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Transcription  
Street,  
629-9285  
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MACKEY,  
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AITAN  
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General, 210  
73102,  
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and  
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114  
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Oklahoma,  
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Suite  
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11  
McVeigh.

APPEARANCES

2 JOSEPH H. HARTZLER, SEAN CONNELLY, LARRY A.  
3 BETH WILKINSON, SCOTT MENDELOFF, VICKI BEHENNA and  
4 GOELMAN, Special Attorneys to the U.S. Attorney  
5 West Park Avenue, Suite 400, Oklahoma City, Oklahoma,  
6 appearing for the plaintiff.  
7 STEPHEN JONES, ROBERT NIGH, JR., ROBERT WYATT,  
8 RICHARD BURR, Attorneys at Law, Jones, Wyatt & Roberts,  
9 East Broadway, Suite 100, Post Office Box 472, Enid,  
10 73702-0472, and JERALYN MERRITT, 303 East 17th Avenue,  
11 400, Denver, Colorado, 80203, appearing for Defendant

12 THURSCHWELL,

MICHAEL E. TIGAR, RONALD G. WOODS, ADAM

13 Street,

and REID NEUREITER, Attorneys at Law, 1120 Lincoln

14 Defendant

Suite 1308, Denver, Colorado, 80203, appearing for

15 Nichols.

16

PROCEEDINGS

17 I want

THE COURT: Well, we have several things that

18 about, the

to discuss. One is what we have just been talking

19 were

scheduling with respect to your submission that you

20 ahead with

talking about, Ms. Wilkinson. Maybe we ought to go

21 a time

the August 2 and then instead of setting a hearing, set

22 hearing.

for response as to what you want to do in the way of a

23 deal with

And if the response is a Rule 16, then, well, we can

24

that and then set that.

25 Honor. I

MR. TIGAR: That is what I proposed, your

3

1 way, but I

didn't mean to have my scheduling get in the Court's

2 have long been scheduled to try the case, this court  
3 case which is a simple consensual sodomy by cunnilingus  
4 that ought to be dismissed.

5 THE COURT: How long --

6 MR. TIGAR: I can't get the Department of  
7 agree that President Clinton meant when he said. If we  
8 trial, it's a three-day trial, your Honor.

9 THE COURT: Okay. Well, Mr. Jones, you've  
10 verge of this Rule 16 motion for quite a while and I  
11 your trying to work things out so that we don't have to  
12 it, but it looks like we are going to be into a  
13 dispute.

14 MR. JONES: We are. There's at least two  
15 do not believe we're going to come to an agreement on.  
16 least one area. We have received next to nothing on  
17 national intelligence and we're going to file a motion  
18 compel and ask the Court to hear that. But that's a  
19 separate  
20 matter from this.

21 With respect to the third issue which is what  
22 I might

20 call the general discovery, there has been some, to be  
fair,  
21 improvement in the Government's response to our  
request.  
22 Ms. Wilkinson has been answering my letters. And she  
has many  
23 pleasant ways to say no. But at least we have answers,  
but --  
24 they are not always no. We did deliver her a letter  
which  
25 followed the two-day or day-and-a-half meeting that she  
and

4

1 Mr. Wyatt had, but I think that the truth of the matter  
is that  
2 we've reached the point where the trickle of discovery  
--  
3 except to the extent that it's more 302's or something  
like  
4 that, we've probably gotten what we're going to get  
5 voluntarily. And the rest of it, we'll probably have  
to ask  
6 the Court for.

7 But sometimes what they give us -- what we ask  
for,  
8 they have given us, but we don't recognize it from the  
indexes  
9 and descriptions that we have and I know that's  
frustrating to

10 them for us to write and say well, what about 1, 2, 3  
and 4 and  
11 they write back and say well, that's in 302 number such  
and  
12 such. And so we didn't want to bring those to the  
Court's  
13 attention. And the only way we know to do that is  
14 preliminarily raise them with the Government. They  
have been  
15 pretty good with responding to those, but, yes, I think  
we are  
16 going to have to file the motion. And we'll file it  
whenever  
17 the Court -- is convenient with the Court. It might  
take 30  
18 days to get it all together with the briefing and  
appropriate  
19 exhibits and so forth.

20 THE COURT: Well, as soon as it can be filed,  
I think.

21 MR. JONES: Then we'll move forward in that  
respect.

22 THE COURT: You can go ahead with your filing.

23 MS. WILKINSON: On August 2, your Honor --

24 THE COURT: Yes.

25 MS. WILKINSON: -- providing our Rule 16 on  
the

1 experts. And would you set a date for at least them  
responding

2 to that?

3 THE COURT: Well, what's reasonable for that  
time?

4 MR. JONES: It depends whether we can  
interview these

5 FBI agents.

6 THE COURT: What is your present position on  
7 interviewing this -- Dr. Whitehurst?

8 MS. WILKINSON: Your Honor, we believe with  
the

9 transcript of Dr. Whitehurst, which we haven't yet  
provided to

10 the defense but we will provide, we provided -- all of  
his

11 allegations, we have provided.

12 THE COURT: The transcript of what?

13 MS. WILKINSON: Of his interview with the IG.  
What's

14 happened, in the Inspector General's investigation,  
they go out

15 and interview some folks and write up a memorandum of  
interview

16 like a 302.

17 For other persons where there's more  
substantive

18 either expertise or information, they have actually  
transcribed

19 an interview, done a tape recording and had some either  
court

20 reporter or some typist type up the interviews and  
21 Dr. Whitehurst has had quite a lengthy interview about  
some of  
22 his allegations.

23 THE COURT: Then does he have an opportunity  
to make  
24 changes and corrections or adopt that or --

25 MS. WILKINSON: Some of the agents -- we've  
asked some

6

1 of the agents to review the transcripts and therefore  
adopt  
2 them. Some have declined to do so.

3 THE COURT: What has he done?

4 MS. WILKINSON: I don't know with respect to  
5 Dr. Whitehurst whether he has reviewed that. I don't  
know. I  
6 don't want to represent that to the Court unless I'm  
sure. We

7 believe that they have the information from Dr.  
Whitehurst that

8 they need to make these challenges.

9 I think we -- again, we need to separate the  
issues

10 Mr. Jones has raised. It's not that we believe he  
cannot

11 challenge the chain of custody of these pieces of  
evidence or

the 12 the contamination, but we don't believe that goes to  
Court 13 credentials of the experts and I think that's what the  
14 was trying to consider in the 703 hearings so --

as I 15 THE COURT: Well, there are two aspects of it,  
giving 16 understand it. One is the qualifications of the people  
themselves. 17 opinions and the other is the laboratory conditions

as to 18 My understanding is Dr. Whitehurst has made allegations  
19 both.

20 MS. WILKINSON: That's true, your Honor.

21 THE COURT: So --

provided 22 MS. WILKINSON: We have -- I guess we have  
23 that information, the allegations he's made about the  
City 24 laboratory conditions during the time of the Oklahoma  
25 bombing investigation.

7

interview 1 THE COURT: What's wrong with the -- an

too. 2 that's sort of like a deposition? You can be there,

3 MR. JONES: We've never opposed their being  
there.

4 THE COURT: And -- and Mr. Nichols' counsel.

5 MS. WILKINSON: I believe, your Honor -- I  
would have

6 to talk to my trial partners here, but we -- that was  
done in

7 the O.J. Simpson case with --

8 THE COURT: Please don't give us that as a  
precedent.

9 MS. WILKINSON: The only reason I say that,  
your

10 Honor, is because the FBI general counsel's office is  
the one

11 that rules on the request to interview Dr. Whitehurst.

12 Mr. Jones properly sent the letter to Mr. Shapiro.

13 THE COURT: And he said subpoena him at one  
point,

14 didn't he?

15 MS. WILKINSON: Right. And that's because I  
think we

16 don't have a trial date. I believe that's why Mr.  
Jones has

17 not subpoenaed him.

18 MR. HARTZLER: May I --

19 THE COURT: He asked to subpoena him and I  
declined

20 the offer, but that's why -- I thought we could do this  
in a

21 more productive fashion than --

22 MR. HARTZLER: Yes.

23 THE COURT: -- a 17(c) subpoena.

24 MR. HARTZLER: We hear you. Could we get back  
to the  
25 Court?

8

1 THE COURT: Work on it.

2 MR. HARTZLER: We understand.

3 MR. JONES: It's not just Dr. Whitehurst.  
There are

4 nine other agents that are intimately involved in this  
very  
5 issue. Some of those, I believe, might be the subject  
of the  
6 hearing that we're proposing. I thought that was the  
whole  
7 purpose.

8 MS. WILKINSON: I believe, your Honor, the  
other  
9 people Mr. Jones are referring to are not experts --  
other than  
10 Mr. Tobin, who we intend to introduce, are not experts  
we  
11 intend to introduce.

12 THE COURT: There's another fellow who made  
13 allegations that starts with a B.

14 MR. NIGH: Burmeister.

15 THE COURT: Yes.

16 MS. WILKINSON: He's going to be a witness for  
the  
17 Government as an expert. They will be able to ask him  
18 questions during the 703 hearings. He'll be provided.  
The  
19 only people I believe Mr. Jones is interested in is Mr.  
Corby,  
20 Mr. Kelso --

21 THE COURT: Let's do this: You have a  
discussion  
22 about this, you get with the FBI as to what they are  
willing to  
23 do and see if we can make some progress.

24 MR. JONES: Okay.

25 THE COURT: And I'm, you know, not trying to  
avoid

9

1 hard decisions. I'm sure we'll be making them  
ultimately, but

2 at least we need to narrow the scope.

3 MR. HARTZLER: We're trying to avoid them.

4 MR. TIGAR: We'd like to have a representative  
at  
5 those discussions, also.

6 THE COURT: Sure. I'm talking about all  
parties.

7 MR. JONES: Well, could we have --

8 THE COURT: Dr. Whitehurst has a lawyer, too.

9 MS. WILKINSON: He does. Mr. Cohen.

10 MR. JONES: Could we have a day by which we  
have to

11 report back to the Court whether we reached an  
agreement or

12 not?

13 THE COURT: Yeah. Give me one.

14 MR. JONES: Two weeks?

15 MR. HARTZLER: That's probably reasonable.

16 MS. WILKINSON: Sure.

17 MR. HARTZLER: That's the 29th.

18 MS. WILKINSON: The 29th, sure.

19 THE COURT: Okay.

20 MR. JONES: This is to discuss the ground --  
well, who

21 we might interview, if anybody, and the ground rules  
for the

22 interview-deposition.

23 THE COURT: Correct.

24 MS. WILKINSON: Your Honor, just to be clear,  
we're

25 talking about interviewing people that were -- we  
wouldn't

1 otherwise provide at the 703 hearing, just to limit the  
2 disputes here.

3 THE COURT: Well, or people who should be  
interviewed  
4 before we suit up for such a hearing. I mean, I don't  
want to  
5 have that hearing become just a discovery hearing.

6 MR. HARTZLER: What are we talking about?  
Could we  
7 find that out?

8 THE COURT: That's what I'm suggesting that  
you talk  
9 about. I don't think you need me to sit in the middle  
as you  
10 talk.

11 MR. JONES: The 703 hearing goes to the  
12 qualifications.

13 THE COURT: Well, there are two issues.

14 MR. JONES: Right.

15 THE COURT: As I understand it, the  
qualifications of  
16 the people whose opinions are going to be offered at  
trial.  
17 And secondly, allegations concerning what I understand  
to be  
18 the protocols and the equipment at the laboratory.

19 MR. JONES: Yes.

20 THE COURT: Now, you know, I don't know what  
we're

about 21 talking about in detail, obviously. But we're talking

22 the means by which these people conducted the tests.

23 MR. TIGAR: And if your Honor please, with  
respect to

24 some of the experts the Government would tender, there  
may be a

25 third issue which would be the threshold point. For  
instance,

11

1 if they tender an entomologist and want to tell us that  
that

2 entomologist can tell something by looking at an insect  
colony,

3 we've got to be figure out whether that's science.

4 THE COURT: That's a Daubert issue.

5 MR. TIGAR: Yes.

6 MS. WILKINSON: Just to be clear, so you don't  
think

7 we're going to have all this resolved --

8 THE COURT: I'm sorry.

9 MS. WILKINSON: -- we have at least four or  
five

10 experts who we have hired relatively recently to make  
findings,

11 including the entomologist, who have not given us the  
reports.

12 The best we'll be able to do is provide the defense

with what

13 we believe -- what their qualifications -- what we  
believe

14 their general conclusions will be and provide those  
additional

15 reports.

16 THE COURT: How can you know what their  
conclusions

17 are before you have their reports?

18 MR. TIGAR: Or --

19 MS. WILKINSON: For example, we have hired an  
20 organization called Failure Analysis Associates who  
were

21 actually present after the bombing at the site to  
ensure the

22 structural integrity of the building for the safety of  
the

23 rescuers. They had come to the conclusion before we  
hired them

24 that the building collapsed due to one bomb and due to  
a bomb

25 that was placed outside the building. We are obviously  
going

12

1 to want -- we have hired them to explain that to the  
jury and

2 show as an outside expert that that's their conclusion.  
So

3 they already came to their conclusion before the  
Government  
4 hired them, but it's a matter of them writing up their  
formal  
5 report, which we believe Mr. Jones and Mr. Tigar will  
be  
6 entitled to, and they have not completed that report  
for us.

7 THE COURT: Well, yeah. I think that's a  
secondary

8 thing. I mean, this isn't a trial before a trial.  
We're not

9 going -- I'm not going to make credibility  
determinations and

10 all those things. I'm going to make a determination  
are they

11 qualified to give opinions. Is the opinion within the  
science.

12 And is there -- as I said at one time, this business  
about the

13 protocol and the equipment, that essentially is voir  
dire

14 preliminary to receipt of the evidence at trial so that  
we

15 don't have to take time off for voir dire issues.  
That's what

16 I have in mind.

17 MR. JONES: I think the problem is that at  
least from

18 our standpoint, in addition to this, is the FBI reports  
are

19 inadequate for the defense to prepare a meaningful

20 cross-examination, particularly in view of the

allegations that

21 have been made in the lab. The United States is not  
the only

22 country in the world that has recently had problems in  
this

23 very same issue. And we have hired certain experts,  
subject to

24 the Court's permission, who are intimately familiar  
with the

25 precise issue here. And they have advised us what we  
need and

13

1 the woeful inadequacy of what we have been given and  
promised

2 and all that --

3 THE COURT: That will be in your Rule 16.

4 MR. JONES: You bet.

5 THE COURT: Okay. Well --

6 MR. NIGH: We didn't establish a firm date for  
that,

7 your Honor.

8 THE COURT: No. I know. We were talking  
about what

9 it is that the date relates to. So we've got two  
things here.

10 First is what you can do informally and by agreement  
and

11 conduct these interviews.

12 MS. WILKINSON: That's by July 29.

13 THE COURT: That's what we just agreed to, I  
thought.

14 MR. JONES: Yes.

15 THE COURT: All right.

16 MR. JONES: Maybe we should just ask the Court  
if you  
17 would consider setting a dates by which you want us to  
report  
18 to the Court on what the outstanding issues are in  
discovery  
19 that the Court will have to rule on.

20 THE COURT: It has to be some time after the  
29th.

21 And I don't know. Again, I'm open to your suggestion.

22 MR. JONES: How about August 29?

23 MS. WILKINSON: We, of course, your Honor,  
would like  
24 it sooner than that. We have been working quite  
closely with  
25 Mr. Jones about discovery disputes.

14

1 THE COURT: I don't have any problem with  
August 29

2 because we've got other things happening too. We're  
not

3 sleeping on the case at that time because that's the

date --

4 isn't that the date when we're here on severance?

5 MR. JONES: Maybe we should say August 27,  
your Honor

6 instead of 29.

7 THE COURT: 27. All right. That's all right.

8 MS. WILKINSON: When would you like us to  
respond?

9 THE COURT: Ten days. Is that enough?

10 MR. CONNELLY: Sure.

11 THE COURT: If it isn't, you'll be filing a  
motion to

12 extend that time. Okay.

13 MR. JONES: Well, that is over the Labor Day  
weekend.

14 Maybe we should say 15.

15 MS. WILKINSON: Thank you, Mr. Jones.

16 THE COURT: Goodness. All right. 15.

17 MR. CONNELLY: It's the 11th.

18 MS. WILKINSON: September 11.

19 THE COURT: Is that what that is? Okay. Now,  
your

20 time -- on this -- I'm a little concerned here about  
our

21 scheduling on the severance and the hearing.  
Obviously, the

22 things we've just been talking about bear some  
relationship to

23 that, although I understand that it's not -- that there  
are

24 more concerns. I, of course, will try to get these  
rulings as

25 soon as I can. I've already adjusted my schedule some  
to focus

15

1 on this. You're supposed to -- I've already forgotten  
my

2 schedule here. You're supposed to make a filing on the  
29th --

3 MR. NIGH: That's right, your Honor.

4 THE COURT: -- of July.

5 MR. TIGAR: Your Honor, that date, as I  
understood it,

6 was vacated at the last hearing.

7 THE COURT: Well, we'll have to vacate it. We  
were

8 going to talk about that being a time related to the  
time of an

9 opinion.

10 MR. TIGAR: Yes, your Honor. That was my  
11 recollection.

12 THE COURT: I think you're right. What were  
we going

13 to do? Two weeks after the opinion? Is that it? I  
don't

14 remember if we discussed a time.

15 MR. NIGH: We didn't say --

specific 16 MR. WYATT: I don't believe the Court set a  
17 date.

then the 18 THE COURT: And the Government's response and  
19 hearing of the 27th. Well --

hearing 20 MR. JONES: Maybe we should move forward the  
21 to, say, September 15.

my 22 THE COURT: When does that mean I have to have  
23 opinion out?

24 MR. JONES: Maybe we should just wait until --

it just 25 THE COURT: I think what we'll do is have --

16

the 1 seems to be necessary that we will contact you to set  
2 progression of the -- your filing of the motions, the  
3 Government's response and the date of argument after --  
really 4 on the day that this comes out.

because we 5 MR. JONES: As you say, we're not sleeping  
discovery 6 have this 27th and we'll be working trying to resolve  
7 matters.

8 THE COURT: So we're vacating the 27th of  
August date.

9 MR. JONES: And the motion date, the briefing  
schedule  
10 is likewise vacated?

11 THE COURT: Exactly, yes. Those dates are  
vacated.

12 MR. HARTZLER: We originally had three weeks  
to  
13 respond. That was the original setting. I would ask  
that  
14 change --

15 THE COURT: You have that interval. Okay.  
We'll keep  
16 that in mind.

17 MR. JONES: Notice he didn't say you'd get it.  
He  
18 just said he'd keep it in mind.

19 THE COURT: All right. Now, another thing  
that I want  
20 to talk with you about is raised in a motion for an in  
camera  
21 hearing concerning the use of jury consultants and what  
is  
22 being done or going to be done. And the background is  
that I  
23 was presented ex parte with a motion to employ jury  
consultants  
24 and I said I wasn't going to do it at that time and I  
thought  
25 this is a matter that we should discuss for all parties  
because

1 I'm aware of the testimony of Vincent -- is that his  
name --

2 MR. HARTZLER: Yes.

3 THE COURT: -- who appeared at our hearings in  
4 Oklahoma City on the change of venue. And that he's  
under some

5 agreement with the Government to provide services.  
Now, I'm

6 not -- I'm not aware what the law is with respect to  
the

7 court's control over that. But I am concerned about  
polling

8 and that sort of thing being done in the District of  
Colorado

9 and its influence or potential for influence on the  
jury pool

10 here.

11 I'm also interested in what our jury pool is  
going to

12 be. I've given some thought to a state-wide panel.  
And for as

13 you know, under our existing jury plan, we have  
registered

14 voters and we enhance that with driver's license  
information,

15 people that have a driver's license from the State of  
Colorado.

16 And I am thinking of enhancing that in addition to  
include in  
17 this state people have -- who don't have driver's  
licenses or,  
18 for that matter, in addition, can have identification  
cards  
19 issued by the State of Colorado. And I'm thinking of  
including  
20 them. I'm sure that's possible through a -- just  
accessing an  
21 additional database that the state has.

22 MR. JONES: We'd like to include to that hotel  
23 registrations in Aspen and Vail during the winter, if  
your  
24 Honor would.

25 THE COURT: I don't intend to include what you

18

--  
1 suggest. You know, I'm not going to do anything unless  
2 without your knowledge of it, certainly. And some  
discussion  
3 of it. Mr. Hirschorn was employed --

4 MR. TIGAR: Yes, your Honor.

5 THE COURT: -- earlier on with the approval of  
Judge  
6 Alley and I don't know really what the scope of his  
work is as  
7 a trial consultant. I think he was employed. But I

think we

8       need to get out here on the table what people intend to  
do with  
9       respect to jury planning, jury consultants and the  
like.

10               MR. JONES:  There are also press reports which  
I think  
11       we filed with our motion indicating that the Government  
had  
12       taken polls already -- or at least one poll already in  
13       Colorado.  I don't know whether that's true or not or  
whether  
14       that was just an intraoffice poll or the Denver jury  
wheel or  
15       what.

16               MR. TIGAR:  If your Honor please, we did  
retain  
17       Mr. Hirschorn.  The testimony of Dr. Vincent was his  
firm had  
18       been hired at a flat fee of \$60,000 to provide  
consulting  
19       services through the trial.  I know Dr. Vincent and  
have used  
20       his services in the past.  They do include the full  
range of  
21       simulation, exhibit preparation and so on.  We too have  
heard  
22       the reports that the Government had done polling in the  
23       district and with --

24               MR. HARTZLER:  Could I interrupt just to say I  
read  
25       those reports, too.  Your Honor, there's just no truth

to them.

19

1 I can't imagine who the source was at the Department of  
2 Justice. We had no plans. This headline came out that  
the  
3 Government has conducted polls. It hadn't been  
discussed  
4 within the team. Hadn't been discussed with Mr.  
Vincent. I  
5 have no idea where that report came from. But it  
wasn't  
6 anybody associated with the -- with this team.

7 MS. MERRITT: One of them cites a public  
relations  
8 spokesman for the Department of Justice.

9 THE COURT: Remember, we're on the record.  
It's  
10 difficult for the reporter.

11 MR. TIGAR: I would hope that the Government  
would,  
12 given this publicity, make a report to the Court after  
13 investigation that the Court could consider. I --  
that's with  
14 respect to polling. We don't have any plans to do any  
polling,  
15 haven't had any plans to do anything with polling and  
so I  
16 think that's an end of that so far as the Nichols team

is

17 concerned.

18 THE COURT: I would hope that nobody is going  
to do  
19 any polling. I think that that's an inappropriate  
procedure  
20 and has an effect that cannot be measured on the jury  
pool.

21 MR. TIGAR: We believe that, also, your Honor.

22 THE COURT: You know, my approach to jury  
selection, I  
23 guess, is -- belies my age and what my experience is,  
which is  
24 that the best jury consultant is a trial lawyer with  
experience  
25 who can listen and participate to the extent the Court  
permits

20

1 in the voir dire process and evaluate these jurors in  
the voir  
2 dire.

3 MR. TIGAR: We -- we share that view, your  
Honor, and  
4 maybe that's a function of our age, as well. Mine as  
well and  
5 Mr. Woods. With respect to the -- the jury selection  
6 principle -- Ms. Wilkinson is laughing; in a few years,  
she

7 won't -- we share the Court's concern about the  
potential jury  
8 pool and as the Court will recall, the test case came  
out of  
9 this district.

10 THE COURT: The District of Colorado, yes.

11 MR. TIGAR: And my client, Mr. Bishop, was one  
of the  
12 defendants that was involved in that. Now, the case  
went off  
13 on another ground for Mr. Bishop, but I think under the  
Jury

14 Selection and Service Act of '68, that the  
supplementation that

15 the Court proposed would be an excellent idea and we  
had  
16 intended to make inquiry about it and even to move the  
Court  
17 should it be necessary, in part because there's some  
voter  
18 disaffection out there and voter registration rolls  
have ceased  
19 to fulfill the constitutional function of providing  
what the  
20 Supreme Court says is a fair and impartial jury which  
is the  
21 object of the exercise, so we concur with that.

22 Finally, with respect to jury consultants, I  
have  
23 worked with jury consultants in several cases and have  
turned  
24 from a -- an outright rejection of them and all of  
their lore

25 and teaching to a sort of agnostic position. I didn't

21

suggested 1 particularly think I was assisted by what Dr. Vincent  
so we 2 in the trial that he was helping me get ready for and  
mock 3 switched and hired somebody else to do some observed  
you'd do 4 openings and closings, to do the same sorts of things  
trial 5 in the age of videotape working with a group of other  
your -- 6 lawyers except that once you tried out your opening on  
to go 7 on my mother and my daughter once or twice, then I have  
to 8 hire somebody to do it. And the consultants are able  
9 assemble a group of people to do that.

Hirschorn is a 10 The other thing they can do -- and Mr.  
worked 11 trial lawyer himself -- is to advise and help and be an  
12 observer based on their expertise. And Mr. Woods and I  
13 with Mr. Hirschorn in Senator Hutchinson's case.

dire 14 THE COURT: You mean he sits there during voir  
15 and tells you what he thinks?

16 MR. TIGAR: He didn't do the voir dire. He  
helped us

17 devise a jury questionnaire.

18 THE COURT: I have no problem with that.

19 MR. TIGAR: A very important function because  
it

20 really helped us to -- to identify some of the hot  
button

21 issues in that case that were of concern.

22 The second thing he did was to work with us as  
though

23 we'd gone to hire a -- some old lawyer that had been  
doing it

24 for a long time. That is, to talk about technique and  
how we

25 asked questions and how we best used the opportunity  
for voir

22

1 dire that the Court would offer us. It's like another  
lawyer

2 on the team for some -- that temporary purpose.

3 So for those things, your Honor, I think that  
a jury

4 consultant can be helpful. This is a case that has --

5 THE COURT: I'm not questioning --

6 MR. TIGAR: -- so many hot button issues, your  
Honor,

7 that we just wanted to be sure that we're doing it  
right.

8 THE COURT: I'm concerned more about polling.  
That's

9 obviously a concern and we've taken that off the table,  
I

10 think. That's not a concern now. Then there are these  
things

11 that are done, as I'm aware, in political races, focus  
groups

12 and that sort of thing where they sit around and  
discuss these

13 things.

14 MR. JONES: I --

15 THE COURT: Go ahead.

16 MR. JONES: My understanding of how some of  
that is

17 done -- and I don't think it's a problem here -- they  
actually

18 use people in different states. Again, Brand X tried  
out of

19 Los Angeles, I think -- someone here is more familiar  
with

20 that. I think maybe they got people in Phoenix or  
someplace.

21 They went outside the district, which it seems to me --  
or the

22 state --

23 THE COURT: Depending upon what happens to  
that. I

24 mean, if -- there are focus groups and then you read  
about it

25 in the Wall Street Journal or somewhere else, that's a

23

in the 1 different thing, so that the jurors, potential jurors  
thinking 2 district read that, as well. I don't know. Are you  
3 about focus groups or -- Dr. Vincent or whoever.

much 4 MR. HARTZLER: Our position has been pretty

engaging any 5 responsive. I contacted defense counsel prior to

to venue 6 consultant to find out if they intended to do so prior

He was 7 hearing and Dr. Vincent's engagement was very broad.

Since the 8 essentially willing to help us in any way we needed.

him, 9 venue hearing, as best I recall, I think we've met with

We 10 we've talked with him and he has proposed focus groups.

done any 11 haven't done any focus groups. We certainly have not

available to, 12 polling or -- or discussed the polling. And he's

consultants 13 of course, assist us with the questionnaire and as

capacity 14 are, their job is to increase their role in whatever

15 they can.

16 I think that all members of this trial team,  
17 though,

18 have much the same old-fashioned view that you do. We  
19 can do

20 it as well as anyone and hope to do that. But you've  
21 got -- I

22 hope you'll appreciate that there is some expertise out  
23 there.

24 Mr. Tigar has indicated that he's calling upon that  
25 expertise

26 and we don't want to be at some disadvantage.

27 THE COURT: Sure. That's why I'm discussing  
28 it here

29 because I don't believe there ought to be any secrets  
30 about

31 what you're doing or what you plan to do. And I don't  
32 have a

33 problem with focus groups where it's done outside the  
34 district,

24

35 but I do have a problem if the people who are in focus  
36 groups

37 are then going to go to talk to media types and say I  
38 had a

39 very interesting discussion with the trial team or the

40 consultant to the trial team in this case.

41 MR. JONES: But if they don't know what the  
42 results

6 are and if we get them to sign a confidentiality  
agreement,  
7 there's at least some inhibition there. There's a  
limit to  
8 what they can say.

9 MR. TIGAR: I think the Government has  
interviewed  
10 people other than Dr. Vincent. Somebody from the  
Government  
11 called Mr. Hirschorn to see if he was available and the  
12 Government has interviewed a Mr. Gustaferro in Chicago.  
Joe  
13 Gustaferro, who is a jury consultant, indicated in a  
letter  
14 that he had been interviewed for the job and turned it  
down.

15 MR. HARTZLER: There's no question that we  
contacted  
16 other jury consultants, but --

17 THE COURT: You're using Dr. Vincent.

18 MR. HARTZLER: We're using Dr. Vincent.

19 THE COURT: I don't -- you know, I think there  
are  
20 some limits on what I can control here. I'm not  
suggesting  
21 that there aren't. But -- and of course, I have  
control over  
22 the defense in the sense that they can't engage people  
without  
23 my approval, but, you know, it's got -- I've got to  
have some

24 idea what you're going to do before I can see what's  
fair for  
25 them and that's why I brought it up.

25

1 MR. HARTZLER: I appreciate that and I think  
that, as  
2 I say, we wish to be in a responsive mode. If you  
restrict  
3 this entirely, I think we would be comfortable with  
that. Our  
4 only concern is the expertise that Mr. Tigar has  
already called  
5 upon, the background that he has, consultants which  
none of us  
6 have and, therefore, we're at some tactical  
disadvantage, but  
7 we're comfortable doing exactly what the defense are  
entitled  
8 to do and doing no more or less.

9 MR. JONES: Well, I think, in the immortal  
words of  
10 H.R. Haldeman, once the toothpaste is squeezed out of  
the tube,  
11 it's difficult to put it back in. We don't have a jury  
12 consultant. They have at least had Dr. Vincent and  
however the  
13 conversations were, they presumably have not conducted  
them as  
14 deaf-mutes and, of course, Mr. Tigar has Dr. Hirschorn

-- or

15 Mr. Hirschorn.

16 We would ask the Court to approve our request  
for a

17 jury consultant, but that the Court limit and enter an  
order

18 that any focus groups are to be done outside the  
District of

19 Colorado and no polling without permission of the Court  
in

20 advance. And that the parties exercise utmost care to  
be sure

21 that if any focus groups or simulations are used, that  
the

22 results are not leaked to the press, either by  
confidentiality

23 agreements or some similar agreement.

24 THE COURT: Yeah. Well -- and I think you  
ought to

25 disclose who it is so they know who it is.

26

1 MR. JONES: Really --

2 THE COURT: And we're all in the open about  
it.

3 MR. JONES: I didn't know you were going to do  
that.

4 I --

5 THE COURT: And maybe then we can have sort of

a

6 memorandum of understanding about what the role of  
these  
7 consultants will be and -- and what won't be done.

8 MR. JONES: Well, there's a psychic down on  
Larimer  
9 Square and we've talked to her and --

10 THE COURT: Well, I don't want to see anybody  
holding  
11 a pendulum pyramid over jury questionnaires.

12 MR. JONES: Stanley Marks and Ann Cole.

13 THE COURT: Okay. So may I anticipate that  
you all  
14 will come to an agreement about what they are going to  
do?

15 MR. HARTZLER: We'll try.

16 MR. TIGAR: We assume then that the agreement  
includes  
17 disclosure as to who the consultants are and what their  
role  
18 is?

19 THE COURT: Yes. Yes. And you don't have to  
share  
20 the results, obviously. That's part of your trial  
preparation,

21 but we need to know, you know -- I don't want any of  
this  
22 suspicion about somebody getting ahead of somebody

else. You  
23 may have different qualities in your consultants, but  
anything

24 that affects a jury pool is what worries me.

the 25 MR. HARTZLER: I really don't think even with

27

assure 1 confidentiality agreement, we're going to be able to

2 there is not publicity out of a focus group.

how you 3 THE COURT: I'm troubled by it, focus groups,

you can 4 can keep it quiet from the participants -- I mean, that

5 keep the participants quiet from the media.

participants would 6 MR. JONES: I mean, obviously, the

7 know there was a focus group, but I don't see how the

expert 8 participants know what the results or opinion of the

9 are.

groups 10 MR. TIGAR: Your Honor, Dr. Vincent used focus

imagine a 11 in Senator Hutchinson's case and it would be hard to

and not 12 case that the media would be more avid to get somebody

17 13 a word of that leaked out. The trial didn't take but

14 minutes so maybe they didn't have a --

15 MR. JONES: You can see what a great job he

did.

16 THE COURT: Yeah. I'm wary of it in this  
case.

17 MR. JONES: In our case, I think we submitted  
under

18 seal to the Court kind of an outline of what he would  
do, which

19 I assure the Court did not include polling without  
prior Court

20 permission. Do you want us to --

21 THE COURT: I want you to talk among  
yourselves openly

22 about what you intend to do and -- and see if there's  
an

23 agreement about it. And if there isn't, I'll have to  
referee

24 the dispute, I guess. But I think this is an area in  
which we

25 have to have an assurance of candor about what's going  
to be

28

1 done.

2 MR. WOODS: Your Honor, can we get a report  
from the

3 Government on polling? There are articles I read  
quoting

4 Government sources talking about the polling they had  
done and

5 how concerned they were on getting the death penalty.

6 MR. HARTZLER: I read the --

7 THE COURT: Where was this article?

8 MS. MERRITT: It was attached to the motion we  
9 submitted.

10 THE COURT: That doesn't mean I read it.

11 MR. WOODS: Both Denver papers, your Honor.

12 MS. MERRITT: I got it off the internet.

13 MR. HARTZLER: I saw the article. It was one  
of the  
14 Denver papers.

15 THE COURT: I don't browse the Internet.

16 MR. HARTZLER: It reported someone that was --  
a  
17 Department of Justice official was the attribution, as  
best I  
18 recall. You know, I -- what can we say? It caught us  
by  
19 complete alarm. We had had no discussions about doing  
any  
20 polling and had no intention of doing any polling. In  
fact, my  
21 reaction to the article was oh, gee, that might be a  
good idea.  
22 I mean, it was completely out of the blue.

23 THE COURT: You don't have any idea of the  
source of  
24 it?

25 MR. HARTZLER: I have no -- I talked to Mr.  
Vincent to

being 1 find out if there was any possibility that, somehow, he  
2 under contract was regarded as a Department of Justice  
any such 3 official. He denied that he had any contact or made  
motivation other 4 statement. I couldn't figure out who had any  
5 than possibly a consultant to make that allegation. I  
have no 6 idea. It was out of the blue.

7 MR. WOODS: There are lot of people above you  
that 8 have a motivation.

9 MR. HARTZLER: Well --

10 MS. MERRITT: I have a copy of them, your  
Honor. I 11 could reassemble them, the articles.

12 THE COURT: Well, Mr. Hartzler indicates an  
awareness 13 of it. He's read the same ones. And have you checked  
with 14 somebody at the Department of Justice?

15 MR. HARTZLER: I've checked with the people at  
the 16 Department of Justice.

17 THE COURT: Who would know?

18 MR. HARTZLER: Yes.

19 THE COURT: And their response is --

20 MR. HARTZLER: They have no idea. No. I  
mean, I

21 understand that there's a certain sense that the people  
above

22 us at the Department of Justice have some interest in  
pressing

23 particular issues. But I can assure you that their  
interest is

24 in making sure that the trial is tried without  
prejudicial

25 pretrial publicity and they would have -- I don't see  
why they

30

1 would have any interest in alleging that we were doing  
polling

2 in Colorado. I don't see how that benefits the  
Government to

3 tell the potential jury pool that the Government  
doesn't trust

4 Colorado jurors and needs to do polling.

5 THE COURT: Well, I will continue to rely on  
the

6 representatives of the Department of Justice  
responsible for

7 this case to tell me what the Department of Justice is  
doing.

8 And I'm not going to require them to go beyond that. I

have

9 Mr. Hartzler's statement and I'm accepting it.

10 MR. HARTZLER: Thank you.

how

11 THE COURT: Now, we still have this matter of

have a

12 we're going to have a controlled television signal. I

under

13 person who's under -- speaking of consultants -- who's

United

14 some contract with the administrative office of the

15 States Courts. Where is Mr. Manspeaker at?

16 MR. MANSPEAKER: George Spano.

last -- was

17 THE COURT: George Spano. I consulted him

18 it last week?

19 MR. MANSPEAKER: Yes, sir.

and we

20 THE COURT: Yeah. In a very preliminary way

considering

21 can give you his qualifications and so forth. I'm

the

22 appointing him as a consultant to me and sort of under

we are

23 expert witness rule if nothing else. And as you know,

drawings that

24 doing -- reconfiguring this courtroom and in the

where it is

25 we have for that, we're switching the jury box from

1 to the opposite side of the courtroom, putting --  
making it  
2 larger to accommodate 18, curving it a little and that  
will  
3 affect the ability of the spectators to see the jury.  
I'm  
4 thinking of an anonymous jury. And placing a camera  
above  
5 and -- the jury and behind them outside of the  
courtroom with a  
6 port and that the -- a hole in the wall. And that the  
camera  
7 be fixed focus, as I've said, and would look down on  
the scene  
8 that's -- the only difference is that you're seeing it  
from the  
9 side instead of from the back of the courtroom and that  
that  
10 would be it.

11 But I also in preliminary discussion with him,  
he --  
12 he's in agreement with your man from USC who says you  
cannot  
13 physically be certain that even with a T1 line -- since  
that's  
14 like a water pipe or something like that and has these  
digital  
15 signals going through, that has to go through some  
switching  
16 stations. And that those switching stations are  
vulnerability

17 points at which it is conceivable that a hacker can get  
into  
18 the system. And my question to him was well, even if  
that  
19 happened, what I want to be sure is we know it happens  
so that  
20 we can immediately know that we've been penetrated.  
And he  
21 thought that was possible and it -- I guess it's all a  
matter  
22 of what you pay for. And that there would be people  
23 monitoring -- he would have people monitoring these  
switching  
24 stations or relay stations or whatever they are. So  
that's a  
25 part of it. We have to -- whatever we're going to do  
in that

32

1 regard, we have to be starting to plan because there  
are  
2 contracts to be written and all those things.  
3 So I think we have to focus on when we can get  
to the  
4 people together who can talk about this and then, of  
course, we  
5 also have to deal with the issue of what are the  
criteria and  
6 what is the process by which people get admitted to the

7 courtroom in Oklahoma City. And indeed, who is going  
to be in  
8 that courtroom in Oklahoma City representing me.

9 MR. JONES: Your Honor, in that connection,  
there are  
10 some problems beginning to occur in the auxiliary  
courtroom  
11 that --

12 THE COURT: Here?

13 MR. JONES: Yes.

14 THE COURT: I don't intend to have the  
transmission  
15 there by television.

16 MR. JONES: I mean --

17 THE COURT: It's statutorily provided for --

18 MR. JONES: There's an audio feed and we feel  
that the  
19 Court should consider seriously having a magistrate or  
judicial  
20 officer preside there at Oklahoma City.

21 THE COURT: What about this -- I'm alerted to  
there  
22 are problems right here in River City.

23 MR. JONES: I say problems. There are  
situations of  
24 people getting up and walking back and forth and  
passing notes  
25 to one another and using hand gestures and -- and  
various

1 facial expressions to register opinions of approval or  
2 disapproval.

3 THE COURT: Well, we'll have to take  
corrective  
4 action. I put it to you directly whether you have a  
concern  
5 about using any of the judicial officers in the Western  
6 District of Oklahoma to control that courtroom.

7 MR. TIGAR: Well, the answer to that is yes,  
your  
8 Honor.

9 THE COURT: I suspected it might be.

10 MR. TIGAR: This is -- it's a hot button  
situation.

11 My mother was sitting in the audience today as Mr.  
Nichols came

12 into the courtroom and the woman next to her -- a  
member of the

13 press said look at those lawyers standing up for those  
creeps

14 and my mother said which creeps do you mean, dear. And  
--

15 because my mother is pretty cool and she said well,  
those

16 defendants. Everybody knows they are guilty. So I --  
that's

17 the sort of thing that people might say. Everybody is  
entitled

18 to their opinion, but it is hot button situation even  
here in 19 the confines of the courtroom.

20 MR. JONES: One of our female staff members  
was 21 approached in what I would consider to be a grossly  
22 inappropriate way in the lady's rest room, so even in  
this 23 building, there are problems.

24 MR. TIGAR: Your Honor, there are two concerns  
that 25 are raised outside the television signal by your  
Honor's

34

1 comments. First was your Honor, you're considering an  
2 anonymous jury. I don't know from whom your Honor had  
thought 3 it would be anonymous, but we would like the  
opportunity to be 4 heard on that subject.

5 THE COURT: Oh, you will be.

6 MR. TIGAR: Because we have strong views about  
it and 7 we understand the Court's concerns. We've addressed  
them 8 somewhat in our papers before Judge Alley that are part  
of the 9 record.

10                   The second is with respect to the organization  
of the  
11 courtroom. What is this courtroom going to look like  
for trial  
12 lawyers? We were asked what we wanted in that way and  
we let  
13 Mr. Manspeaker know and also shared with him our  
concerns that  
14 too much technology in the courtroom, too many wires,  
screens  
15 and so on interferes in a serious way with the uniquely  
human  
16 endeavor of judging. That falls to the jury's lot.  
And each  
17 wire, each screen, each -- each piece of high-tech  
contributes  
18 to dehumanizing, in our respectful view, the process  
and that  
19 in a case in which individualization, humanization, so  
on, is  
20 key to what we regard as our function as advocates.  
21                   THE COURT: Well, we can give you -- I don't  
want to  
22 take the time right now to do it, but we can give you  
the  
23 latest for your consideration. I do not like clutter  
in a  
24 courtroom. I don't like computers in a courtroom or  
VCR  
25 screens and all that. But what we're looking at now is  
a piece

which  
have one  
these  
resolution at  
having  
it go  
of the

1 of equipment that can be utilized for multiple purposes  
2 can include VCR's. And my original plan was that we  
3 screen in a corner so that we don't have the clutter of  
4 screens, but I'm told that we can't get adequate  
5 that distance of a document, for example, without your  
6 to actually type sections of it on WordPerfect and have  
7 up there, which is fraught with difficulties in terms  
8 integrity of the document.

use a  
you look  
going to  
anything  
one right  
parties, and  
what,  
16

9 So reluctantly, I think we're going to have to  
10 couple of -- what are they called -- monitors. What  
11 at that looks like a television set. But we're not  
12 have a bunch of them, you know. One for each juror or  
13 like that. We'll have a screen that's in the middle,  
14 below me that you can see, all counsel, and the  
15 then one or two facing the public. So there would be,  
16 three?

17 MR. MANSPEAKER: Four, I believe, Judge, is  
what we  
18 came up with.

19 THE COURT: Where is the other one?

20 MR. MANSPEAKER: I thought we had two for the  
public,  
21 one for you and one for the jury.

22 THE COURT: Okay. But two, really, that are  
in the  
23 well.

24 MR. JONES: May I -- perhaps I'm  
misapprehending. Are

25 you talking about a TV monitor that will show the jury  
what

36

1 this TV camera is picking up?

2 THE COURT: No. I'm talking about exhibits.

3 MR. JONES: Okay. All right.

4 THE COURT: The exhibition of exhibits through  
VCR.

5 MR. JONES: Okay.

6 THE COURT: So that if -- I assume there are  
documents  
7 in this case that may be received in evidence.

8 MR. JONES: Some thought has been given to  
that.

9 THE COURT: Yes. And instead of dealing with  
10 transparencies and overheads and all of that so that --  
and  
11 instead of passing documents out to every member of the  
jury  
12 and taking the time for that, we project them. And one  
means  
13 to project them is through this VCR system. It isn't  
VCR, but  
14 you can do the same thing so that it's up on a  
television  
15 screen.

16 MR. HARTZLER: Where is the monitor that  
you're going  
17 to see?

18 THE COURT: What makes you think I have to  
look at  
19 this stuff? No. I can have a very small -- a very  
small  
20 monitor. And of course, I have the hard exhibit, I  
assume.

21 MR. HARTZLER: I was thinking not just you,  
but,  
22 obviously, the witness. One for the witness.

23 THE COURT: Generally speaking, the witness  
would be  
24 dealing with the hard exhibit.

25 MR. HARTZLER: I see.

an 1 THE COURT: The document. Let's say this is  
2 invoice.

3 MR. HARTZLER: Okay.

witness. 4 THE COURT: The exhibit is in front of the  
5 Your projection of it after it's received, of course,  
is for -- 6 so other people can look at it while the witness has  
it.

7 That's what I had in mind.

images 8 MR. HARTZLER: I would guess there may be some  
9 that you might want the witness to look at a monitor  
for. Some 10 large pieces of evidence, for example, that might just  
be 11 unwieldy to bring in the courtroom.

12 THE COURT: We might roll in another monitor  
for that 13 particular purpose, but we're not going to have a bunch  
of 14 screens around there and we're not going to have this  
look like 15 some space exploration.

16 MR. TIGAR: Your Honor, at the risk of seeming  
to be a 17 Luddite about all of this, I wonder at the necessity  
for having 18 a video system to show documents. When I started  
practicing

19 law, we got the document in evidence and then we  
published some  
20 of it to the jury as we thought was right and under  
Rule 106,  
21 the opponent could require us to publish more at that  
moment.  
22 If I had to -- wanted to examine the witness, I might  
ask the  
23 witness to read a portion of it. But I always thought  
it was a  
24 diversion, particularly when the document was one  
authored by  
25 the witness or -- that related to the credibility of  
the

38

1 witness. I always thought it was a diversion from the  
jury's  
2 function from looking at the witnesses now testifying  
to have  
3 the document suddenly become the center of attention.  
Then a  
4 little further along, I never saw that that -- if you  
needed a  
5 little more than that, that it couldn't be met by the  
use of a  
6 transparency and an overhead projector.

7 I understand this is your Honor's courtroom to  
control  
8 and we'll try the case the way your Honor wants, but I

-- if a

9 lawyer in this case tells you they have got 1,000  
documents to

10 show the jury, then I don't think they are telling your  
Honor

11 the way it's going to be.

12 THE COURT: I'm not speaking about 1,000 of  
them. I'm

13 speaking about any number. But I'm not going to take  
the time

14 to pass, you know, Exhibit No. whatever from juror to  
juror

15 with 18 jurors the way we used to do things.

16 MR. TIGAR: Well, I --

17 THE COURT: You know --

18 MR. TIGAR: I don't mean to argue with your  
Honor

19 about this. But it is a matter of importance to us.

We had

20 never thought that there would be a passing a document  
along.

21 I've never liked that because it diverts attention from  
that

22 very thing, focussing on the witness. If the document  
is

23 really important, sometimes we'd have 18 copies. Maybe  
there

24 would be one or two documents in a case that met that.  
But for

25 most documents, it isn't really that you want the  
jurors to see

1 the whole invoice and this and that. There's just a  
little bit  
2 of what you want them to see and it's the testimony of  
the  
3 witnesses that drives the case because the document is  
worth no  
4 more than the credibility of the testifier attached to  
it. I'm  
5 simply wondering aloud whether we need even the level  
of  
6 technology that the Court has proposed. And if the  
decision  
7 has been made, then I yield and I'll receive --

8 THE COURT: This is only a planning decision.  
It's  
9 not a decision.

10 MR. JONES: There are some exhibits that I  
think do  
11 clearly lend themselves to the type of thing your Honor  
is  
12 talking about. There would be some videos, I suspect,  
13 certainly, just to name one.

14 MR. WYATT: Your Honor, may -- and I believe  
I've  
15 spoken with Mr. Manspeaker about this just so we're  
clear. I  
16 believe that the type of equipment that you're  
referring to

and will 17 will actually serve as an overhead projector, as a VCR  
one unit 18 perform other functions. It's just the fact that it's  
bringing in 19 that will do all of those functions as opposed to  
20 separate units?

that is 21 THE COURT: It actually minimizes the clutter  
22 otherwise a problem and where, otherwise, it would be  
I guess 23 necessary. In my experience with these overheads is --  
24 you have overheads now that don't require  
transparencies so  
lawyers 25 that you can use the actual document. But, you know,

40

and it 1 get in there and they are -- they fiddle around with it  
2 goes off the screen and it is a distraction. And I'm a  
have to 3 neo-Luddite. But I believe some of these technologies  
4 be used and are appropriate.

of 5 MR. TIGAR: We would appreciate seeing a copy  
6 the -- of the plan and we'll make --

7 THE COURT: We'll get it to you.

8 MR. TIGAR: We'll make our suggestions to the

Court.

9 THE COURT: Right. Okay. I guess, you know,  
the  
10 issue is do we set a time.

11 Now, for dealing with the controls and the  
conditions  
12 for the television transmission. That's a ways off in  
terms --  
13 I don't know what our trial date is going to be yet. I  
wish I  
14 did. But we have to have some interval, as I say, to  
do  
15 contracting and to get funding and to do the things  
that are  
16 necessary for implementation of this decision. So  
you've  
17 already got a consultant on this, I guess. This fellow  
whose  
18 affidavit you attached.

19 MR. JONES: Yes.

20 THE COURT: And I don't know, Mr. Tigar,  
whether your  
21 people want to engage a consultant for this or the  
22 Government -- the Government has its own office on this  
video  
23 conferencing.

24 MS. BEHENNA: We do, yes. What --

25 MR. TIGAR: I don't think we will be moving  
the Court

1 for a consultant, your Honor.

2 THE COURT: Well, we have a rather detailed  
plan in

3 the Government's motion. And as I said, my -- my  
principal

4 response to all of this is that I want to make sure  
that

5 there's a cutoff switch. That's sort of bottom line.  
And I

6 also need to know whether there's a reason to exercise  
it. So

7 I have to have information.

8 And then on the subject of how we determine  
who gets

9 in and who controls the courtroom down there, I think I  
ought

10 to have -- I hear what you say -- I have to have  
somebody down

11 there who is under my complete authority and complete

12 confidence to be in that courtroom. And I don't mean  
this to

13 be suggestive at all of a lack of confidence in the  
people in

14 Oklahoma City, obviously.

15 MR. JONES: Judge Kane, your Honor, I think,  
would --

16 THE COURT: Yes. So I don't know. Do you  
want -- how

17 do you want to be heard on this? How do you want to be  
heard

18 on the question of who gets in?

19 MR. JONES: Well, I think we'd like to submit  
a  
20 written memorandum.

21 THE COURT: Okay. You too, Mr. Tigar?

22 MR. TIGAR: Yes, your Honor. I -- I suppose  
the most  
23 appropriate thing would be for the Government to make a  
24 proposal about what they -- what they want, how they  
define the  
25 class of affected persons and how they and the Court's  
expert

42

1 view the proposed transmission. Until that's done, we  
can't  
2 formulate our concerns with prevision.

3 MR. HARTZLER: We're willing to do that. We  
can make  
4 a proposed list of who we think should be admitted. Is  
your  
5 consultant going to do anything in writing? A report  
of any  
6 nature?

7 THE COURT: Well, I haven't -- well, yeah, I  
think  
8 'hell have to so I can share it with you. I'm not  
going to

9 have him whispering in my ear type consulting.  
Whatever I get

10 from him, you'll get from me. So, yeah, I think we'll  
get a

11 proposal from him and this'll relate to a contract for  
whether

12 we go to Sprint and say give us access to your  
fiberoptic T1

13 digital line. How do you like that for growing  
technology?

14 MS. BEHENNA: Impressive.

15 THE COURT: Yeah. And -- and then who  
monitors these

16 stations where we have a vulnerability and so forth.  
We'll

17 have him work on that and give it to you.

18 MS. BEHENNA: Okay.

19 THE COURT: In the meantime, you develop what  
protocol

20 we're going to use as to who gets access, recognizing  
-- and

21 I'm sure you wrote it down -- that you're applying Rule  
615

22 down there as well as here.

23 MR. HARTZLER: Of course. In fact, I'd  
propose that

24 we devise or whoever your special master is devise some  
kind of

25 notification so it's perfectly clear. We'll control  
it, but

1 there ought to be a notice on the door of the  
courtroom.

2 THE COURT: All of the conditions will be the  
same

3 including the --

4 MR. HARTZLER: I meant to notify anyone trying  
to  
5 enter the courtroom so they are on the notice.

6 THE COURT: I mean, all of the conditions down  
there  
7 are the same with respect to their wearing signs and,  
you know,

8 this has to be a neutral scene there as here.

9 MR. HARTZLER: The report that your  
consultant, I  
10 assume, will be under seal so that anyone who wants to  
11 penetrate the signal won't know how?

12 THE COURT: Yeah. I guess so, yes.

13 MR. JONES: Could the Government respond X  
after we

14 all receive the report and then we respond XX after the  
15 Government files its --

16 THE COURT: I think so, but, as I say, you go  
forward  
17 with this criteria for eligibility of admission in the  
18 meantime.

19 MR. JONES: So that's separate from the  
consultant.

doesn't 20 THE COURT: That's separate. My consultant  
I'm my 21 have anything to do with that. That's an issue for me.  
22 own expert on that.

23 MR. HARTZLER: So may I propose that we  
respond within 24 14 days after receiving Mr. Spano's report?

25 THE COURT: On the technology.

44

reply 1 MR. HARTZLER: And that the defense respond --  
2 14 days thereafter?

3 MR. JONES: That's fine.

4 THE COURT: Okay.

5 MR. JONES: May I ask when you file your --

6 THE COURT: Eligibility for admission.

7 MR. JONES: -- eligibility for admission?

8 MR. HARTZLER: Two weeks? What do you want?

admission 9 MR. JONES: Could we call it eligibility for  
10 and conduct of proceedings --

11 THE COURT: Okay.

12 MR. JONES: -- and address both of those?

13 THE COURT: Sure.

two 14 MR. HARTZLER: We should be able to do that in  
15 weeks.

with 16 THE COURT: All right. I'll have to consult  
be 17 Chief Judge Russell about what courtrooms are going to  
I'll be 18 available, but, fortunately -- in a way fortunately,  
statute 19 seeing him on Wednesday of this week since we are by  
20 required to attend the Tenth Circuit Judicial  
Conference.

21 MR. JONES: An onerous task, always.

But 22 THE COURT: That's your statement. Not mine.  
23 I'll talk with him about the availability of the  
facility down 24 there.

25 MR. JONES: He has 14 days? Is that what you  
said --

45

1 14 days to do your eligibility for admission and  
conduct of 2 proceedings? You said two weeks. May we have two  
weeks 3 thereafter?

4 THE COURT: Yes.

the date 5 MR. HARTZLER: We still do not have resolved  
the 6 on which the defense will submit their challenges to  
703 7 qualification of our experts in anticipation of Rule  
8 hearing.

9 THE COURT: Yeah.

don't 10 MR. JONES: Well, the problem with that is I  
we're going 11 know how much we're going to be able to agree that  
report 12 to get. Perhaps if we -- let's see. We're supposed to  
13 back to the Court by July 29.

14 MS. WILKINSON: The 29th.

15 THE COURT: Well, that's with respect to your  
16 agreements to interview.

17 MR. NIGH: That's right.

18 MR. TIGAR: May I make --

the date 19 THE COURT: We're talking about August 2 is  
Hartzler's 20 of disclosure of these experts and I think Mr.  
21 talking about objections to those experts'  
qualifications.

Honor? 22 MR. TIGAR: May I make a suggestion, your

23 THE COURT: Yes. Sure.

24 MR. TIGAR: I thought that if they made their

25 disclosures on August 2, we would be in a position to  
report to

46

1 the Court on August 9 what we needed to do in order to  
respond.

2 That is to say, suppose that on August 2, they -- it's  
a list

3 of Dr. Whitehurst and a few others, but if on August 2,  
it also

4 includes the entomologist, then I would have to say to  
the

5 Court I wouldn't be ready for a 703 hearing on that  
until we

6 had a chance to retain an entomologist of our own to  
get us

7 ready to attack their entomologist.

8 In short, if we could have a week, we could  
meet with

9 the Government during that week and say this is the  
amount of

10 time we need to respond and if during that week, we  
can't

11 agree, we'd say to the Court this is how much time we  
think we

12 need, what's your Honor's pleasure. But I would find  
it

13 difficult to commit to respond to a document, the  
parameters of

14 which our adversary to this good day is unable to

answer. Once

15 we see it, we'll know how much time we need.

16 THE COURT: Well, you will have the -- let's  
say the

17 entomologist. You have who that is and what that  
person's

18 qualifications are. So --

19 MS. WILKINSON: Your Honor, we're going to  
disclose

20 every expert we know of that we have currently. It's  
not that

21 we're going to disclose only the ones we have final  
reports of.

22 We'll have every 'experts --

23 MR. TIGAR: I couldn't cross-examine an  
entomologist,

24 your Honor. I know there's a head and thorax and  
there's a

25 another part I don't remember and there's six legs.  
That's

47

1 about it.

2 THE COURT: Or is it eight?

3 MR. JONES: How about 30 days?

4 MR. TIGAR: We'd need some time, your Honor.

5 THE COURT: Will your August 2 report include  
an

6 opinion?

7 MS. WILKINSON: If that expert has issued an  
opinion.

8 That's what I was saying earlier. The ones that either  
have

9 issued a written opinion or we anticipate their  
opinion, as I

10 reported on Failure Analysis Associates. Yes. And as  
I said,

11 they have most of those already. For example, we have  
our

12 summary report which talks about the cause of the  
explosion.

13 Within that report issued by Agent Dave Williams,  
there's a

14 report that for truck, we'll --

15 THE COURT: Let's do this to get it moving.  
You've

16 got 30 days to respond to it. If the response is I  
can't

17 respond to this particular person because I don't have  
enough

18 information, then we deal with that.

19 MR. JONES: Okay. That's fair enough.

20 THE COURT: It doesn't have to be the final  
response.

21 Okay.

22 MS. WILKINSON: Your Honor, could I ask one  
other

23 question?

24 MR. HARTZLER: 30 days? Are you saying 30  
days after

25 August 2?

48

1 THE COURT: Yes.

Could

2 MR. HARTZLER: That happens to be Labor Day.

of he

3 you make it four weeks? That would be Friday, the 30th

4 August.

3rd --

5 THE COURT: I could just as well make it the

6 what is the day after Labor Day?

7 MR. MACKEY: The 3rd.

8 MR. JONES: We'll be working.

9 THE COURT: Well, you won't be alone. Okay.

16, if

10 MS. WILKINSON: Yes, your Honor. Under Rule

have

11 the defense knows their experts, we would also like to

12 notice of their experts. And we've written a letter to

information. We

13 Mr. Jones and to Mr. Tigar, requesting that

haven't --

14 have yet to receive anything even lab reports. We

we set a

15 we've received nothing as to their experts. So could

have?

16 date when they would give us the information they now

has 17 Mr. Jones sounds like he has hired some experts and so

18 Mr. Tigar.

does 19 MR. JONES: Well, depending on what the Court

20 this afternoon, I can probably tell them that.

doing 21 THE COURT: Mr. Tigar, do you know what you're

22 by way of experts?

aware, 23 MR. TIGAR: We have retained, as the Court is

so on. I 24 some consulting experts in the areas of pathology and

now. 25 mean, there's a list. I don't have it in my head right

49

way of 1 Until we see what the Government intends to present by

our 2 testimony, I won't be able to tell the Government who

-- under 3 testifying experts will be. We'd be happy to be under

disclosure, a 4 whatever reasonable order with respect to cross

5 fair number of days after --

punch 6 THE COURT: Yeah. I think, you know, that's

7 ground or punch --

the 8 MR. TIGAR: -- their showing. They have got

9 burden of proof and --

10 THE COURT: Well, I know.

11 MR. TIGAR: Well --

going to 12 THE COURT: There will be a time when you're

it's a 13 have to make the disclosure, obviously, but I think

yet. So 14 little -- it's a bit arbitrary to set a date for that

15 I'll wait. Okay?

16 MR. JONES: Go ahead.

17 MR. HARTZLER: On the jury consultants, did I  
18 understand you to say that you had no problem with jury  
19 consultants advising us with respect to preparing a  
jury

20 questionnaire?

21 THE COURT: That's correct.

22 MR. HARTZLER: That's not something the  
parties have

23 to agree upon?

24 THE COURT: Sure. Because the questionnaire  
25 ultimately will be a matter for discussion and ruling.

beyond 1 MR. HARTZLER: Just so we're clear, any task

2 that, other than purely giving advice, we should --

3 THE COURT: Talk about.

4 MR. HARTZLER: -- talk to counsel and get an  
agreement

5 presented to the Court?

6 THE COURT: I don't even have a problem with  
the

7 consultant being in the courtroom listening to the voir  
dire,

8 you know. That's your problem if you want to divert  
your

9 attention and listen to that stuff. Okay?

10 MR. JONES: So we're to talk among ourselves  
about

11 the --

12 THE COURT: About, yeah, what's going to be  
going on,

13 if anything, with focus groups and, you know, other  
things.

14 Moot trials.

15 MR. JONES: When we go out of here this  
afternoon --

16 THE COURT: You're going to be asked some  
things.

17 MR. JONES: Indeed. It seems to me that it  
would not

18 be inappropriate if the Court concurs to say -- because  
the

19 first thing they are going to ask, which I think the  
Court

that the 20 presumably will issue some kind of order on this, is  
21 hearing August 27 is vacated.

22 THE COURT: Correct.

23 MR. JONES: We can say that?

24 THE COURT: Yes.

sure I 25 MR. JONES: These other hearing dates, I'm not

51

1 even remember them so I won't speak to that.

2 THE COURT: I sure don't.

thing I 3 MR. JONES: Other than that, that's the only

that 4 can think of right off the bat that we could talk about

5 wouldn't prejudice anybody.

6 THE COURT: Well --

7 MR. JONES: I prefer not to talk about jury  
8 consultants.

talk about 9 THE COURT: Yes. I would expect you not to

that a 10 jury consultants. And that you can simply talk about

11 number of other scheduling matters were discussed.

due 12 MR. JONES: The Court will file an order in

13 course -- in the fullness of time, I believe, is --

14 THE COURT: That's the new phrase.

15 MR. HARTZLER: Are you -- this transcript then  
is

16 under seal since you haven't decided? I lost or missed

17 whatever it was that was highly confidential --  
controversial

18 or inflammatory. We discussed the fact that there are  
jury

19 consultants that have been consulted. No one has done  
any

20 polling. We anticipate using them to assist us in  
preparing

21 jury questionnaires.

22 THE COURT: Well, I'll open it up. Do you  
think it's

23 prejudicial to disclose this transcript?

24 MS. MERRITT: I think it is, your Honor, only  
from the

25 standpoint our request to use a jury consultant is  
under 848

52

1 and those are usually ex parte.

2 MR. JONES: And we mentioned names.

3 THE COURT: I'll seal it.

4 MR. JONES: But we can say that August 27 is  
vacated?

5 THE COURT: Yes. Right. That's right.

6 MR. HARTZLER: We also, of course, can advise  
our jury  
7 consultants as to what you've indicated with respect to  
the  
8 scope of their work?

9 THE COURT: Correct. All right? Thank you  
all.

10 (The matter concluded at 5:11 p.m.)

11 REPORTER'S CERTIFICATE

12 I certify that the foregoing is a correct  
transcript from

13 the record of proceedings in the above-entitled matter.  
Dated

14 at Denver, Colorado, this 15th day of July, 1996.

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Carpenter

Bonnie

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