destructive device, or any other dangerous
11 weapon.

12 Next, the defendant shall cooperate in the
13 collection of DNA as directed by the probation office.

14 The defendant shall abide by the standard
15 conditions of supervised release which have been adopted by
16 the Court, including the following special conditions:

17 One, the defendant shall participate in a program
18 for substance abuse as approved by the probation officer.
19 That program may include testing, inpatient or outpatient
20 treatment, counseling, or support group. Further, the
21 defendant shall contribute to the costs of such treatment as
22 determined by the Probation Office Co-Payment Program, not
23 to exceed the total cost of treatment.

24 Next, the defendant shall participate in a
25 psychological and/or psychiatric counseling or treatment

1 program to include anger management, counseling as approved
2 by the probation officer. Further, the defendant shall
3 contribute to the costs of such treatment as determined by
4 the Probation Office Co-Payment Program, not to exceed the
5 total cost of treatment.

6 Let me stop here. You know the -- your behavior
7 prior to coming to Minnesota, the three prior criminal
8 interdictions that you've had were all assaultive -- two
9 assaultive behaviors.

10 And so at some point you're going to have to come
11 to grips with your anger and how you handle stress and how
12 you handle rejection or not getting your way. If you look
13 at that videotape, you will see that it's a person that was
14 quite angry, quite frustrated and caused you to be involved
15 in criminal activity.

16 And so if you're going to change, you are going to
17 have to take a look at your whole behavior, your anger and
18 how you handle that. And we will give you assistance in
19 doing that, but we can't make you change. It's going to
20 have to come from you.

21 Next, the defendant shall take any prescribed
22 medications as directed by a medical provider.

23 Next, if not employed at a regular lawful
24 occupation as deemed appropriate by the probation officer,
25 the defendant may be required to perform up to 20 hours of

1 community service per week until employed. The defendant
2 may also participate in training, counseling, daily job
3 search, or other employment related activities as directed
4 by the probation officer.

5 And finally, there's a \$300 special assessment,
6 that's \$100 per each count of the indictment, and that
7 assessment is payable to the Crime Victims Fund, which is
8 required by statute to be paid immediately.

9 Sir, if you feel the Court has not followed the
10 law in the imposition of your sentence, you have a right to
11 appeal your sentence to the Eighth Circuit Court of Appeals
12 which sits in St. Louis. You have ten days from today's
13 date to file your notice of appeal.

14 Mr. DeGree will be -- if you work out an agreement
15 with him, he will be your attorney on your appeal if you
16 feel that your appeal is necessary, if you feel the Court
17 has not followed the law in imposing your sentence.

18 If you cannot afford Mr. DeGree or any other
19 private attorney, you can request to have a free attorney
20 and you will submit an affidavit. I will review that
21 affidavit. If you qualify for a free attorney, then I will
22 appoint an attorney to represent you on your appeal. You
23 can represent yourself, that's always an option.

24 In any event, you have ten days from today's date
25 to file your notice of appeal if you feel the Court has not

1 followed the law in the imposition of your sentence today.

2 Anything further?

3 MR. DeGREE: Not from -- the only thing, Your
4 Honor, if Mr. McKay -- I believe the Court has another
5 hearing after this; is that right? I was going to ask the
6 Court to allow him to visit with his family.

7 THE COURT: He can visit with his family. He can
8 sit in the chair and they can move up to the first row.

9 MR. DeGREE: Other than that, I have nothing
10 further, Your Honor. Thank you.

11 THE COURT: Anything further for the Government?

12 MR. PAULSEN: No, Your Honor.

13 (Court adjourned at 11:30 a.m.)

14 * * *

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16

17 I, Lori A. Simpson, certify that the foregoing is a
18 correct transcript from the record of proceedings in the
19 above-entitled matter.

20

21 Certified by: s/ Lori A. Simpson

22 Lori A. Simpson, RMR-CRR

23

24

25