

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

ISABEL G. ANDRADE, <i>et al.</i>	§	CIVIL ACTION NO. W-96-CA-139
	§	JUDGE WALTER S. SMITH
Plaintiffs,	§	
V.	§	and consolidated actions:
	§	<i>Holub v. Reno</i> W-96-CA-140
	§	<i>Ferguson v. Reno</i> W-96-CA-141
PHILLIP J. CHOJNACKI, <i>et al.</i>	§	<i>Brown v. U.S.</i> W-96-CA-142
	§	<i>Riddle v. Reno</i> W-96-CA-143
Defendants.	§	<i>Gyarfas v. U.S.</i> W-96-CA-144
	§	<i>Martin v. U.S.</i> W-96-CA-145
	§	<i>Holub v. U.S.</i> W-96-CA-146
	§	<i>Brown v. U.S.</i> W-96-CA-147
	§	<i>Sylvia v. U.S.</i> W-96-CA-373

**ANDRADE PLAINTIFFS' MOTION TO COMPEL OR,
ALTERNATIVELY, MOTION FOR SANCTIONS**

On August 9, 1999, the Court ordered—in response to a motion by the Texas Department of Public Safety—that **all evidence** “in any way relevant to the events occurring at Mt. Carmel in February-April 1993” be delivered to the Clerk of the United States District Court, Western District of Texas.¹ The government objected to the Court’s Order. On September 2, 1999, in response to the government’s motion for modification or reconsideration, the Court stated the following:

Because of the unprecedented nature of the litigation currently pending before this Court, the undersigned was endeavoring to ensure that evidence that was relevant to the civil trial could be stored in a central location, accessible to all the civil litigants, under the direction of the Court, and in accordance with the applicable Rules of Civil Procedure Also, such a plan would, hopefully, deflect the suspicion reported in the press, whether warranted or not, that there is a **massive coverup** regarding the evidence that was seized and generated as a result of the *Branch Davidian* criminal case.

¹ The Court’s Order of August 9, 1999, is attached at Tab 1. Emphasis is added throughout this Motion unless otherwise noted.

The Court's purpose is to secure the evidence so that neither the parties to the pending civil litigation, the media or the public will perceive that the government may have the opportunity to **conceal, alter or fail to reveal** evidence.²

The Court further noted—in discussing the government's claim that the Court's Order would impose an "unreasonable burden" upon the government—that the Court "would have thought that the vast majority of the material now sought in this civil litigation would have already been compiled as a result of the various congressional hearings held over the *Branch Davidian* affair."³

Therefore, the Court reiterated its prior Order, stating specifically that "all photographs, audio and videotapes and transcripts of the same evidence (including those recently seized from the Hostage Rescue Team of the FBI)" be delivered to the Clerk of the United States District Court, Western District of Texas and that "**any party that destroys, alters or otherwise tampers with any evidence related to the *Branch Davidian* criminal or civil litigation will be considered in contempt of Court, with the resulting punishment to be determined by this Court.**"⁴

WHERE'S THE EVIDENCE?

² Order of September 2, 1999, at 2. Attached at Tab 2.

³ *Id.* at 4.

⁴ *Id.* at 5 and 6.

After several months of discovery, a disturbing pattern has emerged. Much of the key evidence relating to the events of April 19, 1993, has been “lost”, altered or tampered with. Despite repeated demands for access to original audio and videotapes, photographic negatives, and other physical evidence, the repeated response from the government is “original lost,” “we have been unable to locate the original,” the evidence was “not found,” or the evidence is “missing.” There are many suspicious gaps in the evidence, indicating key evidence has been withheld or destroyed. Moreover, the evidence that has been produced is inconsistent with key testimony, and suggestive of tampering or alteration.

Consistent with the Court’s prior Orders, the *Andrade* Plaintiffs ask the Court to schedule a hearing for the government to show cause why it should not be held in contempt of this Court’s Orders for failure to provide the Court the original evidence contemplated by the Court’s Orders of August 9 and September 2, 1999, or, in the alternative, to determine appropriate sanctions for the government’s willful or neglectful destruction or alteration of original evidence.

I. AERIAL SURVEILLANCE PHOTOGRAPHS FROM APRIL 19, 1993

“Original Lost”

Much was made in mid-January concerning a supposed original FBI photograph of Mt. Carmel claimed to have been taken at 11:24 a.m., approximately 30 seconds before flashes appear on the April 19 FLIR videotape which Plaintiffs and many independent experts, including those for the House Government Reform Committee, have determined were gunfire from government agents.⁵ After learning of the FBI’s claims, the *Andrade*

⁵ See article in the *St. Louis Post Dispatch*, dated January 11, 2000.

Plaintiffs requested access to the supposed original negatives on file with the Court in Waco.

Previously, on December 18, 1999, the Plaintiffs had deposed the photographer for all aerial photographs over Mt. Carmel during the period from approximately 11:00 a.m. until after the fire had consumed the building. He testified to the following:

- He took “**approximately 10**” rolls of film above Mt. Carmel on April 19, give or take one or two.⁶
- He was using a 35mm on April 19 in order to “take **quite a few more pictures** than I could have otherwise.”⁷
- “[A]ny time there was any activity going on around the **building**, which would have only been the tanks, **I would have taken a shot of that.**”⁸
- Resolution in prints and enlargements made from anything other than the original negative “wouldn’t be as good.”⁹

Armed with this information, Plaintiffs were shocked when they obtained the supposed original negatives from the Clerk of the Court and discovered the following:

- Only 7 rolls of film exist from April 19 for the time period in question—not 10.

⁶ Deposition testimony of “FBI 14,” aerial photographer, December 18, 1999, at 10. All excerpts from the deposition of FBI 14 are attached at Tab 3.

⁷ *Id.* at 20.

⁸ *Ibid.* at 20-21.

⁹ *Id.* at 18-19.

- Only 2 of these rolls were shot during the hour the tanks were penetrating the building prior to the fire—while 5 rolls were shot of billowing smoke in the hour or less it took the fire to completely consume Mt. Carmel.
- At least 1 set of negatives—the very set containing the FBI’s touted 11:24 photograph—are admittedly not originals.

Attached is a copy of the negative “sleeve” page for “Roll 1, 4-19-93.” It contains the notation “**original lost**”.¹⁰ No explanation is provided concerning the “lost” original negatives, nor is there any indication that the Court was ever advised that these original negatives were not provided pursuant to the Court’s Order.¹¹ The complete notation at the top of the negative sleeve page is “Duplicates of Roll 1, 4-19-93, original lost.”

The Plaintiffs had a complete set made of the only two rolls of film supposedly shot by the FBI aerial photographer during the period from 11:00 a.m. until 12:10 p.m., when the fire began. The Plaintiffs also made copies of the first two rolls of photographs taken after the fire had begun, even though the photographs show very little but smoke after the first few minutes.¹²

¹⁰ Attached at Tab 4.

¹¹ Amazingly, DOJ continues to represent to the public that all “original negatives are in the custody of the federal court in Waco,” and DOJ continues to deny that any of the negatives have been lost. See *St. Louis Post Dispatch* article of March 5, 2000.

¹² Sets were provided to other interested parties, including the OSC, at their cost.

The photographic lab utilized to make enlarged prints from the negatives confirmed that the negative stock for "Roll 1" was "Kodak 5327," which is used for creating *negatives from prints*.¹³ Kodak 5327 stock is *never original negative stock*.

Amazingly, in addition to the "duplicate" Roll 1 negatives, supposedly one "original negative strip" exists from Roll 1 taken on April 19, 1993. This supposed "original negative strip" was appended to the "duplicate" negative sleeve marked "original lost." Coincidentally(?), this supposed original fragment happens to contain the supposed 11:24 photograph touted by the FBI to reporters in November-January. Of course, the coincidence is too much. All the negative strips from Roll 1 are "lost," except for the one that seems to help the FBI?

Suspicious Gaps

¹³ The "Kodak 5327" label can be seen on the margin of the negatives in question. See Tab 4, the third page.

After obtaining a complete set of enlargements from the first several rolls of film supposedly taken on April 19, and mindful of the photographer's testimony that he took "approximately 10" rolls and that "any time there was any activity going on around the building, which would have only been the tanks, I would have taken a shot of that," Plaintiffs charted the timing of the April 19 aerial photographs produced by the FBI with the time signatures on the April 19 FLIR video for the 11:15 a.m.-12:15 p.m. period. **There are four major time gaps in the sequence of photographs—consisting of approximately five,¹⁴ eight,¹⁵ eleven, and eight minutes.** These gaps occur when most of the significant activity was occurring at the building, including numerous penetrations of the tanks into Mt. Carmel, many instances of gunfire on the FLIR, and even the early stages of the fire.

In light of the photographer's testimony concerning the number of rolls shot and the frequency with which he was taking photographs, this clearly raises the likelihood that

¹⁴ This gap could be only four minutes, if the FBI's favorite photograph was taken at 11:24:00, instead of at 11:23:09 as Plaintiffs believe. Plaintiffs agree it is difficult to determine which of those times is accurate, because the FLIR image at those times is virtually identical. It makes no difference to Plaintiffs' point, however: there is a lengthy gap which commences—at best for the FBI—thirty seconds *before* the flashes appear behind CEV-2 on the FLIR, and continues for at least four minutes. That is more than enough time for experienced, highly-trained HRT operators to find concealed positions around Mt. Carmel. Plaintiffs have never believed government agents would be so foolish as to remain in exposed positions for more than a few seconds.

¹⁵ This gap does contain three photographs—but not of the compound. These three photographs were taken of CEV-1 and the M-88 tank retriever away from the building. At the same time, no photographs were supposedly taken of CEV-2, which was continuing to demolish Mt. Carmel.

there are several rolls of film missing from the evidence turned over by the government to the Court.

Attached is the chart reflecting the timing of the aerial photographs taken on April 19, 1993, by reference to the FLIR video.¹⁶ The pattern is obvious. As one might expect, the photographer—whose job was to create a record of the events he was observing, and who testified that he utilized a 35mm camera to be able to “take quite a few more pictures than I could have otherwise”—took photographs at the rate of two or three per minute, except for the large unexplained suspicious gaps. The pattern of the photographs produced by the FBI suggests only one thing: the FBI has turned over only those photographs to the Court (and the press) that the FBI wants the Court and the public to see. It is clear that the photographs have been “cherry-picked” to provide only those photographs which are not incriminating.

Examination of the FLIR videotape during the four large gap sequences is revealing.

In the first gap sequence (4-5 minutes long) lasting from approximately 11:23:09 (or—at best for the FBI—11:24:00) until 11:27:51, there was the following “activity going on around the building:”

- Apparent gun flashes from behind CEV-2 at 11:24:31 and 11:26:27.
- Multiple penetrations by CEV-2 into the gymnasium, causing the eventual collapse of the northern half of the gym roof, and separation of that roof from the gymnasium catwalk.

¹⁶ Attached at Tab 5. Plaintiffs note that there are three other gaps in the photographs consisting of only two or two-and-one-half minutes. However, these gaps are consistent with the testimony of the photographer that he would not take photographs when there was no activity at the compound.

- Movement of the Echo Team Bradley from a position at the black red corner—where it clearly has its door open—to a new position near the light stanchion on the black side near CEV-2.

None of these events are captured in any of the aerial photographs produced by the FBI.

Likewise, during the second significant gap (at least 8 minutes long) in the aerial photographs occurring from approximately 11:34:26 to 11:43:27, there were numerous significant events recorded on the FLIR:

- Continued demolition of the gym
- A man apparently running from the destroyed northeast corner of the gym to the diving platform at the corner of the swimming pool (11:34:34)
- Gun flashes in front of CEV-2 as it faced the gymnasium at 11:38:31 and 11:38:45-46
- Penetration by CEV-1 into the kitchen on the front of Mt. Carmel

Only three photographs taken during this lengthy gap have been turned over by the FBI, each consisting of a linkage between CEV-1, the M-88 tank retriever, and a Bradley, as debris is being removed from CEV-1. There are no photos of the compound.

The third large gap in the aerial photographs occurs at 11:44:40 to 11:55:20—a gap of 10 minutes, 40 seconds. During this lengthy gap, there was much significant activity:

- Numerous penetrations by CEV-1 to the front of Mt. Carmel
- A lengthy linkage between CEV-2 and the M-88 tank retriever—including a significant period of time in which CEV-2 and the tank retriever were side-by-side and some personnel appear to be between them
- Continued penetration into the gym by CEV-2
- Numerous instances of gunfire

It is interesting to note that just prior to this gap the photographer took eight photographs in less than two minutes—during a period of time when there was little activity. Again, this is completely inconsistent with the testimony of the aerial photographer that “**any time there was any activity** going on around the building, which would have only been the tanks, **I would have taken a shot of that.**”

The final gap is perhaps the most suspicious and most significant. It occurs from 12:02:47 until 12:10:35 (nearly 8 minutes), *between* supposed “Roll 2” and “Roll 3,” and is a period of intense activity:

- CEV-1 penetrates the white-red corner of Mt. Carmel and remains stationary there for 48 seconds (12:05:18-12:06:06).
- CEV-1 reverses from the white-red corner and departs Mt. Carmel at a high rate of speed (12:06:14).
- Heat source (possible flame) clearly visible in second floor window at white-red corner—immediately above the last point of penetration by CEV-1—no more than one minute, thirty-five seconds after tank’s departure (12:07:53).
- Continued penetrations into the gym by CEV-2 until the catwalk buckles and the rest of the gym roof collapses (12:04:30).
- CEV-2 makes contact with the back of the gymnasium and remains stationary for 77 seconds (12:06:06-12:07:23).
- CEV-2 backs off a short distance from the gymnasium and waits for 48 seconds (12:08:10 until 12:08:58).
- Double flash/explosion at the end of the gym catwalk appears on the FLIR at 12:08:31.
- A series of gun flashes appear on the FLIR to the left of CEV-2 at 12:08:51-52.
- CEV-2 departs less than 10 seconds after burst of gunfire next to tank (12:09:00).

- Fire breaks out at gym (12:10:22).
- Heat/smoke escaping from dining room/kitchen area—where notes of *Branch* criminal prosecutors reflect Charlie Team Bradley occupants recalled that “three rounds” were fired into the kitchen and “less than 30 seconds later sees white smoke”.¹⁷

It is likely, given the events during that eight minutes and the testimony of the aerial photographer, that an entire roll of film was shot during this time period and “lost” by the FBI.

Finally, in examining the photographs from the “duplicate” set of negatives for Roll 1, there are several other important discrepancies which must be brought to the Court’s attention.¹⁸ First, frames 31 and 36 of the duplicate negatives for Roll 1 are the same photograph—an impossibility if this was in fact an accurate duplication of Roll 1. In

¹⁷ “White smoke” is consistent with the use of a pyrotechnic M651 military gas round. There were 10 such rounds on the Charlie and Echo Team Bradleys on April 19 according to recent testimony (see *Andrade* Plaintiffs’ Supplemental Response to Defendant’s Motion for Partial Dismissal and Motion for Partial Summary Judgment, filed March 9, 2000, at 4-5).

¹⁸ Attached at Tab 6 are copies of the photographs obtained by Plaintiffs from the negatives on deposit with the Clerk’s office. These have been numbered and the approximate times (based on correlation with the FLIR video) noted for the Court’s convenience. These continue through the point in time at which the fire commences, after which there is little visible of the compound (which is another reason why it strains credulity to think that the aerial photographer took only two rolls of film during the period of greatest activity, but took five rolls of film of virtually nothing but smoke).

fact, Plaintiffs have now compared copies of the aerial photograph contact sheets produced in discovery with the prints obtained from "Roll 1." Frame 36 is a completely different photograph on the contact sheet¹⁹ than the photograph produced from the "Roll 1" duplicate negative.

Second, it is evident from a review of the enlargements made from this supposed duplicate set of negatives for Roll 1, that the photographs from which the negatives were made have been severely scratched and damaged. Some of the scratches appear to be strategically located to obscure material which may have been present on the original photograph. For example, photograph 33 has a white scratch which partially obscures a brown object near CEV-2, an object (or person?) which is not visible in other photographs.

It is obvious that we are seeing only the photographs the FBI wants us to see!

II. FLIR RECORDINGS FROM APRIL 19, 1993

FBI Games with the FLIR Recordings

The FBI and Justice Department have a long history of issuing false and misleading statements concerning the Forward Looking Infrared (FLIR) videotapes taken on April 19, 1993, by the FBI's surveillance aircraft Nightstalker. As recently as July 1998, the FBI claimed in a declaration subject to perjury that:

- "The earliest FLIR videotape recorded on April 19, 1993 occurred at approximately 10:42 a.m."

¹⁹ Attached at Tab 7.

- “[A]ll FLIR videotapes recorded on April 19, 1993 [were] released to [plaintiff (David Hardy)] pursuant to [his] FOIA Request.”²⁰
- The FBI was unable to identify “any audio recordings of communications with armored vehicles at Mt. Carmel on April 19, 1993,” and “in fact,” “no such recordings were made.”²¹

As the Court is aware, each of those statements was **false**. In fact, the FBI began FLIR recordings at approximately 6:00 a.m. on April 19, 1993, audio recordings were made of at least some of the radio traffic between the tracked vehicles on that date, and the videos in question were not provided to David Hardy in his FOIA proceeding or to the American public, until it became convenient for the FBI to do so in August of last year, to bolster its claim that the only pyrotechnic device used on April 19 was early in the day.

²⁰ Brackets in the original.

²¹ Declaration of Sherry L. Davis, Supervisory Special Agent of the FBI, Chief of the Litigation Unit, Freedom of Information-Privacy Acts (FOIPA) Section, Office of Public and Congressional Affairs (OPCA), at FBI headquarters in Washington, D.C., dated July 9, 1998, filed in C.A. No. 95-883 TUC ACM, *David T. Hardy v. Federal Bureau of Investigation, et al.*, United States District Court for the District of Arizona, at 6, para. 18, and at 8, para. 26-29. Attached at Tab 8.

On September 3, 1999, the FBI National Press Office issued a press release in response to the raging controversy over the use of pyrotechnic devices at Mt. Carmel—contrary to the explicit instructions of Attorney General Reno. The purpose of this press release was to announce the “recently discovered” copies of FLIR videos at HRT headquarters in Quantico, Virginia, which contained radio transmissions between one of the Bradley fighting vehicles on April 19—“Charlie 1”—and Dick Rogers, HRT Commander—“HRT 1”.²² The last paragraph in the press release states the following:

The results of the repositioning of “Charlie 1” are not recorded on the audio track. At approximately 8:24 a.m., the audio portion of the videotape was discontinued at the request of one of the pilots. **Audio recording on the FLIR videotapes did not resume for the remainder of the operation.**²³

This last statement was also **false**. In fact, the FLIR tapes produced by the FBI have a highly suspicious pattern of turning the audio recording off and on throughout the day on April 19, 1993.

The sequence of audio recording on the tapes that have been produced to Plaintiffs and provided to the Court is as follows:

6:00 a.m. -8:24 a.m. Audio recording is **on** [except for communications on a military band operating at 400 MHz²⁴]

²² FBI National Press Office Press Release dated September 3, 1999. Attached at Tab 9.

²³ *Ibid.* at 1.

²⁴ There has been testimony from FBI personnel that the tracked vehicles had a separate radio communications link operating at approximately 400 MHz (a military bandwidth), which linked **only** the tracked vehicles and the HRT command. In addition, recent testimony taken from the HRT tank commander for Charlie 1 revealed that even the tracked vehicles lacked the ability to monitor all communications among their vehicles. Specifically, the Charlie 1 tank commander testified that he had no way to monitor communications with CEV-2, the modified Patton tank demolishing the black side on April 19 and the HRT command:

Q. You had _____ and _____, we know. I believe we know that they were in one of the CEVs.

A. Right.

Q. Did you stay in constant radio contact with _____ and _____, the other two members of your team?

A. No.

Q. Did you have the ability to just push a button and call them and talk to them?

A. Ah, I don't know what frequency they were on. They were attached from my team, **assigned to a special mission.**

Q. Ok.

A. And they were being controlled by [HRT 2]. My radio contact went straight from me to [HRT 2].

Q. Got it. So while you were the team leader, as to those two fellows, they were sort of under [HRT 2] back there on the black side, so far as you know?

A. Yes.

Deposition testimony of Charlie Team tank commander, March 2, 2000, at 109-110. Attached at Tab 10. Submitted under seal.

In fact, the Charlie Team leader was not aware until shortly before his deposition in this case that the original CEV-2, manned by two members of his own team, had thrown a track on April 19 and was replaced by a second CEV, which lacked the ability to insert tear gas. *Id.* at 52.

Coincidentally(?), the Charlie Team tank commander received a personal visit *the day before his deposition in this case* from his former team member and occupant of CEV-2 on April 19—despite the fact that his former team member is no longer with HRT and is in fact assigned to an FBI office more than 800 miles away. During this meeting, which lasted more than one hour, the Charlie Team tank commander was advised by his ex-team member that—with respect to what transpired on the black side of Mt. Carmel on April 19— he **“would have no reason to know [what happened], because [he] wasn’t in the loop, as far as what was going on on the black side,** other than what [he] could see from [his] vehicle.” *Id.* at 52-55.

8:24 a.m.	“Turn the audio off ”
8:41 a.m.	“It’s on ” [audio recording resumes]
9:20 a.m.	“Turn the audio off ”
12:26 p.m.-12:27 p.m.	“It’s on ” [audio recording resumes], “Turn the audio off ” [audio recording terminates], “It’s on ” [audio recording resumes]
13:20 p.m.	“Turn the audio off ” [recording of radio traffic concludes]

There has been no explanation offered by any of the occupants of Nightstalker on April 19, 1993, concerning the on-off status of the FLIR recordings.

“Unable to Locate the Original”

On October 21, 1999, DOJ advised this Court that of the eight original FLIR recordings made by Nightstalker on April 19, 1993, the FBI was only able to locate three FLIR tapes which it believes are originals!²⁵ Specifically, DOJ/FBI professes that the tapes from 5:58 a.m.-8:00 a.m., 10:42-12:16 p.m., and 12:16 p.m.-1:39 p.m. are originals. The other four tapes forwarded to this Court’s files in response to the Court’s Order for all original evidence contain the following “qualifiers” concerning their authenticity:

Tape from 5:57 a.m.-7:57 a.m.	“We have been unable to make such a determination [concerning authenticity] regarding [this] corresponding tape.”
Tape from 7:57 a.m.-9:28 a.m.	“We have been unable to locate any corresponding tape for this period nor have we been able to determine if the copy we have is an original.”

²⁵ Letter dated October 21, 1999, from Mike Bradford, acting as Special Attorney to the Attorney General, forwarding a letter dated October 19, 1999, from Thomas A. Kelly, Deputy General Counsel, FBI. Attached at Tab 11.

Tape from 10:41 a.m.-12:41 p.m.

“Our files contain several copies of this tape, but we have been **unable to locate the original.**”

Tape from 12:41 p.m.-2:01 p.m.

“Our files contain several copies of this tape, but we **have not been able to locate the original.**”²⁶

There is no explanation offered by the FBI for its inability to locate the remaining original tapes from April 19, 1993.

“Always Had Clean Tapes at Waco”

Moreover, there are questions concerning the authenticity of even the so-called “original” tapes from April 19. The supposed original tape from 5:58 a.m.-8:00 a.m. contains frames of video in the first few seconds of that tape revealing previously-recorded FLIR footage from April 17, 1993, April 18, 1993, and from April 19, 1993 at 5:19:02 a.m. At the end of that same tape, at 8:02 a.m., there is a still image from April 16, 1993, with a time signature of 5:11:20. This image is never paused and it continues for about two-and-one-half minutes. With images from at least three other days than April 19, this tape clearly cannot be an original video recording from April 19, 1993.²⁷

This was confirmed by the recent deposition of the first shift Nightstalker FLIR operator on April 19, 1993:

Q. Would there have been a time when you would have recorded over a tape?

A. No.

Q. On April 19?

²⁶ *Id.*

²⁷ Laboratory report of Steve Cain, Forensic Scientist, M.F.S., M.F.S.Q.D., dated February 24, 2000, at 14. Emphasis in the original. Attached at Tab 12.

A. No.

Q. I mean you may not have known exactly what was going to happen, but you knew this was a day you wanted to have a clean tape?

A. **We always had clean tapes at Waco.**²⁸

Given the presence of images from other dates and times present on the supposed “original” FLIR video from the 6:00 a.m.-8:00 a.m. time frame, it is clear that this tape cannot be an original as claimed by the FBI/DOJ. In the words of Plaintiffs’ forensic audio/video analyst: **“This tape cannot be trusted concerning its reliability and the possibility that it may have been tampered with.”**²⁹

Where’s the Audio?

The second purported “original” FLIR videotape from April 19, for the time period 10:39 a.m.-12:16 p.m., is also unreliable. Plaintiffs were concerned from the beginning by the complete lack of an audio track on this videotape—just when the critical activity on April 19, 1993, was taking place.

All four occupants of Nightstalker from 10:40 a.m. to 12:15 p.m. on April 19, 1993, were surprised at the lack of an audio track on that FLIR videotape:

FLIR Operator

Q. Mr. _____, tell me why it is that there is no sound on the FLIR that was taken on April 19, 1993, by your crew until after 12:26 when the fire had started and flames had consumed the building?

A. I don’t have an explanation for that.

²⁸ Deposition of 1st shift FLIR operator, dated March 2, 2000, at 26. All portions of the testimony of this FLIR operator referenced herein are attached at Tab 13.

²⁹ Tab 12, at 14.

A. **I was surprised when I played the tape and there was no audio on it.**

Q. Since we've had the testimony now of Mr. _____, Mr. _____, and yourself that all of you were unaware or, in fact surprised that there was no audio, **it is possible that in fact there was audio** and that it was recorded during your shift **and that at some point subsequent to that, either intentionally or inadvertently, that audio was deleted?**

A. It's **probably possible**, but I don't see how it could have happened."³⁰

Pilot-in-Charge

A. To the best of my recollection, as far as I knew, **I thought the recorder was on.**

Q. Mr. _____, it is your testimony today under oath that at this point in time, you believed you were recording all radio traffic and cockpit conversations on April 19, 1993?

A. My normal procedure is that **we normally record audio** and we record video.

Q. Is it your testimony that on April 19, 1993, you thought the radio traffic was being recorded during this period of time?

A. To the best of my recollection, you have asked me to be truthful. I am trying to be as truthful to you as I possibly can. All I can recall is that I would have had no reason not to record the audio. **I would have assumed that it was on.**

³⁰ Deposition testimony of FBI 15, 2nd shift FLIR operator, dated December 14, 1999, at 11-12, 21-23. Attached at Tab 14. See below for "how it could have happened."

Q. You have no justification for not having a recording of the radio traffic during this period of time, do you, Mr. _____?

A. **I cannot explain why it's not on.**

Q. There is no excuse for it not being on, is there?

A. **I cannot explain why it's not on.**³¹

FLIR Trainee

Q. Now, you are aware now, are you not, that in fact the audio recordings were not continuous during your shift, correct?

A. As of yesterday, yes, I noticed while watching the tapes that portions didn't have audio and other portions did.

Q. **Now, were you surprised by that?**

A. **Yes, I was.**

Q. If we had talked with you on Monday of this week, five days ago, before you saw the tapes, before you met with counsel for the Justice Department and the FBI, and we had asked you did you record the audio, did you record the radio traffic and was that continuous on April 19, 1993, would it have been your recollection or would the answer to that question had been yes?

A. **My response would have been, yes, I would have thought the audio was continuous.**

Q. Is it possible, given the joint recollection of the four occupants of the aircraft on April 19, 1993, that the audio recording was continuous, as was the video, **is it possible that someone could have tampered with the audio portion of those recordings after your flight on April 19, 1993?**

A. **I couldn't tell you what happened to the tapes once I left that day.**³²

³¹ Deposition testimony of FBI 12, 2nd shift Nightstalker Pilot-in-Charge, dated December 10, 1999, at 29, 35, 39, and 49. Attached at Tab 15.

³² Deposition of FBI 17, 2nd shift Nightstalker FLIR trainee, dated December 17, 1999, at 38-40. Attached at Tab 16.

Co-Pilot

A. **I was under the impression that audio and video was recording at all times.**

Q. So do you have any explanation for why the audio was turned off during that—the audio was turned off during that part of the operation?

A. **I do not know that the audio was turned off.**

Q. **Is it your testimony** to the best of your recollection, when you turned over the original recordings taken on April 19, 1993, **that those original recordings should have had a recording of the radio traffic that occurred throughout your flight** until the point and time at which the audio recording was turned off, the time that we've been talking about where Mr. _____ began giving you instruction?

A. **I would have expected that that probably would have been there.**³³

Given the consistent testimony of the four Nightstalker occupants that during the critical time on April 19, 1993, they were recording audio as well as video images, it should come as no surprise that Plaintiffs' forensic analyst has concluded the following:

[The claimed original FLIR videotape from 10:39 a.m.-12:16 p.m.] Q-4's audio track has **probably been erased throughout** the entire 10:41 a.m.-12:16 p.m. recording, with a dramatic increase in sound levels occurring after the picture disappears, together with continuing RF and control track activation which continues for several minutes thereafter.³⁴

³³ Deposition of FBI 6, 2nd shift Nightstalker Co-pilot, dated December 8, 1999, at 22, 27-28. Attached at Tab 17.

³⁴ Tab 12, at 15.

Who Done It?

There is no way to authenticate or guarantee the integrity of the FLIR recordings from April 19, 1993. The FBI's custody of this original evidence has been shoddy at best. Virtually nothing was done to maintain the integrity of this evidence. Any number of persons could have destroyed, altered, or tampered with the FLIR recordings from April 19 and there would be no way to identify the culprit.

According to the recent testimony of a FLIR operator on April 19, 1993:

- All of the original Waco tapes were kept in a "safe" in a "utility room" at the aerial surveillance group's headquarters.
- Twelve or thirteen individuals had the combination to the safe following Waco and until the operator left the FBI in 1995.³⁵
- There was no sign-out sheet or security policy for the tapes.
- HRT personnel were frequently at the same site.³⁶

When asked "How would we confirm the authenticity of any of the Mt. Carmel tapes, if they were kept in a safe where twelve or thirteen people had access, and there was no requirement to sign in, sign out, or anything of that nature?", the operator replied "I don't know."³⁷ Obviously, in the six years between April 19, 1993, and the production of the

³⁵ Presumably this same procedure was followed until the present, which means that—given ordinary turnover—dozens of persons have had unlimited access to these original tapes.

³⁶ Tab 13 at 15-18, 22-23.

³⁷ Tab 13 at 24.

videotapes in this lawsuit, there has been ample opportunity for numerous persons within the FBI to alter or tamper with this critical evidence. And, because of the FBI's shoddy procedure for maintaining this key evidence, it would be impossible to identify the culprit.

III. TITLE 3 OVERHEAR/SURVEILLANCE TAPES

The two cornerstones of the government's claim that the Davidians started the fire on April 19, 1993, are supposed references on the Title 3 overhear tapes to "spreading the fuel," etc., and the claim by the government's fire experts that, based on analysis of the FLIR, the fire originated in three locations within a span of only two or three minutes.³⁸ The claims concerning the tapes have always been suspicious, because the logs of the overhears for April 19, 1993, contain no mention or reference to the statements so heavily relied on today by the government. Supposedly, the tapes were reviewed repeatedly over a period of several months by agent Freddy Vela after the fire and, after enhancement and repeated listenings, he began to decipher the statements.

Subsequently, the government retained an outside expert, Paul Ginsberg, to review enhanced versions of the original overhear tapes and prepare transcripts of those tapes for the criminal trial. Those transcripts contained references to "spread the fuel," "light the package," etc. Apparently, however, those references took place several hours before the fire began shortly afternoon on April 19, 1993.

Interestingly enough, no one ever examined the so-called original overhear tapes—relied on so heavily by the government and its outside expert—for authenticity. The

³⁸ With respect to the later, please see the expert report of Patrick Kennedy, Plaintiffs' fire expert, attached at Tab 9 to the *Andrade* Plaintiffs' Response to Defendant's Motion for Partial Dismissal and Motion for Partial Summary Judgment. Mr. Kennedy discusses the problems with the government's "three separate, simultaneous fires" theory extensively at pages 5-6 and 8-20 of his report.

government, in an implicit admission of this serious problem, last month asked to examine the tapes in the custody of the Court to determine their authenticity.

“Stereo”

Plaintiffs' forensic audio expert spent several days at the courthouse in Waco—after the government refused permission for the tapes in question to be sent to Wisconsin pursuant to normal chain of custody procedures—to perform an analysis of the supposed original overhear tapes from April 19, 1993. His preliminary tape testing “disclosed that the audiotapes are probably tape copies and not original recordings.”³⁹ Steve Cain's analysis indicated (1) most of the tapes were probably recorded with stereo heads, contrary to the testimony of the FBI's technical personnel that the surveillance microphones were monaural,⁴⁰ (2) the tapes contained 60 cycle harmonic data (60, 120, 180, etc. hertz), which is not consistent with original recordings but is consistent with high speed copies, and (3) magnetic development of several of the tape copies indicated at least three different tape recorders were used in their creation.⁴¹

While Mr. Cain's opinions meet the reasonable scientific probability standard required for the admissibility of expert testimony, he believes that definitive opinions could be rendered after examination of the original recording equipment supposedly used at Mt. Carmel in 1993. However, despite several requests, Plaintiffs have received no response

³⁹ Tab 12, at 4.

⁴⁰ See, e.g., deposition testimony of FBI 4, supervisor of surveillance microphone insertions, dated December 9, 1999, at 19-20. Attached at Tab 18.

⁴¹ *Ibid.*

from the government's lawyers concerning the location and availability of that equipment for testing.⁴²

“Different Start Signatures”

⁴² See, e.g., letter from Michael A. Caddell to Marie Hagen dated December 2, 1999. Attached at Tab 19.

Plaintiffs have now deposed all of the persons monitoring the surveillance microphone on April 19, 1993, save one.⁴³ Their testimony covers all periods of recording on April 19, 1993—from midnight until shortly before the fire, when the last microphone supposedly went dead. There has been no testimony concerning equipment malfunctions or other problems with the tape recorders being utilized for that purpose, which would necessitate changing tapes from one recorder to another.

Yet, in analyzing the supposed original tapes found at the courthouse in Waco, Steve Cain has identified different “start” signatures at various points on the tapes, which is “strong evidence of different tape recorders.”⁴⁴ This finding casts further doubt on the authenticity and reliability of the government’s surveillance tapes.

For example, the surveillance tape for the critical time period—10:30 a.m. to 1:00 p.m. (which actually ends at approximately 11:55 a.m.)—has three different “start” signatures (one on Side A and two completely different ones on Side B). This almost certainly indicates that three different tape recorders were utilized in its creation.⁴⁵ That is inconsistent with the testimony and evidence concerning the organization of the surveillance tape recorders, as well as any possible legitimate FBI protocol. Since this would be the tape which would contain information closest in time to the start of the fire at approximately 12:05 p.m. on April 19, its authenticity is critical.

⁴³ The one remaining, Freddy Vela, will be deposed on March 16.

⁴⁴ Tab 12, at 5.

⁴⁵ Tab 12, at 5.

“I Initialed Each Original Tape”

Casting further doubt on the authenticity of the supposed original tapes which have been filed with the Court in Waco is the recent report from Defendant's expert, Paul Ginsberg. Mr. Ginsberg's report, dated February 28, 2000, states that he traveled to Quantico, Virginia, on September 27, 1999, where the "original tapes were sealed." Mr. Ginsberg identified a number of witnesses to his removal of the supposed original tapes, their duplication, and resealing.⁴⁶ According to his report, Mr. Ginsberg "initialed each original tape" and the "originals were then sealed in their evidence envelopes by S/A Losinski for safekeeping."⁴⁷

Steve Cain, Plaintiffs' audio forensic expert, examined Mr. Ginsberg's report, including the statements quoted above. When Mr. Cain traveled to Waco last year with his assistant and equipment, he not only examined the supposed original surveillance tapes that have been turned over to the Court, but he also made photographs of each. Mr. Cain has now advised that the tapes at Waco cannot be the supposed originals examined by Mr. Ginsberg at Quantico:

An examination of the AFTI photographs of the seven purported original tapes (Q-1 through Q-7) failed to disclose any initials that appear to be identifiable with Paul Ginsberg nor have we yet to see photocopies of the

⁴⁶ Report on tape-recorded evidence, digital enhancement and transcription, by Paul Ginsberg, President, Professional Audio Laboratories, Inc., dated February 28, 2000. Attached at Tab 20.

⁴⁷ Tab 20, at 2.

source tapes or evidence envelopes that he had for inspection in September 1999.⁴⁸

Obviously, either Mr. Ginsberg did not examine and copy the original tapes or the FBI has not complied with the Court's Order that all original evidence be forwarded to the District Clerk in Waco for safekeeping. In either event, Mr. Ginsberg's supposed transcripts cannot be authentic and must be disregarded.

IV. TEXAS RANGERS' INVESTIGATION

"Item Was Not Found"

⁴⁸

Letter from Steve Cain to Caddell & Chapman dated March 7, 2000, at 2. Attached at Tab 21.

In September 1999, the Texas Rangers issued a review of evidence related to the Branch Davidian investigation. In the course of that review, the Rangers noted that a gray projectile with a red band lying in water had been photographed by a DPS photographer following the fire on April 19, 1993, near the Branch Davidian compound, but the projectile could not be located in the DPS evidence lockers. The Rangers' report noted that the photographed projectile's physical appearance was consistent with a projectile casing found by the Rangers at Mt. Carmel following the fire and designated Q1237. The Rangers identified Q1237 as an "early experimental M651 military tear gas round." The Rangers were advised by a representative of the U. S. military that the fire hazard of the M651 had not been explored "**because it was known to cause fires.**" The M651 burns at "500-700°F" and "is capable of igniting flammable items."⁴⁹

⁴⁹ Texas Rangers Investigative Report, Branch Davidian Evidence, September 1999, at 4-6. Attached at Tab 22.

In January, the Texas Rangers issued a second investigative report, containing the Rangers' findings after recovering from the FBI original negatives and photographs the DPS had taken following the fire, together with their field notes. After review of these field notes and negatives, the DPS photographer identified the location of the missing M651 projectile at 200 yards northwest of the water tower, near one of the Davidian buses.⁵⁰

This location is inconsistent with the testimony of HRT members concerning location and direction of the one M651 military tear gas round admittedly fired on April 19, 1993,⁵¹ and increases the probability that more pyrotechnic rounds were fired by the FBI on April 19, 1993, than has been admitted. In this regard, contrary to what might be assumed, it should be noted that the evidence gathering was not done solely by the Texas Rangers. For example, the Ranger whose team located the M651 casing, Q 1237, actually supervised a team consisting of one other Ranger, and three FBI special agents.⁵²

“FBI Laboratory Clearly Misidentified”

The most interesting section of the new Rangers' report is the extended discussion of numerous “flashbangs” found by the DPS to have been “clearly misidentified” by the FBI laboratory as non-explosive devices, such as silencers and suppressors:

- K 419—“very burned flashbang”—found at “Sector N Grid 4”⁵³—the **chapel**—“**previously misidentified**” by the FBI laboratory as a “silencer.”⁵⁴

⁵⁰ Texas Rangers Investigative Report #2, Branch Davidian Evidence, January 2000, at 2. Attached at Tab 23.

⁵¹ See, e.g., deposition testimony of Charlie Team tank commander, dated March 2, 2000, at 73-84. Attached at Tab 10.

⁵² Department of Public Safety, interoffice memo, dated June 30, 1999, from Sergeant George L. Turner to Chief Bruce Casteel. Attached at Tab 24.

⁵³ Attachment A to the Rangers September 1999 report included a sector map of Mt. Carmel showing the sectors where various evidence was found following the fire. Attached at Tab 25.

- K 432A—“expended flashbang”—found in Sector O, Grid C1—includes the **kitchen/dining room** and courtyard—“**clearly misidentified** by the FBI laboratory as a silencer tube.”⁵⁵
- K 465—“burned and expended flashbang”—found in Sector I, Grid B1—the **kitchen**—“FBI laboratory **misidentified** it as a silencer tube.”⁵⁶
- K 318—“burned and expended flashbang”—found in Sector V, Grid C4—**inside the front door**—**misidentified** by the FBI laboratory as a “smoke grenade.”⁵⁷
- Q 323—“burned and expended flashbang”—located in Sector J, Grid B1—inside at the **white-red corner**—**misidentified** by the FBI laboratory as a “grenade body.”
- Q 267—“expended flashbang”—found in Section CD, Grid A3—outside the front of Mt. Carmel—**misidentified** by the FBI laboratory as “possible silencer.”⁵⁸
- Q 269—rusted, but not burned up, flashbang—found in Sector C—FD, Grid A3—outside the front of Mt. Carmel—**misidentified** by the FBI laboratory as a “piece of metal tubing.”⁵⁹

55 *Ibid.*

56 *Ibid* at 9.

57 *Ibid.*

58 *Ibid* at 10.

59 *Ibid.*

- Q 99—“expended flashbang”—referenced in the FBI laboratory reports—but the location where Q 99 was found was “not received” from the FBI laboratory.⁶⁰

This analysis by the Rangers is strong evidence of either FBI incompetence or willful misrepresentations concerning the classification of evidence found at Mt. Carmel following the fire.

The only mention of a flashbang being used by ATF during its initial assault on February 28, 1993, is contained in the September 1993 Treasury Department Report:

⁶⁰ Tab 23, at 8.

At the arms room, Agent Jordan managed to “break and rake” the window and Agent Buford threw a **distraction device** into the room.⁶¹

The information in the Treasury Report has been confirmed by the criminal defense attorneys who entered Mt. Carmel during the siege, Dick DeGuerin and Jack Zimmermann. The Treasury Report refers to the “arms room.”⁶² Zimmermann’s recollections of his observations at the “weapons storage room” are consistent with the Treasury Report:

- “This is the room where the ATF Assault Team did the ‘break and rake’ entry.”
- “An ATF agent had broken the window glass and apparently thrown in a concussion grenade (flashbang).”
- One of the Davidians told Zimmermann and DeGuerin that he had heard the explosion of the flashbang and that “there had been a fire in the room” as a result.
- Zimmermann saw soot and burned hay in the room consistent with a fire.⁶³

This testimony is significant in two ways: it limits the flashbangs that would have been inside Mt. Carmel after the initial ATF raid to **one**, and it clearly demonstrates the propensity of the flashbangs to start fires.

⁶¹ Report of the Department of the Treasury on the ATF Investigation of Vernon Wayne Howell, also known as David Koresh, dated September 1993, at 98. Attached at Tab 26.

⁶² *Ibid.*

⁶³ Preliminary Report of Jack B. Zimmermann, dated February 29, 2000, at 4. Attached at Tab 27.

So where did the other flashbangs found within Mt. Carmel after the fire come from?

The FBI's claim that Davidians picked the flashbangs up from the ground outside Mt. Carmel—after they had been fired at any Davidian who dared emerge from the building during the siege—and took them inside is simply not credible. Moreover, if Davidians had done so, certainly all of the flashbangs would have been maintained together in one location for safekeeping as potential evidence, or turned over—or at least shown—to DeGuerin and Zimmermann.

There has been consistent testimony from HRT members that they had throwable flashbangs attached to their body armor on April 19, 1993.⁶⁴ Initial versions of the plan of operation actually called for the use of “flashbangs” as part of the plan to force the Davidians out of Mt. Carmel.⁶⁵ It is clear that the on-scene commanders, SAC Jeffrey Jamar and ASAC Richard Rogers, deviated from the plan ultimately approved by Attorney General Janet Reno for implementation on April 19, 1993, by ordering penetration (and demolition) of Mt. Carmel by the tanks only five hours into the operation—without permission or approval. That action had also been part of earlier, rejected plans. Given the evidence of flashbangs found in locations consistent with the points of origin of the fire

⁶⁴ See, e.g., deposition testimony of Charlie Team tank commander, dated March 2, 2000, at 86. Attached at Tab 10.

⁶⁵ See, e.g., Proposed Operations Plan dated March 3, 1993, at II, attached at Tab 18 to *Andrade* Plaintiffs' Response to Defendant's Motion for Partial Dismissal and Motion for Partial Summary Judgment. This plan called for “projectable” flashbangs, but HRT members were all equipped with throwable flashbangs.

on April 19, it is entirely possible that this was another part of an earlier plan that was implemented without permission or approval from FBI leadership. Jamar and Rogers would argue this was within their “implied authority” on April 19.⁶⁶

Another Lost Roll of Film

⁶⁶ In fact, Rogers did claim such authority at his deposition. Deposition testimony of Richard Rogers, dated March 3, 2000, at 86-89. Attached at Tab 28. Submitted under seal.

Finally, the Rangers Report notes that the rolls of film and field notes confiscated by the FBI from the Rangers, and ultimately returned following this Court's orders in August and September 1999, were missing a potentially key roll of film. Michael Holle, a DPS crime scene photographer, reviewed the prints and negatives returned by the FBI in September 1999, and found that one of his rolls of film (Roll 10) and its corresponding log sheet "were not included in the items received by this department." Holle's recollection was that the missing photographs "would have been of items found inside the concrete bunker, *i.e.*, bodies, guns, and hand grenades."⁶⁷

The condition of the bodies in the concrete bunker, including the positioning of those bodies following the fire, is critical to a proper evaluation of several issues in this case. For example, Plaintiffs' forensic medical expert, Dr. Joe Burton, Chief Medical Examiner of the City of Atlanta, has determined that many of the bodies found inside the concrete bunker exhibiting gunshot wounds were not shot at close range. The only reason Dr. Burton discounts the possibility that these individuals were shot by gunfire originating outside of the compound is their location within the concrete food storage area. The absence of these photographs makes it very difficult, if not impossible, to determine if any of these persons were shot outside of that room and moved into it prior to or after the fire.

⁶⁷ Letter from Michael Holle, crime scene photographer IV, dated October 6, 1999. Attached at Tab 29.

CONCLUSION

It is clear that there are serious problems concerning the integrity of evidence produced and relied upon by the FBI in this case. If the Court is to fulfill its goal of assuring the American public that the original critical evidence from Mt. Carmel has not been lost, tampered with, or altered, it must take immediate steps. Based on the evidence set forth above, the *Andrade* Plaintiffs ask this Court to convene an evidentiary hearing at which the FBI and the Justice Department must either produce the original evidence ordered by this Court to be placed within the custody of the District Clerk or show cause why they should not be held in contempt of the Court's orders of August and September 1999.

Respectfully submitted,

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