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1 APPEARANCES
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Special
4 Attorneys to the U.S. Attorney General, 210 West Park
Avenue,
5 Suite 400, Oklahoma City, Oklahoma, 73102, appearing
for the
6 plaintiff.
7 STEPHEN JONES, ROBERT NIGH, JR., AMBER
McLAUGHLIN,
8 RANDALL COYNE, and MANDY WELCH, Attorneys at Law,
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9 & Roberts, 114 East Broadway, Suite 100, Post Office
Box 472,
10 Enid, Oklahoma, 73702-0472, and JERALYN MERRITT, 303
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11 Avenue, Suite 400, Denver, Colorado, 80203, appearing
for

12 Defendant McVeigh.
13 MICHAEL E. TIGAR, RONALD G. WOODS, ADAM
THURSCHELL,
14 and REID NEUREITER, Attorneys at Law, 1120 Lincoln
Street,
15 Suite 1308, Denver, Colorado, 80203, appearing for
Defendant
16 Nichols.

17 * * * * *

18 PROCEEDINGS

19 (Reconvened at 2:00 p.m.)

20 THE COURT: Be seated, please. We have -- I
think we
21 should take this in some categories.

22 And 72 -- Exhibit 72 was something that
counsel were
23 going to work with and excerpt portions, as I recall.

24 MR. MENDELOFF: We have, your Honor; and if I
could
25 explain to the Court what we've done --

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1 THE COURT: All right.

2 MR. MENDELOFF: The McVeigh team has reviewed
the
3 statement and designated the portions that they wish
redacted.

4 THE COURT: Remind me of what statement we're
talking
5 about now.

6 MR. MENDELOFF: We're talking about the notes
of Agent
7 Smith that have been typed out of the --

8 THE COURT: Yes. All right.

9 MR. MENDELOFF: -- interview of Terry Nichols.
The
10 McVeigh team has designated the portions that they wish
11 redacted with yellow highlighter. We have indicated
the
12 portions that we wish included. Those are designated
in, in
13 effect, green highlighter when you look at it, Judge.
And the
14 determination of the Court that's ripe for the Court
is, first,
15 which portions is the Court going to redact.

16 And our position is we don't take a position
as long
17 as the Court in some manner, sealed or not, considers
the
18 portions that are in green, in addition to the portions
that
19 are not highlighted at all. And the portions that are
not
20 highlighted at all are the ones that both sides agree
on should
21 not be redacted. Is that clear, or should I start
over?

22 THE COURT: Is there something wrong with me?

I don't

23 seem to follow that.

24 MR. MENDELOFF: Let me start over, because
this is as

25 difficult for us to figure it out as it is for me to
say. We

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1 start with the notes.

2 THE COURT: All right. That's Exhibit 72.

3 MR. MENDELOFF: The portion of the notes that
have no

4 highlighting on them are the portions that all parties
agree

5 should not be redacted.

6 THE COURT: Open.

7 MR. MENDELOFF: Open.

8 MR. JONES: Why don't we just hand the Court
one of

9 these. I think if you see it, you might understand
exactly

10 what --

11 THE COURT: It might help. Okay. I'm looking
at it,

12 and I go to page 2 and I see yellow highlighter.

13 MR. MENDELOFF: That yellow highlighter is
that

14 portion that the McVeigh team wishes to be redacted.

We have

15 no objection to it, but we don't take any position on
it and
16 leave that issue as to sealing to the Court.

17 THE COURT: And is it your position that the
yellow
18 highlighted portions are something that have to be
considered?

19 MR. MENDELOFF: No, your Honor. The portions
that
20 have to be considered begin on page 4.

21 THE COURT: This is where we go to the green?

22 MR. MENDELOFF: That's right. If your Honor
will look
23 toward the bottom, you'll see the green.

24 THE COURT: So -- it's green because it's blue
and
25 yellow?

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1 MR. NIGH: Yes, your Honor.

2 THE COURT: So it's within the yellow? All
right.

3 MR. MENDELOFF: I flunked primary colors,
Judge, so --

4 As you go through this, your Honor, you'll see
that
5 there are portions that are green and portions that are
yellow

6 and portions that are white. The portions that are
white are
7 the portions that both parties agree should not be
redacted.
8 As to the green, those are the ones we need in; and as
to the
9 yellow, our position is that it's up to the Court. We
don't
10 take any position on the yellow. Some of the things
that we
11 need to rely on to establish our position as to the
statement
12 are in the white and others are in green. But if --

13 THE COURT: Are you in any position to advise
me as to
14 how much of it that is in the green is in the same
material in
15 affidavits for search warrants or any warrants?

16 MR. MENDELOFF: I'm not in a position to give
you that
17 answer right now. We certainly can do it very quickly.
In
18 effect, what it is, Judge, is it is the basis for those
19 affidavits.

20 THE COURT: Yes. That's what I --

21 MR. MENDELOFF: That's all of it.

22 THE COURT: That's why I assume it's relevant.

23 MR. MENDELOFF: That's right. All of it is.
And in

24 effect, what we've done is we've highlighted the
portions that

25 are the underlying basis for Agent Crabtree's
affidavit. I

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1 think your Honor will recall when he testified he said
it was a 2 summary.

3 THE COURT: Yes. I think I follow.

4 Well, I'll hear from counsel for Mr. McVeigh
here; and

5 we can address these search warrants, too, because I
reviewed

6 the opinion that I authored on the subject, and my
7 interpretation of Press Enterprise II and my view of
what is

8 necessarily public and search warrants, when they are
an issue

9 would normally be public, and the affidavits for them.
So I

10 think the same point is applicable to what has just
been

11 described here as the green area that's disputed.

12 MR. JONES: I think we can make a distinction
between

13 the two, but I wasn't present in the negotiating
sessions. And

14 Mr. Nigh would like to clarify what it is we want, but
I'm

15 going to do the arguments; so we thought we would

double-time

16 you.

17 THE COURT: All right. That's fine.

18 MR. NIGH: Briefly. Your Honor, in reference
to the

19 redaction of Government's Exhibit 72, our position is
that the

20 entire document must be considered by the Court in
reference to

21 the Government's motion in limine concerning the
admissibility

22 of Mr. Nichols' statements against Mr. McVeigh.

23 THE COURT: Well, that's a different issue
from the

24 suppression issue.

25 MR. NIGH: Yes.

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1 THE COURT: I'm looking here at this being an
2 adjudicatory proceeding on motions to suppress. Now,
the

3 motion in limine is a different issue, and we will
argue that,

4 as I've hoped, on the 15th.

5 MR. NIGH: In terms of our position in
reference to

6 the public nature of the blue-green portions, our
position is

7 that there was no in-court testimony specifically about
those
8 items; and for that reason, they should not be made
part of the
9 public record.

10 THE COURT: I understand the position. Now,
I'll
11 hear -- well, Mr. Tigar, what is the -- with respect to
Exhibit
12 72, and the search warrants, the position of Mr.
Nichols?

13 MR. TIGAR: If your Honor please, the portions
that
14 Mr. -- the McVeigh team wants to have sealed, we have
no
15 objection to sealing that; and indeed, we will also be
asking
16 the Court to consider the 302's of agents -- the 302 of
Agent
17 Smith of Mr. Nichols' statements on the voluntariness
and to
18 suppress that, even though that is not a part of the
public
19 record. It is our view that your Honor has in the
reading --

20 THE COURT: Well, we don't have the 302's as
exhibits
21 here.

22 MR. TIGAR: They are in the Exhibit book, your
Honor,
23 and they --

24 THE COURT: They haven't been offered, though.

25 MR. TIGAR: They have not been offered.

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1 THE COURT: Yeah. I'm dealing, first of all

--

2 MR. TIGAR: All right.

3 THE COURT: -- with the exhibits for this
hearing,

4 because I think that's of a different -- that's --

5 MR. TIGAR: Yes, your Honor.

6 THE COURT: That's different from the things
that have

7 been exchanged in discovery.

8 MR. TIGAR: We believe that the warrant
affidavits are

9 subject to a common law right of access and that the
burden

10 would therefore be on the McVeigh team to make a
showing --

11 THE COURT: Yes.

12 MR. TIGAR: -- with respect to it. We say
nothing

13 about it. Maybe they can.

14 The exhibit your Honor is now considering,
however, is

15 not a warrant affidavit. The Smith notes are purported

16 statements of Mr. Nichols. As such, there is no common
law

17 right of access; no common law right of access because
a motion
18 to suppress statements was unknown to the common law.
It's
19 true there's a public interest in proceedings directed
at the
20 resolution of allegations of government misconduct.
That
21 public interest informs the drafters of the Fourth
Amendment
22 and those of John Adams in his letter about James Otis'
23 speeches. But the reading of Press Enterprise that
we've
24 arrived at says very clearly that while wholesale
closure is
25 not appropriate, we have to protect potential jurors
from

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1 things that are going to be, in the words of the court,
"wholly
2 inadmissible at trial." And thus, your Honor is
permitted to
3 take the steps that we and other counsel here have
urged with
4 respect to sealing these exhibits. After all, we would
5 otherwise --
6 THE COURT: Which exhibits?
7 MR. TIGAR: Exhibit 72, for example, the
redactions

8 there sought are reasonable.

9 THE COURT: Are you -- are you taking the
position

10 that all of Exhibit 72 should be sealed?

11 MR. TIGAR: No. The white portions, all
parties are

12 agreed should be and can be a part of the public
record. We

13 have no problem with that.

14 THE COURT: All right.

15 MR. TIGAR: But we join our fellow counsel --
that is,

16 counsel for Mr. McVeigh -- in saying that there is no
common

17 law right of access; that this is a statement that is,
we

18 claim, wholly inadmissible at the criminal trial within
the

19 meaning of Press Enterprise. And therefore, your Honor
can

20 easily find that to put us into the position of moving
to

21 suppress it and being required to disclose it publicly
poses

22 the unconstitutional choice that is forbidden by
Simmons and

23 Lefkowitz vs. Cunningham cited on our pleading filed on
June 5,

24 1996.

25 THE COURT: So you're opposing the release of
the

1 green --

2 MR. TIGAR: Yes, your Honor.

3 THE COURT: -- portions as well as the --

4 MR. TIGAR: Yes, your Honor. And I will say
this: I

5 think if your Honor will look at the green, I know why
the

6 Government wants that stuff out in the press. And as

7 Mr. Nichols' counsel, I know why I don't want it out in
the

8 press until your Honor has resolved the constitutional
9 challenge to it.

10 THE COURT: I'll hear from you, Mr. Jones.

11 MR. JONES: Thank you, your Honor.
Unfortunately, I

12 gave you my only copy.

13 THE COURT: Here. I'll give it back to you.
I

14 wouldn't want you to be disadvantaged.

15 MR. JONES: Are you sure, your Honor? If I
may, I'll

16 return this to the Court and I'll just --

17 THE COURT: Well, I assume there's one coming
in,

18 so --

19 MR. JONES: Right. But I was just going to
number
20 each of the greens so I could just address them each
very
21 briefly.

22 The fourth (sic) green appears on page 4.
It's three

23 sentences. There simply is nothing in these three
sentences

24 that is relevant to the hearing that occurred here.
This is

25 not an issue at this hearing. It is -- the Government,
in my

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1 opinion, wants it in the public domain because it will
be
2 picked up and part of the 6:00 news, your Honor.

3 On page 5, there are again three sentences
that are in
4 green. Again, those matters are not at issue in this
hearing.

5 Now, they may have been part of an affidavit for search
6 warrant; but these particular statements that I'm
referring to

7 are not statements in the affidavit for the search
warrant that
8 are in issue in this case.

9 On page 6, there's again a three-sentence
portion in

10 green, and again, the same matter. It simply does not
relate.

11 These are statements made allegedly by Mr. Nichols,
quoting
12 things said to him by Mr. McVeigh.

13 On page 8, there is an extended green section.
Again,

14 this is not a matter that is an issue. The Court could
put

15 this aside and resolve the challenge to the search
warrant and

16 the consent search and it wouldn't make one bit of
difference.

17 On page 9, there are about six portions of
sentences

18 in green. Same announcement, we would make.

19 On page 14, same announcement.

20 Page 17, there is a slight portion on page 17
that is

21 relevant in an indirect way to an issue here.

22 Page 19 does not relate to an issue here.

23 Page 21, there is a portion that could relate
to an

24 issue.

25 Page 22 -- and in candor to the Court, those
three

1 lines that are in green do relate to an issue.

2 In summary, your Honor, this document is 24
pages
3 long, double spaced. At least half of it, if not more
than
4 half, there is no dispute it can be released to the
public.
5 The portion that is in yellow, the Government does not
oppose
6 its being sealed. The portion that is in green is less
than
7 probably five percent of the entirety of this document.

8 The portions that are in green with the
exceptions
9 that I mentioned would not be necessary for the Court
or, for
10 that matter, an appellate court to review the issues
raised by
11 Mr. Tigar on behalf of Mr. Nichols in this hearing.
They
12 almost all with the exceptions that I indicated relate
to
13 Mr. Nichols' allegedly repeating something Mr. McVeigh
said to
14 him. And for that reason -- and I think the Court will
15 understand the reason when it carefully reviews it --
we ask
16 that that be included in the portion that is redacted
and not
17 released to the public.

18 The Court has undertaken certain steps after
very

19 careful and thoughtful review to balance, on the one
hand, the
20 First Amendment right of the public and the press, and
on the
21 other hand, the absolute necessity that at some time
we're
22 going to try this case and we will have to empanel a
jury that
23 should not take forever to seat. And the more
something is
24 repeated in the press, the more it becomes accepted
wisdom that
25 it is true and the more difficult it is to vacate from
the

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1 human mind.
2 And we join the Court in those efforts, and we
hope
3 that the Court -- as we know it will -- will seriously
consider
4 our objection here. If these statements are admitted
into
5 evidence that we have green here, the public and the
press will
6 ultimately know about them. And as the Court itself
said,
7 often, the question is only a matter of timing. If, on
the
8 other hand, the Court should rule that they should not
be

public 9 admitted into evidence, then they should not be in the
the 10 record so the public's right to know what is in here if
at the 11 Court determines that it should come in, should come in
12 appropriate time after the jury is seated.

warrant 13 THE COURT: I'd like you to address the search
14 affidavits.

question 15 MR. JONES: All right, sir. In our view, the
16 of the search warrant affidavit is less clear and less
17 compelling than the argument with respect to No. 72.
And I 18 recognize the public's interest in that. And frankly,
there 19 are so many search warrants that it is difficult to
keep in 20 one's mind which ones have been sealed and which ones
have not 21 been released or have been released. I know the four
in 22 Arizona have never been released. Beyond that, I can't
23 specifically remember them.

Court 24 I don't ask the Court to do our work. If the
the 25 thinks that it's relevant, we can prepare or show to

in the
are in
this
courts,
record,

1 Government those portions of the affidavit that are not
2 public record. But to be frank with the Court, if they
3 the public record, then they should not be redacted in
4 proceeding.

5 THE COURT: Well, we have warrants from other
6 Kansas warrants that are not at this time in the public
7 as I understand it. They were sealed in Kansas and --

8 MR. MENDELOFF: That's correct.

9 THE COURT: -- kept sealed there.

10 MR. JONES: No, but I think Mr. Mendeloff's
11 point was that what's in those affidavits was part of the public
12 record at the preliminary hearing in Oklahoma.

13 THE COURT: I start with this premise, I
14 think, based upon my previous ruling; and that is that the law is
15 that a search warrant, an affidavit for a search warrant after
16 the search has been conducted and the warrant executed and
17 return filed is normally in and of itself public unless there
is a

18 motion to seal it. I presume there was.

19 MR. MENDELOFF: There was, your Honor.

20 THE COURT: In Kansas and elsewhere, by the
21 Government.

22 MR. MENDELOFF: That's correct, your Honor.

23 THE COURT: Now, to the extent that these
warrants and
24 the affidavits that were the bases upon which they
issued are
25 in issue here, it seems to me that they should be
public

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1 because they do deal with governmental conduct and
that's
2 what's at issue.

3 MR. JONES: I believe that the sections that
--

4 THE COURT: So the -- I'm talking about the
exhibits
5 here, not the whole universe of warrants.

6 MR. JONES: All right. I understand. If I
understand
7 your Honor correctly, the fact that they have been
sealed by
8 the District Court of Kansas is not some sort of
collateral
9 estoppel or res judicata on the issue here because here
they

10 are exhibits.

11 THE COURT: Yes. Once they are exhibits, I'm
looking
12 at them as part of this adjudicatory process.

13 MR. JONES: Well, as the Court knows, there
are
14 circumstances under which even exhibits can be sealed.

15 only paragraphs that we have asked to be sealed, I
think, are

16 three: No. 22, and number 14A -- 14B and C and its
17 counterpoint where the numbers are slightly different,
which

18 I've forgotten that, but I think it might be 17B and C.

19 THE COURT: Yes.

20 MR. JONES: Those are very small portions of
the

21 affidavit. And I would respectfully submit to the
Court that

22 they are not part of the issue that the Court will have
to

23 decide. They are in an exhibit before the Court; but
those

24 particular paragraphs are not necessary for the Court's
25 determination of this issue. If they were, we might
still

1 argue they should be sealed. But we don't reach that
point
2 because they, in our judgment, are not necessary.
Again, they
3 relate to statements that Mr. Nichols allegedly made
that
4 Mr. McVeigh made to him. Allegedly. And that's not
what this
5 motion to suppress is about.

6 THE COURT: All right. Mr. Mendeloff.

7 MR. MENDELOFF: Your Honor, I must confess, I
-- I --

8 with the exception of paragraph 22, I find this
argument to be

9 a little odd, because in comparing the various
affidavits, it

10 appears that these paragraphs B and C they were
referring to

11 are already in one of the affidavits that is public.
And I

12 don't see --

13 THE COURT: You mentioned that earlier and I
didn't --

14 Exhibit 19?

15 MR. MENDELOFF: Yes, your Honor. Exactly the
same

16 point. So -- I think they are quoted verbatim, as a
matter of

17 fact, Judge. And I don't -- I don't see the reason to
take up

18 the Court's time on this on -- on this really moot
issue.

19 22 is a different matter. But the results of
what was
20 in paragraph 22 were made public at the initial
hearings in
21 this case. The results of paragraph 22 deals with
certain
22 laboratory results, and those results are made public
already.

23 And Judge, I also understand as to the -- the
Smith
24 notes, we're addressing that only as to this exhibit
and not as
25 to the Rule 804 issue. Is that correct, Judge?

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1 THE COURT: That's right.

2 MR. MENDELOFF: Thank you.

3 THE COURT: Mr. Kelley, I will hear from you.

4 MR. KELLEY: Thank you, your Honor. I hope
the Court
5 will respect that I'm at a disadvantage. I'm the only
person
6 on this side of the bar with a law license that hasn't
seen any
7 of the documents we're talking about.

8 I understand yellow and green and blue. I
think there
9 isn't any question that exhibits admitted in these
proceedings

10 are subject to the Press Enterprises standard. The
idea that
11 we now, after the entire exhibit was proffered and
accepted
12 under seal, temporarily go through it and decide what
we really
13 need for this hearing is just another way of saying we
want to
14 keep part of it under seal. And I submit that can't be
done
15 without meeting the Press Enterprises test.

16 Talking about the green portion, if your Honor
admits
17 that -- talking about the green portion of Exhibit 72,
if your
18 Honor admits that, obviously, it falls into the same
category
19 as the other exhibits. If your Honor excludes the
green
20 portion, then it becomes the proffer of an exhibit by
the
21 Government which the Government will want to be part of
the
22 record for purposes of preserving its contentions. And
our
23 position is, as stated in the brief we filed -- is that
at the
24 very least, that makes it part of the record in
connection with
25 this trial-like proceeding and subject to the same --
same

1 standard.

2 Now, the one area that raises slightly
different

3 problems is the yellow portion of Exhibit 72, which as
the

4 record stands now is not part of the Government's
proffer. But

5 I think -- I would ask the Court to look at the history
of --

6 of that proffer. I can't remember the name of the
witness who

7 was asked these questions. I can look it up in my
notes. But

8 the witness was asked on cross-examination a question
which

9 seemed to me established a foundation for the entire
exhibit.

10 At that point or at the -- the close of that witness'
11 testimony, the Government did offer the entire exhibit.
And an

12 objection was made by Mr. Jones which did not go to the
13 relevance, at least at that point, of the exhibit. The
14 objection simply went to his desire not to have this
disclosed

15 to the public, even though as he conceded some two or
three

16 months earlier, he himself had moved to unseal this
exhibit

17 which I -- which I submit is a virtual concession that
the

18 applicable standard can't be met.

consider 19 Your Honor prevailed upon the Government to

And 20 cutting back its proffer to what is now the green area.

is is a 21 I -- I submit, your Honor, that in substance, what that

the 22 sealing of an exhibit that would otherwise be part of

out of a 23 record in this case for reasons of -- well, out of --

24 desire on Mr. Jones' part to limit public access.

right's 25 Not saying that can't be done, not saying the

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got to 1 not qualified, but we're saying some kind of burden has

2 be met before that can happen.

your 3 We have other things in issue here; but I took

exhibits 4 Honor's comments to mean you want to focus on the

to 5 first. And I'll limit what I have to say at this point

Exhibit 72 is 6 those items. But I would point out that we know

be 7 the draft that led to the 302, which we understand to

frames the 8 Exhibit A1, one of the exhibits to the pleading that
three 9 main issue being litigated throughout these three days,
10 and a half days.

what's 11 That exhibit, your Honor, goes to the heart of
12 being talked about here. It's a document that at least
--

13 THE COURT: No, it isn't. All it is is a 302.

again -- 14 MR. KELLEY: Well, your Honor, it is the --

is the 15 THE COURT: What goes to the heart of it here
16 search warrants.

Nichols, 17 MR. KELLEY: Well, the 302 relates to, as we
18 understand it, your Honor, the conversations with Mr.
19 which are the subject of these proceedings.

or in 20 THE COURT: They constitute an agent's report,
21 this case four agents' report, I guess. But those are
22 investigatory matters; and that has not been received
in 23 evidence in this case.

position 24 MR. KELLEY: Well, just let me summarize my
25 on that; and then I'll move back to the exhibits.

1 We understand that that exhibit was submitted
to show

2 the Court what statements the defense for Mr. Nichols
wished to

3 suppress. I think in public view, it's hard to believe
the

4 Court would decide that motion without reviewing --

5 THE COURT: I'm not going to review anything
that

6 isn't in evidence.

7 MR. KELLEY: But it was part of the initial --

8 THE COURT: It's not a part of the evidence.
That was

9 made as a showing for the need to have this hearing.

10 MR. KELLEY: I understand.

11 THE COURT: All right.

12 MR. KELLEY: Our position -- and I won't dwell
on it,

13 but I want it clear for the record -- is that those
documents

14 which frame those issues and which your Honor reviewed
to be

15 advised of the issues are part of this proceeding and
subject

16 to the Press Enterprise test.

17 THE COURT: Well, A1 will stay sealed, as will
all

18 other 302's that are not in evidence.

19 MR. KELLEY: Your Honor, regarding the Press

20 Enterprise standard, the test requires a substantial
21 probability that the defendants' fair trial rights --
and I say
22 that because that's the only countervailing interest
that's
23 been asserted -- that the defendants' fair trial rights
will be
24 prejudiced by publicity that closure would prevent.
25 In addition, there must be an absence of
reasonable

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1 alternative means of preventing that prejudice. Your
Honor,
2 when it comes to trying to -- to apply and understand
the
3 difference between a substantial probability or a
reasonable
4 probability, it's -- it's, to me, a little bit like
moving
5 first base back a foot to try to avoid all the close
calls.
6 There are standards that require a showing of a
probability and
7 that is the difficult hump to get over in meeting this
burden
8 of proof. It requires someone to show as a matter of
9 probability something that's going to happen several
months

jury. It 10 down the road when this Court attempts to empanel a
11 involves the ability to predict.

very 12 In addition to that very difficult burden and
13 difficult task as far as a Court attempting to identify
is 14 something more than a probability, the only factor that
15 relevant is information that closure of the documents
would
16 prevent. In other words, the documents must involve
additional
17 incremental information, information --

18 THE COURT: What are you talking about now,
the search
19 warrant?

20 MR. KELLEY: I'm talking about whatever
portion of
21 Exhibit 72 is in issue.

22 THE COURT: Oh, well, I'm going to reserve
ruling on
23 72.

24 MR. KELLEY: All right. In that case, I'm
talking
25 about search warrants.

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1 THE COURT: All right.

exhibit 2 MR. KELLEY: And for that matter, any -- any
3 that's been offered into evidence.

evidence 4 THE COURT: Well, do we have any exhibits in
5 that are under seal still, excepting for this dispute
about 6 affidavits for the search warrant? I don't recall any.

7 MR. MACKEY: No.

Honor. 8 MR. MENDELOFF: I don't believe so, your

9 MR. KELLEY: The only one I had a question
about, your

10 Honor, was W-21, which was, I think, a 302 admitted in
lieu of 11 testimony of some FBI agents.

12 THE COURT: I don't show that as in.

13 MR. MENDELOFF: Your Honor, it did come in in
lieu

14 of --

15 THE COURT: It's in?

16 MR. MENDELOFF: -- Agent Gillispie's
testimony.

17 There's no sealing issue on that at all.

18 THE COURT: Is that right, Mr. Tigar?

19 MR. TIGAR: Yes. Our recollection is that
it's in.

20 It's in in lieu of Agent Gillispie's testimony.

21 THE COURT: Yes. I remember now. All right.
It's in

22 and it's open.

warrant
23 MR. KELLEY: Then we're down to the search
24 affidavits since your Honor has ruled on A1 and the
others.

25 THE COURT: Well, I haven't on 72 because --

1075

1 MR. KELLEY: I understand.

2 THE COURT: -- I haven't given it that careful
focus
3 and I may not until I hear arguments on the motions
that are, I
4 hope, going to be on July 15. Because as Mr. Mendeloff
has
5 pointed out, this also relates to another matter and
that is
6 the admissibility of statements of Mr. Nichols against
7 Mr. McVeigh under Rule 804(b)(3), a matter that is, you
know,
8 much in dispute.

9 MR. KELLEY: While I'm on it, before I forget,
I would
10 ask your Honor to authorize release of the white
portions of
11 Exhibit 72 --

12 THE COURT: Yes.

13 MR. KELLEY: -- at this stage.

14 THE COURT: I will do that, sure. I didn't
mean -- I
15 only meant the disputed part.

16 MR. KELLEY: A lot of it was talked about.

17 THE COURT: We'll get the white -- get
somebody
18 redacting it so that the undisputed areas can be
available,
19 given a reasonable opportunity to do that work.

20 MR. KELLEY: Your Honor, just in terms of how
this
21 test is applied, I would ask that the Court, if the
Court has
22 any question about it, to review the opinion in the
Nebraska
23 Press case by the former chief justice who wrote the
Press
24 Enterprises case. It's the only case I know of that
speak --
25 speaks to what this Court really has to find.

1076

1 And that case was a prior restraint case that
dealt
2 with the clear and present danger test, but it
discusses how
3 difficult it is for a trial judge to get beyond the
mere
4 possibility that information released might make it
difficult

5 or impossible to seat a jury.

6
really found

And in that case, the -- the trial judge

7 nothing more than a possibility, understandably sought
to

8 prevent it, but the Court found really was not in a
position to

9 make any stronger finding than that and for that
reason, set it

10 aside.

11 Moving from a possibility to a probability is
a

12 significant burden and I don't think it's been met
here,

13 particularly since based upon what I know -- and again,
I -- I

14 speak with an involuntary degree of ignorance, but
nonetheless

15 ignorance about the exact contents of these documents,
but, as

16 I understand it, the gist of everything is already out
there,

17 so that it is not publicity that any kind of closure
would

18 prevent. And if the information out there may cause
problems

19 seating a jury, it's unfortunate, but it's irrelevant.

20 The issue is whether information not out there
is

21 going to meet this standard and I submit that it takes

22 something stark, it takes something devastating and
most

23 importantly, it takes something new.

24 If we take Mr. Jones at his word that, you
know, the

25 only difference between now and several months ago when
release

1077

1 of all this stuff was okay is the passage of time, that
that

2 not only indicates that we're talking about a mere
possibility,

3 but it's also something that can be remedied through

4 alternative means; namely a delay of a trial for -- for
two

5 months. I -- I see the Court's jaw tighten when I say
that,

6 but it's, nonetheless, one of the alternative means
that has

7 been prescribed for consideration. I don't think it's

8 necessary. I don't think they have come close to
meeting the

9 standard in the first place.

10 THE COURT: Okay.

11 MR. JONES: Your Honor, I have a concession to
make.

12 Stand here --

13 THE COURT: Come forward.

14 MR. KELLEY: Your Honor, can I make just one

more

15 point?

16 THE COURT: Yes.

17 MR. KELLEY: The other -- the other thing
that's clear

18 to me in this case -- and all I can tell you is what I
have

19 observed -- is that your Honor's order changing venue
to this

20 venue has worked. The interest in this case in this
community

21 is moderate. The people I talk to who are interested
are

22 lawyers and they never end up on juries anyway. But --

23 THE COURT: Oh, yes, they do.

24 MR. KELLEY: Well --

25 THE COURT: Maybe you won't.

1078

1 MR. KELLEY: Perhaps that's the problem.

2 THE COURT: We have lawyers on juries in this
3 district.

4 MR. KELLEY: It's un -- it's uncommon. It's
certainly

5 never happened in a case that I've tried. But the
point is,

6 your Honor, the auxiliary courtroom is one-third full
of

7 reporters. This community does not take a personal
interest in
8 this case the way the community of Oklahoma City did
and
9 there's also not the morbid cur -- well, strike morbid
--
10 curiosity generally that you see in a case involving a
11 celebrity. And for that reason, I -- I -- just one
more
12 indication that the burden can -- can't being met and
that this
13 Court's voir dire is sufficient to avoid any prejudice.

14 THE COURT: All right. Thank you, Mr. Kelley.
15 Mr. Jones.

16 MR. JONES: Well, first, your Honor, in the
Western
17 District of Oklahoma, those excluded in the class not
fit for
18 jury are incompetents, drunkards, convicted felons and
lawyers.

19 Your Honor, I must confess -- and as I listen
to
20 Mr. Mendeloff and I have done some checking at the
table -- he
21 is correct. Hopefully, it'll be the last time I'll
have to say
22 that, but in this case he is. The paragraphs that I
objected
23 to, 14B and C are, in fact, in Government's Exhibit 19
and that
24 would also be true for the search warrant where the
numbers are

25 slightly different.

1079

1 Paragraph 22, so far as I know, is not in any
search
2 warrant or criminal complaint that is still sealed.
However,
3 the allegations in paragraph 22 were introduced into
evidence
4 at the preliminary hearing on -- concerning Mr. McVeigh
at
5 Tinker Air Force Base and therefore, I withdraw my
objection to
6 the Court releasing them.

7 I would say, however, your Honor, and I -- and
I'll
8 say it in 15 seconds, that the problem we have is that
so much
9 of this which is damaging is -- to us is in the public
record
10 and got in the public record before we got discovery
and that
11 which we have received in discovery, that would in our
12 opinion -- and we are advocates, but, nevertheless, in
our
13 opinion impeach, minimize or explain is now sealed.
Perhaps
14 the way it should be. But -- but, there is no greater
example

relates 15 of that than the Whitehurst material under seal as it
don't 16 to paragraph 22. We addressed that in our briefs and I
will 17 want to state it any further because I know the Court
18 consider it.

19 THE COURT: Mr. Tigar.

briefly. 20 MR. TIGAR: Thank you, your Honor, very
The 21 authorization for taking the action, we suggest, is at
478 US 22 14. That's at the bottom of page 14 in Press
Enterprise II.
23 Nebraska Press, the prior restraint case, has nothing
whatever
24 to do with the issue here, as Chief Justice Burger
makes clear
25 in Press Enterprise II. Indeed, one of the cases cited
by the

1080

1 press attorneys, In re New York Times -- there are
three Second
2 Circuit opinions in In re New York Times, your Honor.
The one
3 at 834 F.2d 1152, which they cite, but don't discuss,
is the
4 one that says that redaction is permissible, even if it
would

disclosed. 5 render almost meaningless the documents to be

72? 6 THE COURT: Now, are you addressing Exhibit

Exhibit 7 MR. TIGAR: Yes, your Honor. I'm addressing

on that 8 72, but I -- and that's all that I intend to say that

when it 9 subject. That is our position about this sealing issue

Honor 10 comes up in this context, but I wanted to give your

by my 11 pinpoint authority because I think the standard stated

12 learned friend, Mr. Kelley, is just completely wrong.

I'm 13 THE COURT: Well, I've already indicated that

best be 14 going to reserve on 72. Because I -- I think that can

addition to 15 addressed after, really, I hear your arguments in

16 the additional submission.

Judge -- 17 MR. MENDELOFF: Just a question for guidance,

18 THE COURT: Yes.

19 MR. MENDELOFF: -- if I could.

release 20 THE COURT: Except that I've already agreed to

21 those portions, the excerpts about which there is no

22 controversy.

have in 23 MR. MENDELOFF: Judge, the only question I

with 24 terms of guidance is this: We need to draft pleadings
are, of 25 respect to this and the portions that we've designated

1081

Honor like 1 course, essential to our position. How would your
we do? 2 us to reference those portions in making the arguments

3 THE COURT: In a sealed appendix.

4 MR. MENDELOFF: Thank you, your Honor.

5 MR. JONES: Your Honor, the issue has been
avoided but

6 I must address it and that is the 302's because they
are

7 important as it relates to another issue the Court has
under

8 advisement and that is the Government's motion in
limine. May

9 I just in a minute --

10 THE COURT: Yes. But I'm not intending to
release the

11 302's that are not in evidence.

12 MR. JONES: May I --

13 THE COURT: Well, better there so everybody
can hear.

14 We wouldn't want to disadvantage any of those who are
present

15 in the courtroom.

Court,
16 MR. JONES: Your Honor, pending before the
17 waiting decision, is the Government's motion in limine.
In our
18 view, it is difficult, if not impossible, for the Court
to
19 answer the Government's motion without reviewing 1A.
And yet,
20 the issue in the motion in limine is more a legal issue
than it
21 is a factual issue. We took --

22 THE COURT: Well, there's a significant
factual issue
23 presented here and that's why, at times, I have said
here
24 without expanding on it that this is relevant to the
804(b)(3)
25 because there are two parts of 804(b)(3) that are
involved

1082

1 here. One is the language of the rule, itself, and the
other
2 is the confrontation clause under the Sixth Amendment
which has
3 been raised. And one of the things that the Government
is
4 going to have to address is what they believe to be
true in

5 these statements. Now, that's going to have to be
submitted
6 under seal because the whole point of the exercise on
the
7 motion in limine is to -- whether we're going to have
8 admissible statements. Admissible as to Mr. McVeigh in
this
9 separate from Mr. Nichols. And I think to the extent
of my
10 understanding of the law at this time, there's a
problem when
11 portions of it are believed to be true, some statements
are
12 believed to be true, some not by the -- by the party
proffering
13 the evidence. And indeed, where some statements are
14 contradicted by other information which may be or may
not be
15 evidence.

16 MR. JONES: I take your Honor's point and I
confess it
17 to be true. Since there was no testimony before the
Court of
18 the entirety of what Mr. Nichols has claimed to have
said --
19 the Court heard only bits and pieces of it -- I think
that the
20 only appropriate way the Court can answer the question
of the
21 804(b) issue is to have the entire 302 in front of the
Court.

22 THE COURT: A1.

23 MR. JONES: A1, right.

24 THE COURT: Yes.

25 MR. JONES: Exactly.

1083

1 THE COURT: Yes. That matter hasn't been
heard. We

2 have put in some evidence that's relevant to it.

3 MR. JONES: Yes, but --

4 THE COURT: That's not this hearing.

5 MR. JONES: No.

6 THE COURT: That's why I draw a distinction
for

7 Mr. Kelley's benefit between the exhibits that are in
the

8 hearing and a part of this adjudicative exercise and
the motion

9 that is yet to be heard.

10 MR. JONES: The motion --

11 THE COURT: And I understand that to
understand that

12 motion, I'm going to have to look at A1. That's your
point,

13 isn't it?

14 MR. JONES: Exactly.

15 THE COURT: Yes.

16 MR. JONES: All I want to know is in order to
protect
17 the record, if the Court feels it's appropriate and
proper to
18 answer my question, will the Court review A1 as it
presently
19 exists or do I need to move its formal admission and
ask the
20 Court to seal it?

21 THE COURT: Well, what I have -- and it was
pursuant
22 to the agreement of all counsel in the case -- is the
23 correspondence exchanged between parties copied to me
on what
24 it is the Government intends to offer.

25 MR. JONES: All right. And I believe that
that

1084

1 correspondence has in it 1A.

2 THE COURT: I can't remember if it has all of
that.
3 But there were portions that are to be offered; some
not
4 offered, which gives rise to this question about what
do you
5 believe, you know.

6 MR. JONES: Well -- perhaps --

7 THE COURT: I'll -- let me put it to you this

way: I

8 will have an understanding of Exhibit -- what is here
as
9 Exhibit A1, 302, when you stand up to argue the motion
in
10 limine.

11 MR. JONES: Thank you.

12 THE COURT: And I'll also have what's going to
be
13 submitted in the briefing schedule, portions of which
will
14 necessarily be under seal.

15 Okay. Now, the search warrants were -- the
affidavits
16 for search warrants, those exhibits that are affidavits
and
17 search warrants will be open. Made available to the
public.

18 Received in evidence here. Mr. Kelley?

19 MR. KELLEY: Your Honor, could I just get a
20 clarification on 72? Your Honor is taking that under
21 advisement?

22 THE COURT: Yes. I'll be in a better position
to
23 address it when I've heard argument.

24 MR. KELLEY: Okay. My clients would have me
object to
25 that delay in access.

1 THE COURT: I understand. And maybe they will
have
2 you file a petition in mandamus, too, and, you know,
keep the
3 meter running, Mr. Kelley. That's fine.

4 MR. KELLEY: I am learning the way to that
Court, but
5 I can't say --

6 THE COURT: All right.

7 MR. JONES: Your Honor, may we ask the Court,
in view
8 of the fact that oral argument has been set on this
motion
9 which would impact on the severance, that while the
Court
10 continue to hear the motion for severance on August 27,
that
11 the time that the defendants have to move for severance
be
12 enlarged from July 29 to August 10 and that the
Government then
13 respond on August 20? Because we will need to have the
benefit
14 of your Honor's ruling on the 804(b) issue in order to
address
15 the severance and we might as well put it in all at one
time
16 instead of a supplement.

17 THE COURT: Yes. I -- you know, that's
telling me

August 18 that I have to have a ruling by August 10 -- or before
19 10.

20 MR. JONES: Or continue the severance hearing.

21 THE COURT: Yes, which is what I would do,
obviously.

22 I think it's only fair to all counsel that you know my
position

23 on the suppression and really on the admissibility of

24 Mr. Nichols' statements under 804(b)(3), as well. So
both of

25 those things have to be addressed, I think, for a
meaningful

1086

1 analysis of the issues. And there may be others. I
recognize

2 there may be others on the question of severance.

3 Mr. Tigar.

4 MR. TIGAR: I'm sorry. I didn't -- I didn't
5 understand your Honor. So the date the severance
motions are

6 due is put over to August 10?

7 MR. HARTZLER: That's a Saturday, your Honor.
That's

8 a Saturday and it cuts down our time substantially, so
we would

9 ask that it be filed in that week.

a 10 THE COURT: What I propose to do is to make it

11 certain time after the ruling.

12 MR. TIGAR: Okay.

13 THE COURT: That's what makes sense.

14 MR. HARTZLER: Yes. Yes.

15 THE COURT: I can't you -- you know, I cannot
16 myself that guarantee a ruling by a given date. I can't give

17 but, kind of a deadline given my other responsibilities,

18 obviously, I know this is a priority.

19 record MR. TIGAR: Well, I will -- I'll state for the

20 its the Government teed up the 804(b)(3) in recognition of

21 would appeal rights under 3731. So if indeed -- I mean, we

22 solicitor hope that the Government would get something from the

23 the to let us know whether they were going to try to go to

24 and Circuit based on your Honor's decision on suppression

25 Circuit, 804(b)(3). Because, of course, if they did go to the

1 we would not then have a final resolution of the
suppression

2 and admissibility issues.

3 THE COURT: Well, it depends on how fast the
Circuit
4 does its work, you know. That's -- that's up to them.

5 MR. HARTZLER: We're not expecting to have to
appeal
6 on it.

7 MR. TIGAR: Well, we obviously disagree, your
Honor,
8 and I'm going to talk to Mr. Hartzler about this Santa
Claus
9 thing he was telling me about earlier this morning.

10 THE COURT: I'm not going to ask anything
about that.

11 All right. So where are we now? Are you in
agreement
12 with what I suggested as the scheduling on this matter?
13 Mr. Hartzler.

14 MR. HARTZLER: On the matter -- the --

15 THE COURT: The 804(b)(3) and the suppression.
The
16 briefing by noon on July 12, I think I said. Argument
on

17 Monday the 15th, on both issues. Both motions.

18 MR. HARTZLER: Yes.

19 THE COURT: All right. All agreed?

20 MR. NIGH: Yes, your Honor.

21 THE COURT: Good. Then what remains?

22 affidavit -- or

23 that both

24 Court to

25 he

MR. MENDELOFF: Judge, Exhibit 35, the

excuse me, the testimony from the initial appearance

sides marked their designations on is ready for the

receive it. Mr. Tigar has designated the portions that

1088

portions

entire

in the

only

have to

1 views as being significant. We have designated the

2 that we view as being significant. And our position, I

3 believe, is that we're just going to seek that the

4 transcript be admitted into evidence and your Honor can

5 consider the designations for whatever you wish.

6 THE COURT: All right. So 35 is a copy of the
7 preliminary hearing --

8 MR. TIGAR: Yes, your Honor.

9 THE COURT: -- and transcript which is already
10 public record.

11 MR. TIGAR: Yes. It's in its entirety. The

12 purpose of the highlighter is so your Honor doesn't

13 read the whole thing. These are the portions we think

are

14 relevant.

15 THE COURT: All right. 5 then is in with the
16 highlighting as indicated here. Okay.

and

17 MR. TIGAR: I'm reminded that we did take the
18 deposition of Mr. Burmeister outside your Honor's sight

that as

19 hearing the first morning at 9:00. We will be offering

this

20 a part of the exhibits that are to be agreed to after

objection

21 hearing and I assume the Government doesn't have any

22 to it.

Honor. We

23 MS. WILKINSON: We have no objection, your

Burmeister had

24 did that at 9:00 Wednesday morning because Agent

25 to go to Saudi Arabia.

1089

that I

1 THE COURT: All right. Now, there is a ruling

testimony of

2 need to make also on your stipulation of what the

as a

3 Chief Judge Russell would have been had he been called

to

4 witness at this hearing. The dispute is with respect

5 paragraph 12 in which he's offering an opinion. And
the
6 objection, as I take it, is not to the qualifications
of the
7 witness, but to have an opinion. But that the opinion
is
8 irrelevant since the issues are to be resolved within
the four
9 corners of the affidavit as the law requires.

10 MR. HARTZLER: Of course.

11 THE COURT: Yes. Mr. Tigar, I'm -- do you
have any
12 argument on that admissibility of the paragraph 12 as
it's
13 numbered?

14 MR. TIGAR: May I have a copy -- excuse me.
May --

15 THE COURT: Sure. There's a copy right here.
If you
16 want --

17 MR. TIGAR: Thank you, your Honor.

18 THE COURT: Well, here's -- I have it marked
right
19 here.

20 MR. TIGAR: Well, I don't think there's any
question,

21 your Honor, that it's relevant because the
inconsistency on the

22 face of the warrant is an inconsistent matter. The
evidence,

23 your Honor --

24 THE COURT: Well, the question is whether I
need the
25 help of Judge Russell to decide that.

1090

1 MR. TIGAR: Your Honor, we -- we do not offer
this in
2 order to permit Judge Russell to impeach with parol the
solemn
3 declaration of the warrant. It would be inadmissible
for that
4 purpose. It would be like the Penelopes unweaving the
webs
5 they have woven, as Justice Kennedy said when he was on
the
6 Ninth Circuit. We don't let judges admit judge's
opinions for
7 that purpose. The relevance of it is that the warrant
mill --
8 which is how we would characterize it in argument -- in
that
9 command post was observed by many percipient people,
some of
10 whom testified here, and Chief Judge Russell's
observation upon
11 looking at it that, indeed, what appears on the face of
the
12 warrant is inconsistent with the known facts is the
observation
13 of another percipient person that tends to support our

argument

14 that the slipshod and careless manner in which this
matter was

15 handled tended to the prejudice of Mr. Nichols' right.

So for

16 that limited purpose, we believe it's admissible.

17 THE COURT: That doesn't sound like a very
limited

18 purpose.

19 MR. TIGAR: Well, it's a cosmic assertion,
your Honor,

20 but we can only prove it one piece of evidence at a
time.

21 THE COURT: The objection to 12 is sustained.
I'm

22 regarding it as opinion evidence which is not as an
opinion

23 relevant given the standard that I understand I must
apply to

24 the sufficiency of the warrant -- affidavit.

25 Anything else required of me right now?

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1 MR. JONES: No. Not now, we have an 848
matter.

2 THE COURT: Yes, I understood that.

3 MR. HARTZLER: Nothing from us. Thank you.

4 THE COURT: All right. Then I guess in this
matter,

5 we will be in recess until July 15. At 9:00.

6 (Recess at 2:53 p.m.)

7 * * * * *

8 REPORTERS' CERTIFICATE

9 We certify that the foregoing is a correct
transcript

10 from the record of proceedings in the above-entitled
matter.

11 Dated at Denver, Colorado, this 29th day of
June,

12 1996.

13

14

15

Paul Zuckerman

16

Bonnie

Carpenter

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