UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
UNITED STATES OF AMERICA

-against-

98Cr. 13 (JS)

JAMES SANDERS and
ELIZABETH SANDERS

Defendants

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' JOINT MOTION FOR PRETRIAL DISCOVERY.

INTRODUCTION

This memorandum of law is respectfully submitted as a reply to the government's memorandum in opposition to the defendants' joint pretrial motion for discovery relating to their assertion of the defense of vindictive or selective prosecution.

POINT

THE DEFENSE HAS MADE A SUFFICIENT THRESHOLD SHOWING OF VINDICTIVE OR SELECTIVE PROSECUTION TO REQUIRE THE GOVERNMENT TO PROVIDE DISCOVERY THAT IS RELEVENT TO THOSE DEFENSES.

In our opening memorandum, we pointed to substantial evidence that supports the conclusion that the government's actions against James and Elizabeth Sanders - culminating in an unprecedented prosecution of them for their alleged roles as accessories to a removal of valueless scraps of fabric from an aviation accident investigation site - were motivated by animus arising from Mr. Sanders' exercise of his constitutionally-protected right to publish information regarding the cause of the TWA Flight 800 Tragedy, and to disseminate his conclusion that government investigators (including the FBI officials involved in the present proceeding) had concealed that information from the public. As we demonstrated, immediately after Mr. Sanders' views were published in an article that prominently identified Mr. Sanders as an investigative journalist and author, Justice Department officials, disregarding their own First Amendment-based policies, launched an aggressive campaign to uncover Mr. Sanders' confidential source within the official FBI-NTSB investigation. When Mr. and Mrs. Sanders refused to yield to the government's demand for information, the prosecutors followed through on their threats to indict them.

These actions, coupled with evidence that the government has a motive to discredit Mr. Sanders' conclusions, and in fact has used this prosecution as a vehicle for accomplishing that purpose, tends to establish that the present matter would not be before this Court in the absence off an improper motive to suppress or penalize constitutionally-protected speech. That conclusion is further supported by the fact (now acknowledged in the government's response) that FBI Assistant Director James Kallstrom removed property from the wreckage, but has not been prosecuted or sanctioned in any way. As we will show, the government's response, including it's identification of a single prior prosecution under 49 U.S.C. Sec 1155, fails to defeat our threshold showing of "some evidence" tending to establish the essential elements of a claim of vindictive or selective prosecution. Accordingly, the defense is entitled to discovery related to these defenses. See United States v. Armstrong, 517 U.S. 456,116 S.Ct 1480, 1488 (1996).

A. The Defense Has Met Its Burden of Presenting "Some Evidence" that the Government Acted With a Vindictive Motive of Retaliating Against the Sanders for their Exercise of Rights Guaranteed Under the First Amendment, and of Chilling their Exercise of those Rights.

While the government "is not prepared to concede" that Mr. and Mrs. Sanders were engaged in actions protected by the First Amendment, govt. mem., p. 27, it offers no arguments in opposition to that contention, and it does not purport to suggest that Mr. Sanders acted with any other purpose than to gather information to be disseminated to the public, or that Mrs. Sanders acted with any other purpose than to assist her husband in that pursuit. Nonetheless, the government insists that Mr. and Mrs. Sanders "are being prosecuted for the crime they committed, not the opinion James Sanders has advocated." Govt. mem., p. 23. That assertion is belied, however, by the Justice Department's own December 5, 1997, press release regarding the initiation of criminal[1] charges against Mr. and Mrs. Sanders [Def. Exhibit N][2]. The press release summarizes the criminal complaint's gratuitous and misleading assertions that the laboratory testing of the residue samples submitted by Mr. Sanders "provided no conclusive evidence of the presence off solid rocket fuel" and that "JAMES SANDERS misrepresented those results in media reports for which he was a source." Immediately after this effort to discredit Mr. Sanders and his published conclusions, the government's press release offers the following statement by James Kallstrom, Assistant Director in charge of the New York FBI office.

"This criminal investigation is far from over. THESE DEFENDANTS ARE CHARGED WITH NOT ONLY COMMITTING A SERIOUS CRIME, THEY HAVE ALSO INCREASED THE PAIN ALREADY INFLICTED ON THE VICTIM'S FAMILIES. This investigation will continue in an effort to identify any other individuals who may have played a role in this scheme." (emphasis added).

Short of a signed confession, there could hardly be clearer proof that the present prosecution is indeed directed against "the opinions James Sanders has advocated." Mr. Kallstrom's reference to the ""pain ... inflicted on the victim's families" plainly does not relate to the removal of material from the airplane wreckage. (Was the arrest of the truck driver who removed parts from the downed Valuejet plane accompanied by a press release accusing him of causing such pain?)) On the contrary, it obviously relates to Mr. Sanders' propagation of the view that a missile caused the crash, and to the corollary suggestion that, notwithstanding Mr. Kallstrom's repeated assurances to the contrary [see, e.g. Def. Exhibit S, transcript of CNN press conference], the victims could not take comfort in the belief that the massive government investigation that he headed thoroughly and conclusively laid the missile theory to rest. This statement of a high-ranking official of the agency that referred this case for criminal charges, implicitly endorsed and issued by the Department of Justice, constitutes direct evidence of the speech-based animus underlying the present prosecution. [3]

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[1] Prior to the last conference before the Court, counsel for the defense conferred with Assistant United States Attorney Benton Campbell in an effort to resolve disputes with the government regarding our original discovery requests and thereby avoid the necessity for judicial intervention. During that conference, the government opposed all requests for documents and information relating to the government's motive for prosecuting Mr. and Mrs. Sanders, and all parties agreed that it would be necessary to litigate the present motion, and thereby clarify the general parameters of discovery, before continuing our efforts to reach agreement with the government as to particular requests. Accordingly, in view of our understanding that we would attempt to narrow, further define, and possibly supplement our discovery requests by mutual agreement after a ruling on the present motion, the government's effort to fault the defense for failure to "specifically identif[y] what documents or items they are requesting" [govt. mem., p. 11] is inappropriate.

[2] Defense Exhibits A through T are attached to our original notice of motion; Defense Exhibits U through Y are attached to the present memorandum; the government's exhibits are attached to their memorandum in opposition.

[3] During the December 5, 1997, broadcast of the NBC Nightly News, which included on-air statements by Kallstrom, correspondent Robert Hager reported that, "Tonight, the FBI says it's investigation isn't finished, says still more may have been involved in what it calls A PLOT TO REWRITE THE HISTORY OF TWA

Further evidence obtained by the defense ((and submitted as part of the present reply) demonstrates the depth of the government's motivation to discredit Mr. Sanders' published conclusions regarding the content of the red residue that appears in a portion of the airplane's cabin. In remarks to a Congressional subcommittee immediately after publication of the Press-Enterprise article reporting Mr. Sanders' conclusion that the red residue trail was caused by missile fuel, NTSB head Bernard Loeb "categorically" denied the existence of such a trail (which the government has since acknowledged), and asserted that "we believe that the red residue material is an adhesive." [Def. Exhibit G]. The claim that the residue comes from glue has been reiterated in numerous public statements and documents, including Mr. Kallstrom's November 18, 1997, press conference [See CNN Transcript, Def. Exhibit S] and Agent Kinsley's December 5, 1997, affidavit in support of the Sanders' arrest. [Def. Exhibit, E | 9].

These claims were premised on a report of the NTSB Fire and Explosion Team, headed by Dr. Merritt Birky, that purported to summarize testing of "reddish brown" material from selected seat back panels in rows 1177, 19, 24, and 117, by infrared spectroscopy at a NASA lab. That report asserted that this analysis "showed the material to be consistent with a polychloroprene 3M Scotch-grip 1357 High Performance contact adhesive." NTSB Fire and Explosion Group Factual Report, # 20A, p. 9 [Def. Exhibit U, attached to this memorandum]. IN fact, however, the NASA lab had reported to the NTSB that "At no time during the analysis of these samples however, was there conclusive evidence to suggest that Scotch-grip((tm)) 1357 High Performance (HP) contact adhesive was the polychloroprene based adhesive specifically used in any of these applications." NASA Director of Logistics Operations, Report 97-1C0154 [Def. Exhibit V]. Furthermore, Charles Bassett, the NASA scientist who tested the residue samples forwarded to him by Dr. Birky has not only stated that his tests do not support the conclusion that the residue was caused by the 3M adhesive, but has indicated that the 3M adhesive could not be the source of the residue, because that adhesive, when cured, is green or olive drab and, when subjected to heat, turns various shades of green and brown but not red. See Affidavit of Charles Bassett [Def. Exhibit W]

Thus, the government's repeated effort to discredit Mr. Sanders' conclusions about the source of the red residue by insisting that the source of the residue has definitively been determined to be an adhesive are based on a misrepresentation of the results of laboratory analysis. The government's willingness to make such misrepresentations in order to discredit Mr. Sanders' conclusions, and thereby assure the public that there is an innocuous explanation for the reddish residue trail, adds further, compelling support to the conclusion that the present prosecution is motivated by the government's animus relating to the content of Mr. Sanders' public communications. In this regard, it should be noted that the government has not even attempted to dispute the assertion in our opening papers that the government has consistently sought to dispel the notion that a missile was involved in the Flight 800 crash, and that it has resorted to conflicting explanations in pursuit of that effort. See defendants' opening memorandum, pp.177-19.

In response to our argument that such animus can also be inferred from the government's violation of it's own rules regarding subpoenas to journalists, the government maintains, astonishingly, that "the March 10, 1997 article did not clearly identify [Mr. Sanders] as a member of the media." Govt. mem., p. 19. In making this extraordinary claim, the government obstinately continues ((as it did in it's April 1, 1997, letter to Mr. Sanders' attorney [Govt. Exhibit B, attached to govt. mem]) to ignore the fact that the articles first reference to Mr. Sanders, in the second paragraph of the front-page far-left column is as "author and investigative reporter James Sanders," and that three paragraphs later the article describes Mr. Sanders' two previous non-fiction books of investigative journalism [Defendants' Exhibit F]. The government also erroneously contends that Mr. Sanders' counsel offered no evidence of Mr. Sanders' "media status" in response to an inquiry from the government. Govt. mem., p. 200. On the contrary, while noting that the government's questioning of Mr. Sanders' "media status" failed to recognize that First Amendment protection hinges not on an individual's institutional affiliations, but on his intent to disseminate information, see von Bulow by Aursperg v. von Bulow, 811 F.2d 136, 142 (2d Cir.) cert. Denied, 481 U.S. 1015, 107 S. Ct. 1891 ((1987), counsel expressly advised the government that Mr. Sanders had acted as a

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800" [Def. Exhibit Y] (emphasis added) . This remark further reveals that the investigation and prosecution of the Sanders was motivated by the government's reaction to the content of Mr. Sanders' publicly-expressed views.

reporter and writer in connection with the March 10th Press-Enterprise articles ((and that the Press-Enterprise would confirm this fact)), and also advised the government of a number of other publications in which articles by Mr. Sanders had appeared. [Def. Exhibit X]. In view of the substantial information in the government's possession making clear that Mr. Sanders was acting as a newsgatherer in connection with the information referred to in the Press-Enterprise article, the government's bold assertion that it had no basis for recognizing the First Amendment implications of it's interactions with Mr. Sanders until his publisher announced that he was writing a book about Flight 800 is preposterous.

Contrary to the government's memorandum, at pp. 20-21, United States v. White972 F.2d 16, 19 (2d Cir. 1992), does not suggest that the government's violation of Justice Department guidelines can never provide relevant support to a claim of vindictiveness; White simply held that, in that particular case, the defendant's allegations of such violations did not suffice to establish that the government's charging decision was vindictive. Here, however, the government's failure to follow it's own regulations, its absurd disavowal of awareness that Mr. Sanders was engaged in a journalistic pursuit, and its constricted interpretation off the scope of First Amendment protections occurred in the context of an aggressive effort to expose Mr. Sanders' source and to discredit the information that he had disseminated. In that context, the government's violation of it's own policy is a component of a circumstantial showing off vindictiveness.

In an effort to avoid the force of that circumstantial evidence, the government goes so far as to take issue with our position that the government's animus can be demonstrated by a "chronology of events" suggestive of retaliatory intent. Focusing on our citation, by way of analogy, to Gagliardi v. Village of Pawling, 18 F.3d 188, 194 (2d Cir. 1994), which held that such a chronology satisfies the pleading requirements in a malicious prosecution action, the government takes pains to note that the present case is criminal rather than civil, and involves different procedures and standards off proof. As the Court of Appeals has frequently observed, however, in both civil and criminal matters a case can be built entirely of circumstantial evidence. See, e.g., Burger vv. New York Inst, of Tech., 94 F.3d 830, 833-35 ((2d Cir. 1996) (finding a jury question in an age discrimination case based wholly on circumstantial evidence); United States v. Viola, 35 F.3d 37, 44 (2d Cir. 1994) ("Participation in [a] conspiracy can be shown wholly through circumstantial evidence...."). See also United States v. Sureff, 15 FF.33d 225, 229 (2d Cir. 1994)(rejecting "the view that circumstantial evidence is inherently weaker than direct evidence"). If circumstantial evidence can establish a defendant's criminal intent sufficiently to deprive him of his liberty, it can surely establish the government's vindictiveness sufficiently to warrant additional discovery on this issue.

Here, however, we have relied not only on circumstantial evidence, but, as discussed above, have pointed to direct evidence: an admission of a party to this litigation declaring, in effect, that the present prosecution is intended to punish the defendants for the "pain" caused by their speech. Viewed in this conjunction, the direct and circumstantial evidence presented in support of this application constitutes far more than "some evidence" that the government has indicted Mr. and Mrs. Sanders for the purpose of retaliating against, or chilling, their exercise of rights guaranteed by the First Amendment.

B. The Defense Has Met its Burden of Presenting "Some Evidence" that Mr. and Mrs. Sanders Would Not Have Been Prosecuted in the Absence of the Government's Vindictive Motive.

In its effort to justify the prosecution of Mr. and Mrs. Sanders and to support its claim that, even absent the government's animus arising from their exercise of First Amendment rights, their actions would cause them to face the same criminal charges, the government's response strains to portray Mr. and Mrs. Sanders' conduct in a sinister light. Thus, the government refers to the Sanders' "persistent instructions" to TWA Captain Terrell Stacey, govt. mem., p. 14, n. 1, and asserts that he ""reluctantly complied" with their requests. Govt. mem., p. 3. See also govt. mem., pp. 15-116, n. 2 (... when [Stacey] stole the fabric strips from the Calverton hanger pursuant to the INSTRUCTIONS of James and Elizabeth Sanders)(emphasis added). These characterizations, unsupported by any affidavit or other evidentiary showing, stand in stark contrast to Stacey' own statement, under oath, regarding the circumstances leading to his removal of the fabric swatches.

"I was assigned to the investigation immediately after the accident and started working on it. Well, first off I had brought that airplane back in from Paris the week before and had flown that airplane three times in the previous week. And I was assigned to [the] investigation.

"We have been there for many long months. I was away from the family under a lot of pressure and emotional stress to find out the cause of the accident. And when I was given an opportunity or when I -- when Mr. Sanders (ph.) offered to me or the fact I learned that he could help in the investigation through contacts and people he had in labs, then on my own volition took the two small pieces and gave them to him to have them analyzed.

Plea allocution, December 10, 1997 [Def. Exhibit O].

Thus, contrary to the government's unsupported insinuation, Stacey's sworn statement makes clear that his decision to remove the fabric samples was not a response to "persistent instructions" by Mr. and Mrs. Sanders, but reflected his own frustration at the failure of the official investigation to determine the cause of the accident. He provided the fabric to Mr. Sanders because Mr. Sanders had the willingness and the ability to pursue a line of investigation that Stacey believed was important, and that the FBI-NTSB investigators were not pursuing. Stacey's statement does not indicate that Elizabeth Sanders played any role whatsoever in his decision to remove the fabric.[4]

Furthermore, while the government's memorandum repeatedly refers to the material removed by Stacey as "pieces of the wreckage," "parts from the wreckage," or simply "the wreckage," the government ultimately recognizes that the material at issue in fact consisted of nothing more than two pieces of seat backing fabric. The government does not dispute our assertion that these miniscule swatches of material had no intrinsic value, or that Stacey left behind a sufficient quantity of residue bearing material to permit a full range of testing by the official investigators. The government also does not suggest that the Sanders' purpose in obtaining the samples was anything other than to further Mr. Sander's journalistic investigation into the cause of the Flight 800 crash.

Viewed fairly and without the government's unsupported characterizations, the Sanders' conduct does not warrant prosecution under 49 USC Sec 1155 any more than that of James Kallstrom, whom the government acknowledges removed a flag from the wreckage to give to the child of a victim. While the government implies that, unlike the removal of material by Stacey, Kallstrom's removal was "authorized", it does not cite any statute or regulation that authorizes an investigator -- even a high ranking FBI official -- to distribute "property on the aircraft at the time of the accident" [49 U.S.C. Sec 1155(b)] at his own discretion, to the relatives of the victims; indeed, since aircraft disasters almost invariably have numerous victims, most of whom are likely to have grieving relatives, such "authority" would lead to substantial, indiscriminate pilfering of such property. The government does not suggest that Kallstrom took any formal steps to notify any official body of his intent to remove the flag, or that he sought or received approval for his actions in any way.

The government asserts that Kallstrom's "public presentation of a small flag found in the wreckage to a grieving son at his mother's funeral differs in kind and degree" and that "[a]ny comparisons [to the Sanders' actions] is misleading and shortsighted." Govt. mem., p.14, n. 1. If the government means to suggest that Kallstrom's conduct does not warrant criminal prosecution because it served a high-minded and worthy purpose, the Sanders' conduct is equally blameless. In seeking to uncover and disseminate the truth about the causes of the Flight 800 disaster, the Sanders were acting in the tradition of the First Amendment, which recognizes the importance of an "untrammeled press as a vital source of public information." Grosjean v. American Press Co., 297 U.S. 233, 250, 56 S. Ct. 444, 449 (1936); their pursuit of truth about this tragedy offered comfort not just to a single relative of a victim of this tragedy, but to all of the victims' relatives, as well as to the public at large, which, in a democratic society, has a fundamental

[4] Agent Kinsley's arrest affidavit alleges that Elizabeth Sanders had a single conversation with Stacey in which she asked him to obtain the samples. See Def. Exh. E, | 25. Even if this allegation is credited, it provides no support for the insinuation that she "persistently instructed" Stacey to provide the samples.

interest in obtaining information about important public matters from source other than government officials.

The government's suggestion that Kallstrom's "public" presentation of the flag distinguishes his conduct from the Sanders' is both puzzling and baseless. James Sanders not only revealed his obtaining of the Flight 800 material in a newspaper article, but wrote and published a book that recounted in detail his receipt and testing of that material. If Kallstrom's openness regarding his actions signifies a lack of culpability, so does Mr. Sander's. Thus, contrary to the government's argument, Kallstrom's unsanctioned removal of property from Flight 800 establishes that a "similarly situated" person was not prosecuted.[5]

On the other hand, the government has pointed to only one individual who has been prosecuted under 49 U.S.C. Sec. 1155 prior to the institution of the present case.[6] That individual, however, was prosecuted not only for his removal of parts of the Florida Valuejet aircraft involved in an accident investigation, but also for "corruptly persuading another person with intent to cause and induce that person to conceal objects, that is, parts of a civil aircraft with intent to impair the object's integrity and availability for use in an official proceeding," in violation of 18 AU.S.C. Sec. 1512(b)(2)(B), and for "corruptly impeding the due and proper administration of the law under which a pending proceeding was had before an agency of the United States," in violation of 18 U.S.C. Sec. 1505. See Information, United States v. Michael E. Gadsden [Govt. Ex. F]. The affidavit accompanying the criminal complaint in that case indicates that Gadsden falsely denied having parts of the aircraft in an interview with an FBI agent. Affidavit, p. 2, | 7. There is no basis for concluding that, in the absence of his additional serious misconduct involving obstruction of justice and false statements to a federal officer, Gadsden would have been prosecuted for the removal of aircraft parts alone.

Furthermore, unlike the [present case, the affidavit in support of Gadsden's criminal complaint alleged that one of the two parts removed by Gadsden -- a circuit breaker panel from the cockpit area -- was a "relevant discovery with respect to the effort to determine the cause of the aircraft disaster." While removal of that part may have deprived the investigation of an important clue to the cause of the crash, here it is undisputed that the removal of the two swatches of material did not deprive the investigators of ample residue bearing material to analyze.

Additionally, Gadsden ultimately acknowledged that he had taken two aircraft parts as "souvenirs". Affidavit, p. 3 | 8. Thus, his conduct falls squarely within the heartland of the conduct that 49 U.S.C. Sec. 1155 was designed to address. See Public Law 87-810, approved October 15, 1962 (legislation was enacted in response to testimony by NTSB officials that "numerous instances have occurred where souvenir hunters thoughtlessly and, on many occasions, maliciously carried off parts of aircraft wreckage which are vital to the accident investigation"). In the present case, there is no indication that Sanders sought the fabric swatches as "souvenirs". On the contrary, it is clear that the only purpose for which the material

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[5] The involvement of participants in the NTSB "party program" [govt. mem., p. 16] surely does not provide a meaningful distinction between the present defendants and James Kallstrom. If the government has a particular interest in curtailing wrongdoing by civilian participants in an accident investigation, it should have a still greater interest in curtailing wrongdoing by government law enforcement officers involved in such investigations.

[6] In a remarkable example of bootstrapping, the government suggests that the prosecution of Terrell Stacey -- as well as the Sanders themselves! -- establishes that "similarly situated" individuals have been prosecuted under Sec 1155. Govt. mem., p. 15. The government apparently misses the point. Whether or not Stacey is "similarly situated," the government's motive for prosecuting him cannot fairly be viewed as independent of it's motive for prosecuting the Sanders. Although the government asserts that "[t]here is no claim that Stacey was acting in a journalistic capacity," id., Stacey's providing of the Flight 800 material to Mr. Sanders was an essential aspect of Mr. Sander's published information and views. Furthermore, Stacey's prosecution has served as a means of securing testimony against the Sanders. In view of these circumstances, Stacey's prosecution is too closely connected to the Sanders' prosecution to support the government's claim that the Sanders would have been prosecuted absent the government's animus.

was obtained here was to pursue an independent, journalistic investigation with the intent of providing important information to the public regarding a matter of pressing national concern.

Finally, unlike Mr. and Mrs. Sanders, Gadsden acted as the principle in the offenses for which he was charged. The government has pointed to no instances whatsoever in which individuals have been prosecuted under 49 U.S.C. Sec 1155 on a theory of accessorial liability. To truly be "similarly situated" to Mr. Sanders, a defendant would have to be a journalist who did no more than express an interest in obtaining an inconsequential quantity of material from a crash site so that it could be analyzed by an independent laboratory, with the purpose of uncovering and publishing the truth about a matter of widespread significance. To be "similarly situated" to Mrs. Sanders, a defendant would have to have done no more than relay a journalist's desire for such material to a participant in the official investigation. From the information provided by the government, it is clear that Michael Gadsden does not come close to fitting that description.

The defense has presented substantial evidence that strongly supports the conclusion that, in the absence of an improper motive related directly to the Sanders' exercise of rights guaranteed by the First Amendment, they would not have been prosecuted. Therefore, this Court should direct the government to provide discovery relating to the defenses of vindictive or selective prosecution.

CONCLUSION

For the reasons discussed above and in our opening memorandum, we respectfully request that the Court grant the defense motion for pretrial discovery relating to the defenses of vindictive or selective prosecution.

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