

1 FOR PUBLICATION

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7 UNITED STATES DISTRICT COURT
8 EASTERN DISTRICT OF CALIFORNIA
9

10 UNITED STATES OF AMERICA,)
11)
12 Plaintiff,) CR S-96-259 GEB GGH
13)
14 v.)
15) ORDER*
16 THEODORE JOHN KACZYNSKI,)
17)
18 Defendant.)
19 _____)
20

21 Defendant Theodore John Kaczynski moves for the return of
22 property seized as evidence of the Unabomb crimes. On June 26, 2003,
23 Kaczynski filed this motion *in propria persona*, but was subsequently
24 appointed counsel, who now represents him. Kaczynski is a federal
25 prisoner and the criminal proceedings against him have terminated.
26 See United States v. Kaczynski, 239 F.3d 1108 (9th Cir. 2001), cert.
27 denied, 535 U.S. 933 (2002), reh'g denied, 535 U.S. 1043 (2002). He
28 previously pled guilty to the Unabomb crimes in this district and
received a life prison sentence. Part of his sentence requires him to
pay \$15,026,000.00 in restitution; the restitution order remains

29 _____
* This matter was determined to be suitable for decision
without oral argument. L.R. 78-230(h).

1 unsatisfied.¹ (Amended Judgment filed May 6, 1998, at 5.)

2 This motion was referred to a United States Magistrate Judge
3 under 28 U.S.C. § 636(b)(3) and Local Rule 72-302(c)(17). On
4 January 8, 2004, the Magistrate Judge filed findings and
5 recommendations ("F&Rs") which notified the parties that any
6 objections to the F&Rs were due within ten days. Both parties filed
7 objections to the F&Rs. For the reasons stated below, the
8 government's objections concerning Rule 41(g) of the Federal Rules of
9 Criminal Procedure and equity are sustained.

10 RETURN OF PROPERTY MOTION

11 Ancillary jurisdiction exists over Kaczynski's motion
12 because he pled guilty in this district to several crimes.² Rufu v.
13 United States, 20 F.3d 63, 65 (2d Cir. 1994). Under federal
14 jurisprudence the motion is "treated as a civil complaint for
15 equitable relief." Rufu, 20 F.3d at 65; see also United States v.
16 Ritchie, 342 F.3d 903, 907 (9th Cir. 2003). This is how "[s]uch
17 motions are treated . . . even if [they are] styled as being pursuant
18 to Fed. R. Crim. P. 41[(g) (formerly Fed. R. Crim. P. 41(e))]."
19 United States v. Martinson, 809 F.2d 1364, 1367 (9th Cir. 1987). The
20 issues are whether Kaczynski has an interest in the property that is
21 paramount to the government's interest in it and, if not, whether
22 equity favors granting his motion despite the government's superior
23

24 ¹ The record indicates that the only payment toward
25 Kaczynski's restitution debt is \$7,500.00 the government received from
26 the sale of Kaczynski's ownership interest in land located in Montana.
(See docket numbers 602, 604, and 607 in CR-S-96-0259 GEB.)

27 ² "The facts underlying Kaczynski's arrest (April 3, 1996) and
28 indictment for mailing or placing sixteen bombs that killed three
people, and injured nine others, are well known and [need] not [be]
repeat[ed] here." Kaczynski, 239 F.3d at 1110.

1 property interest. United States v. Duncan, 918 F.2d 647, 654 (6th
2 Cir. 1990).

3 The property Kaczynski seeks returned includes guns,
4 ammunition, tools, a large collection of books, documents he wrote,
5 \$32.00 in cash, and miscellaneous items such as "folded papers with
6 chemical residue," "four copper tubes," "wiring," "springs," and a
7 nine-volt battery. (Mot. filed June 26, 2003, Attach. F.)

8 Kaczynski explains the reason for his motion as follows:

9 Note that, in connection with the documents, not
10 only Kaczynski's personal interests are at stake.
11 The public has an interest in knowing the whole
12 truth about Kaczynski's very high-profile criminal
13 case. The documents now held by the government,
14 which Kaczynski will donate to the Special
15 Collections Library of the University of Michigan
16 where they will be available to scholars and
17 researchers, will be of critical importance in
18 revealing the truth about Kaczynski's case.

15 (Mot. at 46.)

16 The government argues the motion should be denied because
17 Kaczynski cannot establish a right to the property in light of the
18 restitution order and the disgorgement provision of his plea
19 agreement. The disgorgement provision states:

20 **Disgorgement of Future Earnings:** The defendant
21 agrees that he shall disgorge monies paid in whole
22 or in part to him or on his behalf, in return for
23 writings, interviews, or other information
24 disclosed by the defendant, photographs or
25 drawings of or by the defendant or any other type
26 of artifact or memorabilia to the United States
27 Probation Office for restitution or other
28 distribution to the victims of the Unabom events.

25 (Memorandum of Plea Agreement filed January 22, 1998, at 4.) The
26 \$15,026,000.00 restitution portion of Kaczynski's judgment constitutes
27 a lien in favor of the United States on the property at issue. See
28 Lavin v. United States, 299 F.3d 123, 127 (2d Cir. 2002) (citing 18

1 U.S.C. § 3613(c)). This lien arose when judgment was entered and
2 continues because the restitutionary liability is unsatisfied. Id.

3 The United States possesses the restitutionary lien on
4 behalf of the victims of the Unabomb crimes. The "restitution order
5 is enforceable as a lien upon *all* of [Kaczynski's] property. . . ."³
6 United States v. Mills, 991 F.2d 609, 612 (9th Cir. 1993).

7 The F&Rs found this lien ineffective against Kaczynski's
8 claimed property interest. It held that "a tax levy is necessary
9 before the government is entitled to possession as against the owner,"
10 citing United States v. Fitzen, 80 F.3d 387, 388 (9th Cir. 1996), and
11 that "even if the present lien were to be considered a levy, the
12 ultimate object of the levy is the sale, not the continued possession,
13 of the property." (F&Rs at 7.) The Fitzen court held a defendant "is
14 presumed to have the right to the return of his [seized] property,"
15 but that the government may overcome the presumption "by demonstrating
16 a cognizable claim of ownership or right to possession adverse to that
17 of [the defendant]." Fitzen, 80 F.3d at 388 (citation and quotation
18 marks omitted.) When contesting a defendant's assertion of a right to
19 possess seized property, "[t]he government need not prove that the
20 government itself is entitled to lawful possession: it is sufficient
21 for the government to prove that [the defendant] is not so entitled."
22 Id. at 389. The existence "of a tax levy demonstrates a right to
23 possession adverse to that of the defendant," such that a Rule 41(g)
24 motion fails when the property is "subject" to a government "tax
25 levy." Id. at 388-89.

26
27 ³ Kaczynski's arguments concerning forfeiture of property are
28 misplaced. The issue is whether, in equity, Kaczynski's ownership of
the property is extinguished by the restitutionary lien.

1 The F&Rs' reliance on the "tax levy" construct is misplaced.
2 The need to levy property arises "where a taxpayer's property is held
3 by another." United States v. Nat'l Bank of Commerce, 472 U.S. 713,
4 720 (1985). In that situation, "a notice of levy upon the custodian
5 is . . . served [which] creates a custodial relationship between the
6 person holding the property and the [Government] so that the property
7 comes into the constructive possession of the Government." Id. at
8 720. Since the government already has actual possession of the
9 property, it need not resort to a "tax levy" legal fiction to secure
10 possession. Because the government's lien derives from "a valid
11 restitution order [issued] under the [Victim and Witness Protection
12 Act,]" the judgment of restitution "gives the government a sufficient
13 cognizable claim of ownership to defeat [Kaczynski's] Rule 41[(g)]
14 motion. . . ." Mills, 991 F.2d at 612. Therefore, the government,
15 not Kaczynski, is "entitled to[, and has,] lawful possession" of the
16 property. Id.

17 Kaczynski indicates the lien should be disregarded since the
18 government has not yet sold the property, and has suggested it has no
19 intention of selling it. But the government holds the restitutionary
20 lien on behalf of the victims, not Kaczynski. Because of this lien,
21 Kaczynski is not entitled to the property. Fitzen, 803 F.3d
22 at 389. Moreover, Kaczynski lacks standing either to assert the
23 victims' interest in the property or to demand that the property be
24 sold or placed where he wants it displayed. San Pedro Hotel Co., Inc.
25 v. City of Los Angeles, 159 F.3d 470, 479 (9th Cir. 1998) (holding
26 Plaintiffs lacked standing to assert rights of third parties).
27 Therefore, this portion of Kaczynski's motion is rejected because it
28 lacks merit.

1 Kaczynski also argues his motion should be granted because
2 the public has an "interest in knowing the whole truth about [his]
3 very high-profile criminal case." (Mot. at 46.) He seeks to compel
4 the government to give the property to the University of Michigan's
5 library, contending the property "has significant social and
6 historical value not only to the press and public, but also to
7 academic researchers and social historians." (Def.'s Supp. Brief
8 filed October 10, 2003, at 4.) He argues that the government is
9 violating his "First Amendment right to express and disseminate
10 information and ideas to others" by not releasing his property as he
11 desires. (Reply filed November 20, 2003, at 6.)

12 The government rejoins that forcing it to heed Kaczynski's
13 request would allow Kaczynski to benefit from the notorious celebrity
14 status he acquired entirely because of his Unabomb crimes. (See
15 generally Opp'n filed November 10, 2003, at 7.) The government argues
16 his celebrity status as the Unabomber resulted only from the infamy he
17 created through his crimes, since he had no such status prior to his
18 apprehension. (Id.) The government indicates granting his motion
19 would assist him to extol, and gain a measure of profit from, his
20 notoriety, contrary to the disgorgement provision of the plea
21 agreement. (Id. at 2.)

22 Kaczynski counters that the disgorgement provision is
23 inapplicable because its text does not literally apply to his motion.
24 This riposte fails to recognize that in equity the substance of the
25 provision is considered, regardless of its literal application.
26 "Equity looks to the substance rather than the form, [in an endeavor]
27 to prevent injustice." Kaydon Acquisition Corp. V v. America Central
28 Indus., Inc., 179 F. Supp. 2d 1022, 1033 (N.D. Iowa 2001). The

1 disgorgement provision exists to prevent Kaczynski from profiting from
2 his crimes.

3 While Kaczynski does not seek monetary profit, the effect of
4 what he seeks would force the victims of his Unabomb crimes to use
5 their property in a way that could preserve for posterity some
6 evidence of the evils wrought by his facinorous Unabomber actions.
7 While Kaczynski insists this is in the public interest and has nothing
8 to do with the "profit" term in the disgorgement provision, that term
9 is implicated. What he characterizes as a public interest in the
10 property "cannot be quantified or traced to bank accounts," but
11 granting his request would aid him in his apparent endeavor to extol
12 his criminal celebrity status, and this extolment could "'salt[] the
13 wounds' of the victims in the same way as financial profit." Gilbert
14 O'Keefe Greenman, Son of Simon & Schuster: A "True Crime" Story of
15 Motive, Opportunity and the First Amendment, 18 U. Haw. L. Rev. 201,
16 227 (1996). Equity does not favor forcing Kaczynski's victims,
17 through the government, to assist him in his effort to display the
18 seized evidence as he desires.

19 Nor does equity favor granting his additional requests that
20 the government provide him with photocopies of his documents, refrain
21 from disposing of his property, and "provide [him] with all
22 information necessary for resolution of the issue . . . of the
23 disposition of [certain] photographs" possessed by his former criminal
24 defense counsel. (See Mot. Requests 2, 3, and 6.) Kaczynski also
25 requests that the government "have no more than 30 days from the entry
26 of the court's order within which to sell such property and apply the
27 proceeds to Kaczynski's debts, and to return to Kaczynski all such
28 property not so sold." (See Mot. Request 5.) Kaczynski states:

1 Included in this property is a .30-06 hunting
2 rifle, which might be worth about \$150 (rough
3 guess). I believe that the rest of the property
4 is of negligible intrinsic financial value (though
5 the documents are of great value as sources of
6 information). I have no idea what the property
7 might be worth to collectors due to its
8 "celebrity" value.

9 (Aff. in Supp. of Mot. For Permission to Appeal In Forma Pauperis
10 ("Aff."), filed August 1, 2003, at 7.) While Kaczynski indicates the
11 "celebrity value" of the property is at issue, the government rejoins
12 that the issue is the "pre-celebrity value" of the property.
13 Specifically, the government argues that "the value of the property
14 . . . is the value it had one day prior to Kaczynski's arrest," which
15 is "a time frame prior to any notoriety of Kaczynski for his
16 connection to the criminal activity." (Gov't Objections to F&Rs filed
17 Jan. 30, 2004, at 4-5 and 5 n.3.)

18 The property is only valued in equity at its pre-celebrity
19 value. A contrary finding would allow Kaczynski to profit from his
20 criminal celebrity status. Further, Kaczynski lacks standing to
21 dictate what the victims do with the property. Since Kaczynski still
22 owes over 15 million dollars in restitution and he concedes that the
23 property at issue has negligible intrinsic value, he has not shown why
24 a court sitting in equity should now determine the pre-celebrity value
25 of the property. A court of equity need not unravel matters having a
26 negligible impact on such an astronomical restitution debt.

27 Kaczynski's First Amendment argument also lacks merit and
28 evidences a misapprehension of the inquiry at issue. The issue is not
whether Kaczynski has the right to communicate any idea, but rather
whether equity supports his position that he can dictate what the

1 government must do with liened property it lawfully possesses.⁴
2 Plainly, equity does not favor granting Kaczynski's motion. For the
3 stated reasons, Kaczynski's motion is denied.

4 APPOINTMENT OF COUNSEL

5 In light of the above rulings, the issue of whether
6 Kaczynski should have appointed counsel under 28 U.S.C. § 1915 at
7 public expense is considered. "There is no constitutional right to
8 appointed counsel in a [civil matter]." Rand v. Rowland, 113 F.3d
9 1520, 1525 (9th Cir. 1997). "However, in 'exceptional circumstances,'
10 a district court may appoint counsel for indigent civil
11 litigants. . . ." Id. When deciding whether "exceptional
12 circumstances exist, a district court must evaluate both the
13 likelihood of success on the merits and the ability of the [litigant]
14 to articulate his claims pro se in light of the complexity of the
15 legal issues involved." Id. (citation and quotation marks omitted).
16 Exceptional circumstances do not exist: Kaczynski's motion lacks
17 merit and his *pro se* filings reveal he possesses the ability to
18 articulate his claims. Therefore, Kaczynski's present attorney's
19 status as appointed counsel under § 1915 is terminated as of the date
20 on which this Order is served.

21 CONCLUSION

22 For the reasons stated, Kaczynski's motion is denied. Since
23 equity does not favor returning the property to Kaczynski and he lacks
24 standing to dictate what the government does with the property, this
25

26 ⁴ In fact, Kaczynski has demonstrated his ability to
27 communicate his ideas. Kaczynski's "Affidavit in Support of Motion
28 For Permission to Appeal In Forma Pauperis" filed August 1, 2003,
indicates he has sent documents to the University of Michigan's
library "from time to time." (Aff. at 4.)

1 matter is dismissed. Therefore, judgment is entered in favor of the
2 United States.

3 IT IS SO ORDERED.

4 DATED: March 5, 2004
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GARLAND E. BURRELL, JR.
7 UNITED STATES DISTRICT JUDGE
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