[ORAL ARGUMENT REQUESTED]
No. 08-4207

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JESSE C. TRENTADUE,

Plaintiff-Appellee,

v.

FEDERAL BUREAU OF INVESTIGATION;
FEDERAL BUREAU OF INVESTIGATION, OKLAHOMA CITY FIELD OFFICE,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
JUDGE DALE A. KIMBALL

REPLY BRIEF FOR THE FEDERAL DEFENDANTS

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INTRODUCTION AND SUMMARY

In his brief, plaintiff identifies no case in which a court has ever ordered the depositions of non-agency employees in connection with a suit under the Freedom of Information Act (FOIA). This is hardly surprising. FOIA is a document-disclosure statute, not a tool for securing the testimony of individuals who might, potentially, have knowledge of events that, in turn, might have led to the creation of agency records. Discovery under FOIA is rare and, in the limited circumstances in which it is appropriate, confined to the scope of the agency's search for responsive documents. Deposing federal prisoners about their knowledge of the Oklahoma City bombing cannot

plausibly inform that narrow inquiry.

Indeed, plaintiff has made no showing that would warrant even the circumscribed discovery occasionally permitted in FOIA suits, much less the unprecedented discovery sought here. The FBI submitted numerous detailed declarations describing the process that it employed to respond to plaintiff's FOIA request. The district court at no point found that these declarations were submitted in bad faith, and the record would not support such a finding. Plaintiff's suggestions to the contrary are baseless.

Finally, plaintiff's discovery demand is anomalous even on its own terms. Plaintiff's FOIA request seeks records pertaining to the Southern Poverty Law Center (SPLC) or its founder, Morris Dees. As plaintiff's brief makes clear, however, he believes that the inmates will shed light on the FBI's conspiratorial involvement in events leading to the Oklahoma City bombing. It remains altogether unclear why such testimony would have any bearing on the existence of records that refer to the SPLC or Dees. Nor does FOIA provide a means for plaintiff to depose prison inmates to develop his unsubstantiated hypothesis.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO CONSIDER WHETHER THE DISTRICT COURT ERRED IN ORDERING THE DEPOSITIONS.

In its order of September 25, 2008, the district court closed this case and terminated the litigation as to all parties and causes of action, subject only to reopening under Rule 60(b)

of the Federal Rules of Civil Procedure. JA 1312-13. That order was a final judgment, see Utah v. Norton, 396 F.3d 1281, 1286 (10th Cir. 2005) ("A final judgment is one that terminates all matters as to all parties and causes of action." (internal quotation omitted)), and the FBI filed a timely notice of appeal from that judgment.

Plaintiff appears to acknowledge that the September 2008 order was an appealable final judgment. Appellee's Br. 3.[1] He notes, however, that the district court originally granted his discovery motion in September 2007, and that the FBI's motion for reconsideration of that order (filed more than ten days after the order's issuance) did not toll the time for appealing it. On this basis, plaintiff argues that the 2007 order should escape appellate review. Id. at 4.

The premise of this argument is mistaken. The September 2007 discovery order was an interlocutory ruling that was not immediately appealable as of right. The order became appealable only when the court entered its final judgement, which subsumed the prior interlocutory orders. See Bowdry v. United Airlines, Inc., 58 F.3d 1483, 1489 (10th Cir. 1995) ("All prior

[1] Because this suit is no longer pending before the district court, it is unclear how ongoing discovery of any kind could be appropriate. See Fed. R. Civ. P. 26(b)(1) (authorizing discovery "relevant to any party's claim"). Plaintiff notes that Rule 27 of the Federal Rules of Civil Procedure permits depositions absent a pending case or controversy when strictly necessary to preserve testimony, Appellee's Br. 15 n.13, but neither he nor the district court has ever identified such a need here.

interlocutory judgments affecting * * * appellants merged into the final judgment and became appealable at that time."); In re Grabill Corp., 983 F.2d 773, 775 (7th Cir. 1993) (Posner, J.) ("An appeal from a final judgment brings up for review by the appellate court all orders (except those that have become moot) rendered by the trial court previously in the litigation."); see also Anderson v. HHS, 3 F.3d 1383, 1385 (10th Cir. 1993) ("A discovery order is interlocutory and cannot be appealed until the proceeding to which it relates is concluded by a final, appealable decision.").[2]

II. THE DEPOSITIONS ORDERED BY THE DISTRICT COURT ARE IMPROPER UNDER FOIA.

A. FOIA Does Not Authorize Deposing Federal Prisoners about Past Events on the Theory That Those Events Might Have Resulted in the Creation of Agency Records.

The Freedom of Information Act (FOIA) provides for the disclosure of government records, subject to several express exemptions. Because FOIA is a document-disclosure statute, and

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[2] If any doubt existed as to its appealability, the 2007 deposition order would be subject to review under this Court's mandamus jurisdiction. See 28 U.S.C. § 1651 (All Writs Act). The district court's error is plain and significant and can be reviewed only at this time. See United States v. West, 672 F.2d 796, 799 (10th Cir. 1982) ("The right to the writ is clear and indisputable when the petitioner can show a judicial usurpation of power."); cf. Boughton v. Cotter Corp., 10 F.3d 746, 751 (10th Cir. 1993) ("With discovery orders involving a claim of privilege we require both that the disclosure render impossible any meaningful appellate review of the claim and that the disclosure involves questions of substantial importance to the administration of justice.").

not a vehicle for launching free-ranging investigations into government conduct, discovery is rarely appropriate. See Baker & Hostetler LLP v. Dept. of Commerce, 473 F.3d 312, 318 (D.C. Cir. 2006) ("Discovery in FOIA is rare * * * ." (internal quotation omitted)). When granted, discovery is sharply circumscribed, and a plaintiff can seek only evidence relevant to "whether the [agency's] search was reasonably calculated to discover the requested documents, not whether [the agency] actually uncovered every document extant." Grand Central Partnership, Inc. v. Cuomo, 166 F.3d 473, 489 (2d Cir. 1999) (internal quotations omitted); see also Lane v. Department of Interior, 523 F.3d 1128, 1134 (9th Cir. 2008) (holding that discovery in FOIA "is limited because the underlying case revolves around the propriety of revealing certain documents"); Public Citizen Health Research Group v. FDA, 997 F. Supp. 56, 72 (D.D.C. 1998) (explaining that discovery under FOIA is "limited to investigating the scope of the agency search for responsive documents, the agency's indexing procedures, and the like").

Plaintiff contests none of this. Indeed, he admits that "discovery is not a common litigation tool employed in a FOIA suit." Appellee's Br. 41. He nonetheless maintains that the satisfaction of his FOIA request depends on deposing two federal prisoners who know nothing about the FBI's record systems or the scope of the agency's search. In plaintiff's view, the

prisoners' testimony is relevant because they might have knowledge of events (second-hand knowledge, in David Paul Hammer's case) that might have led to the creation of documents that might be located somewhere in FBI's files and that might be responsive to his FOIA request. If credited, plaintiff believes, the inmates' testimony might therefore support the inference that government officials acted in bad faith in conducting their FOIA search. Appellee's Br. 39.

Plaintiff identifies no FOIA decision permitting discovery that even remotely resembles his own requests. FOIA is not a means for securing depositions about underlying events that might have some connection to the contents of agency files. It is a statute requiring the disclosure of records. As discussed, even when discovery is authorized, it is limited to gauging the adequacy of the agency's search. The depositions of two federal prisoners who lack any knowledge about the FBI's search cannot advance that inquiry. See Fed. R. Civ. P. 26(b)(1) (limiting discovery to "any nonprivileged matter that is relevant to any party's claim" (emphasis added)).

B. Plaintiff's Allegations Would Not Support Even the Limited Discovery Authorized in a FOIA Action.

Because plaintiff does not seek discovery into the scope of the agency's search, the Court need not determine whether the district court could properly have granted a request for the type of narrow discovery that is, in some circumstances, contemplated

under FOIA. In view of plaintiff's extended attack on the agency's search, however, we briefly recapitulate the governing legal standards and the relevant factual background.

1. The standard for obtaining even limited discovery in a FOIA action is stringent. The courts have repeatedly emphasized that "[m]ere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them." SafeCard Services, Inc. v. SEC, 926 F.2d 1197, 1201 (D.C. Cir. 1991); see also Goland v. CIA, 607 F.2d 339, 353 (D.C. Cir. 1978) ("[E]ven if the documents do exist and the CIA does have them, the Agency's good faith would not be impugned unless there were some reason to believe that the supposed documents could be located without an unreasonably burdensome search."); Founding Church of Scientology v. NSA, 610 F.2d 824, 836-37 n.101 (D.C. Cir. 1979) (holding that the "bare hope of falling upon something that might impugn the [agency's] affidavits" is inadequate). Instead, discovery in a FOIA suit is reserved for those unusual cases in which a court has found either "bad faith on the part of the agency sufficient to impugn the agency's affidavits or declarations," Carney v. DOJ, 19 F.3d 807, 812 (2d Cir. 1994), or that the agency's search was not "reasonably calculated to uncover all relevant documents," Weisberg v. DOJ, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Neither condition is satisfied here.

In response to plaintiff's FOIA request, the FBI first reviewed the computerized index of its Central Records System, which disclosed no responsive documents. JA 77. In May 2005, the district court held that this initial computer search was inadequate. JA 159. In response, as the FBI described in a lengthy affidavit, the agency conducted an exhaustive and partially manual search of its records that, by any measure, far exceeded what FOIA demands. JA 199-209 (Third Decl. of David M. Hardy). After conducting that search, the FBI disclosed seventeen responsive documents. JA 240; JA 494 (Fifth Hardy Decl., which describes the redactions to the documents). In March 2006, over plaintiff's objections, the district court accepted this effort as sufficient and, save for ordering two limited searches, relieved FBI of any further obligations in connection with plaintiff's FOIA request. JA 888-900. The FBI immediately conducted these two searches, as yet another agency declaration attests, and disclosed one additional document. JA 908 (Sixth Hardy Decl.).

The district court has at no point questioned the integrity of the FBI officials who oversaw or conducted the agency's searches. See JA 158-59 (finding that the FBI's computer search was inadequate, but not finding bad faith); JA 901 (relieving the FBI of any further obligations in connection with the FOIA dispute without finding bad faith); JA 1155 (ordering the

depositions without finding bad faith); JA 1312 (rejecting FBI's motion for reconsideration without finding bad faith). Nor has the district court ever revisited its conclusion that the agency's broadened search was sufficiently thorough to warrant relieving the agency of its FOIA obligations. There was accordingly no basis for ordering discovery at all in this case.

2. Plaintiff does not advance his argument by attributing to the district court findings that it never made. Plaintiff mistakenly asserts that, in its May 2005 order finding the FBI's initial computer search to be too narrow, the district court "went on to find that FBI Defendants responded in bad faith"; that the FBI, in its motion for reconsideration, "asked the District Court to withdraw its finding of bad faith"; and that the district court refused to reconsider that finding. Appellee's Br. 8-9. The May 2005 order contains no finding of bad faith and simply held "that the FBI's search was not reasonably calculated to discovery [sic] the requested documents." JA 159. Because the court did not find bad faith, the FBI did not ask the court to reconsider that finding, JA 165-94, and the court never addressed such an argument, JA 888.

Plaintiff also thinks it significant that, in response to the district court's order requiring a broader search, the FBI uncovered seventeen responsive documents when before it had found none. Appellee's Br. 2, 8-9. Plaintiff draws precisely the

wrong inference from this result. The agency accurately explained to the district court the scope of its initial search, and the court demanded a more extensive search. That the agency discovered additional documents in conducting this broader search demonstrates its good faith compliance with the court order, not bad faith. See also Nat'l Inst. of Military Justice v. DoD, 404 F. Supp. 2d 325, 333-34 (D.D.C. 2005) ("Although the agency was not initially diligent, that alone does not demonstrate bad faith, especially in light of the subsequent efforts to search for responsive records * * * ."). Indeed, under plaintiff's logic, a presumption of bad faith would arise every time an expanded FOIA search resulted in discovery of additional records. Yet the unremarkable explanation for the disclosure of additional documents is that the broadened search uncovered documents relating to the Southern Poverty Law Center that were not indexed under that heading in the agency's Central Records System.

Plaintiff is similarly wide of the mark in asserting that the FBI's failure to produce documents referencing Roger Moore, who he alleges helped to engineer the Oklahoma City bombing, "is conclusive evidence of FBI Defendants[']bad faith." Appellee's Br. 45. As plaintiff goes on to recognize, he "believes the reason FBI Defendants have not produced those documents [involving Roger Moore] is the absence of any reference in them to Morris Dees, Southern Poverty Law Center or SPLC." Appellee's

Br. 45. Plaintiff thus chastises the government for not producing records that fall outside the scope of his FOIA request, which, as the district court made clear, encompasses only those documents including "either Morris Dees' name or the Southern Poverty Law Center's name," JA 886.

Plaintiff urges that the district court erred in defining the scope of his FOIA request and that the Bureau should have searched for records that did not reference the SPLC or Dees. Appellee's Br. 16, 45. It is unclear what relevance this argument has to the issue at hand. No inference of bad faith can be drawn from the FBI's compliance with the district court's understanding of the FOIA request. Plaintiff has moreover not filed a cross-appeal regarding the scope of his request, and an appeal on that issue has been waived. See Weber v. GE Group Life Assurance Co., 541 F.3d 1002, 1008 (10th Cir. 2008) ("Absent a cross-appeal, we have no jurisdiction to consider, an issue determined adversely to the appellee unless resolution of that issue would not enlarge the appellee's rights or diminish the appellant's." (internal quotation and citation omitted)).

The district court's reading of the FOIA request was, in any event, entirely correct. A FOIA request must "reasonably describe[]" the records sought. 5 U.S.C. § 552(a)(3)(A); see also Yeager v. DEA, 678 F.2d 315, 326 (D.C. Cir. 1982) (holding that "the linchpin inquiry is whether the agency is able to

determine precisely what records are being requested" (internal quotation omitted)). Given that plaintiff sought records pertaining to the SPLC or Dees, JA 23, the FBI was not obliged to search for and identify records that referenced neither the group nor its founder.

Plaintiff also maintains that, under the D.C. Circuit's decision in Weisberg v. DOJ, 627 F.2d 365 (D.C. Cir. 1980), discovery is appropriate in a FOIA suit "even after an agency claims that it has 'complied substantially' with its FOIA obligations." Appellee's Br. 42 n.43. At no point, however, does Weisberg intimate that individuals with no knowledge of the agency's search are the proper targets of discovery, and the D.C. Circuit in fact later criticized the Weisberg plaintiff for conducting FOIA discovery that "has borne only the slightest relation to whether the FBI has failed to release pertinent documents" and that "more closely resembled a private inquiry." Weisberg v. DOJ, 705 F.2d 1344, 1358 (D.C. Cir. 1983). Nor does Weisberg hold that discovery is invariably appropriate once an agency has searched for and disclosed responsive documents. The court instead held only that an agency's naked claim of compliance would not preclude discovery. Id. at 370-71 (rejecting the sufficiency of a bare-bones affidavit). Here, the district court was not presented with a bare claim of substantial compliance. The agency thoroughly documented the scope of its

search, which it expanded in light of the district court's initial order. JA 199, 908. Based on the agency's explanations, the district court relieved the agency of any continuing obligations in connection with plaintiff's FOIA request. JA 902. The court has never revisited that conclusion or otherwise found that the FBI's renewed search was too stinting.

Plaintiff characterizes as "disingenuous" the FBI's contention that questions of security should have made the district court particularly reluctant to order the depositions of two federal inmates, Appellant's Br. 14, one of whom strangled his cellmate with "a cord braided from a bedsheet," United States v. Hammer, 25 F. Supp. 2d 518, 519 (M.D. Pa. 1998). The Bureau of Prisons has made clear that it could, if necessary, make the two prisoners available for "face to face deposition[s]," Appellee's Br. 40, and the government has not urged that security concerns, in and of themselves, preclude the depositions. It should be equally clear, however, that depositions of the kind requested here impose additional demands on maximum security facilities and that a court should properly take such considerations into account in ordering discovery.

C. The Requested Depositions Lack Even an Attenuated Connection to Plaintiff's FOIA Request.

As discussed, the requested depositions would be unwarranted even if they were closely related to the underlying events that are the subject of plaintiff's FOIA request. Were it otherwise,

there would be no obvious principles for limiting the scope of discovery into historical conduct that might have given rise to the existence of a federal record.

The particular depositions at issue here are doubly inappropriate, however, because they bear no apparent connection to plaintiff's FOIA request. As plaintiff has observed, his FOIA request "was drafted with rifle shot specificity." JA 1063. It covered only those documents including "either Morris Dees' name or the Southern Poverty Law Center's name and at least one of the other listed names." JA 886. Yet neither Nichols nor Hammer mentions the SPLC or Morris Dees in their declarations, and the relationship between their testimony and the substance of plaintiff's FOIA request remains obscure. JA 1022, 1028.

Plaintiff attempts to bridge the gap between the prisoners' testimony and his FOIA request by repeatedly asserting that the SPLC and the FBI conducted what plaintiff calls "a failed sting operation * * * at a white supremacist paramilitary camp compound in Elohim City, Oklahoma which, directly or indirectly, led to the bombing of the Murrah Building in Oklahoma City, Oklahoma on April 19, 1995." JA 986. The record provides no support for this assertion, however.[3] In attempting to forge a pre-bombing

[3] Although plaintiff did not avail himself of Circuit Rule 30.2(a)(1), which permits "[a]n appellee who believes that the appellant's appendix omits items that should be included [to] file a supplemental appendix with the answer brief," he asks this Court to dismiss the appeal because, in his view, the FBI deliberately withheld documents from the appellate record. Out

link between the FBI and the SPLC, plaintiff places much reliance on documents that the FBI disclosed to plaintiff in connection with his FOIA request. Appellee's Br. 18-19. Those documents, however, describe the FBI's efforts during its investigation of the Oklahoma City bombing to learn more about individuals that had been providing information to the SPLC. See, e.g., JA 245 (recounting an FBI agent's discussion with an SPLC employee in January 1996 about information that SPLC had received from its own confidential informants); JA 267 (referencing "the sources (reliability unknown) of the SPLC"); JA 323 ("The SPLC maintains an extensive intelligence database regarding militia groups and members, and shares this information with any law enforcement agency which requests it."). They do not suggest the existence of a prior "FBI-SPLC undercover operation." Appellee's Br. 17.[4]

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of an abundance of caution, the FBI has moved to include in the record the exhibits that plaintiff believes were improperly omitted, specifically exhibits attached to Terry Nichols's declaration that were filed under seal at the district court, Appellee's Br. at 21, 22, and two video exhibits, one of a press conference with Morris Dees and the other of a CourtTV appearance by a convicted felon named Shawn Kenny, id. at 18 n.15, 27 n.26. None of these exhibits advances plaintiff's claim that the FBI and the SPLC conducted a joint sting operation.

[4] Plaintiff asked the FBI to include in the joint appendix unredacted copies of documents that were responsive to his FOIA request. Appellee's Br. 2, 10 n.8. The FBI has included redacted copies in the joint appendix, but the unredacted documents (which, among other things, identify confidential informants) are not part of the district court record and were made available only for ex parte in camera review. Although they cannot properly be included in a public joint appendix, the FBI will promptly provide the documents under seal if the Court believes that examining them would facilitate its review.

Similarly, Morris Dees' statement at a press conference that the SPLC told the FBI about the possibility of a domestic terrorist attack six months before the bombing does not indicate that the FBI and the SPLC conducted a joint sting operation at Elohim City; if anything, it suggests to the contrary. Id. at 18. Far from offering a reason to believe that documents "concerning Roger Moore" would necessarily reference the SPLC or Dees, id. at 39, plaintiff acknowledges that the likeliest reason he has received no documents relating specifically to Moore is "the absence of any reference in them to Morris Dees, Southern Poverty Law Center or SPLC," id. at 45. And the congressional subcommittee report that plaintiff discusses likewise never once refers to the SPLC or Dees. JA 991.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the Court should vacate the district court's orders of September 20, 2007 and September 25, 2008.

Respectfully submitted,

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JANUARY 2009

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of January, 2009, I caused copies of the foregoing brief to be filed with the Court electronically (including attachments in scanned PDF format) and by Federal Express overnight delivery, and served upon the following counsel electronically and by Federal Express overnight delivery:

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(5) and (6), I certify that this brief has been prepared in a proportionally spaced typeface using Corel WordPerfect 12 in 14-point Times New Roman font. I further certify that pursuant to Fed. R. App. P. 32(a)(7)(B) that the foregoing brief contains 3,746 words, according to the word count of Corel WordPerfect 12. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s
Nicholas Bagley

CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to this Court's General Order 5, filed on October 20, 2004, and amended most recently on January 1, 2006, I hereby certify that:

1. all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form is an exact copy of the written document filed with the Clerk, and
2. the digital submissions have been scanned for viruses with the most recent version of the following commercial virus scanning program, which indicates that the submissions are free of viruses.

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Version:	6.5
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/s
Nicholas Bagley