Case No. 11-4151

IN THE TENTH CIRCUIT COURT OF APPEALS

UNITED STATES OF AMERICA, Appellee/Plaintiff, v. TIM DECHRISTOPHER, Appellant/Defendant.	

This is a direct appeal from convictions entered in the United States District Court for the District of Utah, the Honorable Dee Benson, Judge, presiding.

REPLY BRIEF OF APPELLANT
ORAL ARGUMENT REQUESTED

RONALD J. YENGICH (3580))
YENGICH RICH & XAIZ
175 EAST 400 SOUTH, SUITE 400
SALT LAKE CITY, UTAH 84114
TELEPHONE: (801)355-0320

ELIZABETH HUNT (5292)
ELIZABETH HUNT LLC
569 BROWNING AVE.
SALT LAKE CITY, UTAH 84105
TELEPHONE: (801) 706-1114

PATRICK A. SHEA (2929)
PATRICK A. SHEA P.C.
252 SOUTH 1300 EAST, SUITE A
SALT LAKE CITY, UTAH 84102
TELEPHONE: (801)582-0949

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. THE EVIDENCE WAS LEGALLY INSUFFICIENT.

A. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN COUNT 1.

1. THE GOVERNMENT TACITLY CONCEDES THAT IT DID NOT PRESENT THE REQUISITE PROOF OF GROUP AGREEMENT.

The Government does not contest that 30 U.S.C.A. § 195(a)(1) and (b) require proof of consorting by multiple actors, rather than individual decision-making.[1] Compare DB at 16-19 with GB, *passim*.[2] The Government does not contest that there was no evidence of group agreement to sustain the conviction for Count 1. Compare DB at 17-19 with GB, *passim*. The Government effectively concedes that the evidence was legally insufficient to sustain the first count.

---

[1] The statute provides:

(a)Violations

It shall be unlawful for any person:

(1) to organize or participate in any scheme, arrangement, plan, or

(a)Violationsnent to circumvent or defeat the provisions of this chapter or its

It shall be unlawful for any person, or

…. (1) to organize or participate in any scheme, arrangement, plan, or

(b) Pe1agreement to circumvent or defeat the provisions of this chapter or its

Any pimplementing regulations, or

….

(b) Penalty

Any person who knowingly violates the provisions of subsection (a) of this section shall be punished by a fine of not more than $500,000, imprisonment for not more than five years, or both.

….

[2] DB refers to DeChristopher's opening brief. GB refers to the Government's brief.

2. THE GOVERNMENT WAS REQUIRED TO PROVE SPECIFIC INTENT TO DEFEAT OR CIRCUMVENT THE RELEVANT LAWS, AND TACITLY CONCEDES IT DID NOT DO SO.

The Government does not contend that there was proof that DeChristopher harbored the specific intent to defeat provisions of Chapter 3A of Title 30 or its implementing regulations. Compare DB at 19-21 with GB, *passim*. It contends that there was no need for proof of specific intent to violate specific provisions of law. It argues that the use of the word "provisions" in the charging statute evinces congressional intent that to sustain a conviction, no specific laws need be identified as the defendant's targets. GB at 51.

The word "provision" is commonly defined as "a clause in a legal instrument, a law, etc., providing for a particular matter; stipulation; proviso." E.g. Dictionary.com. The term does not denote the absence of a specific intent requirement. See, e.g., id. While the charging statute does not list each individual statute in Chapter 3A of Title 30 and each underlying regulation that must be targeted, it does require proof that the defendant shared the goal to "circumvent or defeat the provisions of this chapter or its implementing regulations[.]" This statute is the only one in the code that requires proof that the defendant agreed to circumvent or defeat provisions of a body of law. The plain statutory language controls. See, e.g., Southern Utah Indian Tribe v. Sebelius, 657 F.3d 1071 (10th Cir. 2011).

The Government identifies no ambiguity in the statute to justify reference to

the legislative history. In the absence of ambiguous statutory language, the Court does not normally resort to extrinsic aids to statutory construction, such as legislative history. See United States v. Romero, 122 F.3d 1334, 1337 (10th Cir. 1997). The legislative history cited by the Government in support of its argument do not reflect that Congress used the word provisions to alleviate the requirement of proof that the defendant entered into an agreement or plan to defeat or circumvent provisions of the Mineral Leasing Act or its implementing regulations. See S.Rep. No. 99-412, at 10 (1986); H.R. Rep. No. 100-378, at 15 (1987), S. Rep No. 100-188, at 7 (1987).

The Government's contention that the elements instruction for Count 1 correctly asserted as the second element that "the scheme or plan was intended to circumvent or defeat the competitive bidding process of the sale of federal oil and gas leases," GB at 50-52, does not square with the law governing elements instructions. See DB at 21. Elements of crimes must be accurately set forth in the jury instructions. See, e.g., United States v. Serawop, 410 F.3d 656, 667 (10th Cir. 2005). The elements of crimes, which by virtue of due process must be proved beyond a reasonable doubt, are those defined by Congress in the code. See United States v. Zuniga-Soto, 527 F.3d 1110, 1118 (10th Cir. 2008). Elements do not differ on the basis of the factual circumstances of cases, but instead are the same basic components that must be proved in any case charging the offense in order to obtain a conviction. See Zuniga-Soto. The second element given to the jurors in support of the first count

diverges from the language enacted by Congress, and would not be charged in every case prosecuted under 30 U.S.C.A. § 195. But see Zuniga-Soto, *supra*.

This error was prejudicial, for had the court given the elements defined by Congress, no conviction would have entered. The evidence was uncontroverted that DeChristopher had no knowledge of the laws he was charged with consorting to circumvent or defeat (DA 804-05).

B. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN COUNT 2.

1. THE EVIDENCE DID NOT SUPPORT THE CHARGE ARTICULATED IN THE INDICTMENT, ELEMENTS INSTRUCTIONS AND GOVERNMENT'S CASE.

The Government does not contest that the language of the bidder registration form did not certify that DeChristopher had a good faith intention to acquire an oil and gas lease on lands offered for auction by the United States. Compare DB at 25-28 with GB, *passim*. Nor does the Government contend that DeChristopher made any false statement when he signed the form. Compare DB at 27-28. Nor does the Government contend that DeChristopher had the intention to acquire leases when he signed the form. See DB at 5-8 and document 84, pages 20-21 (prosecutor's closing argument, which recognized that it was by accident during the auction that DeChristopher won the first two parcels for which he was the highest

bidder).

2. THIS COURT SHOULD REJECT THE GOVERNMENT'S HYPOTHETICAL THEORY.

The Government presents a hypothetical argument that DeChristopher's signing of the bidder registration form "could" constitute a false statement, provided that the Government proved that he harbored the intention to bid in bad faith at the time he signed the form. GB at 48. The Government's hypothetical argument significantly diverges from with the language of the indictment, elements instructions, or arguments made in the trial court, that DeChristopher made a false statement by signing the form that certified his good faith intention to acquire a lease. See e.g. DB at 24-25. This new argument is impermissible, for the Government is bound by the factual theory articulated in the indictment, as this is the document that is constitutionally required to provide the defendant with notice of the charge he faces. See, e.g., DB at 22, and GB at 26, both discussing United States v. Hien Van Tieu, 279 F.3d 917, 921 (10th Cir. 2002), in support of this legal proposition.

The Government's theory that the jurors found that DeChristopher had the intent to bid when he signed the form, GB at 49, conflicts with the record. See DB at 7-8. It is refuted by the Government's closing argument to the jurors that when DeChristopher entered the auction, he "posed as a bidder" and "even fooled a veteran federal agent." (document 84, page 20).

The Government should be prohibited from taking a position on appeal that

is inconsistent with its position below by virtue of judicial estoppel. See, e.g., New Hampshire v. Maine, 532 U.S. 742, 749 (2001). The doctrine of judicial estoppel forbids a party to take a position contrary to the position the party succeeded with below. It applies if the Court finds that a party's positions are clearly inconsistent, if the party succeeded in persuading the prior court of the first position, and if the opposing party would be at an unfair disadvantage if the second inconsistent position were permitted. Id. Here, the Government obtained its convictions of DeChristopher and also obtained a federal prison sentence of him, with the theory that the bidder form essential to the second count and important to the first count certified that he had the good faith intention to acquire a lease. Its hypothetical position asserted on appeal, that DeChristopher's convictions are supported by proof that he had intent to bid at the time that he signed the form, is clearly inconsistent with its prior position. Because the new position is inconsistent with the theory underlying the conviction and because the new position would put the Government in an unfairly advantageous position and would violate DeChristopher's constitutional rights pertaining to the indictment process and due process of law, e.g. Hien Van Tieu, this Court may and should estop the Government from proceeding with this claim. See id.

As this case was indicted, defined by the elements instructions and argued by the prosecution, the bidder registration form should have certified that DeChristopher

had a good faith intention to acquire a lease (DA 34, 372, 486-87, 490). Because the language of the form clearly made no such certification, but instead disproved the indictment and the crime defined by the elements instruction, Count 2 must be reversed for insufficient evidence.

II. THE VIOLATION OF DECHRISTOPHER'S CONSTITUTIONAL RIGHTS TO PRESENT HIS DEFENSE REQUIRES REVERSAL.

A. THE COURT VIOLATED DECHRISTOPHER'S CONSTITUTIONAL RIGHTS TO DEFEND HIMSELF AND TO CONFRONT THE GOVERNMENT'S WITNESSES IN A FAIR TRIAL.

DeChristopher contends that the trial court violated his constitutional rights when the court disallowed him to cross-examine or refute the Government's evidence to the effect that he was solely responsible for millions of dollars of losses to the state and federal taxpayers as a result of his single-handedly foiling the lawfully prepared and beneficial auction. DB at 33-42.

The Government claims that in this argument, DeChristopher's opening brief exaggerates the evidence presented by the Government at trial. GB at 44-45. The Court is asked to review the portions of the record cited in DeChristopher's argument to confirm the argument's accuracy.

The Government asserts the body of law referred to as the "open the door" doctrine, which involves limited admission of otherwise inadmissible evidence to

rebut other inadmissible or incompetent evidence that was erroneously admitted. See GB at 42-47. This law is inapposite. No one is contending that the Government's evidence was inadmissible or incompetent. Rather, it was untrue, and DeChristopher wished to show the jurors this.

The Government itself does not contend that its evidence concerning the time, money and effort BLM employees devoted to setting up the auction was inadmissible or incompetent. Rather, it contends that this evidence was necessary to prove the materiality of DeChristopher's false statement or some other element of the crimes, which element the Government does not specify, or was background information concerning the BLM's employees' compliance with their duties. Government brief at 44.

Actually, the Government's evidence and theory as to the materiality element were that DeChristopher's signing of the purportedly false form was material because this is what caused the BLM employees to give him the bidder paddle he used to bid at and foil the auction. E.g. DA 651, document 84, page 24. The evidence concerning the BLM's expensive, time-consuming and lawful auction preparations was not pertinent to materiality or any element of the offenses charged.[3] Nor was it

[3] The first count required proof that DeChristopher knowingly planned with others to defeat or circumvent the Mineral Leasing Act or its implementing regulations. See 30 U.S.C.A. 195(a)(1) and (b). The false statement count required proof that:

mere background information on BLM employee duties. Rather, it was introduced as part of the prosecution's effort to provoke the jury's personal ire against DeChristopher by portraying and quantifying the purportedly senseless harms he purportedly caused to them and the other local and national taxpayers (DA 651-656).

The Government makes no effort to justify the Court's forbidding DeChristopher to counter the evidence presented to the jury to the effect that DeChristopher single-handedly cost the Utah and national taxpayers millions of dollars of losses by singlehandedly foiling the auction. The financial loss evidence was not essential to any element of any crime charged, and was not mere background information on BLM administrative practices. Rather, it was evidence used to ally the jurors with the prosecution and turn them against DeChristopher by making them think that he had harmed them and all other taxpayers by singlehandedly ruining the auction, and thereby causing millions of dollars of loss to the local and national economies. This misleading evidence was left uncorrected by virtue of the Court's rulings that the jurors could not learn of the factors such as the lawsuit and federal government studies and actions that converged to nullify the auction. See DB at 31-33.

> 1) the defendant made a statement; (2) that was false and the defendant knew it was false; (3) the statement was made knowingly and willfully; (4) the statement was made within the jurisdiction of a federal department or agency; and (5) the statement was material.

United States v. Finn, 375 F.3d 1033, 1037 (10th Cir. 2004).

The Government's argument that the evidence DeChristopher sought to introduce was irrelevant focuses exclusively on the elements the Government contends it had to prove to obtain the conviction. GB at 39-41. The evidence DeChristopher sought to introduce as to the illegal nature of the auction[4] was relevant and necessary to show the jurors that he was not trying to circumvent or defeat the laws, as charged in Count 1, but instead, was trying to ensure that the government actors stopped breaking the laws designed to bring integrity to the leasing of public lands. That evidence and the evidence as to the corrective agents that combined to nullify the effects of the auction, were necessary to correct the distorted picture painted by the Governments' inaccurate evidence. DeChristopher's proposed evidence was also relevant to the necessity, outrageous governmental misconduct, and selective prosecution defenses (DA 396, -97, 399, 401, 402) that DeChristopher was not allowed to present. Cf. GB at 44-45 (arguing that it would have suffered unexplained prejudice if the jurors had been permitted to consider whether DeChristopher's alleged crimes were justified).

The Government argues the trial court properly excluded DeChristopher's evidence, as the defense evidence may well have taken longer than the Government's

[4] The Government's assertion that DeChristopher never proffered any evidence that the auction was illegal, GB at 41, overlooks many instances in which DeChristopher did proffer such evidence (e.g. DA 47-49, 164-203, 206, 274-278, 281, 287-91, 296-318).

case to present. GB at 46. The law does not entitle the prosecution to more time to present its case than the criminal defendant receives. The Government's argument about wasted time fails to recognize our constitutional law regarding the fundamental purposes of our courts and juries, which are of greatest importance in criminal cases: to carefully consider thorough evidence presented by both sides in our adversarial system so the truth comes to light and justice is done. See, e.g. United States v. Nixon, 418 U.S. 683, 708-09 (1974); Duncan v. Louisiana, 391 U.S. 145, 156 (1968). The Government's argument does not account for or refute the fact that some or all of the federal government's own publications as to the improprieties involved in the auction and its nullification by the federal government could have been given to the jurors as exhibits in very little time.

B. THE COURT ABUSED ITS DISCRETION IN BLOCKING THE NECESSITY DEFENSE PRIOR TO TRIAL.

The law on the necessity defense requires courts to objectively assess the choices the defendant was facing and what the defendant reasonably anticipated at the time he acted. See, e.g., United States v. Turner, 44 F.3d 900, 902 (10th Cir. 1995). In contesting the unavailability of legal courses of action open to DeChristopher, the Government claims that the protests filed against the leasing of all 131 parcels would have delayed the issuance of the leases for one to two years, and that the lawsuit ultimately resulted in the issuance of a temporary restraining order enjoining 77 of the

leases. GB at 36.

The Government's argument is legally incorrect, in that it views the alternative courses of action with the benefit of hindsight as to their effectiveness, which DeChristopher was lacking at the time he acted. E.g. Turner, supra. At the time that DeChristopher acted, none of the legal alternatives identified by the Government appeared viable, as none of them had succeeded in stopping the illegal auction DeChristopher was experiencing.

The Government asserts that the protests of the lease parcels were a viable legal alternative, as they would have delayed the issuance of the leases for a year or more. GB at 36 and n.4. The regulation cited by the Government, 43 C.F.R. § 3120.1-3, provides in full:

> No action pursuant to the regulations in this subpart shall be suspended under §4.21(a) of this title due to an appeal from a decision by the authorized officer to hold a lease sale. The authorized officer may suspend the offering of a specific parcel while considering a protest or appeal against its inclusion in a Notice of Competitive Lease Sale.
>
> Only the Assistant Secretary for Land and Minerals Management may suspend a lease sale for good and just cause after reviewing the reason(s) for an appeal.

(Emphasis added). The portion of this regulation relied on by the Government and emphasized above refers to the authority to withhold a parcel from a lease sale before the sale occurs. See id. It does not authorize the BLM to withhold leases that have already been purchased at an auction beyond the sixty-day limit set forth in the Code.

See 30 U.S.C.A. 226(b)(1)(A) (…"Leases shall be issued within 60 days following payment by the successful bidder of the remainder of the bonus bid, if any, and the annual rental for the first lease year."). Nor could an administrative regulation overrule or contradict a statute passed by Congress. Cf. e.g., Food and Drug Administration v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000) (administrative agencies must act within the scope of authority granted by Congress). The Government's argument does not account for 30 U.S.C.A. 226(b)(1)(A), or for the BLM's agreement to withhold protested leases only thirty days following the auction in question, see Impact Energy Resources v. Salazar, 2010 WL 3489544, at *2 and DA 275.

The fact that "the only record evidence" the jurors were given was that protested leases normally do not issue for one to two years, GB at page 36 n.4, demonstrates that the jurors were misinformed by the Government's evidence. It does nothing to show that DeChristopher was properly denied the right to present the necessity defense.

The Government's primary case, United States v. Seward, 687 F.2d 1270 (10th Cir. 1982), stands for the proposition that a person who wishes to raise a defense of necessity must show that he did not have the opportunity to "…both to refuse to do the criminal act and also to avoid the threatened harm[.]" Id. at 1276. While the evidence is lacking that DeChristopher committed a crime, see Point I, *supra*, it is clear

that he could not have avoided the harm threatened by the illegal auction by the legal means identified by the Government, as none of those means (the lawsuit, the protests, the demonstration) was able to prevent the BLM employees from proceeding with the illegal auction, the most immediate evil DeChristopher sought to avert with his actions.

In arguing that DeChristopher faced no imminent harm, the Government fails to account for the actual harms DeChristopher was facing: government employees proceeding to conduct the illegal auction, and the attendant adverse consequences to the environment, archeological and historical treasures, and the local economies depending on some of the lease areas for tourist attractions. The Government again argues with the benefit of hindsight, that the temporary restraining order that issued after the auction prevented the leases from coming to fruition, and that the protests would have stymied the leases for over sixty days. Government brief at 38 and n.5. The law requires an objective assessment of the harms DeChristopher was facing and reasonably anticipated at the time he acted. See Turner, *supra*. As detailed above, the leases were to issue no later than 30 days after the auction under the BLM's special arrangements for this rushed auction, and should have issued within 60 days under the Code.

The Government does not contest that DeChristopher established the remaining elements of the necessity defense. Compare GB at 35-39 with DB at

43-54.

C. REVERSAL IS REQUIRED.

The Government does not take up its burden of proving harmless beyond a reasonable doubt the violation of DeChristopher's rights to defend himself and confront the witnesses in a fair trial. Nor does it refute DeChristopher's argument that there is a reasonable likelihood of a different result in the event the errors are viewed as merely evidentiary, rather than constitutional. Compare DB at 29, 37-40, 42-43 with GB, *passim*. As the constitutional errors were not proved harmless beyond a reasonable doubt, and as there is a reasonable likelihood of a more favorable result had the trial court not erroneously forbid DeChristopher to defend himself, reversal is in order.

III. RATHER THAN IMPRISONING DECHRISTOPHER FOR HIS POLITICAL ADVOCACY, THE COURT SHOULD HAVE DISMISSED THE CASE.

The Government complains that DeChristopher's selective prosecution claim focuses on comments made by the trial court as to why the Government prosecuted DeChristopher, rather than other evidence. GB at 30. Neither DeChristopher nor his counsel were able to obtain access to the information on prosecution's motivations in prosecuting him, despite attempting to do so (e.g., DA 469). Nor were they ever privy to whatever information the trial court had that prompted the

court to state on the record, that from "everything" the court knew about the prosecution of DeChristopher, he "may very well not have been prosecuted" had he not made the choice after he broke the law to "step to any bank of microphones that he could find to give a speech" similar to the speech he gave at sentencing (DA 962-63).

The Government's argument that the court's comments in this regard are ambiguous and were not clarified by counsel for DeChristopher omits the court's language about DeChristopher's having stepped to "any bank of microphones to give a speech" similar to the one given at sentencing. Compare GB at 31 with DA 962-63. When the Court's comments are quoted completely, there is no ambiguity. As soon as the court became aware that DeChristopher was prosecuted for his exercise of his First Amendment rights, dismissal was in order. Wayte v. United States, 470 U.S. at 608-09; United States v. Amon, 669 F.2d 1351, 1362 (10th Cir. 1981); United States v. Dukehart, 687 F.2d 1301, 1303 (10th Cir. 1982).

The Government argues that the trial court properly admitted evidence and considered DeChristopher's advocacy of civil disobedience in the sentencing hearing, as this was relevant to potential recidivism and deterrence of crime. GB at 32-34. DeChristopher's claim is that the trial court violated the constitution in sentencing DeChristopher to prison for his advocacy of political beliefs. The court stated:

> If this hadn't been a continuing trail of statements by Mr. DeChristopher about his advocacy, as he calls it civil disobedience, and that he will continue to

> fight, and I am prepared to go to prison, then others are going to have to be prepared to go with me, that causes me to feel under the sentencing laws before me that a term of imprisonment is required.

(DA 964). See DB at 61-62. The threat of recidivism and need to deter crime do not trump the constitution, Bordenkircher v. Hayes, 434 U.S. 347, 363 (1978); United States v. Lemon, 723 F.2d 922, 937 (D.C. Cir. 1983), particularly when there was no crime committed by the defendant. See Point I, *supra*.

IV. THIS COURT SHOULD REACH THE MERITS AND GRANT RELIEF.

The Government observes that in order to secure appellate review, lawyers must inform trial courts of their positions, because errors are ubiquitous and mostly unimportant, because trial courts should not be "sandbagged" with issues withheld in the trial court for strategic reasons, and because appellate courts should not be fatally burdened with appeals that could have been averted by objections in the trial courts. GB at 22-23.

The Government does not contend that it is in the interest of the trial court or anyone else for a person to be convicted of and imprisoned for federal crimes that he did not commit, or for exercising his First Amendment rights.[5] Nor does it contend

[5] The Utah Supreme Court has recently ceased publishing the names of the trial court judges whose cases are reviewed on appeal so that justice can be done without undue concern for the reputations and sensitivities of the individual trial court judges. This Court may wish to consider following suit.

that such errors are common, too unimportant, or fatally burdensome for this Court to review. Nor does it contend that counsel for DeChristopher withheld his positions from the trial court as part of any conceivable trial strategy in hopes of raising the issues later only if DeChristopher did not prevail in the trial court.

Review of the record confirms that the issues raised on appeal were repeatedly brought to the trial court's attention. In the event that counsel's preservation of the issues was deficient, the Court should nonetheless grant DeChristopher relief under the plain error doctrine.

A. COUNSEL FOR DECHRISTOPHER ADEQUATELY PRESERVED THE ISSUE CONCERNING THE NEED FOR PROOF OF GROUP AGREEMENT.

The record refutes the Government's position that counsel for DeChristopher stood silent as to the need for proof of group activity to sustain the charge in Count 1. DeChristopher's first pretrial memorandum on the necessity defense quoted the statute underlying Count 1, including the group activity language:

> 30 U.S.C.A. § 195(a)(1) makes it a crime for someone "(1) to organize or participate in any scheme, arrangement, plan, or agreement to circumvent or defeat the provisions of this chapter [3A of Title 30] or its implementing regulations[.]"

(document number 18, page 2 n.3). The court read the indictment, including the key language pertaining to group agreement, to the jurors at the outset of the trial, and reiterated its contents in the final instructions (DA 485, document 84, page 17).

DeChristopher's requested jury instructions defining the elements of Count 1 included the group activity language (DA 381). In the jury instruction conference, counsel objected to the Court's giving the Government's elements instruction, rather than DeChristopher's (DA 873). Consistent with his evidence that he tried to pay for the leases (e.g. 815-16, 821), DeChristopher requested two instructions on withdrawal from the group activity, such as are commonly given in conspiracy cases, and he cited conspiracy cases in seeking these instructions (DA 382, 392).

In initially arguing for dismissal, counsel began by noting that the charging statute required proof that someone organized or participated in a scheme, arrangement, plan or agreement to circumvent or defeat Chapter 3A of Title 30 and its implementing regulations (DA 768). Counsel then argued that the Government's proof fell short, as it was focused on the Government's theory of the case charged in the indictment, rather than the plain language of the charging statute (DA 768-69). Counsel argued that because the Government's proof only indicated that DeChristopher came to the auction with the intent to possibly do something disruptive, and took actions that were not premised on any intent to defeat the relevant laws, the court should dismiss (DA 769).

In opening statement following the Government's presentation of its case, counsel predicted that the evidence would show that DeChristopher came to the auction without a plan of action or an understanding of the auction process, signed

the bidder card and went into the auction without having decided what he would do, and opted to participate in the bidding only after he saw a friend crying (DA 783-85). Counsel predicted that the evidence would show that DeChristopher did not intend "on his own to deconstruct the competitive bidding process…" and that "he did not organize, participate in a scheme, arrangement, plan or agreement…" (DA 786).

The defense case began by the jurors viewing the DVD of the auction, and DeChristopher's initially watching, and then later participating haphazardly in the bidding (DA 416). A witness testified that after the auction, DeChristopher immediately contacted him, very afraid and desperate for help, seeking to raise the money he needed because he had bid on leases (DA 793-94). DeChristopher then testified about his individual spontaneous decisions to sign the bidder form and bid on the parcels during the auction process he was not previously familiar with. He also attested to his lack of knowledge of or intent to defeat the Mineral Leasing Act and its implementing regulations (DA 800-811).

DeChristopher specifically testified that he told the investigating agent that he had not agreed or schemed with anyone else before he came into the auction, but acted on the spur of the moment (DA 818). The prosecutor began his cross-examination by reiterating that DeChristopher had no plan to enter the auction and had never told anyone of any intent to go spend millions of dollars on leases (DA 826). Following the Government's brief rebuttal witness, counsel for DeChristopher

renewed the motion to dismiss, arguing that there was a greater evidentiary basis for granting the previously raised motion (DA 867-68).

In closing argument, counsel argued to the jury that DeChristopher had no plan or scheme or desire to violate the law, and asked the jurors to read the indictment to confirm what the Government had charged. He then argued that DeChristopher "didn't have a plan with other people that he had conspired with, and I use that term broadly, not in the legal sense, to go down and do anything." (document 84, pages 35-36, Government's Supplemental Appendix, page 7-8).

Counsel for DeChristopher repeatedly brought the need for proof of group activity to the trial court's attention, and did not abandon this position or strategically mislead or "sandbag" the trial court. Because the trial court was or should have been aware of the issue, the issue is preserved for appeal.

B. THE INSUFFICIENCY OF THE EVIDENCE OF GROUP ACTIVITY CONSTITUTES PLAIN ERROR.

The Government observes that in order to qualify as a plain error, an error must generally be contrary to "well settled law" established by this Court or the Supreme Court. GB at 24, citing United States v. Ruiz-Gea, 340 F.3d 1181, 1187 (10th Cir. 2003). As Ruiz-Gea recognizes, the absence of appellate precedent is not fatal to a plain error claim. If a provision of law is clearly subject to one interpretation, this Court will rectify a trial court's error in deviating from the obvious meaning of

the law. Id. at 1187-88, citing United States v. Brown, 316 F.3d 1151 (10th Cir. 2003). In Brown, the Court found plain albeit non-reversible error on the basis of a trial court's application of a guideline that "surely could have been written more clearly," which application was similar to that of another district court in similar circumstances. See id. at 1158. And in Brown, the court was applying the more stringent plain error test that applies to non-constitutional errors, rather than the more relaxed version that applies to potential constitutional errors. See id. at 1155. See United States v. Trujillo-Terrazas, 405 F.3d 813, 818 (10th Cir. 2005) (recognizing that Court applies a relaxed plain error standard in reviewing potential claims of constitutional errors). Insufficiency of the evidence to sustain a criminal conviction is a constitutional error. E.g. United States v. Gaudin, 515 U.S. 506, 510-515 (1995).

The Government does not contest that the charging statute requires proof of group agreement. Compare DB at 16-19, with GB, *passim*. Because the trial court deviated from the uncontested and only clear interpretation of the statute, and because this error was outcome determinative and seriously affects the fairness, public reputation and integrity of the proceedings, this Court should exercise its discretion to correct the plain error. Particularly given counsel's repeated efforts to bring the issue to the trial court's attention, discussed *supra*, if this Court applies the relaxed harmless error standard to the constitutional error at issue, the Court should exercise its discretion and grant relief from the conviction imposed under Count 1.

C. COUNSEL FOR DECHRISTOPHER ADEQUATELY PRESERVED THE ISSUE REGARDING INSUFFICIENT EVIDENCE TO SUSTAIN THE SECOND COUNT.

As to the insufficiency of the evidence of Count 2 resulting from the plain language of the bidder registration form, the record does not support the assertion that the issue was not preserved. The indictment itself put the court on notice that the Government contended that the bidder registration form certified that DeChristopher had a good faith intention to acquire a lease, and that in signing it when he had no such intent, he made the false statement underlying Count 2 (DA 34). This same purported certification was also important to Count 1 (DA 33). The Government's motion in limine concerning the necessity defense asserted that the bidder registration form required DeChristopher to certify that "he was a good faith bidder" and that "he had the intention to acquire an oil and gas lease on the offered lands" (12 page 5). The first memorandum filed by the defense on the necessity defense accurately summarized Count 2 of the indictment (document 18, page 2). At the hearing on the motion in limine regarding the necessity defense, the court summarized the bidder registration form, stating:

> There was a bidder registration form which, according to the government, required the bidder to certify first that he was a good faith bidder, that he had the intention to acquire an oil and gas lease on the offered lands if he was going to be a bidder, third, that winning the bid constituted a binding legal obligation to accept the lease, and in the event of winning the bid, he was obligate to pay the B.L.M. by the end of the day a percentage of the lease purchase price, whether or not the lease was subsequently issued.

(DA 442).

The court read the indictment aloud to the jurors at the outset of the trial, including the key portions asserting that the bidder registration form that certified his good faith intention to acquire a lease (DA 486), and reiterated its contents in the final instructions (document 84, page 15). In opening statement, the prosecutor asserted that in signing the form, DeChristopher certified himself to be a bona fide bidder "with the good faith intention of acquiring leases at the auction." (DA 490).

The bidder registration form (DA 406) was the exhibit that was central to both counts of the indictment (DA 33, 34), and was the first exhibit presented at trial (DA 499). Agent Love read the relevant actual language from the registration form to the jurors in the court's presence during the trial (DA 568-69, 603). None of this language certified that DeChristopher had any intention of acquiring an oil or gas lease.

In seeking dismissal at the close of the Government's case, counsel for DeChristopher challenged the false statement count by noting that it required proof of a material misrepresentation. Counsel then argued to the effect that the misrepresentation alleged by the Government did not occur, because it was only during the auction, rather than when DeChristopher signed the form, that he decided to participate. See DA 770.

In opening statement following the denial of the Rule 29 motion, counsel

predicted that the evidence would show that DeChristopher quickly looked at and signed the form, before he decided what to do once he got into the auction, and that it was only after the auction began that he decided to begin bidding (DA 784-85, 787). DeChristopher testified that he signed the form because he thought he had to sign up as a bidder to attend the auction, and that he skimmed over it before signing it at a time when he had no intention of actually bidding at the auction (DA 805-06). He described the auction process and how he watched it before deciding to participate in the bidding (DA 809-10). In cross-examination, he agreed that he made statements to reporters that he signed a paper reflecting that it was a federal offense to bid without the intent to pay (DA 513-14), but this testimony and the quotes were accurate and did not indicate that the form certified his intention to bid or acquire leases (DA 836). At the close of the defense case, counsel renewed the Rule 29 motion to dismiss, arguing that the defense evidence augmented the bases for granting the motion (DA 867-68).

The elements instruction the court read to the jury as to Count 2 expressly required the jury to find "First, that the defendant made a false statement or representation to the government when he completed and signed a bidder registration form, and certified that he had a good faith intention to acquire an oil and gas lease on lands offered for auction by the United States." (document 84, page 17). As counsel noted in closing argument, at the time he signed the form, DeChristopher had no

desire to bid (document 84, page 32).

This Court should reject the Government's claim that counsel for DeChristopher stood silent on the insufficiency of the evidence to sustain count 2. The trial court was or should have been aware of the issue, and thus this Court should hold that it is adequately preserved for appellate review.

D. THE INSUFFICIENCY OF THE EVIDENCE TO SUSTAIN COUNT 2 CONSTITUTES PLAIN ERROR.

The insufficiency of the evidence to sustain count 2 is a constitutional error, e.g., Gaudin, *supra*, and thus, in the event the Court feels the issue was not sufficiently preserved, the Court applies the more relaxed plain error analysis, e.g. Trujillo-Terrazas, *supra*. DeChristopher meets the plain error standard, even if it is strictly applied, see DB at 664.

As this case was charged, the controlling case law that was well-established at the time of trial and the code both required the Government to prove that DeChristopher knowingly made a material false statement in order to sustain the conviction underlying Count 2. See 18 U.S.C.A. § 1001 (a)(2) and United States v. Finn, 375 F.3d 1033, 1037 (10th Cir. 2004). As the case was charged in the indictment and elements instruction and argued by the prosecution, DeChristopher should have made a false statement by completing and signing a form certifying his good faith intention to acquire a lease at the auction (DA 34, 372, 486-87, 490). As

the Government does not dispute, the form contained no such certification (DA 406). The error is thus clear and undisputed.

The error is prejudicial to DeChristopher's substantial rights, as he is currently convicted of and serving a prison sentence for another federal felony that he did not commit. The error seriously thus affects the integrity, reputation and fairness of the proceedings. Thus, in the event the Court determines the issue was not adequately preserved in the trial court, the Court should nonetheless grant relief under the plain error doctrine. Id.

E. DECHRISTOPHER PRESERVED THE ISSUES PERTAINING TO HIS HAVING BEEN PROSECUTED AND SENTENCED FOR HIS POLITICAL SPEECH.

The record contradicts the Government's argument that "DeChristopher never argued or presented evidence that he was prosecuted for his public comments about the case." GB at 27. In DeChristopher's initial memorandum seeking discovery on selective prosecution, he argued that the Constitution does not permit criminal prosecutions for the exercise of constitutional rights, and that unlike other similarly situated people who had not been prosecuted, he was being prosecuted without legitimate cause (document 34 at 2-3). At the hearing on the motion for discovery, counsel for DeChristopher argued that people at the Department of Justice and the BLM may have singled out DeChristopher because of political or other motives, and

that they may have been "singling him out not as a protected class, but for what he said at the time he was arrested." (DA 469). DeChristopher attempted to introduce evidence as to other people who had obtained oil and gas leases and failed to pay for them (DA 748-49, 765-66, 848-49). He also tried to introduce evidence to the effect that it was the BLM employees who were circumventing and defeating the laws designed to bring integrity to the oil and gas leasing process, and that rather than consorting to circumvent or defeat the Mineral Leasing Act and underlying regulations, DeChristopher was trying to stop the BLM employees from their law breaking (e.g. DA 47-49, 164-203, 206, 274-278, 281, 287-91, 296-318). DeChristopher submitted a jury instruction embodying selective prosecution as a theory of the defense, seeking to inform the jurors that the Fifth and Fourteenth Amendments bar prosecutions motivated by impermissible factors such as the exercise of constitutional rights (DA 396-97).

After the Government submitted a sentencing memorandum seeking a prison sentence largely for what DeChristopher had said to the press, the defense submitted a memorandum to the court repeatedly noting that DeChristopher's expression of his beliefs to the press and the public were protected by the First Amendment (Government's supplemental addendum at 50-52).

Because the trial court was or should have been aware of the issues and controlling law, this Court should hold that these issues were preserved.

F. DECHRISTOPHER'S HAVING BEEN PROSECUTED AND SENT TO PRISON FOR HIS EXPRESSION OF HIS POLITICAL BELIEFS CONSTITUTES PLAIN ERROR.

As the errors at issue are constitutional, the Court applies the plain error test with greater flexibility toward granting relief. See Trujillo-Terrazas, *supra*. The law forbidding prosecutions and punishments based on the defendant's exercise of First Amendment rights was well-settled prior to this trial. See, e.g., Wayte; Amon; Dukehart; Bordenkircher, *supra*. Thus, the errors involved in prosecuting and imprisoning DeChristopher for his expression of his political beliefs constitute plain errors. E.g. Ruiz-Gea, *supra*. These errors resulted in his status as a convicted felon in federal prison and affected his substantial rights. Because these errors seriously harm the fairness, reputation, and integrity of the proceedings, in the event this Court finds the issues inadequately preserved, the Court should grant relief under the plain error doctrine.

CONCLUSION

This Court should reverse the convictions and remand to the trial court for dismissal of the charges.

Respectfully submitted this 7th day of February, 2012.

/s/ Elizabeth Hunt
RONALD J. YENGICH
ELIZABETH HUNT
PATRICK A. SHEA
COUNSEL FOR TIM DECHRISTOPER

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In so certifying, I am relying on the word count function of the updated "Word" wordprocessing system, version 14.1.3 for Mac.

/s/ Elizabeth Hunt
ELIZABETH HUNT
COUNSEL FOR TIM DECHRISTOPHER

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that all required privacy redactions have been made to this document. This document has been scanned for viruses by the most recent version of Iantivirus, product version 2009, updated on February 7, 2012, on February 7, 2012. According to the program, this document is free of viruses.

/s/ Elizabeth Hunt
ELIZABETH HUNT
COUNSEL FOR TIM DECHRISTOPHER

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that this was served electronically on counsel for the United States, Assistant United States Attorney Dave Backman, on February 7, 2011.

/s/ Elizabeth Hunt