

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action NO. 96-CR-68-M

UNITED STATES OF AMERICA,

Plaintiff,

v.

TIMOTHY JAMES MCVEIGH,

Defendant.

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO
06/05/01
JAMES R. MANSPEAKER,
CLERK

TIMOTHY McVEIGH'S REPLY
TO BRIEF OF THE UNITED STATES
OPPOSING STAY OF
EXECUTION

(REDACTED FOR PUBLIC FILING)

I. OVERVIEW: THE LEGAL STANDARDS FOR A STAY

The government has attempted in numerous ways to characterize Mr. McVeigh's stay application as something that it is not. Accordingly, it is crucial that the Court not be misled and that it accurately assess Mr. McVeigh's application.

Mr. McVeigh seeks the opportunity to file a motion to set aside the Court's order of October 12, 2000, denying his motion to vacate conviction and sentence, which was filed pursuant to 28 U.S.C. § 2255. The sole ground on which Mr. McVeigh will seek to vacate the 2255 order is a ground that has been well-established for decades – fraud upon the court. As the Tenth Circuit explained nearly twenty years ago in *Bulloch v. United States*, 763 F.2d 1115, 1121 (10th Cir. 1985), "It is beyond question that a federal court may investigate a question as to

whether there was fraud in the procurement of a judgment... This is to be done in adversary proceedings as in the case before us.” (Citations omitted.)

The fraud pointed to by the evidence thus far known to counsel for Mr. McVeigh is that the government misled the court concerning the persons responsible for the Oklahoma City bombing. Specifically, counsel believes that the government -- at least some FBI agents -- **knew**, not just that they surmised, through investigation, through informants, or both, that other people, in addition to Mr. McVeigh and Mr. Nichols, were responsible for the bombing. The defense believes that the government had a significant volume of such information, yet chose not to disclose critical portions of it to the defense, and chose not to present it at trial for fear of diminishing the responsibility that would be assigned to Mr. McVeigh during his trial, or for fear of shifting some of the responsibility to itself by revealing that federal informants had advised federal law enforcement officers of the bombing several days or weeks before it occurred. Even though *Brady v. Maryland*, 373 U.S. 83 (1963), and this Court’s specific orders applying *Brady* and ordering timely disclosure of all *Brady* material, required the government to produce all this information, the available evidence to date shows that it has not. Moreover, the evidence shows that while the government was not producing all this information, its attorneys were assuring the Court and the defense that it was producing and had produced all this information.

These are the contours of the fraud that we believe procured the conviction and death sentence for Mr. McVeigh and precluded his ability to expose the fraud as *Brady* violations in the 2255 proceeding. We have shown the Court in the stay application the facts that we know about so far which support our contention that this fraud has been perpetrated. We have shown that the government has turned over in the last three weeks some additional exculpatory information relating to the responsibility of others in addition to Mr. McVeigh and Mr. Nichols. We have shown that there was at least one such exculpatory 302 filed in a different case file – a 302 that was not produced until after May 29, 2001, when a former FBI agent accused the government on national television of not turning over that report. We have urged the Court to make the reasonable inference that there are other such exculpatory 302's or inserts hidden in

other case files. We have also shown that there are some people, named or readily identifiable as suspects shortly after the bombing, about whom the government has still produced nothing, or very little, despite the obvious need to investigate them and some information that the government actually did investigate them.

These facts have meaning in two contexts. First, they support our contention that the order denying the 2255 motion was procured by fraud – that is, by the government’s continuing to suppress exculpatory evidence through the time that Mr. McVeigh had an unconditional right to present a *Brady* claim – in his 2255 motion. Second, they support our contention that there is a *Brady* violation concerning the involvement of others in the bombing, as yet not fully presentable, because the government is continuing to suppress exculpatory evidence.

For these reasons, we cannot yet file the motion to vacate the order denying § 2255 relief. We believe that, because the government failed to disclose some additional exculpatory evidence until May 9, 2001, and because the government is still refusing to disclose additional exculpatory evidence, Mr. McVeigh must be allowed an opportunity to obtain all the suppressed information and conduct necessary investigation in relation to it **before** he is required to file his fraud on the court motion. It is for this reason we have asked the Court to stay Mr. McVeigh’s execution pending the filing and disposition of the fraud on the court motion. The All Writs Act is properly invoked in these circumstances, in that its mission is to maintain the status quo pending the filing of a proceeding that gives the federal court jurisdiction to act on a case.

II. MR. McVEIGH’S FRAUD ON THE COURT MOTION WILL NOT BE A SUCCESSIVE 2255 PETITION

The government complains that we have not followed the procedure required under AEDPA’s amendments to 28 U.S.C. § 2255 for filing a successive 2255 motion. The government also argues that, even if we did follow that procedure, we would not be allowed to file a successive 2255 motion, because we cannot meet the criteria for such a motion.

We have not followed the procedure for filing a successive 2255 motion, because a fraud on the court motion is a distinct post-2255 proceeding that the Court has the inherent power and

duty to entertain. *See Calderon v. Thompson*, 523 U.S. 538, 557 (1998); *Workman v. Bell*, 227 F.3d 331 (6th Cir. 2000), *cert. denied*, 121 S.Ct. 1194 (2001); *Fierro v. Johnson*, 197 F.3d 147, 151-153 (5th Cir. 1999), *cert. denied*, 530 U.S. 1206 (2000); *United States v. McDonald*, 1998 WL 637184 (4th Cir. 1998) (unpublished). Each of the federal appellate courts that has considered such a motion has agreed, at least in theory, that a fraud on the court motion is permitted even though any other post-2255 motion must be treated as a successive 2255 motion.

The government has complained that we have made no claim of factual innocence, as we must do to file a successive 2255 motion.

We have not made such a claim because we are not required to in order to maintain a fraud on the court proceeding. It is not, much as the government would like it to be, governed by the successive motion provisions of 28 U.S.C. § 2255.

The government complains that we have not substantiated the claim that any non-disclosure of evidence by the government violated the due process rule of *Brady*.

We have not done so yet, because we have not had the recently-produced materials a sufficient amount of time to complete the investigation called for by them. *See* sections III and IV, *infra*. Nor do we believe we have yet been provided all exculpatory information known to the government, so that any investigation we need to conduct to determine the availability of *Brady* claims is, of necessity, incomplete.

The government complains that the *Brady*-related allegations we have made do not point to “alternative” conspirators, only to “additional” conspirators, citing *United States v. Nichols*, 2000 WL 1846225 (10th Cir. 2000) (unpublished) in support of its argument that evidence pointing only to “additional” rather than “alternative” perpetrators does not establish a *Brady* claim. In this same vein, the government complains that we have pointed to no information establishing a nexus between Mr. McVeigh and any other suspects.

As the Tenth Circuit’s unpublished opinion in *Nichols* makes clear, the view that “additional” rather than “alternative” perpetrators was not exculpatory was very specific to the facts of that case. *Nichols* complained about this Court’s denial of *Brady* relief on the basis of

the government’s withholding of additional John Doe 2 evidence. The Tenth Circuit affirmed because “none of the JD2 evidence casts doubt on the overt acts committed by Mr. Nichols.” *Id.* at **4. Unlike Mr. Nichols, the overt acts alleged against Mr. McVeigh, together with the circumstantial evidence and absence of proof concerning the making of the bomb, created the impression that Mr. McVeigh was the primary actor bearing full responsibility for the bombing. In this context, any credible evidence that other specific individuals played a major role in the bombing – such as, for example, constructing the bomb – would have cast doubt upon the overt acts committed by Mr. McVeigh.

Further, if Mr. McVeigh’s execution is stayed and he is given access to the tools of civil discovery, there is reason to believe that a nexus between some of these individuals and Mr. McVeigh will be established. -----

The government also complains that no *Brady* claim Mr. McVeigh might eventually be able to make concerning the government’s knowledge of others’ involvement can be credible in light of recently published utterances attributed to Mr. McVeigh. The government acknowledges there is no evidence in the record concerning any statements by Mr. McVeigh, but argues that these statements should be taken into account through the “actual innocence” inquiry.

We have not addressed this matter, since the proceeding Mr. McVeigh seeks to file is not a successive 2255 motion. As a result, actual innocence – the factor permitting the consideration of facts that come into being after trial, *see Schlup v. Delo*, 513 U.S. 298, 327-328 (1995) – will not be at issue. This having been said, we do not want our silence on this matter to become an impediment to justice. It is premature to comment specifically upon this matter prior to revelation of all the facts being suppressed by the government, because the revelation of certain facts may change the way a defendant or his counsel perceives known facts. Suffice it to say that a defendant and his attorney are entitled to rely on the government’s repeated representations that

all exculpatory evidence has been produced. *See Strickler v. Green*, 527 U.S. 263, 283-289 (1999). If it later turns out that the government has information, which neither counsel nor the defendant knew, about the involvement of certain other people – for example, that such people were government informants -- a defendant has made his choices about what matters to pursue as much in the dark as has his counsel. In short, new information can bring about the resolve to pursue a different course.

The government has complained that the All Writs Act, 28 U.S.C. § 1651, provides no basis for the Court's exercise of any jurisdiction, even the granting of a stay of execution.

It is accurate to assert that the All Writs Act does not provide this Court jurisdiction to act on the merits of Mr. McVeigh's case. However, it has long been one of the missions of 1651 to recognize that a federal court which will or may have jurisdiction over a matter in the future has the power to stay executions to preserve its future ability to act once jurisdiction has vested. *See United States v. Shipp*, 203 U.S. 563, 573 (1906) (recognizing such power as inherent to courts' exercise of future jurisdiction).

The government complains that Mr. McVeigh's fraud on the court motion will not be directed at the 2255 ruling but at the criminal conviction itself.

The fraud upon the Court, Mr. McVeigh will assert, was a continuing fraud, which began prior to trial and continues to this date. The 2255 proceeding would have been Mr. McVeigh's first opportunity to raise the issue of withheld *Brady* material concerning the involvement of others in the bombing, as well as Court's first opportunity to rule. The fraud affected each stage of the legal proceedings. The sole opportunity Mr. McVeigh had to complain about the government's suppression of exculpatory evidence was the 2255 proceeding. The government's fraud precluded that opportunity, thereby working a fraud against the court.

The government argues that the fraud upon the court doctrine must be applied narrowly so as not to nullify AEDPA and prior Supreme Court law, both of which require a showing of actual innocence.

If the fraud on the court doctrine were considered as narrowly as the government suggests, the remedy would not exist. As the United States Court of Appeals for the Fourth Circuit pointed out in *U. S. v. MacDonald*, 161 F.3d 4 (unpublished) 10998 WL 637184 (4th Cir. 1998):

We also reject ... the Government's position that MacDonald's motion alleging fraud upon the courts is foreclosed under the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-032, 110 Stat. 1214 ("AEDPA"). The Government contends that MacDonald is effectively attempting to circumvent the amended versions of 28 U.S.C. §§ 2244 and 2255, requiring leave from the court of appeals before filing a successive petition, by proceeding under Rule 60(b), in violation of the AEDPA's finality goals. As the Government points out, however, courts recognized, even before the AEDPA, that an aggrieved party may not circumvent the rules prohibiting successive habeas petition by simply labeling such a petition as a Rule 60(b) motion. *See Felker v. Turpin*, 101 F.3d 657, 661 (11th Cir. 1996). Nonetheless, this did not prevent a party who had previously filed a habeas petition from asserting that a prior petition had been denied based on fraud, unless the grounds for fraud themselves should have been raised in an earlier proceeding. *See Booker*, 825 F.2d 281 (11th Cir. 1987). The AEDPA does not alter these considerations, and the Government cites no case, before or after the AEDPA, in which a defendant's claims of fraud upon the court under Rule 60(b)(6) were found to be barred under the abuse of the writ doctrine.

Not only does Congressional intent point to the maintenance of the fraud on the court remedy, simple logic calls for it. If a fraud on the court proceeding had to bear the restrictions placed by AEDPA on successive 2255 motions, there would no longer be a fraud on the court remedy. No court, from the Supreme Court, to the Fourth, Fifth, and Sixth Circuits, has held that the fraud on the court remedy must now require a showing of innocence to be compatible with AEDPA. It is a remedy that has been excepted from the reach of AEDPA because of the overriding concern for the integrity of judicial proceedings.

Similarly, the government argues that we are trying to do away with the requirement of showing materiality in connection with a *Brady* claim.

We are not. As we noted previously, if we are allowed to reopen the 2255 proceeding, and if we are provided the tools necessary for meaningful discovery of documents the government is still withholding, we will be asserting violations of *Brady*, not simply complaining about violations of discovery agreements or orders. Since a claim under *Brady* clearly requires a showing of materiality, *see United States v. Bagley*, 473 U.S. 667, 676 (1985); *Kyles v. Whitley*, 514 U.S. 419, 433-434 (1995), we will plainly have to make such a showing.

The government also argues that we run headlong into the observations in *United States v. Bulloch*, 763 F.2d at 1121, and *Weese v. Schukman*, 98 F.3d 542, 551 (10th Cir. 1996), that “nondisclosure in pretrial discovery will not support an action for fraud on the court.” The government also argues that the Supreme Court has given its approval to such a rule in *United States v. Beggerly*, 524 U.S. 38, 46-47 (1998).

The government’s argument is misplaced, because the statement it relies on was articulated in civil cases, where there is no constitutionally-based obligation on any party to produce exculpatory evidence. Indeed, no civil party bears the responsibility that a prosecutor bears in assuring the fairness of a trial. As the Supreme Court wrote *Berger v. United States*, 295 U.S. 78, 88 (1935), the United States Attorney is

"the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

Thus, when the prosecutor in a criminal proceeding fails to produce exculpatory evidence, the breach is not simply a “nondisclosure in pretrial discovery.” *Bulloch*. Rather, it is a violation

that goes to the heart of the integrity and fairness of a criminal prosecution. In the right circumstances, such as those presented here, it can create a fraud on the court.

Finally, the government argues Mr. McVeigh cannot establish an intent to commit a fraud upon the Court. The government overlooks the obvious inferences from the evidence already before the Court. There is no explanation, for example, of how the most helpful 302 -----

In addition, the government's explanation about how the missing Ojeda report was hidden, based upon representations by the FBI, does not stand up to even the most superficial scrutiny. This 302 is about the Oklahoma City bombing in every respect. It has potentially exculpatory evidence on every page. Further, Agent Ojeda himself denies the FBI's explanation for how this document was withheld. Agent Ojeda has stated in a recent affidavit that he was not asked to investigate another case, but was pursuing a lead in the Oklahoma City bombing case (Exhibit A). Agent Ojeda's credibility is not for the government to determine. It is for the Court to determine in an objective analysis of the FBI's conduct.

On a daily basis we are developing information that witnesses who were interviewed by the FBI were not the subject of reports turned over to the defense. -----

The government has refused to answer our questions about whether exculpatory evidence has been withheld by placing it in other files. Please see counsel's letter with a very limited request attached hereto as Exhibit "D". The government has refused to provide the 16 requests to the

field offices to turn over information in the case. Please see counsel's requests for information, letters dated May 15, 18, and 21st, Exhibits "E", "F" and "G", and the government's response, Exhibit "H".

The conduct of the government in refusing to produce even cursory information which might negate our claim of fraud should cause the Court to interfere. At a minimum, all materials responsive to the 16 requests for information should be produced for *in camera* review.

III. THE GOVERNMENT BREACHED THE DUTY TO PRODUCE EXCULPATORY EVIDENCE.

The government makes much of the volume of discovery that was provided prior to trial, including 27,000 FBI-302 and insert reports totaling more than 50,000 pages. Of course the volume of documents *produced* is irrelevant. It is the nature of the documents and information *withheld* that determines the issue before the Court.

While the government maintains it had an "open file policy" this Court pointed out such a policy does not satisfy the government's *Brady* obligation, particularly when there is considerable dispute about what information actually makes it into "the file". The government's obligation was given even further definition in this way:

"I don't consider that the government has met—the government counsel has met its obligations under those authorities with respect to due process by simply saying, 'This is open discovery; go fish and find what you want, and if there's anything there that's exculpatory, you're welcome to it.' And you know, I think there's an affirmative duty on the part of government counsel..."

This word "exculpatory" has been misused a lot, I think. Not here, but generally. It's like, "To be exculpatory, it has to be something that proves you're not guilty." That isn't the case. **It's something that may diminish the government's evidence and the credibility of its witnesses.**

United States v. McVeigh, 954 F.Supp. 1441, 1443 (D. Colo. 1997) quoting Tr. of discovery hearing 12-13-95 at 44-45 (emphasis in opinion). In addition, the Court noted that in a capital case:

non-prosecution of equally culpable participants may be an additional mitigator. Accordingly, anything tending to show involvement of persons other than or in addition to Timothy McVeigh may be material to his defense.

Id. at 1447.

Now the government has produced 4,449 pages and 11 computer discs of discovery and said “go fish and find what you want, and if there’s anything there that’s exculpatory, you’re welcome to it”. The current date of execution set by the government provided only 18 days from the date of last production of written materials, and 16 days from production of the computer discs, to perform all analysis of these materials and make a filing with the Court that provides reasonable opportunity for a stay.

This unilateral scheduling effort by the government counts upon the physical impossibility of performing any meaningful analysis and investigation of the materials in the time provided. It defeats the purpose of production in the first instance, which requires that “the information and material must be available to the defense in sufficient time to make fair use of it.” *U. S. v. McVeigh*, 954 F.Supp. at 1441, 1449.

Even so, in the very limited time since production of those new materials counsel have located witness statements which “[tend] to show involvement of persons other than or in addition to Timothy McVeigh” and would be material to his defense. These materials include witness names completely unknown to counsel for Mr. McVeigh prior to trial (-----
-----) and which merit further defense investigation because of the strength of

the statements that others were involved. These were the types of statements specifically requested by counsel for Mr. McVeigh, and which would have provided critical support for his proffer of defense evidence concerning involvement by others.

Counsel does not dispute Mr. Connelly's assertion that he did not learn of the new material until May 8, 2001 and immediately informed counsel for Mr. McVeigh. The problem is the government refuses to inform counsel for Mr. McVeigh and the Court when the FBI knew information had been withheld.

Immediately upon receipt of notice that the discovery agreement had been breached, counsel for Mr. McVeigh attempted to obtain information concerning the extent and timing of the FBI's conduct and the impact this conduct would have upon analysis of a fraud upon the court (please see counsel's letter of May 15, 2001 attached hereto as Ex. "E"). In that letter counsel asked:

... when anyone in the FBI at any level became aware that discovery materials, which should have been produced, had not been provided to prosecutors or to Mr. McVeigh's counsel.

(Ex. "E", at p. 2).

The government refused to respond. Please see the government's letter of May 26, 2001 (attached hereto as Ex. "H"). The government also refused to produce the sixteen communications to the field offices requesting production of witness statements, and the government indicated it did not know when the Inspector General's investigation and report concerning this matter would be completed (Ex. "H", at p. 2). Mr. McVeigh believes he can prove the FBI intentionally withheld exculpatory information from the outset. Mr. McVeigh simply requests a reasonable opportunity to obtain and present evidence in support of this proposition.

**IV. INFORMATION ISOLATED IN THE NEW DISCOVERY
(UNDER SEAL)**

Pages 13 through 15 are submitted under seal.

V. CONCLUSION

At this point, counsel has had the opportunity to read the new written discovery materials one time, and view and listen to the computer discs one time. Based upon this rapid review we have isolated materials that were clearly *Brady* material and should have been produced prior to trial. We have been able to isolate a number of areas within the discovery that we simply do not understand and cannot understand without further examination and physical production by the government. We have identified, in the new witness statements, at least 360 names of individuals (not in reference to John Doe 2 sightings) which we have never seen before in the discovery produced prior to trial. We continue to request additional information from the government concerning this new discovery. Please see Exhibit "I".

We simply request the opportunity to complete the investigation concerning the FBI's fraud upon the court, complete investigation and analysis of the materiality of the evidence withheld, and make a meaningful presentation of evidence to the Court. The government acknowledges through the statements of the Attorney General that complete investigation concerning the new discovery and the FBI's conduct must be performed. Such investigation is meaningless if Mr. McVeigh is executed prior to its completion.

This court is the proper forum for objective determination of what occurred, and its impact upon the integrity of the verdicts. Mr. McVeigh requests a stay so that these findings can be made.

Respectfully submitted,

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By: _____

ATTORNEYS FOR TIMOTHY McVEIGH

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing instrument and the separately bound exhibits designated A through I was hand delivered on the ____ day of June, 2001, to the following:

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