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12 Judi Bari, *et al.*,) Case No. 4:91-1057 CW(JL)
13 Plaintiffs)
14 v.) United States' Response to the Motion for an Order
15 The United States of America, *et al.*,) *In Rem* Seeking Access to Contraband
16 Defendants)
_____)

17
18 Introduction

19 Claiming to act under the terms of a settlement agreement which, notably, is not found
20 among the exhibits to his motion, one of the former plaintiffs in this action seeks an order allowing
21 him access to contraband secured during a criminal investigation conducted by law enforcement
22 agencies. He claims no ownership interest in the property to which he seeks access, instead he
23 asserts an interest that the Supreme Court has held the law does not recognize. While the motion
24 is filed under the caption of this long-closed case, neither the settlement agreement (which the
25 former plaintiff fails to attach) nor Federal Rule of Criminal Procedure 41(g) apply, and the Court
26 lacks subject matter jurisdiction to grant the requested relief. Moreover, as we will show, even if
27 the Court had subject matter jurisdiction, this motion should be denied.

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1 Statement of the Case

2 Plaintiffs other than Bari and Cherney initially commenced the action on April 8, 1991,
3 claiming a violation of their constitutional rights by various Federal Bureau of Investigation (FBI)
4 and Oakland Police Department (OPD) officials. The complaint was subsequently amended eight
5 times in the course of the litigation. Extensive discovery was taken, including over 120 depositions.
6 There were two interlocutory appeals to the Ninth Circuit. The FBI and Oakland defendants jointly
7 pursued the first appeal, *see Mendocino Environmental Center v. Mendocino County*, 14 F.3d 457
8 (9th Cir. 1994), and the Oakland defendants took the second appeal alone. *See Mendocino*
9 *Environmental Center v. Mendocino County*, 192 F.3d 1283 (9th Cir. 1999).

10 The plaintiffs' civil rights claims were tried to a jury for a period of six weeks beginning
11 April 8, 2002. At that time six FBI agents and three OPD officers were named as defendants in the
12 action. The court subsequently granted verdicts in favor of two of the FBI defendants and the case
13 went to the jury as to the other defendants. Jury deliberations extended over three weeks until a
14 partial verdict was finally returned on June 11, 2002. The jury was unable to reach a verdict on a
15 Fourth Amendment claim asserted by Mr. Cherney based upon his arrest. As to the other claims,
16 the jury returned a verdict in favor of one FBI agent on all claims and against the remaining three
17 FBI agents and three OPD officers on all claims except a conspiracy claim.

18 A number of post-trial motions were filed in the district court; while they were under
19 submission, the parties undertook settlement discussions under the auspices of the Court. Those
20 discussions eventually bore fruit – in no small measure as a result of the efforts of Magistrate Judge
21 Larson – and the case was resolved. On May 14, 2004, the plaintiffs filed a partial satisfaction of
22 judgment, which stated in pertinent part that the federal defendants had “fulfilled their obligations
23 under a settlement agreement reached with the plaintiffs.” *See* the May 14, 2004 Partial Satisfaction
24 of Judgment at 1: 24-26. Appended to the Partial Satisfaction of Judgment was a copy of the
25 executed settlement agreement. On June 18, 2004, the Court, per Judge Wilken, entered a
26 conditional order of dismissal, retaining “jurisdiction over this action to enforce the terms of the
27 settlement agreement.”

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1 Discussion

2 I. This Court lacks Subject Matter Jurisdiction to Entertain the Motion

3 It is well settled that federal courts “have only the power that is authorized by Article III of
4 the Constitution and the statutes enacted by Congress pursuant thereto.” *Bender v. Williamsport*
5 *Area School District*, 475 U.S. 534, 541 (1986). Because federal courts are courts of limited, not
6 general, jurisdiction, “[i]t is to be presumed that a cause lies outside this limited jurisdiction, and
7 the burden of establishing the contrary rests upon the party asserting jurisdiction.” *Assoc. of Am.*
8 *Med. Colleges v. United States*, 217 F.3d 770, 778 (9th Cir.2000) (quoting *Kokkonen v. Guardian*
9 *Life Ins. Co. of America*, 511 U.S. 375, 377 (1994)). In support of his motion, Mr. Cherney appears
10 to invoke two possible bases on which this Court’s jurisdiction might rest: *First*, the settlement
11 agreement which resolved this controversy; and *second*, Rule 41(g) of the Federal Rules of Criminal
12 Procedure. Neither applies to his claim.

13 A. The Settlement Agreement does not Provide This Court with Jurisdiction

14 In her June 18, 2004 Order, Judge Wilken retained subject matter jurisdiction to enforce the
15 terms of the settlement agreement. But Mr. Cherney points to no term of the settlement agreement
16 which supports his claim. The only term of the agreement which even arguably would apply is ¶2a.
17 That provision, which by its express terms applies only to the Oakland defendants, states:

18 Non-monetary relief

19 a. The City defendants have stated their intention to release all the evidence
20 gathered in the underlying criminal investigation to plaintiffs (save and except
21 contraband items which plaintiffs would have no lawful authority to possess). This
22 will be reduced to a writing between the plaintiffs and the City defendants. The City
will itemize any items withheld and the parties will refer any disputes regarding
withheld items for resolution to Magistrate Judge Larson.

23 Nothing in that provision, or anywhere else in the settlement agreement obligates the United States,
24 or any of its agencies, to notify the plaintiffs of any proposed action concerning, or to provide them
25 access to, or to transfer to them, any property gathered by law enforcement officials during the
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27
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1 course of their investigation.¹

2 Consequently, while the Court reserved jurisdiction to resolve disputes arising from the
3 settlement agreement, as evidenced by Mr. Cherney's failure to attach the agreement to his moving
4 papers, or even to cite to any paragraph of the agreement, there is no provision of that agreement
5 which governs this dispute. The reservation of jurisdiction to resolve disputes arising from the
6 settlement agreement does not provide the Court with jurisdiction.

7
8 B. Rule 41(g) of the Federal Rules of Criminal Procedure Does Not
9 Provide Jurisdiction

10 Mr. Cherney invokes Rule 41(g) of the Federal Rules of Criminal Procedure in support of
11 his motion. Memorandum at pp. 7-9. But Mr. Cherney fails to claim, far less does he establish, any
12 ownership interest in the remains of the improvised explosive devices he now seeks. That failure
13 defeats his claim at the outset because, the individual requesting return of property under Rule 41(g)
14 must establish that he or she is entitled to its lawful possession before the property sought may be
15 released to him. Fed.R.Crim.P. 41(g). *See U.S. v. Harrell*, 520 F.3d 1051, (9th Cir. 2008)(when
16 motion is made during pending criminal investigation, movant bears the burden of proving both
17 illegality of seizure and that he or she is entitled to lawful possession; when made after criminal
18 investigation is closed, "*person from whom the property is seized* is presumed to have a right to its
19 return, and the government has the burden of demonstrating that it has a legitimate reason to retain
20 the property.")(emphasis added); *United States v. Van Cauwenberghe*, 827 F.2d 424, 433 (9th
21 Cir.1987)("[t]o prevail on a Rule 41(e) motion, a criminal defendant must demonstrate (1) he is
22 entitled to lawful possession of the seized property; (2) the property is not contraband; and (3) either
23 the seizure was illegal or the government's need for the property has ended); *United States v. King*,
24 528 F.2d 68, 69 (9th Cir.1975) (*per curiam*). Mr. Cherney's claim that the bomber remains

25
26 ¹ Nor should Mr. Cherney be permitted to turn a courtesy to counsel into an obligation which
27 was neither negotiated nor agreed upon during the settlement discussions and made part of the
28 integrated settlement agreement embodying the parties "entire understanding and agreement." *See*
¶5b of the Settlement Agreement.

1 unknown, memorandum *passim*, is a red herring: it is well settled that Mr. Cherney “has no
2 judicially cognizable interest” in the prosecution of another person. *Linda R.S. v. Richard D.*, 410
3 U.S. 614, 619 (1973); *United States v. Gamma Tech Industries, Inc.*, 265 F.3d 917, 923 n. 6 (9th Cir.,
4 2001).

5 Mr. Cherney’s motion glosses over the foundational principal of Rule 41(g): that it allows
6 “[a] person aggrieved by an unlawful search and seizure of property or by the deprivation of
7 property” to move for the return of his or her property. Fed.R.Crim.P. 41(g). Mr. Cherney is not
8 a “person aggrieved by an unlawful search and seizure of” the remains of either of the explosive
9 devices that he seeks. Indeed, he nowhere suggests that the seizure of the devices was unlawful, and
10 it plainly was not. Rule 41(g) of the Federal Rules of Criminal Procedure does not provide
11 jurisdiction.

12 II. Even if the Court had Jurisdiction, it Should Not Order the Remains
13 of Explosive Devices Made Available to Mr. Cherney Because They
14 Constitute Contraband

15 Assuming, *arguendo*, that this Court had jurisdiction, still it should not prevent the
16 destruction of the remains of the explosive devices to which Mr. Cherney seeks access. Such
17 devices are contraband.

18 Plaintiff’s claim that the remains of the improvised explosive devices are not contraband
19 because only the explosive material itself is contraband. Memorandum at 6. That claim is
20 specious.² As one court put it, the “issue is not whether one element of the contraband may be
21 lawfully possessed, but whether the element has been used to create an object that is contraband.
22 A pipe is not contraband, but a pipe manufactured into a bomb is contraband that may not be
23 lawfully possessed.” *In re Property Seized from International Nutrition, Inc.*, 1997 WL 34605479
24 (D. Nev., 1997). *See also United States v. Lussier*, 128 F.3d 1312, 1315 (9th Cir., 1997)(noting that
25 parts that *have been converted* into a bomb or similar device are “destructive devices” as defined

26 ² Mr. Cherney’s reliance on *United States v. Kaczynski*, 551 F.3d 1120, 1129-30 (9th Cir.,
27 2009), Memorandum at 6, is misplaced. The Court of Appeals did not determine that Mr. Kaczynski
28 could possess “derivative contraband,” far less did it describe pipe bombs as such. Rather, the court
never reached that contention because it determined that Mr. Kaczynski had no right to possess
derivative contraband as well as contraband *per se*. 551 F.3d at 1129-30.

1 in 18 U.S.C. § 921(a)(4)(vi) unregistered possession of which is precluded by 26 U.S.C. § 5845(f)
2 (emphasis supplied); *see also United States v. Price*, 877 F.2d 334, 337 (5th Cir., 1989) (“A
3 homemade explosive device is a destructive device within the meaning of section 5845(f) even
4 though all of its components may be possessed legally”); *United States v. Campbell*, 685 F.2d 131
5 (5th Cir.1982) (same); *see generally United States v. Wilson*, 472 F.2d 901, 903 (9th Cir.,
6 1972)(characterizing “pipe bombs, blasting powder, and impact fuses” as contraband).

7 In short, the remains of the improvised explosive devices sought by Mr. Cherney are plainly
8 contraband, and therefore his claim to access to them is without merit.

9 Conclusion

10 For all the foregoing reasons, Mr. Cherney’s motion should be denied. The former plaintiffs
11 themselves admitted in 2004 that the former federal defendants had “fulfilled their obligations under
12 a settlement agreement reached with the plaintiffs.” Nor has there been any complaint about the
13 performance of the Oakland defendants. Therefore the Court should direct that no further motions
14 be filed in this long-closed case.

15 Dated: August 12, 2010

16 Respectfully Submitted

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Certificate of Service

I certify that I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following counsel of record:

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