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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DARRYL CHERNEY,

Plaintiff,

v.

THE FEDERAL BUREAU OF INVESTIGATION, *et al.*,

Defendants.

Case No. C-91-1057 CW (JL)

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR AN ORDER *IN REM* GRANTING ACCESS FOR TESTING TO EVIDENCE OF WHO BOMBED JUDI BARI

Date: September 8, 2010
Time: 9:30 am.
Place: Courtroom F, 15th Floor
(Hon. James Larson)

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INTRODUCTION

The federal government is pursuing the destruction of evidence in an unsolved, attempted murder investigation with more gusto and vigor than it ever pursued the attempted murderers. The case is by definition open, even if the government wants to consider it closed, because the would-be assassins have never been caught, and there is no statute of limitations for attempted murder. The government is sitting on a trove of evidence (the remnants of two bombs, a hand-lettered sign, "lifted" fingerprints, and whatever fingerprint analysis it conducted).

The government's determination to destroy this key physical and forensic evidence is nothing short of a decision to sabotage any future investigation or eventual prosecution. Imagine how incomplete and inferior our history would be if the government had destroyed critical evidence in the ultimately successful prosecutions of Medgar Evers' murderers, the Birmingham church bombers, or the Unabomber. Though authorities remain disinterested in pursuing the bombers of Judi Bari and Darryl Cherney, it can be hoped that someday responsible officials will earnestly take up the mantle of investigation. We should not allow the final history of the Judi Bari bombing to be a government cover-up.

Why our government is intent on cover-up is as big a mystery as the bombing itself. Why, people have wondered, would the government try to thwart the investigation unless it had something sinister to hide? However outlandish the theory may be that the government itself is engaged in trying to obstruct justice by destroying evidence, that theory, for the moment, is rationally compelled.

"We go where the evidence goes," as FBI Special Agent in Charge Richard Held once said, ironically. Right now, the evidence points inexorably toward FBI cover-up. Let the evidence point elsewhere. Let the government make the bomb and fingerprint evidence available to plaintiff for independent examination, or explain what legitimate, law enforcement-related purpose it has for destroying it before much basic forensic work has even been done. The government offers no explanation in its papers, and its argument for destruction lacks legal or ethical justification.

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ARGUMENT

I. THE COURT HAS SUBJECT MATTER JURISDICTION OF THIS MATTER

The government argues that the Court lacks subject matter jurisdiction to consider plaintiff's objection to the destruction of evidence and motion for preservation/transfer. The government is incorrect.

A. The Court Has Jurisdiction Pursuant to the Settlement Agreement and Based on the *In Rem* Nature of Plaintiff's Motion

It is well-settled that a court has continuing supervisory jurisdiction over a settlement agreement brokered and finalized in that Court (*Flanagan v. Arnaiz*, 143 F.3d 540, 543 (9th Cir. 1998)), and the government acknowledges that the Court retained jurisdiction to enforce the terms of the settlement agreement in this case. (Gov't Opp., p. 3:14-15). Moreover, the parties explicitly agreed to certify any disputes concerning the disposition of evidence in the case directly to Magistrate Judge Larson. (See Exhibit to Gov't Opp. (Settlement Agreement, p. 6, "Non-monetary relief," ¶2a)).

The Government disputes that it was party to this Agreement, saying that it applied only to the Oakland defendants, not to the United States or any of its agencies. However, it was understood at the time that the United States would return all evidence in the case to Oakland, such that any dispute which arose would necessarily be between plaintiffs and Oakland. Consequently, there was no need for any separate agreement with the United States concerning the disposition of evidence. The United States took the firm position that it could and would only return evidence to Oakland,. Therefore, plaintiffs' settlement counsel only sought to negotiate terms regarding disposition of evidence with the Oakland defendants. (See Decl. of James Wheaton, hereto, ¶s 5-9).

However, The FBI in fact has not returned the bomb evidence, sign, or fingerprint analysis to Oakland. (See Ex. 1 to Motion, June 30, 2010 email from AUSA R. Joseph Sher.). For this reason, plaintiff has also brought this action *in rem* – a third basis for jurisdiction which the Government does not address. The Government should be estopped from asserting that the Court lacks jurisdiction to supervise the settlement agreement, where the Government, having

been party to the three-way settlement negotiations, has not performed an obligation which gave rise to the terms of the agreement.

Alternatively, if the Court agrees that it lacks jurisdiction, it should order the FBI to return the material in question to Oakland with the proviso that Oakland preserve it intact and uncontaminated, pending resolution of this issue with Oakland. Alternatively still, this matter could be set over while the evidence remains with the FBI and Oakland is joined.

Plaintiff avers, however, that the Court has full subject matter jurisdiction (a) under the settlement agreement (based on estoppel), (b) *in rem*, and/or (c) under the Court's inherent supervisory power, as recognized by a number of cases analyzing and implementing F.R.Crim.P. 41(g) (discussed immediately below).

B. The Court Has Equitable Jurisdiction Under the Equitable Principles Governing and Interpreting Rule 41(g)

The Government argues for a cramped interpretation of F.R.Crim.P. 41(g) belied by the case law interpreting and implementing it. The Government cites several, garden variety return of evidence cases which call upon the movant to establish a possessory interest in the evidence sought to be returned. See, e.g., *United States v. Van Cauwenberghe*, 827 F.2d 424, 433 (9th Cir. 1987). This may required under the typical Rule 41 scenario. But this case does not present the typical scenario, and the law is clear that plaintiff is not constrained by such a showing.

On the contrary, as numerous courts have made clear, Rule 41(g) sounds in, is shaped by, and invokes the Court's inherent equitable and supervisory powers, and can therefore be adapted to novel situations. See, e.g., *United States v. Castro*, 883 F.2d 1018 (11th Cir. 1989):

> This Court is not without the power to fashion a remedy under its inherent equitable authority. Rule 41[g], Fed.R.Crim.P., is a crystallization of a principle of equity jurisdiction. ***That equity jurisdiction exists as to situations not specifically covered by the Rule***.

Id. at 1020, citing *Smith v. Katzenbach*, 351 F.2d 810, 814 (D.C. Cir. 1965) (emphasis added). Plaintiff cited numerous additional authorities in support of the Court's equitable power to fashion an appropriate remedy in this case. (See Motion, Part III, pp. 7-8). But the Government simply ignores *United States v. Castro* and plaintiff's other authorities.

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In addition, the cases on which the government relies are inapposite for each of the following three reasons: (1) The government's cases do not address the situation presented here in which the government seeks to destroy key forensic evidence in what should be an open, attempted murder investigation;[1] (2) They involve requests by defendants, whereas Mr. Cherney is a victim and plaintiff. And (3) the government's cases deal only with *return* of property requests, not requests for preservation and third party custody and examination as in this case.

Several further, unique factors (which the government also wholly ignores) render this case a "situation[] not specifically covered by the Rule" (*United States v. Castro*, *supra*), to wit:

(a) the FBI went to extraordinary efforts to frame and smear the victims, as established by a jury which awarded 80% of the $4.4 million in damages for First Amendment violations (See Decl. Cunningham, ¶ 14);

(b) the FBI's disinterest, from day one, in finding the actual bombers is now magnified by its apparent efforts to thwart the investigation altogether by destroying key forensic evidence, thereby scuttling any eventual prosecution of the perpetrators;

(c) the case is factually unique and of immense historic significance, as well as active, ongoing public interest; and,

(d) Plaintiff Darryl Cherney has already demonstrated his interest and ability to pursue investigative leads, including by compiling the only known DNA repository in the case thus far.[2]

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[1] There is no statute of limitations for willful, deliberate, and premeditated attempted murder, as the car bomb assassination attempt in this case obviously was. See Penal Code § 664, prescribing a sentence of life without the possibility of parole in such circumstances, and Penal Code § 799, providing that prosecutions for offenses carrying a life sentence "may be commenced at any time." *Cf. People v. Abayhan*, 161 Cal.App.3d 324, 329 (1984) (noting that statute of limitations applies only if attempted murder was not willful, deliberate, and premeditated.)

[2] The government calls Mr. Cherney's interest in solving the bombing a "red-herring" because, it says, Mr. Cherney "'has no judicially cognizable interest' in the prosecution of another person." (Gov't Opp., p4:24 - 5:4, quoting *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973)). Setting aside the cynicism of this remark, it still fails to deal with the equitable considerations before the Court pursuant to *United States v. Castro* and related authorities. In any event, the government fails to recite the complete holding of *Linda R.S.*, which actually strengthens plaintiff's motion. The Supreme Court held that "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened

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(See Motion and Declarations of Mr. Cherney and Mr. Cunningham).

Lastly, the Court has "inherent equitable authority" to order that the evidence be preserved and transferred to a facility where it will actually be examined under basic guiding principles of *Bivens*/Section 1983 litigation. "Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bivens v. Six Unknown Defendants*, 403 U.S. 388, 392 (1971), quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946). Plaintiffs in *Bivens*/Section 1983 actions are regularly regarded as "private attorney[s] general." See, e.g., *Wood v. Breier*, 54 F.R.D. 7, 10 (E.D.Wis. 1972). "Section 1983 represents a balancing feature in our governmental structure whereby individual citizens are encouraged to police those who are charged with policing us all." *Id.* at 11. Plaintiff Cherney's contributions as a private attorney general in this case now extend to preventing an apparent obstruction of justice by the government itself.

For the foregoing reasons, the Court has jurisdiction to fashion an order ensuring the preservation of the contested items, and to grant plaintiff the opportunity to have them examined and tested by a neutral third party.

II. THE MATERIAL IN QUESTION IS NOT CONTRABAND, BUT EVEN IF IT WERE, THE COURT CAN STILL ORDER THAT IT BE PRESERVED AND TRANSFERED TO A THIRD PARTY

As a threshold matter, the government does not contend that the hand-lettered cardboard sign ("LP Screws Millworkers") left with the Cloverdale bomb, or the latent fingerprints, or any fingerprint analysis which the United States may have conducted, is contraband.[3] As such, the

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with prosecution." *Id*. at 619. In this case, however, Mr. Cherney was initially charged and threatened with prosecution. In fact, the United States has refused ever explicitly to exonerate him. Furthermore, the test articulated by the Supreme Court confers standing on a citizen to challenge the government's non-enforcement of laws where s/he "has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of the issues upon which the court so largely depends for illumination of difficult constitutional questions." *Id*. at 616 (internal quotations and citation omitted). Mr. Cherney certainly has an interest in knowing who bombed him, as well as a potentially beneficial interest in filing a civil lawsuit against the bombers by operation of the delayed discovery rule.

[3] The FBI acknowledges that a "latent print of value" was lifted from the "LP Screws Millworkers" sign by the Sonoma County Sheriff's Department and forwarded to the FBI Crime

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Court should grant plaintiff's request for preservation of, and direct or third party access to, these materials.

The government makes a strained argument that the bomb remnants, consisting of common household items (and in the case of the Oakland bomb, mere fragments) are contraband. The government's cases do not support its argument. But even if the bomb remnants could be characterized as contraband, this does not end the inquiry, for again, plaintiff is requesting preservation and transfer to a third party. Even if the Court were to determine that plaintiff may not take custody of the items directly, the government's authorities in no way foreclose ordering that the material be preserved and/or transferred, e.g. to a bona fide, third-party laboratory.

Only one of the five cases relied on by the government, *In re Property Seized from International Nutrition, Inc.*, 1997 WL 34605479 (D. Nev. 1997), even dealt with a return or transfer of property question. The other four cases simply wrestled with questions of proof in criminal trials concerning what constitutes a destructive device. And although *International Nutrition* dealt with a transfer issue, it did not deal at all with pipe bombs or destructive devices, despite the government's suggestion. Rather, in that case, the company sought return of drugs it had mislabeled, promising to re-label them to make them legal. The Court refused, saying the request was "*akin* to the creator of a seized pipe bomb asking for the return of the pipe with the promise that the pipe will be used for plumbing..." *Id*. at 2 (emphasis added). Thus, the language in the case about pipe bombs is pure dicta. Furthermore, in *International Nutrition*,it was the culpable party who sought direct return of the evidence. In contrast,, Mr. Cherney is the victim, not the culpable party. Nor does his motion depend on transfer of the items in question directly to him.

In *United States v. Wilson*, 472 F.2d 901 (9th Cir. 1972), relied on by the government, the Court of Appeals vacated an order suppressing explosives evidence seized without a warrant after defendant abandoned his lodgings and the landlady discovered them and alerted police.

Lab for analysis. The Lab reported that it would conduct the fingerprint analysis (See Ex. 3 (5/31/90 FBI Airetel and 6/13/90 FBI lab inventory)). In addition, the FBI reportedly developed a fingerprint from the Lord's Avenger letter as well. (See Ex. 8 (Pltffs' Brief re Qualified Immunity, p. 33:2-6)).

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The Court used the term "contraband" as a shorthand to describe the evidence in question, but there no issue in the case of return or transfer of evidence.

The government's three other cases are factually even more remote from the case at bar. *United States v. Lussier*, 128 F.3d 1312 (9th Cir. 1997), *United States v. Campbell*, 685 F.2d 131 (5th Cir. 1982), and *United States v. Price*, 877 F.2d 334 (5th Cir. 1989), all dealt with questions of proof at trial regarding what constituted a destructive device, not with any transfer of property issue.

Finally, the government contends that plaintiff's reliance on *United States v. Kaczynski*, 551 F.3d 1120 (9th Cir. 2009) is misplaced because, the government says, the Court did not determine that Mr. Kaczynski could possess 'derivative contraband' or describe pipe bombs as such. (Gov't Opp., p. 5, n. 2). However, although the Court stopped short of explicitly characterizing Kaczynski's bomb making-materials as derivative contraband, it strongly implied that this would be the right characterization. The Court wrote: "Although Kaczynski emphasizes that many listed items are not "'per se' contraband, this argument does not get him as far as he hopes, because the court is entitled to prohibit him from possessing derivative contraband as well." *Id*. at 1129). The Court went on to explain that it was denying Kaczynski's return of property request because he had unclean hands, suggesting again that that material might properly be characterized as derivative contraband, legal to possess on the right showing, but not by the Unabomber. The Court wrote:

> Thus, *even if the items sought to be returned could somehow be construed as innocent in and of themselves*, the motion could be denied if such items had been utilized or intended to be utilized for illegal purposes. ...[I]t makes scant sense to return to a convicted drug dealer the tainted tools used or intended to be used in his illegal trade when the same were lawfully seized. [Quotations and citation omitted]. Kaczynski similarly has unclean hands and should be denied the right to possess or direct the disposition of *these otherwise innocent materials*. [Citation omitted].

Id. at 1129-1130 (emphasis added). Thus the Court of Appeals' implied that a different result might obtain but for Mr. Kaczynski's unclean hands. In the present case, of course, Mr. Cherney, the sole surviving plaintiff and a victim in the case, has both clean hands and good

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intentions, rooted in compelling public policy considerations. Therefore, *United States v. Kaczynski* in fact does provide support for plaintiff's position.

CONCLUSION

WHEREFORE, plaintiff respectfully requests that this Honorable Court order that the United States preserve against loss, alteration, destruction, or contamination all components and remnants of the Oakland and Cloverdale bombs, along with the "LP Screws Millworkers" sign, the "lifted" fingerprints, and any fingerprint analysis; fashion an order *in rem* that the same be transferred to plaintiff, or to a reliable third-party custodian, for examination and testing; and grant such other relief as the Court deems appropriate in the premise of this historic civil rights case.

Respectfully Submitted,

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DATED: August 25, 2010

By: /s/
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