ORAL ARGUMENT NOT REQUESTED

Case No. 08-4207

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JESSE C. TRENTADUE,

Plaintiff/ Appellee,

vs.

FEDERAL BUREAU OF INVESTIGATION and
FEDERAL BUREAU OF INVESTIGATIONS'
OKLAHOMA CITY FIELD OFFICE,

Defendants/Appellants.

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

PLAINTIFF-APPELLEE'S OPENING BRIEF

Notice Of Attachment: This Brief Has An Attachment

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STATEMENT OF RELATED CASES

There are no related cases.

I.

INTRODUCTION

On April 19, 2009, it will have been 14 years since 168 people, including 19 toddlers, were killed in the attack upon the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma. It was and still remains the single greatest act of domestic terrorism committed in the United States during the 20th Century. It is also a matter of great public interest, especially the federal governments' possible prior knowledge of that attack as the result of an informant-sting operation conducted by the FBI and the Southern Poverty Law Center ("SPLC").

This joint undercover operation targeted a white supremacist paramilitary training complex in southeastern Oklahoma named "Elohim City," and a group of bank robbers known as the "Mid-West Bank Robbery Gang" and/or "Aryan Republican Army" or "ARA," whose members frequented Elohim City. Timothy J. McVeigh, who was convicted and executed for his role in the Bombing, was a frequent visitor to Elohim City and part time member of the bank robber gang.[1]

Plaintiff-Appellee, Jesse C. Trentadue, filed a request under the *Freedom of Information Act* ("*FOIA*") for documents-records involving this failed sting operation that

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[1] This joint operation may have been part of an FBI undercover operation known as "PATCON," which was an acronym for "Patriot Conspiracy." PATCON involved the use of undercover operatives to infiltrate-monitor-disrupt the activities of groups the FBI considered to by anti-government.

eventually led to the attack upon the Murrah Building. That *FOIA Request* was filed with the Federal Bureau of Investigation and the Federal Bureau of Investigation's Oklahoma City Field Office (collectively "FBI Defendants").

Rather than stepping forward and meeting their *FOIA* obligations in accordance with the law, FBI Defendants' first response was to claim that there were no documents involving that informant operation. FBI Defendants, however, did not know that Plaintiff had two documents, teletypes, from FBI Director Louis Freeh discussing this operation, which documents Plaintiff subsequently filed with the District Court. Those submissions to the District Court resulted in an *Order* requiring FBI Defendants to conduct a manual search for additional documents.

That search eventually led to the production of almost 150 pages of FBI-SPLC informant documents. The informant documents provided to Plaintiff were redacted. However, unredacted copies were submitted to the District Court for *in camera* review. Those unredacted FBI-SPLC informant documents, combined with other evidence of FBI Defendants bad faith in responding to Plaintiff's *FOIA* request, resulted in a "*Discovery Order*" from the District Court allowing Plaintiff to depose McVeigh's accomplice in the bombing, Terry Lynn Nichols, and death row inmate David Paul Hammer, with whom McVeigh had shared the full story of the Bombing, including the presence and activities of informants. The *Discovery Order* also allowed Plaintiff to videotape those

depositions. This appeal is from that *Discovery Order* and the District Court's subsequent *Order* denying FBI Defendants' *Motion to Reconsider* the *Discovery Order.*

II.

RECORD ON APPEAL

The parties are filing a "*Joint Appendix*." The evidence and other materials contained in the *Joint Appendix* will be cited by the reference "*J.A.*" followed by the page number on which the document or other evidence appears within the *Joint Appendix*. That *Joint Appendix*, however, is not complete. Neither is the record complete for purposes of this appeal. Despite Plaintiff's request that they be made part of the record on appeal, FBI Defendants have not submitted to this Court the unredacted documents provided to the District Court for *in camera* review.[2]

III.

STATEMENT OF JURISDICTION

Plaintiff concurs with FBI Defendant's *Statement of Jurisdiction* with respect to this Court's authority to review the District Court's *Order* denying the *Motion to Reconsider*. But with respect to the *Discovery Order*, appellate jurisdiction does not

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[2] Plaintiff's designation of matters to be included in the *Joint Appendix* is included in the *Addendum* to this brief. That designation included all of the evidence considered by the District Court in issuing the *Discovery Order*, significant portions of which FBI Defendants chose not to include in the *Joint Appendix*. Among the evidence omitted from the record on appeal are: "FBI-FD 302s." These are the official forms on which FBI agents report or record witness statements and other evidence.

exist because that was a collateral order. *See Swint v. Chambers County Comm'n*, 514 U.S. 35, 41-42 (1995). FBI Defendants' time for appealing the *Discovery Order* commenced to run with that *Order* was entered. *Weir v. Propst*, 915 F.2d 283, 286 (7th Cir. 1990). FBI Defendants' *Motion to Reconsider*, which was filed more than ten days after entry of the *Discovery Order*, did not toll the time for appeal of that *Order*. *Properties Unlimited, Inc. Realtors v. Sendant Mobility Services*, 384 F.3d 917, 922 (7th Cir. 2004). Thus, only the District Court's *Order* denying the *Motion to Reconsider* is reviewable since the *Notice of Appeal* was not filed until more than one year after entry of the *Discovery Order*.

IV.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Plaintiff disagrees with the FBI Defendant's *Statement of The Issue*. The issue is not whether discovery is allowed in a *FOIA* suit. The decisional law clearly holds that discovery is permitted under *FOIA* in order to disclose the "malfeasance" of the Government.[3] The issue before this Court on appeal, therefore, is whether the District Court abused its discretion by not reconsidering and vacating its *Discovery Order* allowing Plaintiff to depose Nichols and Hammer and/or to videotape those depositions?

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[3] *See* 37A *Am.Jur. 2nd* Freedom of Information Acts §§ 503-508. *FOIA* even authorizes the responding agency to conduct discovery. *See Weisberg v. Webster*, 749 F.2d 864 (D.C. Cir. 1984).

In addition, this Court is free to affirm the District Court on any ground for which there is a record to permit their conclusions of law, even grounds not relied upon in the District Court. *United States v. Sandoval*, 29 F.3d 537, 542 fn. 6 (10th Cir. 1994). And one such ground being FBI Defendants' failure to provide an adequate record for appellate review as required by *Fed. R. App. Pro.* 10, 11 and 30, as well as 10th *Cir. Rules* 10, 11 and 30. *See Travelers Indemnity Co. v. Accurate Autobody, Inc.*, 340 F.3d 1118, 1181 (10th Cir. 2003). Perhaps equally fatal is FBI Defendants' practice of raising on appeal arguments not presented to the District Court. *See Costo v. United States*, 922 F.2d 302 (6th Cir. 1990).

As for the standard of review, a *Motion to Reconsider* cannot be used to reargue matters previously raised or to present the District Court with arguments or evidence that could have been presented earlier but were not. *See Servants of the Paraclete v. John Does,* 204 F.3d 1005, 1012 (10th Cir. 2000). Reconsideration by the District Court of its *Discovery Order* would only have been proper if grounded upon: (1) an intervening change in the law, (2) availability of new evidence, or (3) the need to correct clear error or to prevent manifest injustice. *See Reagan v. Bankers Trust Co.,* 863 F.Supp. 1511, 1521 n. 10 (D. Utah 1994).

V.

NATURE OF THE CASE

Plaintiff disagrees with FBI Defendants statement of the *Nature of the Case*. This case arises out of a *FOIA* request. Pursuant to *FOIA*, Plaintiff asked FBI Defendants for documents and/or records concerning Morris Dees [4] and/or the SPLC's involvement with and/or connection to Elohim City, OKBOMB, BOMBROB,[5] Tim McVeigh, Richard Guthrie, Terry Nichols, Dennis Mahon, Robert Millar, Michael Brescia, Peter Langan and/or Andreas Strassmeir as part of a joint FBI-SPLC undercover sting operation involving many informants. FBI Defendants eventually produced to Plaintiff well in excess of 150 pages of documents. Those documents, however, were heavily redacted with the names of informants blacked out; no document was dated earlier than April 19,

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[4] Dees was a co-founder and Executive Director of the SPLC. Dees' elevated rank within the SPLC is important because of the admissions he made regarding the SPLC's intelligence gathering operations that were directed against various hate groups, such as those residents of and visitors to Elohim City.

[5] "OKBOMB" and "BOMBROB" were the case names FBI Defendants gave to, respectively, the Oklahoma City Bombing and the Midwest Bank Robbers.

1995, the day of the Bombing[6] and; more importantly, nothing would have been produced by FBI Defendants but for the District Court's *Orders*.

The notion that a joint sting operation involving the FBI and SPLC sprang suddenly to life on April 19, 1995, the day of the worst domestic terrorist strike against the United States in the 20th century was not – and is not – credible. It was especially not credible given the fact that the documents produced by FBI Defendants showed that there were at least seven informants involved with McVeigh and the others who likely carried out the attack on the Murrah Building. More importantly, the District Court also did not believe it to be credible that there were no other documents. (*J.A.* 872.)

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[6] This document is a teletype to FBI Director Louis Freeh and it appears in the record at *J.A.* 1099. It is from the Oklahoma City Field Office to the FBI Director and all other FBI Field Offices. It is reporting the bombing of the Alfred P. Murrah Building. The next oldest informant document provided by FBI Defendants is dated April 25, 1995. (*J.A.* 1012.) This teletype is remarkable not only for being the second earliest SPLC informant document produced by FBI Defendants, but also because of its contents. It originates out of the FBI Little Rock Field Office, and references an Arkansas informant who, as a result of "his undercover capacity," had been able to infiltrate a number of militia groups around the Country, including the "Arizona Patriots" and their "white supremacist activities around the **Kingman, Arizona**, area."(emphasis added). This informant was to undergo a "detail debriefing to be conducted by the FBI at Montgomery, Alabama," which is also home to the SPLC. FBI Defendants did not produce any documents related to the "detailed debriefing" of this informant.

VI.

COURSE OF PROCEEDINGS BELOW

Plaintiff disagrees with FBI Defendants statement of the *Course of Proceedings Below* in response to Plaintiff's *Complaint* seeking to enforce his *FOIA* request, FBI Defendants moved for summary judgment contending that there were no documents related to a joint FBI-SPLC sting operation. FBI Defendants argued that they were entitled to summary judgment because there was nothing to produce. (*J.A.* 80.) Plaintiff then filed with the District Court two teletypes from FBI Director Louis Freeh dealing with this sting operation. (*J.A.* 89-105.)

On May 5, 2005, the Court entered an *Order* denying FBI Defendants' *Motion for Summary Judgment*. In that *Order*, the District Court concurred with Plaintiff that FBI Defendants' responses were not "credible." (*Id*. at 158.) The Court went on to find that FBI Defendants had responded in bad faith because "the FBI search was not reasonably calculated to discover the requested documents." (*Id*. at 59.) Based upon these findings, the Court ordered FBI Defendants to search the OKBOMB and BOMBROB case files and produce unredacted copies of the records requested by Plaintiff. The *Order* further stated: "That upon motion, the Court will permit Plaintiff to conduct discovery should the FBI fail to produce documents and/or records responsive to his *FOIA* requests." (*Id*. at 160.)

FBI Defendants moved the Court to stay the May 5, 2005, *Order* pending a motion for reconsideration and/or an appeal. (*J.A.* 239.) FBI Defendants also asked the District Court to withdraw its finding of bad faith. (*J.A.* 885.) The District Court relieved FBI Defendants of their obligation to produce unredacted documents by June 15, 2005, but refused to stay its *Order* pending an appeal. The District Court also refused to withdraw its finding of bad faith. (*J.A.* 888.) Furthermore, the District Court ordered that if "FBI [defendants] discovered documents that are responsive to Plaintiff's *FOIA* requests . . . and to which Defendants do not assert any *FOIA* exemption, they shall produce such documents as they become available." (*J.A.* 239.)

Shortly after that *Order* was entered, FBI Defendants began to release documents to Plaintiff. (*J.A.* 240-331.)[7] These documents were heavily redacted. Plaintiff objected to the redactions. (*J.A.* 332-436.) That objection prompted the District Court to schedule a hearing and to order FBI Defendants to provide the Court "with unredacted" copies of

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[7] FBI Defendants first notified the District Court that they had located 340 responsive documents. This number was later reduced to 17 because, according to FBI Defendants, there were multiple copies of the same documents in the OKBOMB and BOMBROB files. (*J.A.* 205 and 334.) When the documents were produced, however, there were many more than 17. Furthermore, because informant documents are kept in a sub-file of each case file, it would have been a very simple matter for FBI Defendants to have located and produced all such responsive informant documents. (*J.A.* 224-232.) This fact undoubtedly influenced the District Court in entering the *Discovery Order*. So, too, would the fact that despite there being 340 copies of these documents in the OKBOMB and/or BOMBROB files, FBI Defendants were initially unable to locate a single responsive documents.

all documents for its *in camera* review. *(J.A.* 437*.)* FBI Defendants submitted unredacted copies of the sting operation documents to the District Court for *in camera* review. (*J.A.* 618.)[8]

FBI Defendants contended that the redactions were necessary to protect their informants and confidential witnesses who had been guaranteed anonymity. (*J.A.* 409-617.) In an *Amended Memorandum Decision and Order* entered March 30, 2006 (*J.A.* 881), the Court discussed each document and made findings as to the informant exemptions claimed by the FBI Defendants, affirming many but denying others. (*J.A.* 881-902.) The following language from that *Decision* is instructive:

> Exhibit 1 is a redacted teletype dated April 25, 1995. Plaintiff claims that this document indicates that there was an undercover operative in with Timothy McVeigh and members of the various militia groups who aided and supported McVeigh. Plaintiff wonders why, given the subject matter, there are no earlier records that have been produced by the FBI.[9] Plaintiff also wonders why there is no FD-302 Report of this informant and the document itself indicates that an FBI agent is ordered to interview the informant. Plaintiff has posed some very good questions . . .

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[8] On appeal, FBI Defendants' refused to include unredacted copies of these documents in the record. Plaintiff filed a *Motion* in District Court requiring that the appellate record include this evidence (Doc. 135). FBI Defendants opposed that *Motion* (Doc. 140). The District Court has yet to rule on that *Motion.* If it is denied, Plaintiff intends to bring the same *Motion* before this Court.

[9] Subsequently, FBI Defendants did release an earlier teletype dated the afternoon of the Bombing. (*J.A.* 1099.) But they released nothing dated prior to the Bombing.

> To the extent the FBI claims that it need not conduct the search prior to a finding by the court that the public interest outweighs any privacy rights of Mr. Dees, the Court hereby makes that finding in light of the evidence proffered by Plaintiff, concerning the information provided to the FBI by Mr. Dees.
>
> * * *
>
> Also, it is troubling that so many of the documents produced by the FBI refer to FD-302s that were or should have been, prepared, and the disclosed documents also refer to other attachments that at one time appear to have accompanied the document, yet these documents have not been produced. While the FBI's failure to discover documents is not necessarily an indication of bad faith, it is puzzling that *so many* documents could be referenced but not produced.

(*J.A.* 895, 900 and 991)(emphasis in original).[10] Finally, the District Court ordered FBI Defendants to conduct two additional searches their OKBOMB case file and to produce documents discovered as a result of those searches.

On February 16, 2007, Plaintiff filed a *Motion to Conduct Discovery*. (*J.A.* 995.) Specifically, Plaintiff asked the District Court for an *Order* allowing him to take the depositions of Terry Lynn Nichols and David Paul Hammer and to videotape those depositions. Plaintiff supported that *Motion* with considerable evidence showing FBI Defendants' bad faith and malfeasance in failing to produce documents in response to his *FOIA* request. This evidence included the *Declaration of Terry Lynn Nichols* (*J.A.* 1028-

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[10] Unlike many *FOIA* cases in which the agency contends that it has produced all of the responsive documents, the undisputed evidence in the instant case is that FBI Defendants did not.

1044), and the *Declaration of David Paul Hammer* (*J.A.* 1022-1026), as well as *Declarations* from other witnesses and, most importantly, FBI documents involving informants (obtained from other sources), which should have been produced by FBI Defendants, but were not produced.

In opposition to that *Motion*, FBI Defendants argued: (1) that the District Courts do not have authority to order discovery under *FOIA*; (2) that the District Court lacked jurisdiction to enter a discovery order since there was no longer a case or controversy because some **BUT NOT ALL** responsive documents had been released to Plaintiff; and (3) that they had not responded in bad faith to Plaintiff's *FOIA* request so as to trigger any right to discovery. (*J.A.* 1047-1059.)[11] On September 20, 2007, the District Court entered the *Discovery Order* allowing Plaintiff to take the videotaped depositions of Nichols and Hammer. (*J.A.* 1153-1156.)

In its *Order,* the District Court stated that it would not compel either Nichols or Hammer to submit to a deposition, but would allow Plaintiff to take the depositions of these two individuals so long as Nichols and Hammer were willing to cooperate and to videotape those documents.[12] The District Court also repeated its concerns about FBI

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[11] This case would only be arguably "moot" if "all of the documents" had been produce. *See Anderson v. Dept. Health & Human Services*, 3 F.3d 1383, 1384 (10th Cir. 1993).

[12] Before the District Court, FBI Defendants cited to *Kurz-Kasch v. Dept. of Defense,* 113 *F.R.D.* 147 (S.D. Ohio 1986) for the proposition that the Court was without

Defendants' bad faith response to Plaintiff's *FOIA* requests: " [w]hile the FBI's failure to discover documents is not necessarily an indication of bad faith, it is puzzling that *so many* documents could be referenced but not produced." (*Id*. at 1155)(emphasis in original). But perhaps the strongest language in the *Order* was the District Court's reasoning for granting Plaintiff's *Motion* to conduct discovery:

> The Court has also noted in its May 5, 2005 *Order* that '[u]pon Motion, the Court will allow Plaintiff to conduct discovery should the FBI fail to produce documents and/or records responsive to this *FOIA* request.**' In light of (1) the Court's previous finding that the FBI's original search was not reasonably calculated to locate responsive documents; (2) the troubling absence of documents to which other documents refer; and (3) the information that Plaintiff has thus far discovered from Terry Nichols and David Paul Hammer, the Court is persuaded that it continues to maintain jurisdiction over this action and, furthermore, that by allowing the requested depositions, Plaintiff may be better able to identify the existence of other records responsive to his *FOIA* requests that have not yet been produced.**

(*Id*.)(emphasis added).

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the authority to allow the depositions of Nichols and Hammer. But *Kurz-Kasch* is inapplicable to the facts of the instant case. In *Kurz-Kasch*, the District Court stated that it could not, under *FOIA*, enforce a subpoena against a private citizen. But in the instant case, the District Court undoubtedly recognized that limitation when it entered its *Discovery Order* and stated therein that: "The court notes it is not compelling Nichols and Hammer to cooperate; rather the court is permitting Plaintiff to take and videotape the depositions, so long as these individuals are willing to cooperate." (*J.A.* 1155.) It is obvious from their *Declarations* that both Nichols and Hammer are not only cooperating with Plaintiff but desire to have their depositions taken. (*J.A.* 1210 and 1238.) Thus, there is no ordering of these witnesses, either directly or by subpoena, to testify so as to trigger the legal principles discussed in *Kurz-Kasch*.

On October 31, 2007, FBI Defendants filed a *Motion* asking the District Court to reconsider its *Discovery Order*. (*J.A.* 1157.) With one exception, in that *Motion* FBI Defendants raised the same arguments in support of reconsideration that they had raised in opposition to Plaintiff's *Motion* to conduct this discovery. The one exception was the new claim that allowing these depositions to be videotaped would interfere with the security of the institutions at which Nichols and Hammer were incarcerated. That security argument obviously could have been raised in opposition to the initial *Motion* to conduct discovery, but was not for obvious reasons: It was disingenuous.

It was disingenuous because the institutions where Nichols and Hammer are incarcerated have video conferencing facilities which are frequently used to allow inmates to give depositions, to make court appearances and to participate in other legal proceedings. (*J.A.* 1178-1217 and 1234-1238.) It was likewise disingenuous because federal law specifically allows inmates to participate in Court proceedings "by telephone, video conference or other telecommunications technology." *See* 43 *U.S.C.* § 1997e(f).

On September 25, 2008, the District Court entered an *Order* denying FBI Defendants' *Motion to Reconsider*. (*J.A.* 1311-1313.) In that *Order*, the District Court stated that because it had previously considered and rejected FBI Defendants' arguments about the *Discovery Order* exceeding the scope of discovery under *FOIA*, the District Court supposedly lacking jurisdiction to enter such an order once some documents were

produced, and there having been no bad faith on the part as to FBI Defendants so as to create a right to discovery, it would not reconsider them. (*J.A.* 1312).

With respect to FBI Defendants' argument about security, the District Court quickly disposed of that issue as well. It ordered that only Nichols and Hammer could be videotaped, that the video recording equipment could only be used in the room in which the depositions were being taken, and that correctional officers would transport the video equipment into the prison and to the room where the video taped depositions were to take place. (*Id*. at 1512.) Finally, in that *Order* the District Court closed the case, but in doing so stated that:

> Plaintiff has stated, however, that 'he believes that if he is allowed to depose Nichols and Hammer, these men will be able to provide evidence that will link the informants thus far revealed to the SPLC and, thereby identify and/or document the existence of records responsive to Plaintiffs' *FOIA* requests that have not been produced.' **If Plaintiff is correct and through these depositions he discovers the existence of records responsive to Plaintiffs' *FOIA* requests, he may file a motion to reopen the case.** At that point, the Court will determine whether it is appropriate to reopen the case or direct Plaintiff to file another *FOIA request.*

(Id. at 1312-13)(emphasis added).[13]

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[13] FBI Defendants suggest that allowing Plaintiff to depose Nichols and Hammer when the case has been closed is somehow inappropriate. That is not so. An *Order* from a United States District Judge is required to depose an inmate. *See Fed. R. Civ. P.* 30(a)(2)(B). A Court *Order* is definitely required when, as in the instant case, there is governmental resistance to deposing an inmate. *See Ashby v. McKenna*, 331 F.3d 1148 (10th Cir. 2003). In addition, the *Federal Rules of Civil Procedure* allow depositions even in the absence of a lawsuit when necessary to preserve testimony. *Fed. R. Civ. P.* 27. Furthermore, such depositions can even be taken when the case is on appeal. *Id*. at 27(b).

On November 4, 2008, FBI Defendants filed their *Notice of Appeal*. FBI Defendants are appealing from both the *Discovery Order* and the *Order* denying their *Motion to Reconsider the Discovery Order*. But as previously shown, FBI Defendants' appeal from the *Discovery Order* was untimely.

VII.

STATEMENT OF FACTS

The place to begin in evaluating the District Court *Orders* allowing Plaintiff to conduct discovery is the evidence before the District Court.[14] Set out below is that uncontroverted evidence that supported the District Court's issuance of the *Discovery Order* and denial of FBI Defendants' *Motion to Reconsider*.

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[14] *FOIA* requests are to be liberally and broadly construed. *See Anderson v. Dept. of Health and Human Services*, 907 F.2d 936 (10th Cir. 1990). That, however, FBI Defendants did not do. FBI Defendants would not produce any document unless it contained the name of Dees, the Southern Poverty Law Center or acronym "SPLC." In other words, even if the document concerned informants working for the SPLC but failed to include the trigger names/words "Dees," "Southern Poverty Law Center" or "SPLC," then the document was not produced. (*J.A.* 168 and 173.) FBI Defendants' narrow interpretation of their *FOIA* obligations is inconsistent with the purposes and policy of that law, especially given the evidence, overwhelming evidence, of FBI wrongdoing with respect to the Bombing. Under *FOIA*, the public's interest in insuring the integrity and reliability of the Government through disclosure is greatest, as in the instant case, when there is evidence of wrongdoing on the part of the Government. *See Lissner v. United States Customs Service,* 241 F.3d 1220 (9th Cir. 2001).

A. Morris Dees: The SPLC Warned The FBI About An Attack

On August 20, 2004, Plaintiff commenced this action to require FBI Defendants to produce documents/records which, directly or indirectly, reported upon, concerned, referenced or referred to Morris Dees and/or the SPLC's involvement with and/or connection to the following: Elohim City, OKBOMB, BOMBROB, Tim McVeigh, Richard Guthrie, Terry Nichols, Dennis Mahon, Robert Millar, Michael Brescia, Peter Langan, and/or Andreas Strassmeir, including all contacts which Dees or the SPLC may have directly or indirectly had with any of the foregoing individuals through informants. (*J.A.* 39.) FBI Defendants responded with a Motion for *Summary Judgment* representing to the Court that there were no such documents or records. (*J.A.* 79.) Plaintiff then placed in the record two teletypes from the then Director of the FBI, Louis Freeh, both of which referenced the FBI- SPLC undercover operation. (*J.A.* 89-105.)

The filing of those two responsive documents by Plaintiff when FBI Defendants had said that no such records existed did not go unnoticed by the District Court. In its May 5, 2005 *Order*, denying FBI Defendants' *Motion for Summary Judgment*, the District Court stated:

> Given the specific nature of Plaintiff's requests in this case – and Plaintiff's specific evidence that at least some of the requested documents do exist and reasonably should have been found by the FBI – **the Court finds that the FBI search was not reasonably calculated to discover the requested documents.**

(*J.A.* 159.)(emphasis added). The District Court then ordered FBI Defendants to do a

manual search and produce all responsive documents, which were documents related to the SPLC's contacts with McVeigh, the Midwest Bank Robbers, Elohim City, etc. through informants. (*Id.* at 160.)

On July 26, 2005, FBI Defendants produced 87 pages of heavily redacted documents referencing a SPLC informant operation. (*J.A.* 240-331.) That production was followed on June 2, 2006, by another production of 58 pages of heavily redacted documents also discussing the FBI-SPLC informant operation. (*J.A*. 921-984.) As previously noted, the subject of these documents was a widespread (nationwide) undercover operation directed at various patriot, militia and/or neo-Nazi groups that was being jointly conducted by FBI Defendants and the SPLC, which operation seems to have drawn in McVeigh and the others who carried out the Bombing.

In the record before the District Court (Doc. No. 26), is a DVD recording of a press conference given in December of 2003, by Mr. Dees.[15] That conference took place at Southeastern Oklahoma State University. At this press conference, Mr. Dees spoke about the SPLC working closely with the FBI in forming and operating an intelligence network to monitor and gather information about hate groups. Dees also stated at this press conference that six months prior to the Oklahoma City Bombing, the SPLC had warned both FBI Defendants and Attorney General Janet Reno about an impending

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[15] Plaintiff requested FBI Defendants to include that DVD as part of the *Joint Appendix*. FBI Defendants, however, refused to do so.

severe domestic terrorism attack and, that within minutes following the Bombing of the Murrah Building, the SPLC had telephoned the FBI to say that the "patriot movement" was involved in that attack. (*J.A.* 150-151.)[16]

B. Roger Moore: Was A Protected Witness

Terry Lynn Nichols was convicted along with Timothy McVeigh for having carried out the bombing of the Alfred P. Murrah Building in Oklahoma City, Oklahoma on April 19, 1995. Nichols submitted a *Declaration* in support of Plaintiff's *Motion to Conduct Discovery*. (*J.A.* 1028-1044.)[17]

Nichols states that on September 3, 2004, he wrote to then Attorney General John Ashcroft. Nichols' purpose in writing to Mr. Ashcroft was to have others involved in the Oklahoma City Bombing brought to justice. In that letter, Nichols said that he was prepared to fully cooperate with the Department of Justice to achieve this goal. Nichols, never received a response to that letter either from Attorney General Ashcroft or from anyone else at the Department of Justice. Nichols says that since writing that letter the

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[16] The SPLC's call to the FBI immediately following the Bombing stating that the attack was the work of the "patriot movement" seems to be corroborated by a teletype from the Oklahoma City Field Office to Director Freeh. It was sent at 4:40 PM on April 19, 1995, and requests that "all offices canvas sources and complaints involving domestic terrorism . . . ." Immediately focusing the search for perpetrators upon domestic terrorists is consistent with the SPLC's call to the FBI earlier that day. (*J.A.* 1099.) However, FBI Defendants produced no documents related to the warnings it had received from the SPLC.

[17] Again, FBI Defendants omit from the record the exhibits attached to *Nichols' Declaration*.

Government has denied him all contact with the media. (*J.A.* 1029 and 1110-1113.)

In this letter, Nichols told Mr. Ashcroft: "I am willing to disclose publicly all I know including how I was involved in the OKC bombing." (*J.A.* 1112)(emphasis in original.) Nichols then proceeded to outline for Mr. Ashcroft the role that Arkansas gun dealer Roger Moore played in the Bombing by having provided "blasting caps" and "kine-stik along with other explosive components." (*J.A.* 1111.) According to Nichols, Roger Moore "**was part of McVeigh's plot**." (*Id.* at ¶ 31)(emphasis added).

In the record on appeal, is a memorandum from McVeigh's defense counsel documenting what McVeigh told them about Moore's involvement in the Bombing, including Moore having provided McVeigh with the kine-stik used to detonate the bomb and McVeigh's threats to "**sink Roger Moore**" if Moore testified against McVeigh. (*J.A.* 1240-1242.) This document reveals that "**Mr. McVeigh stated [to his defense attorneys] that he made several 'Kinestik purchases from Moore and Moore even commented to him that he didn't mind selling [McVeigh] the Kinestik' because he [Moore] knew that he [McVeigh] would put them to good use.**" (*Id.* at 1241)(emphasis added).[18]

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[18] This document also reveals that Moore told a member of McVeigh's defense team that he was "**glad that the FBI did not search his house the day after the Bombing because if they had done so, that they would have found more weapons in his home than were found at the Dividian Compound at Waco, Texas**." When McVeigh was told this, he "**immediately replied that the FBI would have found cases of Kinestiks**."(*Id.*)(emphasis added).

Nichols says in his *Declaration* that McVeigh "staged" the robbery of Roger Moore and that he (Nichols) carried out that robbery. This was done to protect Moore because Moore had provided the Kinestik used to detonate the bomb. Thus, if any investigation of the Bombing tracked back to Moore, Moore could claim that he was a victim of a home robbery rather than a supplier of funds and explosives used to carry out the attack. (*J.A.* 1038, ¶ 32.)

Also attached to the *Nichols Declaration* was a report on Moore's activities prepared by the Nichols defense team from FBI documents, including a FD-302 reporting upon a conversation between Moore and his attorney Richard McLaughlin. (*J.A.* 1036, ¶ 25.) This report reveals that: "McLaughlin told Moore that he [McLaughlin] hopes the government indicts him [Moore] for financing the OKC bombing." That report goes on to say that "In response, Moore then got a funny look on his face and stated they would not do anything to him because **he was a protected witness."** That report is not in the record on appeal, however.

Nichols likewise discussed McVeigh's involvement with Moore and Moore's girlfriend Karen Anderson, including their relationship with Andreas Strassmeir who, according to McVeigh, was to provide, "if necessary," a "safe house" following the Bombing at "some back woods place in Oklahoma." (*J.A.* 1033, ¶ 14.)[19] Nichols says

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[19] That "backwoods" place was Elohim City.

that McVeigh, Anderson and Moore traveled the gun show circuit together and that the gun show circuit was McVeigh's "network" used to obtain materials and people with the knowledge-skills needed to carry out the Oklahoma City Bombing. (*J.A.* 1032, ¶ 13).[20]

Moore, McVeigh, Anderson and Strassmeir met at a gun show in April of 1993 in Tulsa, Oklahoma. (*Id*. at ¶ 14.) FBI FD-302 reports of interviews with Moore and Anderson were attached as, respectively, *Exhibits* B and C to the *Nichols Declaration*. (*J.A.* 1032.) These reports disclose that Moore and Anderson, who had an apparent relationship with the Arizona militia movement, put McVeigh in contact with a chemist having anti-government views by the name of Steve Colbern. Colbern was living in the desert near **Kingman, Arizona**. This evidence, which the District Court found persuasive on Plaintiff's *Motion to Conduct Discovery*, FBI Defendants have not included in the record on appeal.

C. <u>McVeigh: Moore Provided Weapons And Explosives</u>

Also in the record in this case is a *Declaration* from David Paul Hammer. (*J.A.* 1022-1026.) Hammer spent almost two years with McVeigh on death row prior to the

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[20] Moore may have been the Arkansas informant referred to in footnote 6, *supra*. Of course, if Moore was that informant then the gun show circuit would have been a means for him to tap into the various militia groups around the Country. Moreover, Terry Nichols' defense team put together a thorough "*Investigative Memorandum*" of evidence, mostly from FBI FD-302s, on Moore's activities, including his statement that: "Whatever I was doing for the FBI is f* * * * ed (fucked up) because they blew my cover." (*J.A.* 1118.)

latter's execution. During their association, Hammer and McVeigh had long discussions about the Oklahoma City Bombing, including the others involved.

McVeigh told Hammer about his trips to the Christian Identity Settlement in Oklahoma known as "Elohim City." McVeigh said that at the request of Roger Moore, he attended a gun show in Tulsa, Oklahoma during April of 1993 where he sold guns to Andreas Strassmeir. (*J.A.* 1024, ¶¶ 14 and 15.) [21] McVeigh visited Strassmeir, Michael Brescia, Kevin McCarthy, Richard Guthrie and Shawn Kenny at Elohim City. McVeigh's first trip to Elohim City occurred on October 12, 1993. (*Id*. at ¶ 17.)[22]

McVeigh said that Strassmeir was friends with both Roger Moore and Karen Anderson. McVeigh also said that he traveled from Elohim City to Arkansas to visit Moore where the Oklahoma City Bombing was discussed. Moore told McVeigh that he [Moore] would be willing to provide materials for the cause. (*J.A.* 1025, ¶¶ 18, 20 and 22.) Moore and Anderson delivered weapons and explosives to Strassmeir at Elohim City when McVeigh was present.

Also present at Elohim City were Michael Brescia and Kevin McCarthy. (*J.A.* 1025, ¶¶ 20 and 22.) McVeigh first met members of the Midwest Bank Robbers,

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[21] FBI records indicate that McVeigh reserved a table at that gun show using the name "Tim McEeige" giving as his address "the same [address] as that for Karen Anderson." (*J.A.* 1121, ¶ 10.)

[22] These were the same individuals who Plaintiff had identified in his *FOIA* request.

including Guthrie, at Elohim City and thereafter began to rob banks with them. (*Id*. at ¶¶ 21 and 22.) McVeigh admitted that while at Elohim City in September of 1994, he, Strassmeir, Brescia and Dennis Mahon planned the bombing of the Alfred P. Murrah Building. (*Id*. at ¶ 23.) [23] Dennis Mahon was the leader of the Tulsa, Oklahoma Chapter of the White Aryan Resistance. (*J.A.* 1025, ¶¶ 20 and 23.)[24]

D. <u>Richard Guthrie: McCarthy Took Out The Murrah Building</u>

Peter K. Langan was convicted along with Richard Guthrie and other members of the Midwest Bank Robbery Gang in the FBI case known as “BOMBROB.” He was also an informant for the United States Secret Service. Langan, too, furnished a *Declaration* in support of Plaintiff’s *Motion* to conduct discovery. (*J.A.* 1130-1143.) In that *Declaration*, Langan provided information concerning others who were involved in the Oklahoma City Bombing.

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[23] That date is consistent with Nichols’ statement that McVeigh started to gather the components for a bomb in late September of 1994. (*J.A. 1033,* ¶ 17). This date is also consistent with the date of the warning about a domestic terrorist attack Dees says the SPLC gave to the FBI and Attorney General Janet Reno in the Fall of 1994. FBI Defendants, however, produced no document related to that warning.

[24] Corroboration for McVeigh’s connections to Elohim City comes, from of all places, the SPLC informant documents produced by FBI Defendants. For example, in the record (*J.A.* 759) is a February 27, 1997, teletype from the FBI’s Denver command post to the Mobile, Alabama Field Office stating that “Intelligence reports from the Southern Poverty Law Center, an Alabama-based organization that tracks militia groups, indicate that McVeigh visited the compound in 1994 and 1995.”

In 1993, Langan was in jail in Georgia awaiting trial on armed robbery charges when he was recruited by the United States Secret Service to act as an informant against Richard Lee Guthrie and other members of the Midwest Bank Robbers. Langan was released from jail and made contact with Guthrie in October of 1993. (*J.A.* 1131, ¶¶ 3 and 4.)

Associated with Langan were Kevin McCarthy, Shawn Kenny, Scott Stedeford, Mark Thomas and Michael Brescia. (*Id*. at ¶ 28.) McCarthy, Brescia and Stedeford stayed for long periods of time with Strassmeir at Elohim City. (*Id*. at ¶ 31.) Langan said that in the early hours of April 20, 1995 between 1:00 a.m. and 2:00 a.m. – following the Bombing – McCarthy and Stedeford arrived at the house where Langan was living in Pittsburg, Kansas. They had traveled to Kansas from Elohim City. (*Id*. at ¶ 8.) McCarthy subsequently admitted to Langan that he had "**liabilities**" arising out of the Oklahoma City Bombing. (*Id*. at ¶¶ 20 and 21)(emphasis added).

Shortly thereafter, McCarthy and Stedeford went to visit fellow gang member Mark Thomas at Thomas' home in Pennsylvania. Guthrie joined them in Pennsylvania. Guthrie later told Langan that as a result of that trip he learned that McCarthy was John Doe 2. Guthrie also supposedly said to Langan that: "**Your young Mr. Wizard [Kevin McCarthy] took out the Murrah Building**." (*Langan Dec.*, ¶¶ 13 and 15)(emphasis added).

Attached as *Exhibit* A to *Langan's Declaration* is the FBI's FD-302 report of an interview with Kevin McCarthy following the Bombing. (*J.A.* 1144.) That interview took place June 14, 1996 and the purpose of that interview was to query McCarthy "**regarding his knowledge of the Oklahoma City Bombing . . . .**" (Emphasis added.) According to this report, McCarthy admitted that in April of 1995 he was residing at Elohim City "with Andy Strassmeir." McCarthy stated that "also residing with Strassmeir were McCarthy's close friends, Michael William Brescia and Scott Anthony Stedeford."

This FD - 302 likewise states that "**Timothy McVeigh, who had been arrested for the Bombing, had apparently telephoned Andy Strassmeir in Elohim City several weeks prior to the Bombing**."[25] McCarthy, however, insisted in his FBI statement that three days prior to the Bombing he and Stedeford "left the Strassmeir residence and traveled to Pittsburg, Kansas where they stayed with Peter Langan and Richard Guthrie." (*J.A.* 1144.) But as previously noted, according to Langan, that was not true. McCarthy

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[25] This is a highly significant fact. It is highly significant because in one of the documents produced by FBI Defendant, a January 4, 1996 teletype, the telephone calls McVeigh made to Elohim City are reported but the name of the person McVeigh was calling is redacted or blacked out. (*J.A.* 664.) Knowing that the redacted name was that of "Strassmeir," fills in a lot of the missing information on this document. It, for example, reveals that FBI Defendants knew that Strassmeir was then in North Carolina and planning "to leave the U.S. via Mexico, in the near future," which he did. But despite this knowledge of flight, FBI Defendants did not stop Strassmeir. Incredibly FBI documents reveal that Strassmeir (who was German citizen on the State Department's terrorist list, a military-explosives instructor and illegally in this County), was escorted out of the United States by a former CIA operative. *See J.A.* 143, 148, 836 and 839.

and Stedeford did not arrive in Pittsburg until the early morning hours of April 20, 1995. Moreover, they had traveled to Pittsburg from Elohim City.

E. <u>Secret Service: Money From Bank Robberies Financed The Bombing</u>

Also in the record is the *Declaration* of Matthew J. Moning, a former Cincinnati police officer. (*J.A.* 1147-1149.) Moning was involved in tracking the activities of the Midwest Bank Robbery Gang, including Langan, Guthrie and Shawn Kenny. Kenny recently went public with his role as an informant for the FBI. (*Doc*. No. 82.)[26] Moning supplied information about the activities of Guthrie and the others, including the involvement of the FBI and Secret Service

From August of 1993 to June of 1994, Moning was actively involved in tracking Guthrie, Kenny and the "Midwest Bank Bandits." (*Id*. at ¶ 1.) While Moning provided many interesting details about Kenny and the others, the most significant evidence for purposes of this appeal would be in ¶ 12 of his *Affidavit* where he discusses his conversations with Secret Service Agent Larry Haas. Haas informed Moning that Guthrie had committed suicide while in custody "after being told that he was going to be executed for his role in the Oklahoma City Bombing case."[27] According to Haas, Guthrie was told

[26] Again, Plaintiff asked that this evidence be included in the record on appeal, but FBI Defendants' refused to do so.

[27] This, too, corroborates McVeigh's admission to Hammer that he (McVeigh) had robbed banks with members of the Midwest Bank Robbery Gang.

that "**money from his robberies had been tied to that case** and that meant the death sentence." (*Id*. at ¶ 12)(emphasis added).

Years before Shawn Kenny went public with his role as an informant for the FBI, Moning correctly states in his *Affidavit* that Shawn Kenny was an FBI informant. (*Id*. at ¶ 10.) Moning also states that Kenny's record and criminal history "has been and still is being actively 'erased'." (*Id*. at ¶ 11.) [28] Moning even said that FBI Agent Wood admitted that the FBI had recovered from the Midwest Bank Robbers "an arsenal in weapons, ammunition, explosives, blasting caps, rocket launchers, etc." (*Id*. at ¶ 7.)[29]

F. <u>BATF: Strassmeir Threatened To Blow Up Federal Buildings</u>

In the record is a transcript of a sealed proceeding in the *United States of America v. James Viefhaus, et al*, United States District Court for the Northern District of Oklahoma, No. 97-CR-00005-BU. (*J.A.* 765-834.) This is a transcript of federal court proceedings that took place on April 24, 1997. The proceedings involved the testimony of

[28] The fact that Kenny's criminal record has been expunged is consistent with his role as an informant.

[29] Langan said that the blasting caps had been seized from Guthrie's residence and destroyed by the FBI. Langan also said that McCarthy had given the blasting caps to him and Guthrie. (*J.A.* 1138, ¶ 32.) Langan has no knowledge of how McCarthy came to possess these blasting caps. But with McCarthy's Elohim City connections, the blasting caps may have come from Roger Moore who McVeigh supposedly said was a purveyor of weapons and explosives to the Elohim City network. If true, then Moore's status as a "protected witness" means that he was possibly an agent/informant or, perhaps, even a provocateur? Hopefully, the depositions of Nichols and Hammer will answer this question, as well as reveal the existence of other responsive documents.

Angela Graham, a Special Agent with the Bureau of Alcohol, Tobacco and Firearms ("BATF"). Graham testified about BATF informant, Carol Howe. Graham was asked, specifically, whether the Government's claim about not having informants at Elohim City was true and she said "no."

Howe was the BATF informant at Elohim City during the fall and winter of 1994 and 1995. (*J.A.* 771.) Howe made numerous contacts at Elohim City with Dennis Mahon. Mahon was suspected of making hand grenades and engaged in similar activities on behalf of the white supremacist movement. (*Id*. at 772-73.) Howe called Graham the day after the Bombing to say that she thought she could identify John Doe No. 2. (*Id.* at 780.) Howe also provided the BATF with information about Strassmeir. (*Id*. at 782.)

Howe told the BATF about Strassmeir's threat to "blow up federal buildings."

Q. **And Ms. Howe told you about Mr. Strassmeir's threats to blow up Federal buildings, didn't she?**

A: **In general, yes.**

Q: **And that was before the Oklahoma City bombing?**

A: **Yes.**

(*Id*. at 794*)*(emphasis added). Graham said that this threat was made several months before the Oklahoma City Bombing. (*Id*. at 794.)

According to Graham, at her direction Howe actually went with "these people from Elohim City" to Oklahoma City, presumably to scout the target. *(Id*. at 795.) Graham

gave the following additional testimony about Howe's information concerning Strassmeir and the others at Elohim City:

Q: And this was the place where Strassmeir was living? Elohim City?

A: Yes.

Q: **And this is the gentleman that she [Howe] told you about that had intentions to blow up federal buildings?**

A: **That is the general militia rhetoric. Everyone out there [Elohim City] is saying the same thing.**

Q: And this trip to Oklahoma City by these Elohim City residents occurred before the bombing in Oklahoma City, actually just by about a few weeks, didn't it?

A: No, it would be months.

Q: **Oh, when did that occur?**

A: **The fall of 1994.** [30]

Q: **And you are sure about that?**

A: **Yes.**

(*Id*. at 796) (emphasis added).

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[30] Again, this date coincides with Nichols's statement about when McVeigh began to gather components for a bomb, with McVeigh's statement to Hammer about when the plan to attack the Murrah Building was formed, and with Dees' statement about the warning of a domestic terrorist attack given by the SPLC to the FBI and Attorney General Reno.

But perhaps the most startling testimony from Graham concerned the fact that the Government was not being truthful in the McVeigh trial when it said that there were no informants at Elohim City.[31] Graham's testimony on this subject is set out below.

Q: Well, had you heard government statements that there was never an informant at Elohim City in the fall of 1994?

A: I haven't heard that.

Q: You've never seen those reports that the government took the position in connection with the McVeigh trial –

A: No, I haven't.

Q: **You would know that to be untrue though, that statement?**

A: **Yes, I would know that.**

(*Id*. at 807) (emphasis added).[32]

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[31] McVeigh said that Elohim City was known as "ATF City" because of the number of informants living there or visiting the compound on a regular basis. (*J.A.* 1025, ¶ 24.) McVeigh identified Strassmeir as an informant. (*Id*. at ¶ 18.) In addition to Howe (**BATF**), Langan (**Secret Service**) and Kenny (**FBI**), all of whom are admitted informants, in the instant case, FBI Defendants submitted a *Declaration* from David E. Hardy, the Section Chief of the Bureau's "Records Management Division," disclosing the existence of still more unnamed informants. (*J.A.* 525-526). That *Declaration* was submitted in support of the FBI's contention that Plaintiff should not be given documents containing the names of the informants because they were promised confidentiality.

[32] Graham's testimony about the presence of informants at Elohim City prior to the Bombing seriously calls into question FBI Defendants' response to Plaintiff's *FOIA* requests. Specifically, the fact that FBI Defendants failed to produce any documents or records related to SPLC informant activities with a date earlier than April 19, 1995. Again, it is not credible that given the level of infiltration of the Midwest Bank Robbers and Elohim City by FBI-SPLC agents prior to April 19, 1995, that the earliest record of

That questioning of Graham resulted in the Government asking that the transcript of those proceedings be "**sealed**." The Government's attorney asked that it be sealed to prevent the information from falling into the hands of the McVeigh defense team. (*Id*. at 815-827.) The Court granted that *Motion* stating that: "With that McVeigh trial going on, I don't want anything getting out of here that would compromise that trial in any way." (*Id*. at 827.) Defense counsel immediately asked: "**What do you mean by compromise? Do you mean shared with the McVeigh lawyers**?" To which the Court responded:

> **Yes, or something that would come up, you know. We have got evidence that the ATF took a trip with somebody that said buildings were going to be blown up in Oklahoma City before it was blown up or something of that nature and try to connect it with McVeigh in some way or something.**

(*Id*. at 827)(emphasis added).

G. <u>SPLC: McVeigh Called Strassmeir At Elohim City For Help In The Bombing</u>

In the record - - produced as a result of this *FOIA* suit -- are a number of FBI teletypes. With respect to this appeal, two teletypes are of special significance: The first is a January 4, 1996, teletype from FBI Director Louis Freeh to a number of field offices which appears of record at (*J.A.* 662.) This teletype discusses a number of SPLC informants, including one from "Cincinnati" apparently associated with the Midwest Bank Robbery Gang and another at Elohim City. According to the Elohim City informant,

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SPLC informant activity is the DAY of the Bombing.

before the Bombing Tim McVeigh telephoned Elohim City a number of times, including on April 5, 1995, asking for Strassmeir and attempting to recruit others to "**assist in the OKBOMB attack**." (*Id*. at 665)(emphasis added). [33] This FD-302 likewise reports that just two days before the Bombing on April 17, 1995, McVeigh again called Elohim City asking for Strassmeir.[34]

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[33] Admittedly, the name of the person McVeigh was trying to reach at Elohim City is blacked out on this document, but that name consists of 23 letters and/or spaces and so, too, does the name "Andreas Carl Strassmier." From the previously mentioned McCarthy FD - 302, it is now known that with this call and another call just two days before the Bombing McVeigh was trying to reach Strassmier. Knowing it is Strassmeir's name that is blacked out on this teletype provides the key to interpreting still other SPLC informant documents wherein the name is blacked out, such as a January 26, 1996, teletype from the Oklahoma City command post to Director Freeh. This document is filed of record at (*J.A.* 379-387). It indicates that the person at Elohim City McVeigh was calling "conducted paramilitary training for EC [Elohim City] as well as other militia groups." According to this document Strassmeir, who by then was in North Carolina on his way out of the United States, left Oklahoma because things were "too hot out there . . . referring to the Bombing in Oklahoma City."

Strassmeir's name was blacked out on these and other SPLC informant documents by the FBI. Based upon the *Declaration* David Hardy, Section Chief of the FBI's Records Management Division, this was done the informants, of which Strassmeir was obviously one, had been promised anonymity. Again, this teletype was produced as a document responsive to Plaintiff's *FOIA* requests for records involving the SPLC's informant undercover sting operation linked to Elohim City, the Midwest Bank Robbers and/or the Bombing, and that fact cannot be over emphasized. FBI Defendants' production of these records in response to Plaintiff's narrowly drawn *FOIA* request is an admission that there was such an SPLC informant operation involving these subjects.

[34] FBI records reveal that on April 17, 1995 McVeigh also telephoned and spoke with Dave Hollaway. This information is contained in a FD-302 of an informant concerning his or her discussions with Hollaway. According to the FD-302, Hollaway was former Special Forces, was involved with the Central Intelligence Agency, and had

The second teletype is dated August 23, 1996. It, too, was produced by FBI Defendants, and appears of record as (*J.A.* 667). Again, this teletype is from FBI Director Louis Freeh, and it concerns a domestic terrorism investigation being run or conducted out of the FBI's Philadelphia Field Office. The subjects of the teletype are OKBOMB, BOMBROB, Kevin McCarthy, Scott Stedeford, Michael Brescia, Richard Guthrie, Mark Thomas, and other members of the Midwest Bank Robbery Gang, as well as McVeigh and his connection with Elohim City. In this teletype, Director Freeh talks at length about information provided by Guthrie after his arrest, including Guthrie having "**admitted to paying [someone whose name has been blacked out but is seven letters long -- as is M-C-V-E-I-G-H] money derived from bank robberies and identified [again blacked out a person whose name is seven letters long] as an accomplice in certain bank robberies**." (*J.A.* 668)(emphasis added).

This teletype is significant because it repeatedly refers to "OKBOMB subject Timothy McVeigh" as well as the "BOMBROB subjects" who, the FBI publicly insists, have no relationship to each other or the Bombing.[35] Another interesting subject in this

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explosive ordinance disposal training. The informant states that in discussing the Bombing, Hollaway said: "The fucking truck was too far away" and that it was not parked in a position to "inflict the most damage on the building." The informant states, too, that Hollaway described the bomb "with an alarming degree of specificity" and implied that he was also involved. A copy of that FD-302 can be seen at *J.A.* 1151.

[35] This seems to be a common pattern of FBI Defendants: public statements that there is nothing linking McVeigh to Elohim City or the Midwest Bank Robbers. Yet as

teletype are the April of 1995 telephone calls which McVeigh placed to Strassmeir's residence in Elohim City as well as an April 16, 1995 telephone call from Strassmeir's residence in Elohim City to Mark Thomas' home in Pennsylvania where Stedeford, McCarthy and Guthrie would eventually gather immediately post-Bombing.[36]

Yet, for purposes of this appeal, perhaps the real significance of these two teletypes is that they were not produced until Plaintiff obtained copies of both documents from another source and filed them with the District Court. It was only after the District Court was made aware of the fact that these responsive documents existed that they were produced by FBI Defendants.

H. Congress: McCarthy Is Also A Protected Witness

In December, 2006, Congress issued a report of its two-year investigation into the Oklahoma City Bombing by the Oversight and Investigations Subcommittee of the House International Relations Committee. The central findings of this report were that: (1) many questions remain unanswered about the Bombing; (2) the FBI should not have called off

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this document shows, within the FBI this link is clearly recognized and secretly pursued. Consider, for example, the June 17, 1996, FD-302 attached to Langan's *Declaration*. That document was part of the Bombing investigation (case 174A-OC-76120) and it references not only McVeigh, but also Strassmeir, McCarthy, Stedeford, Guthrie, Brescia and Elohim City. For some reason, though, Elohim City and these individuals suddenly became of no interest to the OKBOMB investigators.

[36] Director Freeh also stated that there apparently is an informant among this group who "consented to wearing a body recorder and transmitter." (*Id*. at 668.)

the search for John Doe 2; (3) the FBI did not thoroughly investigate the involvement of Andreas Strassmeir in the Bombing; (4) the FBI erred in allowing McVeigh to move forward the time of his execution while major questions remained about whether others were involved in the crime; and (5) that, far from assisting the Subcommittee with its investigation, the Justice Department and the FBI essentially dragged their feet and hid information from congressional investigators. That *Report* appears of record as *J.A.* 991-1004.

The Subcommittee investigated the connection between Strassmeir and McVeigh, which the Subcommittee said gave "reason for suspicion." Of particular concern to the Subcommittee, was the FBI's insistence that there was no relationship between McVeigh, Strassmeir and Elohim City. This assertion caused the Subcommittee to wonder with obvious cynicism: "**Why would McVeigh try to recruit a virtual stranger to join him in such a monstrous criminal act? Obviously there was more to this relationship than is currently acknowledged.**" (*Id*. at 998)(emphasis added).[37]

But perhaps the most significant of the Subcommittee's findings related to Kevin McCarthy. Most notably, the Subcommittee's attempts to investigate McCarthy's obvious link to the Bombing, which the *Report* says ran into a stone wall:

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[37] And indeed there was more of a relationship between Strassmeir and McVeigh than FBI Defendants are willing to admit. In the January 4, 1996 teletype, for instance, Director Freeh refers to information from an SPLC source at Elohim City that Strassmeir "allegedly has had a lengthy relationship with Tim McVeigh . . . ." (*J,A,* 664.)

The subcommittee's unsuccessful yet repeated attempts to reach Kevin McCarthy created more unanswered questions. Law enforcement officials told subcommittee staff that, after serving 5 years in federal prison for his role in the robberies, McCarthy was released on probation and returned to his native Philadelphia.[38] However, a federal probation officer in Philadelphia could find no record of McCarthy in the federal probation system. A confidential law enforcement source informed the subcommittee that McCarthy was in some type of federal witness protection program and even located him living in Newtown, Pennsylvania. **When pressed for details a week later, this same source told staff that he could no longer help with this matter and that it was 'above his pay grade.'**

Continuing the attempt to locate McCarthy, the subcommittee chairman contacted the head of the Department of Justice's federal witness protection program. The official confirmed that in the past McCarthy had been in the program but had no information on his current status. Similarly, the subcommittee also discovered, through a private source, that McCarthy is no longer attached to the Social Security Number he had at the time of entry into the federal prison system. These facts raise questions about whether McCarthy is, in fact, still under some sort of federal protection as well as why the Department of Justice was unable or unwilling to help find him. **It is astonishing that officials from the Department of Justice and other law enforcement agencies were unwilling to permit congressional investigators to question a former bank robber with a possible connection to a large-scale terrorist attack.**

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[38] Before the District Court was the fact that Langan, a Secret Service informant, received a life sentence without the possibility of parole, plus 35 years; whereas McCarthy received only a five year sentence and has been "disappeared" by the Government. Another curious figure is Midwest Bank Robber Mark Thomas, who seems to have enjoyed treatment similar to McCarthy's. During Langan's trial, Thomas agreed to testify about what he knew concerning McCarthy's connection to the Oklahoma City Bombing. That did not happen, however. Rather, Thomas became an FBI informant and "protected federal witness." (*J.A.* 1142, ¶ 49.)

(*Id*. at 1000-1001) (emphasis added).[39]

I. <u>Thomas: We Are Going To Hit One Of Their Buildings</u>

Finally, and most troubling, are a series of FBI FD-302 informant reports involving Mark Thomas, a frequent resident of Elohim City and member of the Midwest Bank Robbery Gang. In response to the Federal Government's role at "Waco" and "Ruby Ridge," Thomas is reported by an informant to have stated in early 1995 that:

> We are going to get them. **We are going to hit one of their buildings during the middle of the day. It is going to be a Federal building**. And we will get sympathy if we bomb the building . . . The people who will lose their loved ones, will realize how bad it feels.

(*J.A.* 1310)(emphasis added).

Just prior to the Bombing, Thomas was at Elohim City. However, Thomas and other gang members left Elohim City and arrived back at his home in Macungie, Pennsylvania on April 19, 1995, "the day of the bombing" because "[T]hey were warned three days in advance." This information came from an informant on May 1, 1995, which was less than two weeks following upon the attack on the Murrah Building. (*J.A.* 1295-1296.)

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[39] The FBIs resistance and obstruction of justice in the McCarthy matter is not so astonishing when one considers what was at stake: Subcommittee access to McCarthy placed at risk of exposure the FBI's complicity, through informants, in the Bombing and its failure to prevent that attack.

There is also a teletype from FBI Director Louis Freeh to the Pennsylvania Field Office regarding an informant's reports about Mark Thomas and other Midwest Bank Robbery Gang members. This informant is reported to have said that on April 16, 1995, Mark Thomas left Elohim City for Pennsylvania while other gang members left Elohim City for Kansas to join Richard Guthrie and Peter Langan. (*J.A.* 1298-1302.)[40]

VIII.

SUMMARY OF ARGUMENT

The discovery Plaintiff seeks and which the District Court allowed is not a fishing expedition. If Plaintiff is allowed to depose Nichols and Hammer, these men will be able to provide and/or identify the existence of records responsive to Plaintiff's *FOIA* request that have not been produced. In fact, they have already done so. The evidence upon which the District Court based its *Discovery Order* were documents and facts provided by these witnesses. Documents such as those concerning Roger Moore, which Plaintiff submits FBI Defendants should have produced but did not. Facts such as Moore's role in the Bombing, a subject on which there should be extensive records that should have been produced to Plaintiff, but were not produced. Simply put, with this discovery, Plaintiff expects to demonstrate not only FBI Defendants' bad faith and malfeasance, but also the existence of other responsive documents, especially documents involving Roger Moore.

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[40] . Interestingly, Thomas was taken into the *Federal Witness Protection Program*. (*J.A.* 1142, ¶ 49.)

Nichols and Hammer's knowledge on these matters can only be fully exploited by taking their depositions, preserved on videotape. During a face to face deposition, Plaintiff can show the witnesses documents, and follow up on answers with clarifying questions when needed. Being present in a face to face deposition also reduces the likelihood of the witnesses being intimidated by other's present in the room with them. It is necessary to videotape these depositions because FBI Defendants will undoubtedly attack the credibility of these witnesses. Consequently, if the depositions are videotaped, the District Court will be able to judge for itself the credibility of these witnesses.

Whether to allow Plaintiff discovery in this case fell within the District Court's discretion. Based upon the principles underlying *FOIA,* which are to inform the public about the activities of the Government, and based upon FBI Defendants' obvious bad faith in responding to Plaintiff's *FOIA* requests, it was not an abuse of discretion for the District Court to allow Plaintiff to take these depositions.[41] On the contrary, the District Court was correctly upholding the core principles of *FOIA*: The public's right to know.

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[41] *See NLRB v. Robins Tire & Rubber Co*., 437 U.S. 214, 242 (1978) (*FOIA* is designed "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed); *Executive Order* 13392, 70 F.R. 75373 (*FOIA* was enacted because "[t]he effective functioning of our constitutional democracy depends upon the participation in public life of a citizenry that is well in formed. . . ."). And there could be no better use of that law than this case.

IX.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ISSUING THE DISCOVERY ORDER AND NEITHER DID THE DISTRICT COURT ABUSE ITS DISCRETION BY REFUSING TO RECONSIDER AND VACATE THAT ORDER

Admittedly, discovery is not a common litigation tool employed in a *FOIA* suit. Nevertheless, discovery is appropriate in a *FOIA* case when there is reason to believe, as in this case, that the agency is either withholding records or did not conduct an adequate "good faith" search for the materials.

> Discovery in a Federal *FOIA* action is permitted in order to determine whether complete disclosure of documents has been made and whether those withheld are exempt from disclosure. Whether a thorough search for documents has taken place and whether withheld items are exempt from disclosure are permissible avenues for discovery. **If the Plaintiff or the Agency's response raises serious doubts as to the completeness and good faith of the Agency's search, discovery is appropriate.**

(37A *Am.Jur.2d* Freedom of Information Acts, § 503)(emphasis added). [42] The discovery permitted under *FOIA* also includes depositions designed to disclose the "malfeasance" of

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[42] Although discovery is not a common litigation tool employed in a *FOIA* suit, it is appropriate when there is reason to believe, as in the instant case, that the Agency is either withholding records or did not conduct an adequate "good faith search for the materials." *See Info. Acquisitions Corp. v. Dept. of Justice*, 444 F.Supp. 458 (D.C. 1978); *Murphy v. Fed. Bureau of Investigation*, 490 F.Supp. 1134 (D.C. 1980); *Giza v. Sec'y of Health, Educ. & Welfare*, 628 F.2d 748, 751 (1st Cir. 1980); *Niren v. INS*, 103 F.R.D. 10 (Or. 1984); *Weisberg v. Dept. of Justice*, 543 F.2d 308 (D.C. Cir. 1976); *Van Strum v. U.S. E.P.A.,* 680 F.Supp. 349 (D. Or. 1987).

the government. *See Judicial Watch, Inc. v. United States Dept. Of Commerce*, 127 F.Supp.2d 228 (D.C. D.C. 2000.)[43]

Since the discovery ordered by the District Court is allowed under *FOIA*, the only issue is whether the District Court abused its discretion by entering the *Discovery Order* and/or by denying FBI Defendants' *Motion to Reconsider*? The answer to both questions is: "No." A District Court only abuses its discretion when: it makes a clear error; its ruling exceeds the bounds of permissible choice; its decision is arbitrary, capricious or whimsical; or it decision results in a manifestly unreasonable judgment. *Eastman v. Union Pacific R. Co.,* 493 F.3d 1151, 1156 (10th Cir. 2007). The District Court's rulings at issue do not meet this abuse of discretion standard. They were within the bounds of the law and supported by the evidence.[44]

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[43] The foregoing case law certainly disposes of FBI Defendants argument that discovery is not allowed in a *FOIA* case. That is - - discovery allegedly being beyond the Court's jurisdiction to authorize in a *FOIA* case. FBI Defendants also argue that the need for discovery is essentially moot since they have complied with the District Court's *Order* regarding production of informant records. That argument, however, is disposed of by *Weisberg v. USDOJ*, 627 F.2d 365 (D.C. Cir. 1980), which holds that even after an agency claims that it has "complied substantially" with its *FOIA* obligations discovery, including depositions, is permissible to test the veracity of that claim. And, Plaintiff wishes to undertake limited discovery to test FBI Defendants' "good faith" or "malfeasance" in responding to his *FOIA* requests.

[44] The District Court did not abuse its discretion in denying FBI Defendants' *Motion to Reconsider*. A *Motion to Reconsider* cannot be used to reargue matters previously presented to the Court or to present legal theories or facts that could have been raised earlier. *See Servants of the Paraclete v. John Does,* 204 F.3d 1005, 1012 (10th Cir. 2000). Reconsideration by the Court of its *Discovery Order* would only have been proper if grounded upon: (1) an intervening change in the law, (2) availability of new evidence, or (3) the need to correct clear

X.

AT A MINIMUM, NICHOLS AND HAMMER WILL PROVIDE EVIDENCE ESTABLISHING ROGER MOORE AS THE KEY FBI-SPLC INFORMANT ON THE RUN UP TO THE BOMBING, WHICH MEANS THAT THERE ARE OTHER DOCUMENTS THAT HAVE NOT BEEN PRODUCED

On appeal, FBI Defendants argue for the first time that these depositions should not go forward because neither Nichols nor Hammer could possibly have any knowledge or information that would even, directly or indirectly, suggest the existence of other documents related to this sting operation.[45] Plaintiff admits that he presently does not know the specifics of how all of the numerous informants being protected by FBI Defendants are tied to the SPLC. But the District Court certainly believed there was a connection when it gave as a reason for entering the *Discovery Order*: "**the information that Plaintiff has thus far discovered from Terry Nichols and David Paul Hammer. . .**" (*J.A.* 1155-56)(emphasis added). That "information" being Roger Moore's involvement in the Bombing.

Before the District Court, was evidence that a key informant in this FBI-SPLC undercover sting operation was from Arkansas. This individual, in an undercover

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error or to prevent manifest injustice. *See Reagan v. Bankers Trust Co.,* 863 F.Supp. 1511, 1521 n.10 (D.Utah 1994). Yet, none of these grounds for revisiting that *Order* existed.

[45] That argument seems to conflict with the scope of discovery permitted under *Federal Rule of Civil Procedure* 26(b)(1), which is "reasonably calculated to lead to the discovery of admissible evidence."

capacity, infiltrated militia groups all across the United States. (*J.A.* 1012.) Moore was an Arkansas gun dealer who traveled the gun show circuits with McVeigh. (*J.A.* 1032 ¶ 11.) McVeigh used this network of gun shows to obtain materials, people and knowledge with which to carry out the Oklahoma City Bombing. (*Id*. at ¶¶ 13 and 16.) Moore even provided McVeigh with the Kinestik used to detonate the bomb. (*Id*. at ¶ 15.) McVeigh and Nichols staged the robbery of Moore's house to protect him in the event he was somehow linked to the Bombing. (*Id* at ¶ 32.) Moore bragged that he did not have to worry about being indicted for the Bombing because "he was a protected witness." (*Id*. at ¶ 25.) Moore was likewise reported to have said that "whatever I was doing for the FBI is f * * * ed (fucked up) because they blew my cover." (*J.A.* 1118.)

Nichols and Hammer clearly have knowledge about informants and even some FBI-SPLC informant related documents. Plaintiff believes, too, that Nichols and Hammer have much more knowledge about Moore's role in the Bombing, as a FBI-SPLC informant, including having additional documents on Moore. Plaintiff hopes to obtain this information by deposing these two witnesses. Armed with that evidence, Plaintiff intends to go back to the District Court and ask that this case be reopened rather than require Plaintiff to file another *FOIA* request for these documents, and begin again the arduous process of trying to obtain them.

Specifically, Plaintiff will ask the District Court be reopened with respect to documents related to Roger Moore. If Moore was an informant in this FBI-SPLC sting

operation, it would be a very simple matter for FBI Defendants to retrieve these documents associated with his informant activities. The undisputed evidence before the District Court was a detailed description of how the FBI prepares and maintain informant documents. (*J.A.* 224-232). Included in this evidence was the fact that informant documents are maintained by the FBI in a sub-file in each FBI main case file and to retrieve them merely requires and FBI agent to go to the informant sub-file and copy the documents. (*J.A.* 229-232, ¶'s 38-48). This means that those documents could have been retrieved and produced to Plaintiff with very little effort. Yet, those documents have not been produced, which is conclusive evidence of FBI Defendants bad faith. *See Goland v. Central Intelligence Agency*, 607 F.2d 339, 353 (D.C. Cir. 1978).

Plaintiff believes the reason FBI Defendants have not produced those documents on Roger Moore is the absence of any reference in them to Morris Dees, Southern Poverty Law Center or SPLC. FBI Defendants take the position that while they may have tens of thousands of documents related to this operation, unless "Dees," "Southern Poverty Law Center," or "SPLC" appears on the documents, they need not be produced even though these documents are otherwise responsive to Plaintiff's *FOIA* request. (*J.A.* 168, 173.) That interpretation of the law is contrary to the dictates of this Court that *FOIA* requests are to be liberally and broadly construed. *See Anderson v. Dept. of Health & Human Services*, 907 F.2d 936 (10th Cir. 1990). FBI Defendants have an obligation to

produce all of these informant documents, not just the few that reference "Dees," "Southern Poverty Law Center," or "SPLC." [46]

XI.

SECURITY IS NOT A LEGITIMATE CONCERN

FBI Defendants argue that if the Court does permit Plaintiff to depose Nichols and Hammer, it should only allow these depositions to be taken by telephone because a video recording somehow poses a potential threat to the security of the Institutions where these individuals are confined.[47] Before the District Court, FBI Defendants attempted to support this argument by reliance upon two provisions of the *Code of Federal Regulations*, which they contend prohibit introducing cameras or recording equipment

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[46] If, as Plaintiff suspects, there are other such documents and he obtains them, Plaintiff likewise intends to request the District Court to refer Moore to the Department of Justice for prosecution for his complicity in the Bombing. That referral for prosecution would not only be in furtherance of the policy underlying *FOIA,* which is to expose governmental wrongdoing, but it would also be the duty of the District Court to make that referral. *See Adamson v. CIR*, 745 F.2d 541, 546 (9th Cir. 1984).

[47] If the witness cannot be present to testify in person, a videotaped deposition is preferred over a written deposition. *See Windsor v. New Jersey Nat. Bank*, 793 F. Supp. 589, 611 (E.D. Pa. 1992). Telephonic depositions are not favored under the *Federal Rules of Civil Procedure* because it is important for the attorney to observe the demeanor of the witness. Telephonic depositions are also not favored when exhibits will be involved in examining the witness. *See Cressler v. Neuenschwander*, 170 F.R.D. 20 (D. Kan. 1996). Thus, in order for Plaintiff to follow up and fully probe the knowledge of these witnesses, the depositions need to be face to face, not over the telephone. This is especially true since so much of the examination of Nichols and Hammer will involve numerous FBI documents. Being present during the depositions allows Plaintiff to show the witness documents, to observe the witness' demeanor in answering questions and to follow up immediately to clarify answers. Being face to face also reduces the possibility of other's being present in the room with the witness as a form of intimidation.

into a BOP facility: 28 *C.F.R.* §§ 511.11 and 511.12. Those *Regulations*, however, applied to visitors to a federal prison, not legal proceedings such as depositions.

Legal proceedings involving attorneys are governed by 28 *C.F.R.* § 543.13, including subsection (e) which allows for recording inmate interviews. Furthermore, both USP Terre Haute and USP Administrative Maximum or "ADX" have video conferencing facilities. With respect to USP Terre Haute, while incarcerated there Hammer has personally used the video conferencing facilities to make court appearances and to participate in other legal proceedings. USP Terre Haute even has an Institution *Supplement* covering video conferencing which provides, in pertinent part:

> A Video Conference Room is located in the special confinement unit and it is available to inmates and their attorneys who wish to conduct attorney/client visits through the use of video teleconferencing.

(*J.A.* 1189, ¶ 12B.)[48]

USP ADX where Nichols is incarcerated has a video conference center and routinely uses those facilities to allow inmates to make court appearances, give depositions and participate in other legal proceedings. The extent of USP ADX's video conferencing ability and capacity is well documented in the record by the *Declaration of Ronald C. Travis*, *Declaration of Jesse C. Trentadue*, and *Second Nichols Declaration.*

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[48] David Paul Hammer's *Second Declaration* describing the video conferencing facilities at Terre Haute appears of record at *J.A.* 1178. The Institution *Supplement* is attached to Hammer's *Declaration* as Exhibit 1. Furthermore, in *United States v. David Paul Hammer*, 226 F.3d 229, 233 (3rd Cir. 2000), the Court references the fact that "Hammer was present by video conferencing and he argued at length." USP Terre Haute's video conferencing capabilities are also documented by the *Declaration Wesley I. Purkey* (*J.A.* 1214.)

(*J.A.* 1194-1217.) [49] Simply put, FBI Defendants' claim that videotaping the depositions of Hammer and Nichols poses a security risk is not true.[50]

XII.

CONCLUSION

For reasons stated hereinabove, the District Court's *Discovery Order* allowing the requested discovery and subsequent *Order* denying reconsideration should be affirmed.

XIII.

ORAL ARGUMENT NOT REQUESTED

The issues presented in this appeal are simple. The law is well established. Nothing would be gained by oral argument.

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[49] The claim that videotaping poses a security risk even conflicts with United States Supreme Court precedent on Institutional policies based upon security concerns. *See Turner v. Safley*, 482 U.S. 78 (1987). Furthermore, video conferencing appears to be the preferred method for deposing inmates. *See* 43 *U.S.C.* § 1997e(f)(allowing inmates to participate in court proceedings "by telephone, video conference or other telecommunications technology").

[50] The purpose of videotaping these depositions is to allow the trier of fact to view the witness and assess their credibility. It goes without saying that the credibility of these two men will be severely attacked by FBI Defendants. Hence, rather than a security problem, Plaintiff submits that FBI Defendants' true goal is to prevent the District Court from seeing these witnesses testify and, thereby, judge for itself their credibility.

DATED this 12TH day of January, 2009.

/s/ Jesse C. Trentadue
Jesse C. Trentadue
Pro Se Plaintiff

XIV

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12TH day of January, 2009, I caused two true and correct copies of the foregoing **PLAINTIFF/APPELLEE'S OPENING BRIEF**, to be served via first class United States mail, postage prepaid, and by electronic process, upon:

Nicholas Bagley, Esq.
Assistant U.S. Attorney
950 Pennsylvania Ave. Rm. 7226
Washington, D.C. 20530

/s/ Jesse C. Trentadue

XV.

CERTIFICATE OF COMPLIANCE

As required by *Federal Rules of Appellate Procedure* 32(a)(5) and (6), I certify that this Brief has been prepared in a proportional spaced typeface using WordPerfect in 35 pt. Times Nu Roman font. I further certify pursuant to *Federal Rule of Appellate Procedure* 32(a)(7)(B) that the foregoing Brief contains 13,031 words according to the word count of WordPerfect. 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.

I further certify that (1) all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and (2) the digital submissions have been scanned with the most recent version of a commercial virus scanning program (AVG Anti-Virus 7.1, updated April 10, 2006) and, according to the program, are free of viruses.

/s/ Jesse C. Trentadue
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Pro se

XVI

ADDENDUM

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November 26, 2008

VIA E-MAIL AND U.S. MAIL

Mr. Nicholas Bagley, Esq.
Assistant U.S. Attorney
950 Pennsylvania Avenue
Room 7226
Washington, D.C. 20530

Re: *Trentadue v. FBI*
Record on Appeal

Dear Mr. Bagley:

Pursuant to *Federal Rules of Appellate Procedure* 10, 11 and 30, as well as 10th *Circuit Rules* 10, 11 and 30, I am writing in response to your e-mail to me of November 24, 2008 setting out what your clients deemed to be the record necessary for this appeal. From my review of your clients' designations, it is apparent that the proposed record on this appeal is both inadequate and not in compliance with the Tenth Circuit rules. The Tenth Circuit,for example, requires the *Amended Complaint* and *Answer* to be included in the record on appeal. But your clients have not included either in their designations .

In addition, the record on appeal must include pertinent written *Orders* from the District Court as well as the *Order*s from which the appeal is taken. More importantly, when the appeal is from an *Order* disposing of a *Motion*, the evidence such as *Affidavits*, *Depositions,* and other supporting documents, and all supporting *Briefs, Memorandums* and *Points of Authority* filed in connection with that *Motion*, as well as any *Responses* and *Replies* filed in connection with that *Motion* or pleading must be included in the record. 10th *Cir. R.* 10.3.

With these Tenth Circuit requirements in mind, set out below are the filings which I insist must be included in the *Appendix*.

No.	Doc. No.	Description	Date
1.	3	Amended Complaint	8/26/2004
2.	5	Answer by FBI Defendants	9/20/2004

3.	9	Second Declaration of Jesse C. Trentadue	10/20/2004
4.	14	FBI Defendants' Motion for Summary Judgment	11/22/2004
5.	20	Motion by Jesse C. Trentadue to Supplement the Record and supporting Memorandum	12/17/2004
6.	23	Third Declaration of Jesse C. Trentadue	1/13/2005
7.	24	Declaration of Emanuel E. Johnson, Jr.	2/10/2005
8.	25	Second Motion by Jesse C. Trentadue to Supplement the Record	2/15/2005
9.	26	Fourth Declaration of Jesse C. Trentadue	2/17/2005
10.	30	Minute Entry	2/25/2005
11.	31	Order	5/05/2005
12.	38	Fifth Declaration of Jesse C. Trentadue	5/31/2005
13.	39	Declaration of Emanuel Johnson, Jr.	5/31/2005
14.	58	Notice of Release of Docket	7/26/2005
15.	59	Response to Notice of Release of Documents	7/28/2005
16.	61	Order	8/17/2005
17.	62	Motion to Supplement Record	8/25/2005

18.	66	Sixth Declaration of Jesse C. Trentadue	9/15/2005
19.	70	Order	10/7/2005
20.	76	Notice of In Camera Submissions	10/18/2005
21.	77	Reply to FBI Defendants' Response to Plaintiff's Objection to Release of Documents	11/04/2005
22.	78	Exhibits	11/04/2005
23.	81	Minute Entry	11/14/2005
24.	82	Notice of Filing	12/22/2005
25.	84	Response Re: Objections	1/15/2006
26.	85	Seventh Declaration of Jesse C. Trentadue	1/17/2006
27.	86	Declaration of Leslie Blade	1/17/2006
28.	87	Order	3/29/2006
29.	88	Amended Memorandum Decision and Order	3/30/2006
30.	96	Notice of Document Search and Production	6/02/2006
31.	97	Motion for Discovery	2/16/2007
32.	98	Memorandum in Support of Motion for Discovery	2/16/2007
33.	99	Declaration of David Hammer	2/16/2007
34.	100	Declaration of Terry Nichols	2/16/2007

35.	101	Sealed Documents	2/16/2007
36.	107	Memorandum in Opposition to Motion for Discovery	2/23/2007
37.	112	Reply Memorandum in Support of Motion for Discovery	4/16/2007
38.	113	Memorandum Decision	9/20/2007
40.	114	Motion to Reconsider Discovery Order	10/31/2007
41.	115	Memorandum in Support of Motion to Reconsider Discovery	10/31/2007
42.	119	Declaration of David Paul Hammer	11/20/2007
43.	120	Declaration of Ronald C. Travis	11/22/2007
44.	121	Declaration of Jesse C. Trentadue	11/20/2007
45.	122	Declaration of Wesley I. Purkey	11/21/2007
46.	123	Memorandum in Opposition of Motion to Reconsider Discovery	12/03/2007
47.	124	Errata	12/03/2007
48.	125	Motion to Amend and Correct Memorandum	12/03/2007
49.	126	Order Granting Motion to Correct	12/10/2007
50.	127	Reply in Support of Motion to Reconsider Discovery	1/30/2008
51.	128	Notice of Supplemental Authority	1/31/2008
52.	129	Notice of Release of Documents	4/03/2008

53.	131	Response Re: Objections to Release of Additional Informant Documents	4/17/2008
54.	132	Order Denying Motion to Reconsider Discovery	9/25/2008

These materials are necessary to be included in the Appendix because they go to the heart of your client's response to the *FOIA* request, which resulted in the discovery *Orders* now subject to appellate review. Moreover, these filings are the record upon which the Court based its discovery rulings, which were intended to allow me to probe the adequacy and good faith of FBI Defendants' responses to the *FOIA* requests.

In its May 5, 2005 *Order* (Doc. 31), the Court stated that it would allow me to conduct discovery if the FBI failed to produce documents and/or records responsive to my *FOIA* requests. The materials I have designated, especially the *in camera* submissions (Doc. 76), led the Court to conclude that "it is troubling that so many of the documents produced by the FBI refer to FD-302s that were or should have been prepared, and the disclosed documents also refer to other attachments that at one time or period accompanied the document, yet these documents have not been produced." (Doc. 88) Based upon this evidence, the Court not only entered the challenged discovery *Orders*, but specifically stated that, although the case is closed, I can move to reopen if the existence of other responsive documents is established by these depositions.

In a nutshell, your clients cannot ask the Court of Appeals to review these *Orders* without including in the Appendix the evidence relied upon by the District Court. Consequently, if my designations are not included, I will take the position that the record is not adequate for the Tenth Circuit to address the issues on appeal and ask that the District Court's *Rulings* be affirmed based upon the record not being adequate for appellate review.

SUITTER AXLAND

Jesse C. Trentadue

cc: Ms. Christensen

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