Dennis Cunningham #112910
Robert Bloom
3163 Mission Street
San Francisco, CA 94110
415-285-8091 / FAX 285-8092

J. Tony Serra #32639
506 Broadway
San Francisco, CA 94133
415-986-5591/ Fax 421-1331

William M. Simpich #106672
1736 Franklin St.
Oakland, CA 94612
510-444-0226 / FAX 444-1704

William H. Goodman, Legal Director
Michael E. Deutsch
Center for Constitutional Rights
666 Broadway
New York, NY 10012
212-614-6464 / Fax 614-6499

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Estate of JUDI BARI and DARRYL CHERNEY,

Plaintiffs,

v.

FBI Special Agent FRANK DOYLE, etal., And the UNITED STATES,

Defendants.

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

PLAINTIFFS' OFFER OF PROOF
Re: Expert Testimony of Anthony Bouza

Trial Date: April 8, 2002
Judge WILKEN

1.

Plaintiffs expect to call former police chief Anthony Bouza to give, in expert testimony, opinions about the (lack of) reasonableness, truthfulness and good faith — as a matter of sound

and upright police practice, consistent with normal training — of the proven actions and purported conclusions and decisions of the defendant investigators herein, in deciding to arrest plaintiffs for knowing possession of the bomb, and presenting their purported grounds in the search warrant affidavit; his discourse will be focused particularly though not exclusively towards the Oakland defendants, especially Lt. Sims, the supervisor, who made the final decision to carry through with the booking of plaintiffs and announcement of the charges, and finally approved the warrant application.

As a former detective and supervisor of detectives himself, who made, oversaw and reviewed countless decisions to arrest suspects, or not, and to go ahead with applications for search warrants, or not, in all kinds of cases including bomb cases (Depo, Exhibit B, p.49-50; 79-80; Ex.C),[1] Chief Bouza has stated his opinion that mere suspicion, supposition, rumor, wishful thinking and plain prejudice against plaintiffs as protesters, rather than evidence reasonably indicating apparent guilt, were behind the arrest of plaintiffs and the search warrant affidavit in this case. (Ex.B, p.63-65; 81; 93-96; 137) He recognized it as a classic false arrest, and, after analyzing the particulars, called defendants' warrant affidavit "a dishonest document," and "a tissue of lies". (Ex.B, p.139, 81; Ex.D)

As he readily conceded, the Chief is not a trained bomb technician or a forensic tool marks examiner. (p.49, 141) Neither is or was he a ballistics or firearms identification analyst, fingerprint examiner, serologist or lab or expert technician of any kind. However, that never prevented him from participating in investigations of crimes involving evidence examined and interpreted by such specialists, or from supervising and making evaluations and final decisions about the quality or adequacy of evidence such specialists worked on in such cases. (Ex.A) Nor does it prevent him from giving valid expert opinions here, about the interpretations and

[1] Exhibit A is a short note to counsel, written last year. Pertinent selections from the deposition testimony are attached as Exhibit B. Exhibit C. is Bouza's *curriculum vitae,* and Ex.D is his 'report of 10/6/95, with an amendment concerning the informant's tip, 12/3/95. Exhibit E contains excerpts from the deposition of defendant Frank Doyle.

decisions the defendant police officers purport to have made, and the presence or absence of reasonable basis for them — just as he routinely did as a working police supervisor (like Sims), when he reviewed investigations and gave or withheld approval for arrests and warrant applications (as Sims claims to have done in this case...). "Genuine expertise may be based on experience or training." *Tyrus v. Urban Search Mgt.*, 165 F.3d 511, 519 (7th Cir.1996).

Mr. Bouza has reviewed the reports, interview notes, photographs, &tc. compiled by defendants, etal., and studied the search warrant affidavit, as a basis for opinions he gave in his report and at depo which strongly verify the claims the plaintiffs have raised. (Ex.D) He now again affirms that he is perfectly competent to review and evaluate such particulars — including technical particulars — in a police investigation of a pipe bomb exploding in a car, and to consider the explanations and interpretations given by the investigators, and look at and judge for himself the assembled evidence, in order to determine its merits for submission to a prosecutor's office and possible presentation to a jury. As he put it in a note to the undersigned after learning of the objections defendants filed against him, "The issue centers on police practices and procedures in conducting investigations, which includes securing evidence; analyzing for search warrant, wiretaps, etc; canvassing witnesses id, gathering relevant information and acting on it, and in those (things) I am an expert." (Letter of 9/25/01, Exhibit A).

2.

Defendants, for all the heat with which they attack Chief Bouza's qualifications, do not assert he should not testify, only that he should not be permitted to give expert opinion contradicting defendant Doyle's pretense that the bomb was in plain view behind the driver's seat, or opine about the purported tool mark comparison forensics on the nails (See Dfts' Objections To Ptffs' Witness List, 9/14/01, p.2) ; the tool-mark complaint is irrelevant, of course, because no forensics were developed before the arrests and warrant applications that first night, and Mr. Bouza has no opinion on the purported comparison developed later. Here he said only

that use of the term "identical" nails in the affidavit was wrong *without* forensics (p.55)—and, that calling the nails identical when they weren't even similar sounded like an outright lie, which of course it was (p.69, 143).[2]

So defendants' challenge boils down to the validity and admissibility of that one facet of Bouza's conclusion that defendants had no reasonable basis for their decision to arrest plaintiffs, and seek a search warrant: that Doyle's purported theorem about the location of the bomb was groundless and false — despite its being embraced by all the conspiring defendants and their co-conspiring colleagues. This opinion has two basic parts: One, that it was clear from the pictures, the descriptions of plaintiffs' injuries, and various statements in the materials he'd read, that the bomb was under the seat, not behind it; and Two, that the assertion that plaintiffs had to have been aware of its presence in the car was not evidence, but only surmise -- part of a "house of cards", built on a "Procrustean Bed of unsupported opinions". Exhibit D.

Certainly the latter point is clear on its face. Even if it were arguably possible (though it is not) that the bomb was on the 'rear seat floor board' when it exploded, that could not fairly be counted as evidence — as opposed to a basis for some possible suspicion — that plaintiffs knew it was there. As to the former point, the Court is well aware that plaintiffs' position has been that

[2] The Court added its own stricture to defendants' protests, barring opinions on the sufficiency of grounds for arrest and search, since these are matters of law. As noted, plaintiffs obviously won't try to elicit legal opinions from this witness—who has said he couldn't give them in any case—so this is not a problem. See, e.g., *Spina v. Forest Preserve of Cook County (Dept. of Law Enforc.*), 2001 WL 1491524, *13 (N.D.Ill.)("Moreover, Chief Harrington's testimony does not constitute an inadmissible legal conclusion. Courts have admitted expert testimony concerning whether a defendant's conduct has satisfied certain norms. Nieto v. Kapoor, CIV 96-1223 MV/JHG, 1998 U.S. Dist. LEXIS 22490 (D.N.M. Sept. 17, 1998) (permitting expert to testify that an employer should have investigated a plaintiff's allegations and that the employer was remiss for failing to discipline the alleged harasser in a hostile work environment case) Therefore, to the extent that Chief Harrington confines her testimony to her opinion that the District's conduct was inappropriate based upon generally accepted police custom and practice, her testimony is not an inappropriate legal conclusion. See Zuchel v. City of Denver, 997 F.2d 730 (10th Cir.1993) (permitting a police expert to testify regarding the use of deadly force.)").

no expertise at all was needed to show the bomb was under the seat — Ray Charles could have seen it — and that defendant Doyle perverted his knowledge and training, as well as his office and his oath, in claiming otherwise. As he wrote and testified so forcefully, the Chief sees it that way also.

3.

In this connection it is important to note that, notwithstanding the expansive recitation of his qualifications in the warrant affidavit, defendant Doyle has been at pains in this case to deny that he himself possesses expertise as an analyst of bomb evidence. Thus he testified that he is not and does not regard himself as an expert in bombing matters (Depo, p.132, 11; Exhibit C); that he should have changed the wording about this in the warrant affidavit before it was submitted (id. p.128); that, when Sgt. Chenault had testified that Doyle told the assembled company of officers and agents at the briefing that first night that he was an expert, that was Chenault's interpretation, not Doyle's (p.11-12, 333-336); and that only people from the lab are experts, not those who work in the field (p.210).

Moreover, Doyle said the undoubted expertise of the FBI Crime Lab was available to him on May 24 in the person of David R. Williams, who he could have called with any question he had (depo, p.131-132); and in fact the record shows that a similarly qualified Lab colleague of Williams, SSA Thomas Thurman, was right here in San Francisco on FBI business that very day — and indeed, "observed most of the (evidence) items, according to a memo by defendant Buck[3] — but Doyle and the other T-Squad members obviously found no need for recourse to either of them in the process of developing their purported evidence against plaintiffs that day. Doyle's answer when asked why not: "This is not a World Trade Center bombing." Asked what <u>that</u> meant, Doyle said, "I mean that is not a major case or a major incident that would warrant such

[3] Airtel to HQ (attn: Lab), 5/31/90, (HQ#) 174-10707, S.1, p.2.

immediacy (of reference to the Lab's true experts)"; and, "...I mean it did not have the urgency, the dollar value, the whole exigency that a crime of that nature has." Asked if he hadn't been concerned about the effect his purported interpretation would have on plaintiffs—who were arrested and held on high bail, after all, and defamed as terrorist bombers in headlines from coast to coast, on the basis of it—the defendant sniffed, "I just called it the way I saw it." (Ibid, p.133-135)

Just so. The entirety of these passages should be perused for a good taste of Doyle's *post facto* disclaimer of responsibility for—or application of expertise beyond the ken of the likes of Chief Bouza in—'causing or helping cause' the false arrest and illegal searches in this case. In this context especially, it is hard to see why there is anything so arcane or exalted about Agent Doyle's purported interpretation of the damage to Judi's car—decisively adopted as it was by the arresting detectives and their supervisor—that another (former) supervisor of detectives can't give an expert opinion about it, or about its purported acceptance by other investigators. The pictures do clearly expose the falsehood of Doyle's pronouncement, recounted by Chenault, even to a total layperson, let alone experienced police investigators; the plaintiffs' injuries—the nature of which the defendant investigators et al. made no inquiry about on that day—also showed clearly that the bomb had been under the seat, and at least two trained observers, Gribi and Roumph—who weren't in on the plot—noted it at the time.

Even more powerfully, the FBI's own fully certified bombing analysis expert, David R.Williams—sullied though his name and reputation may be by the subsequent Crime Lab scandal—demonstrated the correct location of the bomb to the defendants on the car itself unmistakably, during his visit to Oakland on June 14, 1990—the results of which were kept secret—in what ought to now be taken as an admission binding on all defendants...

In light of all this, there is no justification for any restriction on expert professional opinions from Chief Bouza about any phase of defendants' purported investigation of the bombing in this case, including the matters supposedly seen, analyzed and relied on by Doyle and

the others in supposedly concluding that the presence of the bomb was necessarily known to plaintiffs, because it was in open view behind the driver's seat — and using that fanciful notion as the basis for their concerted assault on the plaintiffs' fundamental rights.

Respectfully submitted,

DATED: January 20, 2002.

Dennis Cunningham
Attorney for plaintiffs

CERTIFICATE

I certify that I served the within Offer of Proof on defendants by E-mail and personal delivery to R. Joseph Sher, Esq. and Maria Bee, Esq., in Washington and Oakland respectively, on January 22, 2002.

Dennis Cunningham.