PETITION FOR REHEARING AND SUGGESTION OF REHEARING *EN BANC*

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

D.C. CIR. NO. 16-5067

ANGELA CLEMENTE

Appellant,

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL.

Appellees

On Appeal from the Distrct Court for the District of Columbia
Hon. Barbara J. Rothstein, District Judge

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Date: Dec. 11, 2017

Counsel for Appellant

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

ANGELA CLEMENTE,	:	
	:	
Appellant,	:	
	:	
v.	:	**D. C. Cir. No. 16-5067**
	:	**C. A. No. 08-1252 (BJR)**
	:	
FEDERAL BUREAU OF INVESTIGATAION, ET AL.,	:	
	:	
Appellees	:	

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

ANGELA CLEMENTE, appellant in the above-captioned case, hereby submit this certificate of counsel as to parties, rulings, and related cases pursuant to Rule 28, Fed. R. Civ. P.

1. Parties and Amici

No amici appeared in this case below. The parties appearing below are ANGELA CLEMENTE, plaintiff, and the FEDERAL BUREAU OF INVESTIGATAION and the DEPARTMENT OF JUSTICE, defendants.

2. Rulings under Review.

The rulings under review are:

Doc. 140, Jan. 29, 2016 Order Dismissing Civil Action No. 08-1252;

Doc. 139, Dec. 1, 2015 Order Denying Plaintiff's Motion for Re-consideration;

Doc. 131, Oct. 14, 2015, Order Denying Plaintiff's Renewed Motion for an Interim Award of Attorney Fees and Costs; Doc. 121, Aug. 18, 2014, Order Granting in Part and Denying in Part Defendants' Second Renewed Motion for Summary Judgment; Doc. 98, Aug. 30, 2013, Order Denying Plaintiff's Motion for an Interim Award of Attorney's Fees and Costs; Doc. 81, April 13, 2012, Order granting Renewed Motions for Summary Judgment in Part and Denying the remainder Without Prejudice; Doc. 61, Aug. 3, 2011, Memorandum Opinion and Order; Doc. 42, Sept. 28, 2010, Opinion; Doc. 41, Sept. 28, 2010, Denying Defendant's Motion for Summary Judgment and Supplemental Motion for Summary Judgment are Denied with Prejudice as to Count II and Without Prejudice as to Counts I and III of Plaintiff's Second Amended Complaint, Etc.; and Doc. 16, Jan. 8, 2009. Memorandum Opinion and Order.

3. This case has not previously been before this Court.

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Counsel for Appellant

Dated: Dec. 11, 2017

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PETITION FOR REHEARING AND SUGGESTION OF REHEARING *EN BANC*

Pursuant to FRAP Rule 35(a) appellant Angela Clemente (Clemente) petitions for a rehearing and suggests a rehearing *en banc*. *En banc* consideration is necessary (1) "to secure or maintain uniformity of the court's decisions;" and (2) "involves . . . question[s] of exceptional importance." Id. The panel slip op. is found in the Addendum at Att. A. See 1a-19a).

STATEMENT REGARDING NECESSITY OF REHEARING OR REHEARING *EN BANC*

A. The Panel Decision Conflicts with Decisions of the U.S. Supreme Court or this Court

Courts "owe no particular deference" to an agency's interpretation of what FOIA requires. Judicial Watch, Inc. v. Rossotti, 326 F.3d 1309, 1313 (D.C. Cir.2003), citing Tax Analysts v. I.R.S., 117 F.3d 607, 613 (D.C.Cir. 1997)(courts "will not defer to an agency's view of FOIA's meaning."). The panel decision repeatedly defers to the FBI's interpretation of the FOIA on multiple issues and disregards and discounts the facts put forward by Clemente. Assuming the representations made by the FBI are trustworthy, and they were not, the panel's deference to the FBI violated the fundamental principle that summary judgment cannot be sustained if there are disputed issues of material fact. There were.

To warrant summary disposition, an agency's affidavits must be trustworthy and based on personal knowledge. The FBI's interpretations in this case are set forth in some eight declarations by David M. Hardy, Section Chief, Record/ Information Dissemination Sectio (Section Chief Hardy). Clemente put in her own counter-affidavits contradicting the FBI's representations, so the record establishes, at the very least, disputed issues of material fact invalidating summary disposition of the issues.

In addition to the extant record in this case, at least two recent court cases gravely impair Hardy's credibility. In Jett v. F.B.I., Civil Action 14-0276 ("Jett"), Judge Mehta found that the FBI's filings left "unanswered questions" and that these "and the inconsistencies in the FBI's statements not only within this case but

OTHER AUTHORITIES

***Cases chiefly relied upon marked by asterisk**

also across different cases over the course of years, give rise to the kind of serious misgivings that may evidence agency bad faith and warrant discovery to resolve." Id., Doc. #41, Memorandum Opinion and Order, March 13, 2017 at 13. Judge Mehta ordered Hardy's deposition be taken, stating: "Jett, the court, and the public have a profound interest in achieving clarity regarding the searchability of the ELSUR indices and resolving the conflicting representations that the FBI has made about the characteristics of that database." Id

Hardy's deposition was not taken because the FBI settled Jett's claim for attorney's fees in record speed. But Hardy did file another declaration which stated that until about February 15, 2015, "Hardy/RIDS was not directly involved in ELSUR searches and was unaware of the specific search method used by the ELSUR personnel." See Jett, Doc. # 44-1, 5th Hardy Decl., ¶6 (emphasis added). Hardy admits that his prior declarations in 2010 and 2013 "were based on obsolete information and practice." Id Either Hardy had no personal knowledge of what he swore to or he lied.

Questions about the trustworthiness of Hardy's declarations arose once again in National Security Councilors, et al. v. U.S. Department of Justice, C.A. No. 13-556 (NSC), in which Hardy detailed a very complicated, time-consuming and expensive process for conducting its digitized ELSUR searches. The search methodology set forth there is in conflict with that set forth in other Hardy

affidavits in this and other cases and does not address the many search issues raised by Clemente.

The panel's deference to Hardy's construction of statutory language and acceptance of his untrustworthy affidavits fatally impacted the panel's legal holdings and finding of facts on all the issues in this case.

These issues will be addressed in greater detail below.

Under FOIA, a courts "shall determine the matter de novo." § 552(a)(4)(B). In applying this mandate, courts are bound by Milner v. Dept. of the Navy, 131 S.Ct. 1259, 562 U.S. 3 (2011)(Milner), which forbad the Navy from construing Exemption 2 more broadly than the plain meaning of the statutory language warranted. "We have often noted 'the Act's broad disclosure' and insisted that the exemptions be 'given a narrow compass.'" Id. 262 U.S. at 1265, quoting *Department of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989). The panel decision conflicts with Milner and many other Circuit Court decisions. Rather than apply the "plain meaning" rule, and allowing withholding tobe greatly reduced, the panel increased the amount withheld. This is particularly evident wit respect to the scope and adequacy of the search issues, where the panel decimated Clemente's request for the "entire UNREDACTED FBI file of Gregory Scarpa, Sr." and her subsequent requests dated July 9, 2008., The District Court also ignored the existence of Office of Professional Responsibility (OPR) files, including a 550-

page OPR Report, the existence of which was established by Clemente affidavits and reported New York State court decisions.

B. The Panel Proceeding Involves Multiple Questions of Exceptional Importance

This case involves issues of exceptional importance. The amended of Exemption 7 in 1974 was precipitated by this Circuit's decisions rigidly interpreting that exemption to make all law enforcement information unavailable to the public. Watergate and a series of political assassination in the 1960s and the Vietnam War all made the conduct of law enforcement officials a matter of deepest public concern that continues to this day. The deep public dissatisfaction with the government and the press and the increasingly oligarchical nature of American society is epitomized by the glowing accolades for the unrequited efforts Clemente has made to address the issue of corruption by some law enforcement officials by trying to pry lose information the public is profoundly interested in.

Attorney fees for lawyers who seek to enforce the FOIA's disclosure mandate is also of extraordinary importance. If attorneys can't get paid reasonably promptly, they can't properly represent their clients and huge public benefits are lost. The panel's namby-pamby, misinformed and inaccurate opinion on interim fees makes effectively nullifies the incentive for attorneys to take on difficult and prolongated litigation that generally bconferns the greatest public benefit.

ARGUMENT

I. This Court should rehear the Search Issues

A. Scope of the Search

The panel decision correctly acknowledges that Circuit law that "agencies should construe FOIA requests liberally. . . ." Att. A at 7a-8a, citing see Nation Magazine, Washington Bureau v. U.S.. 71 F.3d 885, 890 (D.C. Cir. 1995) (Washington Mag. It then proceeds to violate that principle in several different ways. It proclaims that "[w[e are not persuaded" by Clemente's contention that "the scope of her requestwas broader than the terms laid out in the first July 9, 2008 letter." Att. A at 7a. But the panel was obligated under Rule 56 to determine whether were any material facts in dispute. If there were, it would not be "persuaded," it had to reverse the summary judgment.

The panel limited consideration of the scope of the request to the terms of the first July 9 request even though there were three other requests and other events that had to be considered in evaluating the scope. The panel simply ignores the fact that Clemente submitted two pro se requests before she retained attorney James H. Lesar (Lesar) to represent her. It is undisputed that Lesar represented to the District Court that he advised Clemente that if she wanted any records promptly, she would have to file a request which sought no more than 400 pages. He did this. He drafted a second July 9 letter which he has represented as

attempting to accomplish what Clemente intended when she sent out her two pro se requests. The panel, relying solely on affidavits submitted by Hardy, asserted that "[t]here is no evidence that Clemente's attorney ever sent, or the FBI ever received, the second July 9 letter." Id. at 8a.

While there is no proof that Lesar sent the 2d July 9 letter, it is implausible that he did not. As a matter of practice, he routinely sends out hundreds of requests that are not in draft form. The copy that was attached to the First Amended Complain was not in draft form. Contrary to the panel decision, there is evidence that the FBI did receive the letter. As the panel acknowledges, the FBI had responded to her 1st July 9 request by stating that it had located approximately 1,070 pages of documents potentially responsive to her request. But if that was the request the FBI was responding to, there was a limit of 500 pages. The panel attempts to dismiss this point, stating "Clemente incorrectly reads the FBI's response to to be broader than the 500-page limit referenced in her first July 9, 2008 leter." Id. at 9a. The panel notes that that letter asked the FBI to advise her of the number of additional pages it had found. But when she sent the FBI fees for the 1070 pages, they released them. But this is inconstant with FBI's inviolate practice of not furnishing records that are beyond the scope of a prior request which it deems the only one subject to the lawsuit. It would require a new request

to which a new FOIPA request number would have to be assigned. That did not occur here.

It does make sense, though, if the FBI had received the 2d July 9 letter or if it recognized the validity of Clemente's two pro se requests for the "entire UNREDACTED FBI file of Gregory Scarpa, Sr." The panel acknowledges that Clemente again set forth her two pro requests in her amended complaints. She did not withdraw them and the FBI did not move to strike them. This conferred upon the FBI the obligation to respond to them, or at least to the one which the FBI did admit receiving.

The FBI's claim not to have received the 2d July 9 letter is not credible because of the unreliability of Hardy's affidavitws, but also because the FBI said it never received Clemente's 1st pro se request. So out of a total of four requests, the FBI claims it did not receive half of them. The panel asserts that the "FBI attests that it found no evidence, even upon re-examining its records, of its having received that letter." Id. at 8a. Aside from the demonstrated unreliability of Hardy's affidavits, and the inability to determine which of his statements are based on personal knowledge, the problem is that the FBI's searches are based on a search of digital indices, not examination of the paper copies contained in its files.

footnote. Id., 648 F.Supp.2d at 57, n.3, citing 5th Hardy Decl. in C.A. 03-2126, at ¶¶ 6-14.

Nearly all of these databases could hold records responsive to Clemente's requests. Of great importance is the fact that the indexing of the records in the CRS is discretionary, not full-text searchable. This greatly lessens the reasonableness of conducting a search of it instead of a system which fully text-searchable.

In addition to the problems present by the records repositories listed in Negley, there are others. For decades the FBI responded to FOIPA requests by swearing under oath that it had no ELSUR index cards prior to January 1, 1960. This was false. Hardy has sworn to this falsehood countless times. The FBI now admits to having 7 file boxes of largely pre-1960 ELSUR index cards. Give that Scarpa's job as an FBI informat was to conduct surveillance operations, it is highly reasonable to expect that these indices may contain records responsive to Clemente's requests.

The FBI did not provide cross-reference materials on Scarpa or any other of the subjects of Clemente's 1st July 9th request. In Negley, the FBI was ultimate compelled to process and release cross-reference materials. Here, the panel found that because Clemente's request "was directed to Scarpa's informant file, the FBI was not required to search cross-references, which by definition indicate references

to Scarpa in files on *different* subject matters." Id. at 10 (emphasis in original). But the panel mischaracterizes Clemente's request. It did not seek the informant file on Scarpa as the panel represents. Rather, Lesar clarified Clemente's original request to indicate that she sought not "the FBI informant file of Scarpa," but "any informant file on Mr. Scarpa . . . ." (emphasis added). Other parts of Lesar's letter were even more expansive. The first of three other subjects listed is for "all records pertaining to New Orleans Mafia Chief Carlos Marcello." She expressly indicated that she wanted all informant materials on Marcello because the Chief Counsel of the HSCA, G. Robert Blalkey, had indicated he had requested all informant materials on Marcello but had not received any on Scarpa. This clearly included cross-reference materials that pertained to Marcello. The terms of the request must prevail, not the FBI's policy of discouraging the search for cross-references.

Clemente's 1st July 9 request also states that its terms apply to "this request," evidence that Clemente had other viable requests and was not limiting herself to just this one. Clemente's pro se requests do seek "the entire UNREDACTED" FBI file" on Scarpa, but this request was submitted pro se, not by an attorney familiar with the FBI records systems. FOIA requests are to be liberally construed and even greater deferemce sjown to pro se requesters, but not by by the court below or this panel..

There is no question that Lesar ultimately sent the 2d July 9 letter to the FBI. It is reproduced in the amended complaints. In light of the conflicting evidence concerning its sending and receipt, the District Court erred in not remanding it to the FBI for exhaustion of administrate remedies or ruling that in light of the great public interest in prompt disclosure it should be made part of the complaint as an exception to the judicial doctrine of exhaustion of administrative remedies.

B. Adequacy of the Search

The panel begins its discussion of the adequacy of the search issue by relying on Hardy's description of the FBI's search methodology which is based on a search of the General Indices to its Central Records System ("CRS"). Stating that the FBI's search yielded one main informant file directly responsive to Clemente's request, the panel declares that the FBI "had no obligation to conduct further searches once it found the Scarpa informant file." Slip op. at 9 (emphasis added). As pointed out above, in light of the Jett and NSC decisions, Hardy's declarations on this point on clearly not worthy of credence.

They also are in direct conflict with the detailed findings set forth by Judge Kessler in Negley v. F.B.I., 658 F.Supp. 2d 50 (D.D.C. 2009)(Negley). Based on discovery obtained by Negley, the Court found, that in addition to the Universal Index (UNI), there were nine additional databases or storage locations which maintained records responsive t Negley's request. The court listed them in a

Always portraying Hardy as the messenger of unvarnished truth while belittling Clemente's credibility, the panel dismisses her challenge to the adequacy of the search for records on Scarpa's trip to Mississippi at the behest of the FBI to beat confessions out of those thought to have murdered civil rights workers. The panel considers the FBI's search sufficient because it produced a document on the trip. But it is not disputed that Scarpa took the trip. If so, then obvious questions arise about how he was paid and how much, where he stayed, who he traveled with, who he was in contact with, and what activities, including physical and electronic surveillances, he was he engaged in. A "reasonable search" could be expected to locate such information.

Additional information about the Scarpa's trip has been reported in several federal court decisions. See Orena v. U.S., 956 F.Supp. 1071, 1086 (E.D.N.Y. 1997); U.S. v. Sessa, 2011 WL 256330 (E.D.N.Y.), citing Orena at 1086. In addition, one of the individuals convicted of complicity in this crime, Edgar Ray Killen, filed a federal civil rights complaint, alleging, *inter alia*, that "[t]he FBI employed George [sic] Scarpa, Sr., an organized crime figure, and paid him at least $30,000 to locate the victims' bodies and otherwise obtain evidence for the prosecution of the crimes. Mr. Scarpa's tactics included 'intimidation of potential witnesses, pistol-whipping actual witnesses, and assaulting other local residents.'" Killen v. Hood et al., 2011 WL 1103150 at *2. At the very least sufficient

evidence of a disputed issue of material fact exists to warrant discovery being taken on this matter as was done in Negley.

As to the missing sections 3 & 4 of the FBIHQ file, the panel tries to rebuff Clemente's reliance on Campbell by asserting that it "predated the agency's promulgation of the regulation requiring requests for records held by a field office to be directed to that Office." It further found that "we have no basis to conclude that the FBI acted unreasonably in requiring requests for records held by a field office to be directed to the relevant office." Id, Att. A at 12a, citing, See 28 C.F.R. § 16.3(a) (2008). First, once more panel has deferred to the FBI rather than analyzing what the FOIA promotes. Second, contrary to the panel'[s view, this practice conflicts with FOIA interpreted according to the plain meaning principle. It greatly hinders prompt access to information by requiring requesters to expend time and money making multiple request to dozens of field offices which then usually refer them to FBIHQ for processing.

Third, after repeated searches by the NYFO, RIDS located what it thought were the missing HQ sections. It has provided one of only135 pagesand says that the other doesn't exist because the file was closed. Clemente is extremely skeptical of the FBI's account will press to obtain the HQ originals or copies.

II. The Panel Decision Misapplies the Law Enforcement Threshold Test

Pratt v. Webster, 673 F.2d 408 (D.C. Cir. 1982)((Pratt) construed Exemption 7's "compiled for law enforcement purposes" threshold in a manner very deferential to law enforcement agencies. However, there is a critical distinction between Pratt and this case. In Pratt, the FBI cited a memo explaining its COINTELPRO program against the Black Power Party which listed five goals of he program. On the basis of these professed goals, Pratt ruled the FBI had submitted sufficient evidence to receive protection from disclosure under Exemption 7.

But one of the goals was "Prevent violence on the part of black nationalist groups. . . ." Id. at 422. At oral argument Lesar argued "[t]he activities of . . . the FBI in this case were not designed to prevent violence, they fostered it." Oral Argument Transcript at 4 ("OA Tr."),

Lesar gave two examples based on records obtained by Clemente on Scarpa and his collusion with his FBI handler, DeVecchio. In May 1992, Scarpa got DeVecchio to provide him with FBI surveillance information so he could assassin=nate Lampesi. On May 22, 1992, Scarpa and his crew ambushed Lampesi at 4:00 AM as he went to work.

Second, in the 1960s J. Edgar Hoover sent Scarpa south to beat confessions out of those suspected of murdering civil rights activists. The murders of Vernon Dahmer and the three civil rights workers in Mississippi were odious acts. But

sending a gun thug to the southland to beat confessions out of them is not being done for law enforcement purposes. It is a violation of law, not an enforcement of it, and it does not deserve protection from disclosure under Exemption 7.

In John Doe Agency, et al. v. John Doe Corp., 493 u.s. 146 (1992 the Supreme Court construed the Exemption 7 threshold in a manner which "recognizes the balance stricken by Congress between the public's interest in greater access to information and the Government's need to protect certain kinds of information from disclosure and is supported by the FOIA's s legislative history." Id. at 146, citing pp. 153-158.

Three justices dissented. Although the Court stated that it had applied the "plain meaning" rule and narrowly construed the Exeption 7 threshold, Justice Scalia was sharply critical. "Narrow construction of an exemption means, if anything, construing ambiguous language . . .in such fashion that the exemption does not apply." Id. at 161 (Scalia, dissenting). He noted that Roget's Thesaurus of Synonyms and Antonyms includes "compile" in the following list ing of synonyms: "compose, constitute, form, make; make up, fill up, build up; weave, construct, fabricate; compile; write, draw; set up (prin ting); enter into the composition of etc . (be a component)." Roget's Thesaurus 13 US. (Roget component)." Roget's Thesaurus 13 US. Roget rev. 1972).

Scalia contended that "the regime that the Court's interpretation estab-

lishes lends itself to abuse so readily that it is unlikely to have been intended." Id. at 161. Clemente agrees. This Court needs to consider narrower construction of "compiled for law enforcement purposes" to prevent the facile ability of any law enforcement or national security agency to cover up the tracks of its wrongful activities merely by citing a "colorable" law enforcement purpose.

III. The Panel's Interim Fee Decision is Not Well-Founded

In Morley v,. C.A., D.C. Cir. No. 12-5032, Judge Kavanaugh issued a concurring opinion in which h called on the D.C. Circuit to rehear the issue of the proper interpretation of the FOIA attorney fees provision *en banc* in an appropriate case. Doc. # 1441749 at 9 (Kavanaugh concurring), While Morley involved a final award of attorney's, this case remains in an interim fees posture while awaiting the District Court's ruling on a motion to reconsider her decision partially denying and partially granting a Rule 54 motion for a final award of fees.

Judge Kavanaugh said the Circuit "should ditch the four-factor standard" standard because it does not narrowly construe the plain meaning o language as required by Milner. It has no basis in the statutory text. Id. at 4, citing See Davy v. CIA, 550 F.3d 1155, 1166 (D.C. Cir. 2008) (Randolph, J., dissenting); Burka v. HHS, 142 F.3d 1286, 1293. With respect to the public benefit factor he asks, "[d]oesn't this factor inevitably devolve into what the judge subjectively thinks is important, rather than an objective determi-nation? And what about cases where

the degree of public benefit may become apparent only years later, after the litigation has ended? After all, information sometimes becomes meaningful only when later pieced together with other information. And more broadly, even if the information is of value only to a small group or segment of the public, why treat those citizens as secon class in determining who gets attorney's fees?" Id. at 5-6.

Judge Kavanaugh notes the cost and inefficience and delay in the prompt release of records that is built into the present system. Clemente es with these views. The present system which permits enormously powerful government agencies to grind down citizens seeking to enforce the FOIA's goals. As Judge Kavanaugh indicates, there is no better example of the futility of trying to enforce prompt disclosure than the Morley case where the FOIA requester is now in the fourth round over trying to secure an award of attorney fees.

The lack of availability of interim fees is even exacerbated in the case of interim fees because the denial of interim fees is considered an interlocutory order and not appealable. In this case, which involves a terminally ill client and an attorney on the verge of bankruptcy pitted against an obsterous government and a district court judge intent on getting the case over with as soon as possible, the result has been disastrous to the public interest in pursuing disclosures involving cikkysuib betweeb Top Echelon Mafia informants and the FBI's sometimes very corrupt involvement with them.

\\CONCLUSION

For the reasons set forth above, the Court should grant Clelmente's petiton for a rehearing or her petition for a rehearing *en banc.*

Respectfully submitted,

/s/s/

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CERTIFICATE OF SERVICE4

I cert8f6 that I have this 11 day of Decemvber, 2017 mailed a copy of the foregoing petition for rehearing and suggestion of rehearing en banc to Daniel Schaffer, 555 5th Street, N.W., Washington, D.C. 20539,

/s/

==James h. Lesazr

CERTIFICATE OF COMPLIANCE

I certifty pursuant to FRAP Rule 32(g) that this petition contains 2,897 words and was typed in New Times Tome 14-point type.

/s/
James H. Lesar