IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 96-CR-68

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TERRY LYNN NICHOLS,

Defendant.

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REPORTER'S TRANSCRIPT
(Hearing on Motions)

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Proceedings before the HONORABLE RICHARD P. MATSCH, Judge, United States District Court for the District of Colorado, commencing at 2:01 p.m., on the 13th day of August, 1997, in Courtroom C-204, United States Courthouse, Denver, Colorado.

Proceeding Recorded by Mechanical Stenography, Transcription Produced via Computer by Paul Zuckerman, 1929 Stout Street, P.O. Box 3563, Denver, Colorado, 80294, (303) 629-9285

APPEARANCES

PATRICK M. RYAN, United States Attorney for the Western District of Oklahoma, 210 West Park Avenue, Suite 400, Oklahoma City, Oklahoma, 73102, appearing for the plaintiff.

LARRY A. MACKEY, SEAN CONNELLY, GEOFFREY S. MEARNS, JAMIE ORENSTEIN, and AITAN GOELMAN, Special Attorneys to the U.S. Attorney General, 1961 Stout Street, Suite 1200, Denver, Colorado, 80294, appearing for the plaintiff.

MICHAEL E. TIGAR, RONALD G. WOODS, REID NEUREITER, and JANE TIGAR, Attorneys at Law, 1120 Lincoln Street, Suite 1308, Denver, Colorado, 80203, appearing for Defendant Nichols.

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13 PROCEEDINGS

14 (In open court at 2:01 p.m.)

15 THE COURT: Be seated, please.

16 We're convened in 96-CR-68, United States against

17 Terry Lynn Nichols, for the purpose of hearing the motion of

18 Mr. Nichols, Renewed Motion to Disqualify Government Lawyers

19 from the Western District of Oklahoma, this matter having been

20 continued from last week.

21 And for the Government, Mr. Mackey?

22 MR. MACKEY: Good afternoon, your Honor. Larry Mackey

23 for the United States. With me is Mr. Sean Connelly and Pat

24 Ryan, who I expect will team together to respond to the

25 disqualification motion. Also with me is James Orenstein, who

1 is prepared to address the prison mail matter, if the Court

2 addresses that this afternoon. In addition, Geof Mearns and

3 Aitan Goelman for the Government.

THE COURT: All right.

And Mr. Tigar?

MR. TIGAR: Good afternoon, your Honor. Michael Tigar. I'm here in court with Terry Lynn Nichols, Ron Woods, Jane Tigar, Reid Neureiter. We have our paralegals, most of whom your Honor has met, and of course our law students. The summer still hasn't quite waned yet, so they're still with us.

THE COURT: All right. Well, who is going to address the motion? Mr. Woods?

MR. WOODS: I will, your Honor.

THE COURT: All right. The record should reflect, of course, that the motion was responded to and that there was a supplement -- supplemental submission submitted, and indeed there was also an additional declaration from -- no. That's in the correspondence matter.

You do want to hear that -- motion to suppress matter, too, today?

MR. TIGAR: Yes, your Honor. We're prepared, and Mr. Manspeaker had said your Honor was as well.

THE COURT: I'm prepared.

Okay. Mr. Woods?

MR. WOODS: Thank you, your Honor.

DEFENDANT'S ARGUMENT ON MOTION TO DISQUALIFY

MR. WOODS: May it please the Court, Mr. Mackey, Mr. Ryan. First, your Honor, I wanted to address the Government's response to this was an ad hominem or a personal attack on Mr. Ryan. It is not a personal attack on Mr. Ryan. From the day I met Mr. Ryan with Mr. Tigar and we met with him in his office with Donna Bucella on May 24, '95, Mr. Ryan has been a perfect gentleman and a perfect professional in his limited dealings with us on this case. He is an excellent trial lawyer, as was exhibited in the McVeigh trial through voir dire, through presentation of witnesses, and through his opening statement on the penalty stage. It is in no way a personal attack on Mr. Ryan. However, Mr. Ryan becomes

emotional in front of a jury on this case, your Honor; and when he does that, it impacts the right of Terry Lynn Nichols to receive a fair trial.

We feel that because of Mr. Ryan's emotion and his personal involvement in this case, his emotional involvement in this case, he should recuse himself; however, he has not recused himself.

I would point out others in like situation. The two lawyers that were initially appointed to represent Mr. McVeigh and who early on withdrew from the case stated that "I just don't see how any lawyer in Oklahoma City can be objective about anything in this case."

"I can't imagine there is a judge or lawyer in town who could be sure of approaching this case dispassionately."

That sums up our feelings about Mr. Ryan and that office, the U.S. Attorney's office in Oklahoma City.

We feel
that they are too emotionally involved in this case and that they should recuse themselves, but they haven't.

The next step that should be taken if he won't recuse himself is that the Attorney General should remove him from the case. The Attorney General -- if the Court recalls the testimony of Donna Bucella in the June 26 hearing, the Attorney General sent Donna Bucella here on April 20, the day after the bombing; and she stated under oath that she was here because of the deaths in the family of employees of the U.S. Attorney's office. We have been informed by the Government that the deaths consist of a paralegal who lost her husband, a HUD employee; another paralegal who lost her grandchild in the day-care center, and an assistant U.S. attorney who had a child in the day-care center that was injured. We've also been informed recently by letter, as the Court has, of another involvement that we feel is material to this hearing.

That's what the Attorney General knows. That's what

she knew beginning the day after the bombing, and she did the right thing. She sent Merrick Garland here, who is the principal Associate Deputy Attorney General, who early on started signing pleadings as the lead lawyer and who on May 18,

1995, handled the preliminary hearing against Mr. Tigar representing Mr. Nichols. They knew that they needed to send someone here from Washington because of the damage, because of the emotional involvement of this office.

She then, according to public record and public information, launched a search amongst all of the 94 U.S. Attorneys' offices in the country to find the very best prosecutors she could to come in and prosecute this case. And she did. She found Mr. Hartzler, she found Mr. Mackey and Sean Connelly, who we began to deal with and negotiate with on this case in May of 1995. And we have dealt with them on a professional, dispassionate basis from that very day in May,

'95. And I would point out that during the course of the trial that those individuals did not show emotion or did not cry, did not visibly react in front of the jury as they presented their case dispassionately, which is the obligation of a prosecutor to do.

The Attorney General did all the right things to a certain point but then neglected to remove the U.S. Attorney's office from Oklahoma City from this case.

Now, U.S. Attorneys are an independent lot. They feel that their presidential appointment is just as significant as others, including the Attorney General; and indeed, the U.S. Attorneys look upon their role, as they came along way before the Attorney General did, your Honor, when the Constitution was

drafted and the Article III judges were laid out to handle cases involving the United States where the United States is a

party. Congress passed the Judiciary Act in 1789, creating the office of the U.S. Attorneys as an independent office representing the United States in that district. George Washington appointed John Marshall as one of the 13 U.S. Attorneys that year.

The Attorney General was not created until 1870, when the Department of Justice was created and the U.S. Attorneys went under the supervision of the Department of Justice in 1870.

The -- there is great sensitivity between the U.S. Attorneys and the Attorney General, and the Attorney General usually gives great deference to what a U.S. Attorney wants to do; but there comes a point in time when the Attorney General has to remove an office from a case. It's been done before on a number of occasions, and this is an occasion where it should have been done.

The Attorney General knows of the personal involvement of the people in that office. They know of the deaths in the

family and they know of the death recently. And that is just cause under the case law, under the Code of Fed -- Code of Federal Regulations and under the U.S. Attorneys' manual to recuse a U.S. Attorney when they have a personal interest in the case, and we feel that's where we are right now, your

Honor.

Mr. Ryan has exhibited an inability to control his emotions both in the change of venue hearing in Oklahoma City when he cried to this court in begging the Court to leave the case in Oklahoma and numerous times in the McVeigh trial where he cried in front of the jury. And we've pointed out the case law where that is impermissible and has an effect of being a witness. In essence, you are attaining witness veracity when you show your personal involvement and your knowledge of the case.

Mr. Ryan repeatedly told the jury that he was the U.S. Attorney from Oklahoma City and that his office is three blocks from the bombing. The jury knew his personal involvement, and the jury watched he and Ms. Behenna as they sat next to the jury rail, crying when other people presented evidence and when they presented evidence.

We feel that the Attorney General should remove the U.S. Attorney, but the Attorney General has not shown that courage as a pattern in this case. Initially, when we moved to recuse Judge Alley from this case, the Attorney General insisted that the Government oppose that. And the Tenth Circuit had the courage to speak out both against Judge Alley, who filed a brief arguing he should stay on the case, and the Government, who filed a brief arguing that Judge Alley to stay on the case.

The Tenth Circuit spoke very plainly to that

by stating, "We have also balanced the possible questioning of impartiality by a reasonable person against the relative ease of replacing Judge Alley with an available judge from a very large pool of judges outside the state of Oklahoma."

They sent the clearest message they could have to the Department of Justice: Get this case out of Oklahoma, get it outside of Oklahoma prosecutors, and go forward with it. Yet the Government opposed that recusal of the initial judge, and then we filed a change of venue.

The Government opposed the change of venue. And it was interesting to note who handled that change of venue. The outside prosecutors brought in by the Department did not handle it; it was Mr. Ryan. It is my theory that the outside prosecutors wanted to try that case in Lawton, Oklahoma, about as much as we did. But nonetheless, Mr. Ryan was the one who argued that case at the insistence of the Attorney General, who wanted to keep it in Oklahoma.

This court had the courage to rule that a fair

trial

could not be obtained in the state of Oklahoma and moved it to

where we are now, in Denver.

The next important issue that came up in this case was

severance, and the Attorney General insisted that the

Government oppose severance in this case. This court heard

evidence from Judge Charles Campbell from the State of Texas,

which, it's common knowledge, has more people on death row than

a number of states combined below them. But even in that

state, the prosecutors know it's not fair to try two people

together when you're seeking the death penalty because of the

spillover; yet the Attorney General wanted the Government to go

forward and oppose severance. This court again had the courage

to step up and say no, these cases have to be tried separately

to receive a fair trial.

We are asking the Court again to step up and oppose

the Government in this. We feel that Mr. Ryan's emotion, as is exhibited in this case, is not fair to the defendant on trial when it gets in front of a jury.

The Government has told us, "Well, we've cured that problem now. It's not going to happen the third time." Your Honor, I've touched a hot plate once and been burned. I've touched a hot plate twice and been burned. If I do it a third time, then I'm very foolish; and the mere fact they say it's not going to happen again after it happened in two separate occasions over a year and a half apart, we feel, shows that Mr. Ryan will do that again in front of the jury that's picked to try Mr. Nichols because of his emotional involvement.

And I would like to -- not only did Mr. Ryan cry during the trial to show his emotional involvement, but I would like to show the Court as a demonstrative exhibit a newspaper photograph that was in the local Denver Post the day after the

death penalty verdict was rendered. The headlines on the paper are "Death for McVeigh." This was a special edition set aside for the verdict. And I would like to show the Court the photograph of prosecutors who were dispassionate and what their reaction was to the verdict, if I can get somebody --

THE COURTROOM DEPUTY: It's on.

MR. WOODS: Your Honor, this is a photograph of professional, dispassionate prosecutors. There is Mr. Defenger -- Defenbaugh, rather, the lead agent, and several other agents, Mr. Mendeloff and Mr. Hartzler. Those are people reacting to a death penalty verdict. These are photos coming out of the courtroom, out of the courthouse.

This is Mr. Burr, one of Mr. McVeigh's lawyers.

And then lastly, this is the reaction of Mr. Ryan, who not only showed emotion during the trial of sorrow and crying, but on obtaining the verdict of death, this is the gleeful reaction of Mr. Ryan.

Your Honor, I tried a number of death penalty cases as a state prosecutor, and I supervised a number of death penalty cases as a state prosecutor. And I have never seen a prosecutor cry during the presentation of the evidence, and I've never seen a prosecutor react with emotional glee upon obtaining a verdict of death. And if they did so, it would have been judged that they were not suitable for trying the cases. It would not have been a criticism of them, but I would

have never let another person -- a person of that emotional involvement try another death penalty case; and we're asking the Court to disqualify Mr. Ryan and that office from this case.

THE COURT: You mentioned, Mr. Woods, a recent event there, and I did receive just a little while ago a letter from Mr. Mackey indicating that you have a copy as well.

MR. WOODS: Yes, your Honor, I received a copy.

THE COURT: Concerning what is known with respect to a recent event there and asking that it be considered under seal, indicating that -- well, on its face, it would not appear to relate to this motion, but you mention that you think it does.

MR. WOODS: Yes, your Honor.

THE COURT: Obviously, there are things in here that would invade the privacy interests of people not here.

MR. WOODS: Yes, your Honor. I do not want to discuss it in public because of the privacy interests of the family members of that individual, but we do have an argument as to certain points in that letter we feel are directly relevant to this hearing.

THE COURT: Is there a way to make the argument by indirection, or --

MR. WOODS: No, your Honor. I need to refer to it to point out to the Court, and I would like to do it in chambers, or however the Court desires; but I feel that it is directly

relevant to this matter.

THE COURT: Well, I'll ask what the Government response to that is as a part of their response.

MR. WOODS: Thank you.

THE COURT: I do have it in mind. I want the record to reflect that I have it in mind.

PLAINTIFF'S ARGUMENT ON MOTION TO DISQUALIFY

MR. CONNELLY: Good afternoon, your Honor.

As to the Court's last question, our position is that we would be uncomfortable with any discussion of that. We don't think it's related but certainly no discussion of that in court. We'd be very uncomfortable with it. I think I agree with Mr. Woods that I'm not sure how we could indirectly discuss that without subverting the process.

THE COURT: It may be that the record has to be completed in camera.

MR. CONNELLY: Turning, your Honor, then, if I may, to the really two arguments that I understand Mr. Woods to

be

making, the two different grounds for disqualification, the first argument that I think is made in the brief and that I heard made expressly by Mr. Woods orally today is that any lawyer in Oklahoma City must be disqualified because the crime had such a grievous impact on the community there. We would submit, your Honor, that that argument, that facial challenge to any lawyer in Oklahoma City participating is at odds with

the Congressional judgment of 28 U.S.C. Section 547 that says that normally crimes are presumptively prosecuted by the U.S. Attorney's office for the crime in which -- for the district in which the crime occurred.

Obviously, that Congressional judgment has to give way if the circumstances are such that, in the words of separate federal statutes, the U.S. Attorney or any other prosecutor has

a, quote, "personal interest" in the case. We would submit that there is no -- been no showing and there is not in fact a case that Mr. Ryan has a personal interest in this case as distinct from the professional interest that all of us at this table share in seeing that justice is done in the case.

THE COURT: Well, do you think personal interest is limited to financial interest?

MR. CONNELLY: No, I'm not saying that, your Honor. I don't believe that at all. There is one statute, Section 208, requires disqualification of all executive branch employees if there is a financial interest. That clearly doesn't apply. Section 528 requires disqualification if there is a, quote, "personal interest."

THE COURT: Like a family member -- I believe there is a case about a family member being a victim.

MR. CONNELLY: Right.

THE COURT: What is being urged here is that perhaps unknowingly, Mr. -- to him -- Mr. Ryan is himself a victim. I

think that's the argument.

MR. CONNELLY: I understand that there was really a two-prong charge. First of all, apart from his conduct and alleged conduct during the McVeigh trial, that everybody in Oklahoma City is necessarily a victim such that no lawyer in Oklahoma City --

THE COURT: That isn't being argued here. That was attributed to the first appointee, first lawyer appointed; and I think it was made to a magistrate judge there.

MR. CONNELLY: I had also understood -- and maybe I'm wrong -- that the motion required disqualification of attorneys in the U.S. Attorney's office; and if the Court doesn't -- we feel that's without foundation.

THE COURT: Well, that was in the motion, yes. But the response is there is only one person from the office; and that is the United States Attorney from the Western District of

Oklahoma, Mr. Ryan, who intends to participate.

MR. CONNELLY: That is correct. And in that respect, there are a couple of facts I'd like to highlight on the record. First, Mr. Ryan at the time of this offense was not the U.S. Attorney for the district. I believe he had some understanding that his nomination would be forwarded; but in fact, I'm not sure and I don't believe he had even been nominated by that time; but after the bombing, in part because of the fact that there was no U.S. Attorney in place in the

office -- and that was one of the reasons why Merrick Garland had to come down and basically take charge of the case, because there was no appointed U.S. Attorney there. It was an interim U.S. Attorney. The past one had just left for the bench, so there was no U.S. Attorney in place; and Mr. Ryan understood that he would be nominated, but he had not in fact assumed the

position of U.S. Attorney at that point.

At the time of the bombing, Mr. Ryan was some 15 miles from downtown Oklahoma City. Mr. Woods notes correctly that in the office at that time two paralegals lost loved ones in the bombing. One paralegal lost her husband and another paralegal lost her grandchild. Mr. Ryan did not know either of these paralegals at the time; so I think on its face that there is no personal interest, and therefore I'd like to turn to the point of Mr. Ryan's alleged conduct during the McVeigh trial.

The way it was represented by the defense in the papers and again today -- in the court papers and again today in the argument suggests that this court really lost control of Mr. Ryan and that Mr. Ryan was literally sobbing -- that's the word that was used in the papers, "sobbing" -- throughout the trial; the Court repeatedly had to admonish him, and that he was sobbing.

I looked up in Webster's what the definition of "sobbing" is, and sobbing is defined as weeping aloud with

convulsive gasping. I think there is no credible and good

faith factual allegation that Mr. Ryan ever sobbed in the case, much less did he ever sob after repeated admonitions from the Court.

I think the genesis of this claim is something that happened on May 7, 1997, during the examination of a witness, Mr. Martin, when Mr. Ryan's voice became emotional. It was noted by the defense at that time, and the Court noted it as well; and then on May 10, the Court said, "We must avoid any emotion. It's understandable. I understand that there would be emotion here, but it must be avoided by all at counsel table."

So the Court recognized the case was unavoidably emotional for everyone involved, and I include in that the spectators, I include the journalists, and I include, in fact,

the defense counsel, all of whom at times during this trial had the experience of their eyes welling up or emotion coming in. This court ensured that the trial was conducted in a fair manner by which the jury fairly decided not only guilt or innocence but also the appropriate punishment of Mr. McVeigh. The Court has so held in its recent order denying the new trial.

We would take strong issue with any argument that Mr. Ryan's conduct was, as portrayed by the defense in their papers, sobbing, and, today, crying numerous times after court admonitions. We just think that was not the case, and the

Court obviously doesn't need to hear a lot of argument on that, because the Court is in the best position of anyone to know what, in fact, happened. The Court, to be sure, did take strong preventive measures and repeated several times

the

admonition to all counsel to be poker-faced, I think was the

Court's expression at one time, and other times simply to avoid

emotion as best can be happened (sic); and I think that the sum

and substance of the McVeigh trial was a fair trial in which

emotion was kept to the minimum.

I think in this regard it's important to point out

that while the defense seizes on an emotional questioning of

one particular witness, Mr. Ryan questioned some 35 witnesses.

Mr. Ryan presented, as Mr. Woods acknowledged today, the

closing argument during the penalty phase, the most emotional

part of this case and the most emotional statement, I would

say, of the entire case. Mr. Ryan presented over an hour of

opening statement and in an entirely professional manner that

no one has ever challenged.

So I think, your Honor, that the issue of whether

Mr. Ryan has exhibited a personal interest is one that this

court is uniquely well situated to decide, and we would ask the

Court to decide that in fact Mr. Ryan acted entirely professionally and can be trusted again to act entirely professionally in this trial.

I would like to make -- I know Mr. Woods says that he

didn't intend it to be personal, but I think there have been a couple of unfair shots taken at Mr. Ryan in this proceeding, and I think one of them is this picture in The Denver Post paper. It's a picture of Mr. Ryan walking out of court with his daughter, and what happened at that time and what was said could have been anything. I mean, who knows what was said; but I think more telling than the picture itself, a snapshot when we've all walked by the press and somebody makes a comment of some kind, especially if you have a family member nearby or anything -- more telling than the picture is the comment that was attributed to Mr. Ryan in that paper and the comment that

Mr. Woods didn't bother to read into the record. The paper reads, "Patrick Ryan, a U.S. Attorney in Oklahoma City and key member of the prosecution team, said, 'I would say to the people of America that this is not really a time for exhilaration. Personally, I'm going to reflect on the loss of lives and broken dreams of people in Oklahoma.' Ryan said, 'I'd like to thank the people of Colorado for their hospitality and their generosity.'" It's the same type of professional comment that Mr. Hartzler made in that same -- in that same article.

So I think, your Honor, the question really boils down to whether in fact the conduct described by the defense team in challenging Mr. Ryan was in fact the conduct that this court saw. We don't believe it was, and for that reason we would ask

the Court to deny the motion to disqualify Mr. Ryan, just as it

denied the motion to disqualify the Attorney General, the Deputy Attorney General, Mr. Mackey, and several other attorneys that had been lodged by the Nichols defense. We think that the challenges to prosecutors in this case reflect a misunderstanding of the role of a prosecutor as compared to a judge of this court. In its Nichols vs. Ryan opinion which denied the motion to disqualify the Attorney General and Deputy Attorney General and indeed a motion to disqualify Mr. Garland, who Mr. Woods now says was the appropriate prosecutor, this court said there is a difference between a prosecutor and a judge. And the Court was correct: Prosecutors are entitled to strike hard blows but fair ones. And we don't think that Mr. Ryan's behavior in any way was unfair, and we submit that the Court took adequate and complete steps to ensure that Mr. McVeigh received a scrupulously fair trial and that Mr. Nichols would receive that same trial.

If the Court has any questions of me, I'd be happy to address them. Mr. Ryan has indicated that he'd like to make a

brief statement or respond to any of the Court's concerns as well.

THE COURT: All right. Mr. Ryan, certainly you're welcome to respond to this.

MR. RYAN: Thank you, your Honor. It's not my intention to make an argument at this time. I wanted to

apologize to the Court for my inability to come to Denver last Wednesday when the Court originally set this matter.

THE COURT: No apology is necessary. We understood the circumstances as presented by other counsel.

MR. RYAN: I don't particularly care to argue the facts of what occurred during the trial. As Mr. Connelly said, your Honor is certainly qualified to assess the conduct of all counsel in that matter.

I would say, your Honor, that the two years prior to the McVeigh trial was an exceedingly difficult time for me. I

was charged with the responsibility to ensure that the victims of this crime's needs were met.

THE COURT: When did you become the United States Attorney in the Western District of Oklahoma?

MR. RYAN: May 9, your Honor, about three weeks after the bombing.

THE COURT: May 9.

MR. RYAN: And I made it my personal responsibility to ensure that the Attorney General guidelines with respect to the victims were met. I took a personal interest in ensuring that the victims were well informed of the proceedings.

THE COURT: And you appointed Lynn Anderson --

MR. RYAN: I did your Honor.

THE COURT: -- to the responsibility for dealing with the victims as required by the Congressional mandate?

MR. RYAN: I did, your Honor. But I also --

THE COURT: And did you essentially separate yourself from that, then?

MR. RYAN: No. I mean, I separated myself in the sense that Lynn -- that was Lynn's responsibility to do certain things with respect to the victims to ensure that their needs were met; that the law was complied with; that their inquiries were responded to, but in connection with my position as the United States Attorney and given the magnitude of this crime, I felt that when people wanted to see the United States Attorney and talk about the facts of this case that it was my obligation to meet with them.

THE COURT: And I remember that you did on occasion speak, as I believe it came up once in a motion that you had had a meeting and said something that was objected to.

MR. RYAN: That's correct, your Honor. I met with them on a group basis on several occasions; but perhaps more significantly, I met with them individually on many, many occasions. And I would not deny the fact that there was a certain emotional toll that was extracted from me in connection

with those many meetings and the performance of my obligations,

what I felt my obligations were.

I felt -- in retrospect, I feel like my time was well

expended. I didn't have the opportunity to perform the

traditional role of a United States Attorney because of the

extraordinary circumstances that existed. And as a result of

all of that effort, I felt it was important for me to partake

and participate in the McVeigh trial.

Circumstances have changed somewhat due to the recent

event and other factors. I feel that I'm going to need to

limit my participation in some fashion in the second case, and

I need to discuss that with Mr. Mackey. Those considerations

are unrelated in any way to this current motion, but I do feel

that I need to spend additional time in my office in the wake

of what's occurred, and I intend to do that.

THE COURT: Do you anticipate, with the Court's

permission, of course, being away from this trial and present at other times?

MR. RYAN: Yes, your Honor. That would be my thought. But again, that's something that Mr. Mackey and I have not explored; and one of the things I intend to do while I'm in Denver this week is to discuss that with him and try to reach some resolution.

THE COURT: I don't want to intrude into matters that should not be public or even known to the Court with respect to the organization of the prosecution team and the like, but am I to understand that decisions with respect to strategy and tactics and some other aspects of the presentation of the Government's case here will be made by people other than you?

MR. RYAN: I think that's true, your Honor. It's not

to say that --

THE COURT: -- you won't participate.

MR. RYAN: -- that I'm not consulted in matters, as I am from time to time. Mr. Mackey will call and ask my judgment and I certainly offer it, but I have certainly given some thought to a limited -- more limited role in keeping with what I regard as my responsibility within my district.

I do feel that there was, certainly with respect to my examination of Captain Lawrence Martin -- I recognize that my voice quivered, and I stopped talking for some 10 seconds or so to try to regain control. There was no intentional effort to evoke any personal sympathy on the part of the jury.

All I can tell your Honor is that, as an officer of the Court, I understand my duties and responsibilities, I understand the Code of Professional Responsibility. I will do my best in the upcoming trial of Mr. Nichols should the Court permit my participation, and I'm here principally to answer any questions that the Court wishes to address to me; or if your Honor permits the defense to address questions to me, I'll

respond to their questions.

THE COURT: Well, I suppose the question is whether, all things considered, as they say, you believe that you can participate in the trial of Terry Nichols -- and I'm not commenting on the past trial -- with the necessary detachment and professionalism that is required of a trial advocate.

MR. RYAN: I do, your Honor; but I won't pretend to tell your Honor that there won't be times in trial that will be difficult, because there will be. All I can do is promise to your Honor to do my utmost to maintain the proper decorum in the courtroom. I recognize that as the obligation of all of us, and I intend to do that.

THE COURT: All right. Thank you, Mr. Ryan.

MR. RYAN: Yes, your Honor.

THE COURT: Mr. Woods, you have some additional --

MR. WOODS: Yes, your Honor.

THE COURT: Or do you have any question you want me to put to Mr. Ryan on your behalf?

DEFENDANT'S REBUTTAL ARGUMENT ON MOTION TO DISQUALIFY

MR. WOODS: Your Honor, Mr. Ryan related that he became U.S. Attorney on May 9, 1995. I assume that he just didn't get notified that day that he was going to be U.S. Attorney. He got it from his desk at Crowe & Dunlevy and walked across the street and became U.S. Attorney. He was notified well in advance of May 9, 1995, that he was going to be U.S. Attorney. He took office and actually sat in the chair and supervised the office on May 9, 1995; but he knew well before then that he was going to be the U.S. Attorney.

THE COURT: Well, perhaps the question that you want me to ask is when did you begin, Mr. Ryan, to prepare to undertake the role. I mean, it has happened that presidents

have named people and the Senate has disagreed, so --

MR. RYAN: Your Honor, if I may --

THE COURT: Not that that was ever a question in your case.

MR. RYAN: Well, I don't know. There was a Republican majority in the United States Senate. I had been notified prior to the bombing that Congressman Brewster, the only Democratic congressman in the state of Oklahoma -- we had no Democratic senator -- intended to nominate me to the President, and that was the state of my knowledge on April 19. In terms of the appointment by the President and the confirmation by the Senate, all of that occurred after the bombing.

THE COURT: All right.

MR. WOODS: Thank you, your Honor.

Your Honor, Mr. Connelly gave a quote from Berger vs. U.S. that the prosecutor is entitled to strike hard blows but they must be fair blows. Well, Berger goes on to say that the attorney for the Government is not a representative of the normal party. He represents the sovereign, and the

sovereign

has an obligation to govern impartially.

And what all of this motion goes toward is a conflict

of interest, your Honor. The crying and the emotion is

evidence of the conflict of interest; but once it is shown that

a person has a conflict of interest because of his emotional

involvement in the case, then the appearance of partiality is

lost. And that's what the cases speak to; that not only must

there be fairness in administering the criminal justice system,

but there must be an appearance of administering it. And when

a person has a conflict, as has been exhibited in this case --

and even if he weren't exhibiting it by crying, your Honor, the

facts that happened within his own office, the people that

are -- have family members killed and injured in the new

incident -- the case law speaks to that that those people

should be disqualified, your Honor.

Now, as to the letter, I think what I can do is just refer the Court to a paragraph --

THE COURT: Now, in those cases it's my understanding of those cases from my reading of them that in those situations we are talking about prosecutors who had the full discretion that prosecutors normally have, the United States Attorney normally has; that is, who is the target of the investigation, what methodology is used to conduct the investigation, what should be presented to a grand jury, what charges should be submitted to the grand jury, who should be called as witnesses, whether there should be -- all of those things that go together to make up the full range of discretion that belongs to the United States Attorney. That's why I asked the question here somewhat pointedly as to Mr. Ryan's present role and was assured, of course, that whatever his interest, as you say, may be, it's greatly attenuated by the fact that we have a

prosecution team and that the key decisions are expected to be made by someone other than Mr. Ryan.

MR. WOODS: Well, I understand the Court's statements concerning one of the factors the Court looks at is the prosecutor's exercise of discretion. But I would call the Court's attention to the California case, Conner, where that was just a matter of an assistant in the office had been a victim or a witness to a shooting at the courthouse and then another prosecutor was going to prosecute the case. The one who was the victim wasn't exercising any discretion. There was another prosecutor within the office of 25 prosecutors. The court ruled, "No, that is a conflict. The impartiality is lost. We need to disqualify that whole office."

So that's -- the court looks at the factors that you just mentioned, your Honor, about the prosecutor exercising his discretion. That is clear that if there is a personal interest when he's exercising the discretion, that's improper;

but if

he's not exercising his discretion, he's merely in front of the

jury, he's trying the case, the courts also speak to the

tactics used at trial. Are his tactics affected by what will

be perceived in the public as perhaps an unfair motive? We

feel that it meets that standard, your Honor.

As to whether or not Mr. Ryan is making the decisions

in this case, I assume the Attorney General makes the decisions

and these prosecutors carry them out. It appears to be the way

this has gone from the first day; but Mr. Ryan was the one who

argued -- handled all the evidence, handled the

cross-examination and handled the change of venue motion, so

his role is not de minimus in this case.

We would ask the Court to do the right thing, your

Honor, and disqualify Mr. Ryan. It is not a personal matter,

but we want to ensure our client gets a fair trial. Thank you.

THE COURT: Well, I'll, as I've already indicated, permit the defense to add to this record whatever you wish to with respect to this letter from Mr. Mackey, but . . .

MR. WOODS: Your Honor, if the Court desires, I can point out certain paragraphs that we would ask the Court to pay special heed to --

THE COURT: All right.

MR. WOODS: -- that we feel directly relates.

THE COURT: Well, that's why I was suggesting that we might indirectly consider it, rather than going nonpublic on it.

I have the letter before me. The paragraphs are not numbered, but the letter is not that long.

MR. WOODS: It's a short letter, your Honor.

I would point out paragraph 4, beginning with "Mr."

THE COURT: Yes.

MR. WOODS: We feel that that is relevant as to the location.

THE COURT: I see. There is an identification later about --

MR. WOODS: About what that location --

THE COURT: The relationship to the events that may be considered here, yes.

MR. WOODS: Yes, your Honor.

THE COURT: All right.

MR. WOODS: And the second page, fourth paragraph again: "At . . ."

THE COURT: Yes.

MR. WOODS: We feel that is relevant, your Honor.

THE COURT: All right.

MR. WOODS: It was a symbol.

THE COURT: I see what it says.

MR. WOODS: Also, the fact of the last sentence of that paragraph.

THE COURT: Yes.

MR. WOODS: And again, as the Court pointed out, the letter goes on to explain in the next-to-the-last paragraph about the location.

THE COURT: Right.

MR. WOODS: And then we feel that the last paragraph is certainly relevant as to the Oklahoma City bombing case reference.

THE COURT: Yes.

Perhaps I could ask a couple of questions of Mr. Ryan here, again without reaching the privacy interests of those who are not present.

Of course, you're directly familiar with what this letter is talking about.

MR. RYAN: Yes, your Honor. I helped Mr. Mackey compose it.

THE COURT: All right. And I assumed the source of the information that Mr. Mackey is relating here really is from you.

MR. RYAN: Yes, your Honor.

THE COURT: Do you have a copy there?

MR. RYAN: Yes, your Honor.

THE COURT: With respect to the last paragraph, let me just ask you whether the next-to-the-last sentence of the last paragraph refers to some discussion you may have had with your assistant, or whether there was a request for participation, something like that.

MR. RYAN: Your Honor, that was a widely held feeling throughout our office. This was not expressed personally to me. When I was helping Mr. Mackey compose this letter, I was trying to give your Honor information, much of which was hearsay.

THE COURT: Yeah.

MR. RYAN: And this was information other people have

told me was expressed.

THE COURT: All right. But this was not something --

well, let me ask it a different way: Was there a time when you and this person conferred to discuss whether or not he

or she
would be a part of this prosecution?
MR. RYAN: No, your Honor. No, your Honor.
THE COURT: And I suppose the other question is, is
there anything in this recent event and your responsibilities
in connection with it that you believe now in any way
influences you in your role and expected role in this
forthcoming trial?
MR. RYAN: Only to the extent, your Honor, it makes me
feel that perhaps I had more of a duty within my district than
I felt prior to this; but in terms of adding --
THE COURT: This is one of the reasons for you to say
that you may be required to be back in Oklahoma City at times?
MR. RYAN: That's exactly right, your Honor. I mean,
this was an emotional event for everyone in our office,
including me. I don't want to in any way mislead the Court.
It was a very trying day --
THE COURT: Yes.
MR. RYAN: -- for all of us, but I don't feel that it
adds anything to the already difficult circumstances that our

office has endured in the past two years.

THE COURT: All right. Thank you.

RULING ON MOTION TO DISQUALIFY

THE COURT: Well, I'm prepared to rule on this matter, then. And it's a difficult matter, of course, to define, really, the respective roles of everybody.

I think, Mr. Woods, you've pointed out the historical independence of the position of the United States Attorney and the relationship between the United States Attorney and the Attorney General's office, not personnel who may be now incumbent. And the court has to have a concern about the independence of United States Attorneys as well. It's not the role of the court to act as an oversight group or supervise the offices of the United States Attorney. It's not the role of the court to enforce the policies expressed in the United States Attorneys' manual or even, really, to enforce the Rules

of Professional Conduct in the abstract. It is the role of the court to ensure a fair trial for the accused and to be certain that the protections of the Fifth and Sixth Amendment are provided to the accused, including, of course, the right to an impartial jury and fair consideration of the evidence. So I look to really in this case the role of Mr. Ryan as United States Attorney participating as a trial advocate in the -- as one of the trial advocates representing the Government in the forthcoming trial.

I have reviewed Mr. Ryan's conduct in the trial of United States against Timothy McVeigh. It was necessary to do

so in considering Mr. McVeigh's motion for new trial, because the same conduct that is cited here as some evidence of a personal interest on behalf of Mr. Ryan was argued in part there. And of course, I did, in connection with that, review

the transcripts of my conversations with counsel at side bar and in chambers with respect to what occurred and where I did admonish the -- mostly in connection with the May 7 event -- counsel to avoid emotional responses to the testimony being presented.

I denied the motion for new trial of Mr. McVeigh, which I'm sure you're aware of; and therefore, I concluded that nothing that Mr. Ryan or others did warranted -- there were motions for mistrial in the course of the trial --

MR. WOODS: Yes, your Honor.

THE COURT: -- warranted the granting of a mistrial or in retrospect constituted such conduct as would warrant a new trial.

Now, that's not related to where we are here. These are separate trials; and of course, we're starting anew with preparing for Mr. Nichols' trial.

Considering the responses that Mr. Ryan has made here this afternoon as to what his anticipated role is, I -- you

know, I'm not going to disqualify him. I don't think that the evidence shows a personal animosity or a hostility or some -- of course, no conduct that approaches the Berger case or some

of these other cases. And everybody has been alerted to the concerns expressed by Mr. Nichols' counsel and will be aware of them as the case progresses in jury selection and the trial of Mr. Nichols' case; so we're forewarned. Counsel for the Government is forewarned. Looking at this thing, then, entirely prospectively, I expect to be certain that nothing will happen that will prejudice the rights of Mr. Nichols.

So the motion is denied.

MR. WOODS: Your Honor, I appreciate that. May we have an understanding that Mr. Ryan may not introduce himself in voir dire and to the jury as the U.S. Attorney from Oklahoma, because that does give the personal interest when he does show emotion that the jury latches on right away.

THE COURT: Well, we'll discuss that. I will see what the Government says about that. My recollection of what happened in the McVeigh trial was everybody was introducing themselves and apologizing for Texas accents and things of that nature, so we had a lot of people saying where they were from. But we'll consider that with counsel.

MR. WOODS: Thank you, your Honor.

THE COURT: Now, do you want to go to the matter of the motion to suppress? Mr. Tigar?

MR. TIGAR: Yes, your Honor.

DEFENDANT'S ARGUMENT ON MOTION TO SUPPRESS

MR. TIGAR: If your Honor please, this is a motion

with respect to the interception and copying of Mr. Nichols' mail at the Federal Correctional Institution in El Reno and here at the FCI in Englewood.

THE COURT: Now, this is where we -- I was thinking

ahead to where we have this supplemental affirmation of Mark White concerning the subject matter.

MR. TIGAR: Yes, your Honor.

THE COURT: Do you have that?

MR. TIGAR: Yes, your Honor. We've received Agent White's supplemental affirmation.

The matter has been briefed. We filed a brief with the exhibits, the exhibits being under seal. The Government filed a response in which it did refer to some of the sealed matter, and then it filed that supplement.

And I think the most useful way to approach this is to take a look at the Government's response and try to point out to the Court the ways in which that response is very wide of the facts. The Government takes the position that its interception of the mail was sort of authorized by an order entered by Judge Alley on November 1, 1996. The Government says at page 5 that until this court ruled on November 20 --

excuse me. Mistaken date. November 1, 1995.

Now, Judge Alley's order --

THE COURT: I looked at a copy of it, but do

you have
it here?

MR. TIGAR: Yes, your Honor, I have it. I made a note at the top in my own handwriting; but other than that, I've got the whole order right here.

Let me put it on the screen, see if I can figure out how to do this.

There it is, your Honor. This is an order directing the Bureau of Prisons to produce records and recordings.

THE COURT: Yes.

MR. TIGAR: That order entered, as the Court can see, November 1, 1995, is what the Government said it obeyed, until November 20, 1996, when this court rescinded Judge Alley's order and ruled that the BOP should no longer give access to Nichols' prison social telephone conversations to the FBI and prosecution.

Now, of course, the order of November 1, 1995,

didn't

16 give anybody any authority to do anything about prison mail.

17 Nonetheless, the Government interprets it in the spirit of your

18 Honor's November 20, 1996 order, to apply equally to prison

19 mail; i.e., that they were going to stop looking at it.

20 So what one can infer from this is that on November 1,

21 1995, the Government interpreted an order that authorized

22 making copies of telephone calls to give it authorization to

23 copy mail.

24 The trouble with that analysis is that paragraph 3 of

25 the order says that within five days of receipt, the FBI should

1 provide the same records and recordings to defense counsel,

2 which they never did with respect to the mail. So Judge

3 Alley's order cannot have been any authorization to the FBI to

4 do anything.

5 THE COURT: We begin, don't we, with the authority of

the Bureau of Prisons to -- under the Code of Federal Regulations -- to open and read mail?

MR. TIGAR: We begin, your Honor, with the Code of Federal Regulations that sharply limits the authority of the Bureau of Prisons to open and read mail.

THE COURT: The beginning is it has authority to do so and to notify those in its custody that it's doing so. And in the Government's response, there is an identification here of a document acknowledging that that is so; that the mail will be opened and read for the purpose of security of the institution. I mean, that's the purpose of the C.F.R. regulation. You agree with that, don't you?

MR. TIGAR: I agree with what the Government says, your Honor.

Let's turn, then, to the legal analysis. I'd like to come back to the facts, because as I say, the Government's attempt to invoke these regulations is flawed as a matter of the history of what it actually did.

THE COURT: I know, but it -- I'm trying to

make a

distinction with what the Bureau of Prisons can do for its

purposes and then what happened here, because there is no challenge, is there, to the fact that the Bureau of Prisons' personnel have the authority to look at the mail, incoming and outgoing, of those in its custody for purposes of security of the institution?

MR. TIGAR: No, your Honor, there is no dispute. But let me describe our position about the regulation.

THE COURT: But then what happens here is the FBI gets copies of it.

MR. TIGAR: Well, yes, your Honor.

THE COURT: That's where -- that's where the concern comes --

MR. TIGAR: That's where the problem starts; but, your Honor, our point is that they don't even obey the regulations. They cite a regulation that states that the prosecution

or the

prison officials can impose extra security measures with

respect to particular inmates; that is, that they can be

supervised extra. That general regulation, of course, does not

prevail over the specific regulations that we cite in our

memorandum. As the Supreme Court of the United States has

held, specific language prevails over general.

Turning to the specific language, the rules for

outgoing mail are that the mail may be sealed by the inmate and

sent out unopened and uninspected. It is true that Mr. Nichols

did authorize by his signature -- acknowledged that incoming

mail -- that is, general mail -- could be opened. There is

nothing in the record that indicates that Mr. Nichols was

informed that his outgoing mail was going to be read, inspected

and copied by the FBI. What Mr. May says, your Honor, is that

Mr. Nichols was told that he had to provide his outgoing mail to the guards unsealed.

Now, we reported our conversation with Mr. May when he reported his practice with respect to that; and if we need to have a hearing about it, we can. Whatever Mr. Nichols expected by having his correspondence unsealed, he certainly didn't expect that it was going to be turned over to the FBI for investigative purposes.

We interpret the unsealing is so that the folks can look in there and see if there is any contraband that shouldn't be smuggled out of the prison. We did not interpret the regulations, and the regulations don't subject themselves to an interpretation that even prison officials can read the contents of Mr. Nichols' communications.

Nonetheless, despite the administrative disagreement about the regulations, all of this is, as your Honor suggests, irrelevant with respect to the next step that takes place; that is to say, the turnover to the FBI for investigative purposes.

As to that turnover, the Government has two arguments, one a factual one and the other the legal one. The factual one is that somehow they thought that under Judge Alley's order

they were supposed to or that they could.

Now, the problem with that, of course, is that Judge Alley's order wasn't entered until November 1, '95, and they began reviewing mail in August of '95. Whatever the FBI may be able to do with respect to past facts -- and sometimes they get it right and sometimes wrong -- precognition has never been claimed to be one of their attributes.

THE COURT: What happened with this Judge Alley order? All I have is the -- seen is the order. I didn't see the motion, and I don't know whether -- You were representing Mr. Nichols.

MR. TIGAR: Oh, yes, your Honor. I can give your

Honor the oral history, and Mr. Mackey was around and he can contradict me about that, if he wishes.

The oral history is this: We said, "Are you all listening to his telephone conversations?"

And they said, "Well, the Bureau of Prisons is."

We said, "Well, if you are, we'd like copies of them."

And the Government said, "Oh, no, no, no, no. The Bureau of Prisons is an independent agency. We don't have anything to do with them. If you want copies of those, you have to get an order from Judge Alley, because we don't have any authority," "we" being the prosecutors and the FBI, "to get those things."

Well, we believed that.

Well, Mr. Woods didn't. Mr. Woods said to Mr. Mackey, "Aw, come on, Larry, you know the FBI is getting all that stuff. Don't try to pull my leg here."

Well, Mr. Mackey stuck to his story, and we then went to Judge Alley and got this order that said that we were to get these things.

That's how the order came to be, your Honor, is the Bureau of Prisons was pretending to be kind of a separate government of its own out there in El Reno, and that's how we got it.

Well, of course, the order didn't say anything about giving anything to the FBI, and it turned out, as it happens so often in my life for all the years I've known him, even though he's a prosecutor, Mr. Woods was right about what the FBI was doing. They'd already been out there getting that stuff.

Well, that's what our motion is about. The prison had a policy of turning this over to the FBI; and the FBI's purported justification, as I say, couldn't possibly be the order, nor could it be the regulations, because even under the Government's interpretation of the regulations, this is for prison security purposes, not law enforcement purposes.

The Government gives us a -- then a Fourth Amendment argument, and that Fourth Amendment argument is that there is no expectation of privacy here. And the reason they say there is no expectation of privacy is twofold. First they say that

Mr. Nichols signed that so-called "consent," and then they cite paragraphs from two letters in which Mr. Nichols joked that prison officials were probably reading his mail.

Well, of course, even taking that for what it's worth, that's no more than an authorization for prison officials to read your mail; but I don't know if your Honor has ever done it -- that is to say, joked on the telephone that the FBI is probably listening. I've done it, and I never thought that was authorization for them to listen to my telephone conversations.

THE COURT: I don't know who is listening when I'm on the phone.

MR. TIGAR: Well, your Honor --

THE COURT: Usually, it's not the other party on the phone. I've determined that in the conversation.

MR. TIGAR: Your Honor, I must say that based on my experience that's hard for me to believe.

But passing on to the question before us, the consent doesn't amount to that -- to the consent the Government claims for it. What the Government says is that prison cells -- and the Supreme Court has so held -- have this diminished expectation of privacy; but we're not talking about prison cells, we're talking about mail from a pretrial detainee. The Government then cites a number of cases beginning with Stroud vs. United States, a 1919 Supreme Court case, and two Tenth Circuit cases that follow it. Stroud is a wonderful case.

That's the Birdman of Alcatraz, who was the Birdman of Levenworth apparently before he was the Birdman of Alcatraz;

and he had been in jail on a murder wrap, on a murder conviction, before he was tried. So the Supreme Court said that if you're a convicted murderer, your mail can be subject to security arguments and there is no Fourth Amendment violation; and all the cases the Government cites that follow Stroud say the same thing; that is to say, the convicted person forfeits certain rights with respect to the privacy of correspondence. That's what all of those cases hold. So the Government's Fourth Amendment argument doesn't hold water, either.

The cases that make it are the ones that we talk about, the rights of pretrial detainees.

THE COURT: Well, the basic Government response here is "no harm, no foul" response.

MR. TIGAR: Exactly.

THE COURT: That we didn't do anything with it, so what are you trying to suppress? I guess that's the point at issue; and of course, you filed under seal appropriately copies of that which you received. And as I told you, I think at a

22 scheduling meeting, I wasn't going to read that and I haven't,

23 so I don't know what's in there. But -- and I don't want to

24 know what's in there unless I have to.

25 MR. TIGAR: Let me turn to that, your Honor.

1 THE COURT: The question is what are you really asking

2 me to do?

3 MR. TIGAR: What happened? Let me turn to that, your

4 Honor, because once again the Government's argument falls first

5 by a factual recitation that beggars imagination and second by

6 a misinterpretation of a key Supreme Court case, Alderman

7 against the United States.

8 This is the Government's position: That the mail was

9 simply collected, categorized and filed away; the mail was not

10 being used to advance the investigation or prosecution of this

11 case. That, they say at page 6.

12 Five FBI agents, two clerks, took this mail. They

categorized it. They began doing so in August of 1995, and even after your Honor's order, continued until January of 1997. It is the Government's contention that all of this work -- and by the way, each piece of correspondence -- and we can -- we can open enough to show that. Each piece of correspondence that came through was stamped. And it's true that it didn't go to the FBI Lab. That's the initials of someone, L-A-B; but it was stamped 174A-OC-56120. That is the FBI case number of this case. It is the number that appears on all the investigative documents.

Here's an example: There is that case number, your Honor, FBI file number, and this is another one of these FBI laboratory reports. I just chose that at random. You'll see

that same case number all over the case.

So what the Government wants you to believe without a

hearing -- it might be true, but without a hearing -- is that five FBI agents, two clerks, a file stamp that's identified as Oklahoma City, a diligent investigation in which the mail was categorized and only, quote, "significant mail," was looked at extensively -- that's what Agent White says -- that the FBI spent more than a year doing that at enormous expense to the taxpayers, but it was all a frolic and detour; that it made no sense; that they weren't really doing what FBI agents do; that is, investigate a case. They were just fooling around. They were just categorizing. They were just filing.

THE COURT: Well, Mr. White does refer to several lead opportunities that he says didn't result in anything.

MR. TIGAR: Yes, your Honor.

THE COURT: That they did indeed send out lead sheets or something.

MR. TIGAR: With respect to the McVeigh letters, your Honor, he does make that admission, so that in addition to being implausible, his affidavit is self-contradictory. That's

true.

But the problem, your Honor, is that the Government then says, "Well, we -- There really isn't anything that happened here. You, the defense, have a burden. You have to identify some source of taint in order for you to have the

right to have things go further than they are." And they cite Alderman vs. United States in 394 U.S. And that's what I'd like to turn to now. What are we asking your Honor to do, and what does the law require under these circumstances? Let's take a look at Alderman.

Your Honor may recall that case began in this court. It was Judge Arraj's case. It went to the Supreme Court of the United States. The convictions were vacated and sent back here by the Supreme Court case the Government cites. What had happened there was that business premises of Petitioner Alderisio, who was in the case for having made death

threats to

12 a man named Robert Sunshine, a stock promoter in Denver, had

13 been overheard, bugged, by the Federal Bureau of Investigation.

14 Alderman was a breakthrough case because it held that the

15 Government, when premises are interfered with or when

16 wiretapping takes place, has the obligation to produce all the

17 fruits of its illegal activity. Then the defense has the

18 opportunity to go through those and identify potential sources

19 of taint. It then becomes the Government's ultimate burden --

20 that's the Nardone case which was cited with approval in

21 Alderman -- to purge the evidence of the taint either by

22 showing an independent source or, in the Wong Sun addition to

23 Nardone, to show that the connection between the illegality and

24 the evidence is so attenuated as to dissipate the primary

25 taint.

1 We haven't even got to the point where we have

to

shoulder a burden, your Honor, because all we have, or as

Agent -- all we have are the letters they took and Agent

White's general description of the filing and categorizing

system. In Alderman, when the case came back here, what we had

was -- or what they had -- I wasn't on the case anymore then --

were the FBI Airtels and 302s that had been generated as a

result of the Alderisio bugs. So we were lacking a big piece

of the discovery that we're owed, and we'd like a direction the

Government produce it.

But let me suggest to your Honor based on these

letters where the taint can come from. Although the

prosecutors claim never to have read these things, that claim

is not backed up with affidavits from all the prosecutors, nor

is it inherently credible, given the way in which information

is shared. These prosecutors come to court, and every time

they came to court they've got FBI agents with them. It's the

FBI agents' job to go figure out what to investigate, to tell

the prosecutors where the leads are, and to do what Agent White

describes in his affidavit they do.

In this pile of letters here, your Honor, are a number

of letters to Joshua Nichols from Mr. Nichols. This is

Mr. Nichols talking to his boy. And it's Joshua writing back

to Mr. Nichols. Those letters begin in July of 1995.

Mr. Joshua Nichols is interrogated by an FBI agent and by

Mr. Mackey in a, quote, "substitute," close quote, for the

grand jury on August 4, 1995. Included in this packet, your

Honor, are dozens of letters back and forth between Mr. Nichols

and his wife, Marife, Mr. and Mrs. Nichols having the most

intimate kinds of discussions about things that people can have

under these difficult circumstances. Mrs. Nichols well may be

a witness of the trial of this case, whether there is a

stipulation or not about her testimony. In the Government case

she may very well appear here, and the Government has

an

intense interest in cross-examining her, as we saw at the

suppression hearing, about the most intimate and personal

details of her life and background, not to mention the

continuing contact that the Government had until recently with

Mr. Joshua Nichols through his then lawyer, Mr. Stanley

Hunterton, until Mrs. Lana Padilla got a different lawyer for

Joshua, Dominic Genteel. So the FBI has had plenty of chance

to talk to Mr. Hunterton. Whether they used the letters or

not, I don't know. There is certainly plenty in there, and

they haven't made an accounting of it.

Third, many of these letters, your Honor, are back and

forth between Mr. Nichols and a man named Robert Papovich. Mr.

Papovich is a friend of James Nichols. He lives up in

Michigan. Now, that Michigan group of people is very central

to this case. How central, we don't know until your Honor

rules on the 403/404 motions; and I'm not going to talk about

that in detail because it's under seal. But the Court well knows that Mr. Terry Nichols' living at the James Nichols' farm at a time when Timothy McVeigh was a farmhand there figures in this case, because there is a lot of talk about what they were doing up there at that time. Then there is some dispute in the record about what the Government is going to do about Mr. Nichols' expressing his views about the monetary system.

Now, the monetary system constitutionalist perspective is one that is shared by a number of people in the Thumb of Michigan, and Mr. Papovich is one of those articulate folks that writes about it. He's a part of a group of people that discuss those things, and that's reflected in this correspondence.

Now, in addition to that, your Honor, there is correspondence back and forth between Mr. Terry Nichols and his mother, between Mr. Terry Nichols and his sister. Now, it is beyond belief that if there ever is a penalty phase in this

case, which we don't think there will be -- we think that there is a reasonable doubt here, but we have to get ready. We know that the Government under our discovery agreement, your Honor, is absolutely prohibited -- they don't get our interviews -- interviews with family members. They don't get them. Why? Because that's the agreement. Well, they get the next best thing if they can read the letters.

Moreover, we don't have a discovery agreement,

reciprocal discovery agreement with respect to penalty phase materials. We're not getting theirs, they're not getting ours; but much of this family information and personal information is the very sort of thing that becomes relevant in the penalty phase of this case. So once again, we have the Government mixing in, just like they did when they sent that psychiatrist to Terry Nichols' cell without his counsels' permission very

early in the case. They want to get this personal information. Why? Because it gives them the opportunity to try to fire it back at us or to blunt the effect of our effort to show -- to try to make 12 people, if it ever comes to that, to choose life.

Those, your Honor, are the avenues that an intelligent investigator, not one who says, "I just wasted the Government's money for 12 months," which I don't believe for a minute -- those are the avenues that a trained investigator would use based upon this incursion. And therefore, to come back to where we started, we understand the need for prison security. Yes, I disagree with the Government about the details of these regulations; but as your Honor wisely points out, I don't need to argue that today, because regardless of our disagreements here, this ought never to have happened. What we suggest is that the Government be ordered to make complete discovery about this filing system, categorization, and use what Agent White

talked about and then that we have a hearing at which the two

clerks that he referred to and the FBI agents identified by name, Elizalde, Lawson, and the other in the White affidavit, be called here and we have a hearing and we say, "Did you, or didn't you?" That is what the Alderman case requires, your Honor.

THE COURT: Okay.

Who is addressing this? Mr. Orenstein.

MR. ORENSTEIN: Good afternoon, Judge.

THE COURT: Good afternoon.

PLAINTIFF'S ARGUMENT ON MOTION TO SUPPRESS

MR. ORENSTEIN: Judge, first, I think I should address what I think is a straw man argument here, which is that the Government relied on a future order by Judge Alley regarding prison tapes to start collecting the mail. Obviously, that's not the case. The mail was being collected starting in August. It had nothing to do with Judge Alley's order. What

the

reference to Judge Alley's order and your order later on was

with respect to was the decision to stop doing it. We

interpreted the spirit of your November 20 order broadly to say

that if we shouldn't be getting prison tapes, let's stop

getting prison mail. So it wasn't the basis for starting to

get it, but we interpreted your order to stop.

THE COURT: Well, are you suggesting that the FBI had

any authority to get this mail?

MR. ORENSTEIN: The BOP had the authority to turn it

over to the FBI. The Privacy Act governs what the BOP can do

with this mail, and there is a specific exception under the

Privacy Act. I believe it's Section 552(a), subsection (B)(7),

that allows the BOP or any agency that collects such

information to turn it over to another law enforcement agency.

THE COURT: Only if there is a law enforcement purpose

disclosed, isn't it?

MR. ORENSTEIN: If there is a law enforcement purpose disclosed.

THE COURT: I mean, you can't just put innocent mail over there. It has to be mail that suggests that there is some law enforcement interest.

MR. ORENSTEIN: Right. I think they said for the purpose of investigating the Oklahoma City bombing case, for example. I think that would be the identification of a law enforcement purpose. I don't know how specific under the statute the identification --

THE COURT: Do you have any case authority that goes that far?

MR. ORENSTEIN: Off the top of my head, no, Judge. I can certainly research the issue.

THE COURT: Well, your position really is that you haven't gained anything from it.

MR. ORENSTEIN: That's exactly where I was going next, which is that --

THE COURT: Well, the only way that I can evaluate that position is to find out, isn't it, by having the kind of hearing that Mr. Tigar is suggesting?

MR. ORENSTEIN: No. I actually disagree with that point that you need to have a hearing to find out, because I think under Alderman and the cases we cite in our brief that there is a burden on the defense, who has the information -- they have what mail was turned over and they know -- they know what our case is, they know who our witnesses are, they know what the exhibits are. There may be some very small exceptions, but they essentially know the case; and I think they have an obligation to come forward to the Court and say, "We fear that because of the prison mail's turnover to the FBI that this evidence is tainted," and they haven't done so.

THE COURT: Well, but what they don't know and I don't know is what, for example, in interviewing Josh

Nichols, use
was made of information that was obtained through the reading
of the mail between him and the accused.
MR. ORENSTEIN: I think that's a good example, because
they fear the interview process was tainted. Mr. Mackey
interviewed Joshua Nichols on August 4, 1995. I think the
earliest reference to any collection of mail is August 1, 1995,
and that mail did not include mail between Mr. Nichols and his
son. So again, it -- they have the ability to --
THE COURT: Well, what's the FBI doing with all of

this classification and all of this attention being paid to the
mail? Is that -- are you suggesting that was just an idle
exercise?
MR. ORENSTEIN: It wasn't an idle exercise. It wasn't
a frolic and detour, as Mr. Tigar mentioned. It was a dead
end. It was, as you saw from Mr. -- from Agent White's

affidavit -- there were some occasions, very rare, when the mail presented the possibility of some investigative interest. It was pursued. Nothing came of it, and they --

THE COURT: I think we're entitled to find that out and not have to rely on an affirmation that is then supplemented and the supplement seems to change what's in the original affirmation.

MR. ORENSTEIN: The supplement was -- we realized that there were two small sources of mail in addition to the larger collection from the BOP.

THE COURT: Well, we're going to hold a hearing --

MR. ORENSTEIN: Yes, sir.

THE COURT: -- and find out what was done with this mail. I'm not suggesting that the lawyers here who have said "We haven't seen it or used it" are not to be believed. Neither has the defense team suggested that. But it's another thing as to what all these FBI people were doing with it, and I think that we're entitled to know what they did do with it.

MR. ORENSTEIN: We will prepare the agents and

clerical personnel for that hearing.

THE COURT: And we'll schedule a hearing on it, and then we'll know whether there is anything to be worried about.

MR. TIGAR: Your Honor, and we will -- may I speak from here?

THE COURT: Yes.

MR. TIGAR: We will send to the Government our suggestion as to the materials that ought to be presented at the hearing so that if there is any dispute it can be presented to your Honor in order to make it run efficiently and keep it within the bounds that your Honor provides.

THE COURT: Yes. I would expect there to be some communication between counsel for preparation for the hearing, but it's something that ought to be done soon.

Now, there is another motion outstanding, a Motion for Change of Venue; and there is -- there was a quick response by the Government; and I've reviewed the defense motion

and the
Government's response.
Mr. Tigar, do you wish to address that?
DEFENDANT'S ARGUMENT ON MOTION FOR CHANGE OF VENUE
MR. TIGAR: I can address the legal issues in the venue motion today, your Honor. The Government's quick response contained some material that we would have moved to strike had this been a civil case as impertinent and scandalous, and I don't want to get into --

THE COURT: About San Francisco? Is that it?
MR. TIGAR: That was the place where it was, yes, your Honor. I don't want to make this into a rhetorical free-fire zone, your Honor; and we could file a response to the Government's motion, or I could describe --
THE COURT: I'd rather hear you now, because I think this is a matter that needs to be ruled on very promptly. Obviously, if the motion were to be granted, a great deal has to be done; and you said in your motion that, you know,

you don't want to delay the trial; but logistically, it's almost an impossibility to comply in any other district, whether it's San Francisco or Minneapolis or Des Moines or wherever it is, because not only is there the matter of arrangements logistically but there are things like the closed-circuit television transmission, a lot of other things that require considerable preparation before we began the McVeigh trial.

MR. TIGAR: Let me then address, your Honor, the legal points without waiving our concern that there ought to be a hearing on the motion.

THE COURT: Yes. You know, I understand that and I have indeed read Scott Armstrong's analysis and the materials submitted with it, extensive materials submitted as an array or display of at least illustrative publicity.

MR. TIGAR: If your Honor please, had -- were we to have a hearing, it would be our proposal to do some or all of

the following things subject to your Honor's view. Your Honor may recall -- excuse me -- in Oklahoma City, we walked through the exhibits as a way of introducing them to the Court. We'd do the same thing. We'd take about the same amount of time, an hour or so.

We did not submit with the motion four montages of television coverage, thinking that we would do that as a hearing; so at a minimum, we would like the opportunity to submit those to your Honor; and whether you wish to receive them through the clerk's office and in chambers or in open court, that is, of course, for the Court to decide.

Moreover, we think that Mr. Armstrong's views are subject to elaboration and may be subject to questioning by the Court. But with that as a prelude, let me tell the Court frankly what are our concerns here and to try to allay some of the Court's concerns about the logistical difficulty.

THE COURT: All right.

MR. TIGAR: This is not a motion that could have been made before Monday. It could not have been made because we needed to assess the effect of media coverage of the trial of Mr. McVeigh on this venue, an effect that will continue, I suspect, through tomorrow and beyond.

In addition to that, as the Court knows, we then asked for authorization to have someone study the media coverage, and that took time. So when we filed the motion, we were acutely

conscious of the fact that the trial date impends.

And to respond first to that part about San Francisco, your Honor, we did identify San Francisco in part because we didn't have all the money in the world to go study a bunch of different venues.

The Government taxes us for not having proposed Chicago. Some history may be in order. When Mr. Woods and I

were first appointed and Mr. Hartzler was first appointed, we went to see him. We said, "Mr. Hartzler, this case is not going to be tried in Oklahoma, and it's not going to be tried before an Oklahoma judge; and you know it. We offer you Denver or Chicago. You were principal assistant in Chicago. I talked to judges up there; I talked to the U.S. attorneys you work for. Wherever you want to go. Those are two places easy distance from Oklahoma City." And they turned us down, and we spent nine months in litigation on recusal and venue. So we've been responsible about this.

As far as San Francisco is concerned, I think we can ignore that. Your Honor, I hope we can. Terrance Alanan, who is the district attorney they don't mention, was a heavyweight boxing champion as an undergraduate at Berkeley when I knew him. I knew his dad. I know his mom. He's a responsible public official. It's interesting they have jury sentencing in death cases in California but not anymore in Colorado, according to a witness the Government called; so I

don't know

what the concern is. I'll address a little more of that later.

As far as timing is concerned, we waive the right to have a camera for closed-circuit Oklahoma City mounted in a hole in the wall; that is to say, if you had to have a camera in San Francisco with a camera visible to the jurors, Mr. Nichols is prepared to waive that right for these purposes.

In addition, as far as the other electronics are concerned, there are other courtrooms in this courthouse where ELMOs have been used, even though they weren't specially wired in this way, although more of the wiring was visible. I trust that representation is accurate. I attempted to verify it with another judge of this court.

THE COURT: No, that's true.

MR. TIGAR: I think Judge Weinshienk had a trial that featured this degree of electronic wizardry.

16 THE COURT: I think the lawyers brought their own for

17 some other trials.

18 MR. TIGAR: Well, there was one of the lawyers in the

19 last case, your Honor, who could probably afford to bring some

20 equipment if it was necessary for the new one; but I'm sure

21 that that -- that material is available in San Francisco. I've

22 tried cases in the courtrooms there; and that building, the new

23 building -- new by my standards; shows how old I am -- on

24 Golden Gate Avenue has all the security arrangements that one

25 could want. That's why we looked at it.

1 Also we looked at it because a judge of that court had

2 said when this case was first brooded about as to whether there

3 was going to be a change of venue -- had told me that that

4 courthouse was suitable. Judge Lowell Jensen came up to me at

5 a meeting and said that San Francisco would certainly be

available in case I wanted to know that.

We believe --

THE COURT: Did he volunteer to take the case, too?

MR. TIGAR: As a matter of fact, your Honor, he did.

And I don't want to get into one of these things where the next thing I have is Lowell -- Judge Jensen calling me; but somebody else was present, your Honor, and it was -- so that's what he said.

THE COURT: Okay.

MR. TIGAR: Now, with respect to delay, the reason we -- we took the position the trial can begin September 29 is, quite frankly, that the San Francisco venue -- I was amazed when I looked at the disparity in the coverage. They simply have not had this degree of focus on these issues to the point where the special screening that's necessary -- it would not be necessary in our view there, and the ordinary venire that's called could handle the case. And of course, with enough lead time, you could even summon some extra jurors, have them fill

out the questionnaires, and begin voir diring them in groups of ten. So logistically, we don't think there are those problems.

Of course, the Government admits that, hey, nuts to logistics; if it's fair, we ought to do it. But I wanted to let your Honor know that we are not trying to take tactical advantage here. We have never attempted to make a tactical issue of the venue choice.

With respect to the part that I would ask be stricken, the Government says that we are afraid of jury sentencing in capital cases. We are concerned as lawyers in a capital case. We are concerned by what we have seen with the Attorney General announcing what ought to be done in this case before anyone was apprehended. We are concerned with the word-for-word same death penalty notices issued by this Western District of Oklahoma U.S. Attorney's office and concerned by the

administrative process about which we're going to argue in the Tenth Circuit on September 8 in appeal from a ruling in this court.

So yes, we are concerned, your Honor; and I don't think it's fair to taunt us with that concern. I think respectfully it's unprofessional.

Now to the merits.

Your Honor defined the law of the case for venue purposes. I read your Honor's opinion carefully. I know there are differences between this venue and Oklahoma. But I respectfully submit that the similarities that have appeared so greatly overwhelm any of those differences that a change of

venue is the only responsible course at this point.

We might, it seems to me, have predicted it. And I don't want to say -- I'm sorry, your Honor. You're about to ask me a question.

THE COURT: Well, yes. One of the things not

addressed in the motion but required under the rule before you can -- before the Court can change venue from the district is that the showing be that the defendant cannot obtain a fair and impartial trial at anyplace fixed by law for holding court in the district.

Now, in the District of Colorado, we hold court not only in Denver, Colorado, but also in Grand Junction and Pueblo, Colorado, where we -- we no longer have a courthouse in Pueblo. The economy subcommittee told us to get rid of the rent there, but we do have a facility in Grand Junction.

MR. TIGAR: And Sterling, your Honor, I think.

THE COURT: We no longer have a courtroom there, either; but we have, of course, I hope, such good relations with state courts that we can borrow courtrooms if need be. I'm just -- you know, the rule does say that you have to -- before you can move it from the district, have to show you couldn't hold it anyplace within the district.

MR. TIGAR: I agree with that, your Honor; and let me

make a representation to the Court as to what we could show at the hearing of this motion. There has been a lot of work in

Colorado done on these CATV and cable television systems in different parts of the state; and our research shows, for example, that in Durango a few years ago -- and we could present a witness about this, but let me make an informal offer of proof to your Honor. In Durango a few years ago, there was a proposal as to how many channels they were going to have, and the question was which ones are we going to cut and which are going to be part of the premium and which are going to be part of the basic and those sorts of discussions. And it turned out that people who have access to cable/CATV-type arrangements in Colorado overwhelmingly prefer to get and do get their news from these Colorado metro stations.

Moreover, the local papers -- although there

are a

number of papers in Pueblo and other parts of the country,

those can't be searched; but the metropolitan counties, the big

counties around, they tend to be dominated by The Denver Post

and the Rocky Mountain News. Of course, most people get their

news from television. And that's both something that we note

and something that makes it hard for us to track it, because

it's very expensive for us to get copies of all the programs;

but we would be able to prove to your Honor that the domination

by Denver-based media of the entire jurisdiction is a known

fact; that is to say that it's a provable fact, so that I don't

think that that is an impediment.

Also, your Honor, I trust the rule can be made in a

practical sense; that is to say, when it says "anyplace fixed

by law for holding court in the district," we have to ask

ourselves fixed by law, including the practicalities of running a case of this magnitude there.

THE COURT: True.

MR. TIGAR: If your Honor says, "Well, Mr. Tigar, you didn't prove to me that the good people of Sterling are not suitable to be jurors," I'd say, "Well, your Honor, nobody seriously proposed we go there."

I've never been to Sterling, your Honor. I have been to Lawton. I don't want to make comparisons between those two communities. I don't have the information, but I suggest there may well be an analogy there; that is, nobody would seriously contend that we ought to go there.

It might ameliorate it by looking to a statewide jury pool, but that in turn involves enormous logistical problems; so to continue, what's the law of the case?

Now, we did not, your Honor -- we don't have a poll. Your Honor knows why. What we have is an analysis of the media. The Government impliedly taxes us for not looking at juror attitudes, but we know why that happened.

What happened here? What happened is something that I think does credit to the people of this community. Very soon after the change of venue occurred, the people of Colorado opened their businesses, their churches, their homes and their

hearts, and they welcomed the survivors and victims and they made them a part of this community.

The media, responding to their market, their listeners, in the way that good editors and good reporters do, saw that; and they began to have not only a quantity but a type of coverage that Mr. Armstrong had identified as significant in Oklahoma; and I remind the Court as we did in the motion that nobody thought -- nobody thought we would try the case in Oklahoma City. We didn't have to prove that. Your Honor noted, quite rightly, that that was conceded at the beginning of the argument and in your opinion. And nobody thought after

Mr. Bodley testified about the gun practice that we were going to try it in Lawton. Rather, your Honor's opinion focused on the question of whether we'd get a fair trial in Tulsa or Muskogee or someplace else in Oklahoma, so that we don't have to prove here that Denver got to be Oklahoma City. We've got to prove that it was something like Tulsa; that the same sort of reaching-out took place. And when I look back at what we showed in Oklahoma about the compassion shown, I think that we've done that.

I don't say, we do not say, that the trial of Mr. McVeigh ought not to have taken place here. That's not what we say. What we do say is that this having taken place and the jurors who were standing by, ready to be called to come here, who were not sheltered from what they would read by your

court's -- your Honor's orders that you issued to the McVeigh

jury from the very first day -- that those folks, it's unfair to ask them to set it aside and not -- and it's unfair to the process.

As your Honor pointed out in your first opinion, there are views we have that are sometimes just beyond the reach of the most thoroughgoing questioner and the most ardent and truthful responder; and those things that are just beyond the reach are things that have to do with these deep-seated emotional feelings that are drawn up by the kind of publicity that we've seen here.

I'm not going to go on at length, your Honor, because your Honor wrote the opinion. Your Honor's opinion stands, together with Tokars and Moody and the two Kemp cases in the Eleventh Circuit, as the leading authority, if Professor Charles Allen Wright's footnotes in his latest pocket part are to be believed, on the question of presumed prejudice in jury selection. We simply say, your Honor, that with the showing we did make and the showing that we ask the right to make

in a
very short additional presentation to your Honor -- shows that
there ought to be a change of venue here.
I trust that I presented this, your Honor, in a way
that doesn't, you know, sound all the rhetorical bells and
whistles. That's not what we're trying to do here, your Honor.
We don't want to create some difficulties in the process of

moving for something we think we have the right to move for. I
trust I've been restrained in the presentation.
THE COURT: All right.
Well, it won't be necessary to file a reply brief,
then. You have stated the defendant's position on the motion.
MR. TIGAR: Yes, your Honor. We would like leave to
present these additional exhibits to your Honor that I
mentioned, the montages of the television --
THE COURT: Well, that's a part of what you want on an
evidentiary hearing.

MR. TIGAR: On an evidentiary hearing; but in the alternative, should your Honor not feel it necessary, we did want to get those in the record.

THE COURT: All right.

PLAINTIFF'S ARGUMENT ON MOTION FOR CHANGE OF VENUE

MR. CONNELLY: Thank you, your Honor.

Our -- we've been around this before in this case, and I don't have to remind the Court. Obviously, the Court has taught us all the principles of venue. And I think beginning with this court's opinion back in Oklahoma City in terms of circumstances, when should you presume prejudice, presume that you may not be able to empanel a fair and impartial jury and when should you trust the process of voir dire, the Court has said that normally you should trust the process of voir dire. The Court trusted in the McVeigh case after extremely

prejudicial publicity, if believed, would have

certainly been
negative to Mr. McVeigh in a way that I would not predict would
exist in any way, shape, or form in this case.
Back in the week or two before trial, Mr. McVeigh
asked the Court to presume that the Court would be unable to
select and fair and impartial jury, given the reports of
confessions in various news media.
THE COURT: That wasn't a venue change; that was an
abatement, I think it was called, of the trial date.
MR. CONNELLY: I think it asked for abatement. It
asked for dismissal outright, but it did ask for a change of
venue, I believe, as well; and I believe he threw in a lot of
requested claims for relief.
THE COURT: I guess that's right. There were
triple -- triple motions.
MR. CONNELLY: As I recall, it was abatement, but
venue, I believe, was in there. But the issue was the same:
It was should the Court presume that it was incapable of
selecting a fair and impartial juror -- jury given the
extensive publicity on the eve of trial. The Court

rejected

21 that motion. The Court went forward and in fact, we would

22 submit, selected entirely a fair and impartial jury and I would

23 submit with surprising ease. The Court only questioned 99

24 jurors to qualify 70 of them.

25 To be honest with the Court, before jury voir dire I

70

1 would have expected that we'd lose maybe two out of every three

2 jurors, and the Court instead presided over process whereby

3 more than 70 percent of the questioned jurors in court were

4 determined fit and qualified to serve and meeting the standards

5 of impartiality required of jurors.

6 So given the well-established background of the case

7 not only in terms of the legal standards but in terms of the

8 Court's experience, we would submit that there is clearly no

9 reason to presume that the Court will be incapable of

10 empaneling that same fair and impartial jury here. Really,

nothing has changed since the McVeigh case; and we would submit that it will be even easier in this case. The publicity will be even less in this case than it was in the McVeigh case. And I would argue that -- obviously we're all predicting at this point, but I would submit that it -- jury voir dire, there will be even less knowledge about Mr. Nichols' identity, let alone any evidence against him, so that the Court's burden of empaneling a fair and impartial juror (sic) will be no more difficult and perhaps even easier than it was in the McVeigh case.

We would submit that a hearing is not necessary here. You can submit -- you can accept everything that Mr. Armstrong says as true, but it still doesn't change the analysis. The analysis ultimately calls for this court's legal judgment, judgment bolstered not only by its experience on the bench for

the past couple of decades but also by its experience in the trial of this very case of the co-defendant and confidence in its ability to preside over a proceeding that selects a fair and impartial jury.

So we would submit in terms of a hearing, it's not necessary. And we have not challenged anything Mr. Armstrong says or even any factual claim made in the defense motion, but we do submit that there is one critical factor that we're overlooking. If this court transferred the case to San Francisco or to anyplace -- not to single out San Francisco -- or to Chicago or Houston or anywhere else, publicity undoubtedly would follow that transfer. The transfer would change the story from a national story in those jurisdictions to a local story, and that's pure and simple what happened in this case. The Armstrong declaration concedes that at the time of this court's original venue decision, or maybe going back a little further, at the time this court was appointed to preside over the case, there was no difference between Denver

and any

other city outside Oklahoma. In fact, the Armstrong declaration reveals that publicity about this case in Denver prior to December, 1995, was even less than it was nationally and even less than it was in San Francisco. So there is nothing unique about Denver that would require this court to presume it would be incapable of selecting an impartial jury.

What this court found in Oklahoma was that there had

become an Oklahoma family and not only was it an Oklahoma story but it had become an Oklahoma family; and I would submit that there is no Colorado family unique from any other jurisdiction in this country in terms of its ability to fairly, impartially decide the facts of this case and fairly and impartially decide the appropriate punishment in the event that Mr. Nichols is convicted of the crimes charged.

So for those reasons, we'd ask the Court to

deny the

venue motion without an evidentiary hearing.

THE COURT: Mr. Tigar?

DEFENDANT'S REBUTTAL ARGUMENT ON MOTION FOR CHANGE OF VENUE

MR. TIGAR: Very briefly, your Honor.

I think that counsel for the Government has seized our

point quite well. You only get one fair trial in any

jurisdiction to which a case that tugs on the heartstrings as

this one does (sic); and that's what's shown by the Denver

media. What we're saying is that yes, it is the experience of

the first one that causes us now to pause; and that, of course,

makes the difference.

Of course, there is another difference. We don't

adopt any motion that was filed by another lawyer for another

defendant. That motion didn't have any analysis of the media

or any analysis by somebody like Mr. Armstrong. I don't think

that's precedent for anything anyone would be asking your Honor

to do -- as well as other circumstances that make it very, very

different. And I don't think I need to go into those, because we're writing on a clean slate.

I think that the issue that counsel talks about is one that I referred to: Well, how many prospective jurors know Terry Lynn Nichols' identity? I can't answer that question. We could poll them, I suppose; but the Court doesn't think that's a very reliable way of getting at it.

What we see here and what makes this a presumed prejudice case is the very thing that in your 918 F.Supp. opinion you identified, your Honor; that is, maybe not very many people do recognize Mr. Nichols' name, although I really doubt that very, very much. I think an overwhelming majority of people would do it, and the media has seen to that; but it is this extra thing, the reaching out. And tugging on the heartstrings is precisely the sort of thing that interferes with, that gets in the way of any penalty determination that a

juror has to make; that is to say, the enormity of what happened and the sympathy that one has for those victimized by it tends to occupy such a large place in our consciousness that when we do become aware of this real live human being named Terry Nichols that these other things get in the way of what the Eighth Amendment requires.

THE COURT: What is the -- You wanted to add this montage, as you call it. Is that in the form of a video cassette tape?

MR. TIGAR: Yes, your Honor. These would be four video cassette tapes, each of which is no more than 15 or 20 minutes.

THE COURT: Do you have them? Have they been prepared?

MR. TIGAR: Yes, your Honor. We are in the process of cutting them and putting them together. I can find out exactly

when they'll be ready, if your Honor will indulge me for a moment.

THE COURT: All right.

MR. TIGAR: We're dealing with a commercial provider, your Honor, who's actually doing the edits. By Friday, we believe we can have them, certainly no later than next Tuesday; that depending upon this entity in Oklahoma City that collects these things and copies them. We've identified the portions that we want to put in them. They're just doing the collecting.

THE COURT: I'll permit you to add them to the record. I may not wait for them in making my decision.

MR. TIGAR: Very well, your Honor. We'll add them as soon as we get them.

THE COURT: All right. I believe that's the matters that we have for discussion this afternoon.

MR. WOODS: Your Honor, I just wanted to make sure that the letter that Mr. Mackey submitted today is part of the

record on our motion for disqualification, sealed portion.

THE COURT: Yeah. We'll seal that, make it a part of the record. Any objection to that?

MR. MACKEY: No, your Honor.

THE COURT: I think it has to be so that if this were to be reviewed at some later time that full information would be available to the reviewing authority.

All right. This venue matter is -- stands submitted with the caveat that you may add to the record this videotape that's been discussed.

MR. TIGAR: I think I'm understanding your Honor to say that the likelihood of a hearing is slim; but I want to make sure that our request for one is noted.

THE COURT: It's part of the motion, of course. Yeah.

MR. TIGAR: Yes, your Honor.

THE COURT: I'll address that.

Okay. Court is in recess.

(Recess at 3:50 p.m.)

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REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Dated at Denver, Colorado, this 11th day of August, 1997.

_____

Paul A. Zuckerman