Tuesday, June 3, 1997 (morning)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Criminal Action No. 96-CR-68
UNITED STATES OF AMERICA,
Plaintiff,
vs.
TIMOTHY JAMES McVEIGH,
Defendant.

REPORTER'S TRANSCRIPT
(Trial to Jury - Volume 131)

Proceedings before the HONORABLE RICHARD P. MATSCH, Judge, United States District Court for the District of Colorado, commencing at 9:00 a.m., on the 3d day of June, 1997, in Courtroom C-204, United States Courthouse, Denver, Colorado.

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

APPEARANCES

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

JOSEPH H. HARTZLER, SEAN CONNELLY, LARRY A. MACKEY, BETH WILKINSON, SCOTT MENDELOFF, JAMIE ORENSTEIN, AITAN GOELMAN, and VICKI BEHENNA, Special Attorneys to the U.S. Attorney General, 1961 Stout Street, Suite 1200, Denver, Colorado, 80294, appearing for the plaintiff.

STEPHEN JONES, ROBERT NIGH, JR., RICHARD BURR, and RANDALL COYNE, Attorneys at Law, Jones, Wyatt & Roberts, 999 18th Street, Suite 2460, Denver, Colorado, 80202; JERALYN MERRITT, 303 East 17th Avenue, Suite 400, Denver, Colorado, 80203; CHERYL A. RAMSEY, Attorney at Law, Szlichta and Ramsey, 8 Main Place, Post Office Box 1206, Stillwater, Oklahoma, 74076, and CHRISTOPHER L. TRITICO, Attorney at Law, Essmyer, Tritico & Clary, 4300 Scotland, Houston, Texas, 77007, appearing for Defendant McVeigh.

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PROCEEDINGS

(In open court at 9:00 a.m.)

THE COURT: Please be seated.

We're resumed in 96-CR-68, United States against Timothy James McVeigh, for a hearing of a number of the motions. Before calling up these motions, though, I want to take care of a matter relating to the custody of the exhibits.

We have during the trial agreed that exhibit -- the physical exhibits, the objects, could be kept in the custody of the Government through counsel, and I propose to continue that.

Mr. Jones, what's the --

MR. JONES: That's satisfactory, your Honor, through the completion of the trial.

THE COURT: All right. So we will permit, Mr. Hartzler, your people to regain custody of the physical exhibits, most of which are now on the floor in the adjacent courtroom.

MR. HARTZLER: Thank you.

THE COURT: All right.

Now, the motions to be heard are the defendant's motion to declare the Victims Rights Clarification Act unconstitutional, a motion with a brief in support. And I'll hear that first.

Then there is a motion for prepenalty phase voir dire of the jury. There's a motion for a brief recess between the Government penalty phase presentation and the defendant's penalty phase presentation. There are defendant's motions in=20 limine, several, dealing with anticipated evidence; and because it's anticipated -- information, I guess we should begin saying, in the words of the -- in the word of the statute. Those motions were filed under seal because they related to the possibility of evidence, some of -- or information, some of which I believe has changed in the Government's planning.

And there's also a plaintiff's motion in limine with respect to defense information to be introduced. So those I think are the pending motions, and we'll hear them in the order I've just announced them.

So we'll begin with the motion to declare the Victims Rights Clarification Act unconstitutional and brief in support, and that of course addresses the -- some of the issues that were dealt with in this Court's previous memorandum opinion and order on a similar motion filed before the trial began.

So who's to speak in support of the motion?

MR. COYNE: I am, your Honor.

THE COURT: All right.

DEFENDANT'S ARGUMENT ON VICTIMS RIGHTS CLARIFICATION ACT

MR. COYNE: May it please the Court. For the second time during the pendency of this capital case, Congress has declared war on the independent, nonpolitical, federal judiciary, what Chief Justice Rehnquist has called the crown jewel of our democracy. They've done it this time by passing what's titled the Victim Rights Clarification Act. We submit that that statute passed by Congress for the specific purpose of interfering with this Court's ruling in this case, under Rule 615 of the Federal Rules of Evidence, is unconstitutional for a number of reasons.

First, the statute violates the separation of powers clause. It violates Mr. McVeigh's Eighth Amendment right to heightened reliability during his capital sentencing proceeding. It violates the ex post facto clause, the Sixth Amendment fair trial guarantee, and the Fifth Amendment rights to due process and equal protection. And we move that the Court strike down this statute as unconstitutional.

Now, I won't burden the Court with the lengthy recitation of the history of your Honor's rulings in this case. But the purpose of those rulings, I think, is worth bearing in mind this morning. The purpose was to avoid prejudicial pretrial impact from possible emotionally traumatizing effects of what penalty phase witnesses may see and hear at the trial.

It shouldn't surprise anyone that this statute suffers from as many defects as I've enumerated, given the incredible haste with which Congress slapped the statute together and passed it so that it could, again, interfere with this Court's ruling in this pending capital case.

The bill was introduced in the House just six days before the en banc Court of Appeals upheld your Honor's Rule 615 ruling, and then the legislation sped through both houses during the course of two weeks.

THE COURT: I don't think it's correct to say that the Tenth Circuit upheld the ruling. It declined to rule.

MR. COYNE: And in so --

THE COURT: It had the effect of leaving the order in force.

MR. COYNE: Agreed, your Honor. The order remained intact after the -- your ruling was twice challenged on appeal, but they did not reach the substance of that ruling on appeal.

THE COURT: Right.

MR. COYNE: Congress wasn't entirely unaware of the constitutional problems that it raised. And if I may quote from the congressional record, I think the remarks of Representative Scott in particular sum up one of the problems that I see, and that is in particular the separation of problems (sic) difficulty. "The bill violates the constitutional framework of separation of powers in its undue retroactive interference with a ruling in a pending criminal case. It is an obvious attempt to obtain legislatively a ruling in the Oklahoma bombing case different from the one already entered into by a federal judge according to the law and according to the facts in the particular case."

Now, the statute didn't leave your Honor with much, if any, discretion, at least as I read it. It speaks in terms which are mandatory. 18 U.S.C. Section 3510 provides in pertinent part that this Court and any other United States district court shall not order any victim of an offense excluded from the trial of the defendant accused of that offense because such victim may during the sentencing hearing testify as to the effect of the offense on the victim and the victim's family or as to any other factor for which notice is given as required under Section 3593.

The statute also amends 18 U.S.C. Section 3593 in pertinent part to read: "The fact that a victim attended or observed the trial --" and again mandatory language -- "shall not be construed to pose a danger of creating unfair prejudice, confusing the issues, or misleading the jury."

What seems to be happening is that Congress in this case has decided to overrule Federal Rule of Evidence 403 at least as regards to victims.

Now, the separation of powers principle, as I'm sure the Court's aware, developed from the framers' deep-seated hatred of legislative interference with the courts at the

hatred of legislative interference with the courts at the behest of private individuals and factions, and that's precisely what we have in this case. We have victims who appealed the Court's rulings, victim rights associations who appealed the Court's rulings, attorneys general who lobbied Congress on behalf of overturning this Court's ruling, all binding together for the purpose of disturbing a ruling that this Court entered for the purpose of protecting the fair trial rights of Mr. McVeigh.

This specter created by state politicians and private parties inserting themselves into the legislative arena for the purpose not just of affecting the law and changing it, but of changing the law in the middle of an ongoing capital trial is one which I submit brings into disrepute both branches of government, the legislative and the judicial branch.

The Supreme Court has never hesitated to strike down provisions of law which seem to accord to one branch powers more appropriately disseminated among other branches. That's taught to us by the Mistretta case, and yet in this instance, the Congress has done -- has reached into the middle of this capital trial and it has overruled this Court's order. In essence what Congress did after the judicial process had run its course was to resolve itself into a super supreme court so that it could overrule this Court's decision and ignore any other decisions of any other courts contrary to it. The precedential value of such incursion into the judicial process is staggering, and one which I think needs to be taken into consideration.

Plaut vs. Spendthrift Farms stands for the principle that the legislature cannot control the actions of the courts by directing the particular steps which shall be taken in the progress of a judicial inquiry; yet in this case, the Victim Rights Clarification Act does precisely that: It directs this Court that it cannot apply Rule 615 to protect this defendant and countermands this Court's order, twice considered after some thought and deliberation, revisited after some extensive briefing and argument, and by legislative fiat just overturns it.

If I could turn to another constitutional flaw; that is, the Eighth Amendment requirement that Mr. McVeigh is entitled to a capital sentencing proceeding which has heightened reliability. Indeed, when the United States Supreme Court struck down the death penalty in Furman vs. Georgia, it was concerned, deeply concerned about the irrational and unpredictable manner in which the death penalty had been imposed. Yet by permitting victim impact testimony in this case, which has been tainted by inflammatory trial testimony, the Victim Rights Clarification Act ensures that those same constitutional problems will pervade Mr. McVeigh's sentencing hearing.

The Supreme Court has said it is vitally important, your Honor, both to the defendant and to the community that any decision to impose the death sentence be and appear to be based upon reason rather than caprice or emotion. And I think those were the principles which guided your Honor's early decisions when you decided to sua sponte, without any motion by the defendant or the Government, to invoke Rule 615 to protect the

integrity of this very important capital trial and sentencing proceeding.

When victim/witnesses are exposed to the type of inflammatory, emotional, heartrending testimony permitted during the guilt phase of this trial, passion, prejudice, and perhaps even mistake are as inevitable as they are understandable.

This Court did not rule in a vacuum. Indeed it had before it several examples of emotional outbursts by victims in direct response to attendance at proceedings in this case. I won't lengthen my argument by reciting those; they're noted in our brief. But I would like to say that the wisdom of the Court's decision, I think, has been shown even during the course of the trial and beyond as after the appearance of certain witnesses, at least -- Jennifer McVeigh, Lori Fortier come to mind -- there were again emotional responses of victims outside the courthouse in response to those testimony.

Those are the types of effects, your Honor, that we can't cabin off. Those are also the types of effects that are very difficult to detect. And for that reason, we respectfully submit that the Court's suggested procedure of taking these victim impact witnesses on voir dire for the purposes -- purpose of determining whether in fact they have been affected by attendance at trial proceeding is one which may prove unsatisfactory and may not ferret out the bias which may have infected their testimony.

If I could turn to the ex post facto clause argument just briefly, we submit that this particular statute does violate the ex post facto clause. It is being applied retroactively; Congress passed its statute and then reached back and imposed it on this Court, on this defendant, on this process.

Perhaps the most critical element of that particular argument is whether or not this statute, Victim Rights Clarification Act, acts to disadvantage Mr. McVeigh. According to Lynce vs. Mathis, a case cited in our brief, the narrow issue is whether the statute's consequences disadvantage, in this case Mr. McVeigh, by increasing his punishment.

Well, the very purpose of victim impact testimony is of course to persuade the jury to impose the most severe sentence possible; in this case, a death sentence. The statute's consequences, on the other hand, allowing that victim/witness testimony which has become contaminated and in a real sense supercharged by attendance at court proceedings, dramatically increases the risk that Mr. McVeigh will be sentenced to death.

We submit, therefore, that application of the Victim Rights Clarification Act to Mr. McVeigh during his ongoing trial will have both the purpose and effect of increasing the quantum of punishment.

Just briefly, your Honor, if I could note our fair

trial argument under the Sixth Amendment and our due process, equal protection arguments under the Fifth Amendment, I won't lengthen my presentation by spelling those out -- they're set out in the brief -- other than to note that the Supreme Court

has consistently emphasized that a criminal defendant's right to a fair trial guaranteed by the Sixth Amendment is the most fundamental of all freedoms. And that fair trial right, of course, extends beyond a guilt phase proceeding and into a sentencing phase proceeding.

Mr. McVeigh is entitled to that fair trial; and indeed, your Honor's orders under Rule 615, I submit, were tendered for that very purpose: To ensure the integrity of a very important capital sentencing proceeding in this case. Thank you.

THE COURT: All right. Thank you.

Mr. Sean Connelly, are you going to respond to Mr. Coyne?

PLAINTIFF'S ARGUMENT ON VICTIMS RIGHTS CLARIFICATION ACT

MR. CONNELLY: Yes, your Honor, just briefly.

The Victims Rights Clarification Act made two procedural clarifications in federal sentencing law in capital cases. The first, which this Court has already applied, said: "The United States district court shall not order a victim excluded because that victim will offer victim impact testimony or other sentencing testimony in a capital case." The Court has applied this by rescinding its prior orders, so that's no longer in effect -- that's no longer in dispute, I don't think. I think the only issue at this point is the amendment to Section 3593(c) which says that the fact that a victim attended part or all of the trial proceedings, or in this case closed-circuit broadcast, shall not be a basis for excluding that victim on grounds of unfair prejudice or other types of arguments that could otherwise exclude somebody under 3593(c).

We submit, contrary to defendant, that this is a constitutional exercise of Congress's power to prescribe the rules of procedure in federal courts.

I'd like to address briefly the three constitutional arguments that have been made. Each of them is precluded by controlling case law. First, it is not a violation of separation of powers for Congress to prescribe the rules of procedure that a court must follow in a criminal or any type of proceeding in federal court. The Supreme Court's made clear in the Plaut case that Congress can alter the rules of procedure even after they've been applied by a court in a given case as long as it does so prior to final judgment. And indeed as long as it does so, it can even reopen final judgments as long as the judgment is not final in the sense of all appellate remedies haven't been exhausted through the Court of Appeals and ultimately through the Supreme Court, the highest court.

Congress has clearly exercised its power under Plaut and under the Rules Enabling Act and power to prescribe the rules of procedure in federal court; so we submit that under

Plaut, there is no basis for any separation of powers argument. In fact, Plaut is a 1995 decision, but the principle goes as far back as to Chief Justice Marshall in 1801 in the Schooner=20 Peggy case where Congress changed the rules that governed a case that had become decided by the district court, and a forfeiture case, had been affirmed by the Court of Appeals, the Supreme Court Chief Justice Marshall in the Schooner Peggy case applied the new rules that Congress had established for that

applied the new rules that Congress had established for that very case and applied it because the case had not yet become final in the sense that all appellate rights had been exhausted up to and including the Supreme Court. So we'd submit that as a controlling case when there's basis for any separation of powers attack on it.

The next argument is ex post facto, and as this court recognized in its opinion back in September 1996, overruling challenges to the Government's allegation of nonstatutory aggravating factors that the defendant claimed would violate the ex post facto clause, the Court said that there's been no change in the definition of the offense or in the applicable punishment, the only change is a matter of sentencing procedure. And the Court cited Dobbert vs. Florida. Dobbert involved a case where the Florida legislature, after the defendant's crime had been committed, changed sentencing procedure in that case so that the judge no longer had to automatically defer to a jury recommendation of life in prison. The judge after the legislative enactments was entitled to override a jury recommendation of life and impose a death sentence. The defendant in that case argued there was an ex=20 post facto violation, and the Supreme Court unanimously said that it's simply a change in sentencing procedure. It may work to the detriment of the defendant, but it's merely a change in procedure. It is not as required under ex post facto case law, a redefinition of the elements of offense nor is it a increase of the punishment after the fact of the crime. So we submit that this Court's decision back in September relying on Dobbert also disposed of any ex post facto challenge.

The only other argument is that allowing a victim who watched part or all of the trial to testify at sentencing would violate the Fifth, Sixth, and Eighth Amendments. Again, that has to be an argument as applied that the victims' testimony is somehow so tainted by the exposure to any part of the trial that that victim constitutionally may not testify. We would submit there's no basis for such a broad constitutional prophylactic rule and in effect it is asking the Court to make Rule 615 of constitutional stature, and it has never been interpreted that way. The Sixth Amendment gives the defendant a right to confront witnesses, not to exclude them from part of the trial. And this argument if taken to its logical context would result not only in striking down this statute but also similar or even broader statutes applied in many, many states around the country; and we submit there's no basis for a constitutional prophylactic rule, that simply by attending all or part of the trial, a victim is constitutionally disabled from testifying.

If the Court has any other questions, I'm sure I'd be happy to answer them. But otherwise, that's our response.

THE COURT: All right.

MR. COYNE: If I may just briefly, your Honor?

THE COURT: Yes, Mr. Coyne.

DEFENDANT'S REBUTTAL ARGUMENT, VICTIMS RIGHTS CLARIFICATION ACT

MR. COYNE: Your Honor, Mr. Connelly's fond of Chief Justice John Marshall; so am I, and in a case called Marbury=20 vs. Madison Chief Justice Marshall wrote that it is exclusively

vs. Madison Chief Justice Marshall wrote that it is exclusively the province and duty of the judiciary to say what the law is. But more apropos to this point, in Fletcher vs. Peck, an 1810 decision written by Chief Justice Marshall, he wrote, quote, "It is the particular province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals and society would be seem to be the duty other departments." Congress in this case had prescribed a rule of procedure, a rule to bind this Court in this case, a rule for this Court's benefit, for the benefit of the defendant; that was Rule 615. You applied the rule in this case, and it was your duty to do so. And what happened was Congress stepped in.

Also, just to briefly remind the Court that during a March 7, 1997, conference, though without the benefit of oral argument or briefing, it seemed that the Court shared some of the separation-of-power concerns that we voiced this morning.

Other than that, if there are no questions, thank you, your Honor.

THE COURT: All right.

RULING ON VICITMS RIGHTS CLARIFICATION ACT

Well, I've considered the briefing that's been submitted and the arguments here; and in addition, I would recognize that yesterday there was a pleading filed, motion of the victims, the Oklahoma City bombing, to reassert the motion for a hearing on the application of Victims Rights Clarification Act of 1997, attached to which was the brief that was earlier submitted on March the 21st, 1997, by counsel for the named persons, and have considered that as an amicus briefing because it is not my view, and it's not been argued by the Government that the view -- that the statute creates standing for the persons who are identified as being represented by counsel in filing that brief.

Now, I already expressed my general views with respect to the constitutional issues presented here. First of all, in the previous opinion of course I said that we never may -- we may never get to the question of constitutionality because that arises only upon a guilty verdict. Now there is a guilty verdict, so we must address the constitutional issues.

I did, however, go forward to talk about the separation of powers and the ex post facto issues, but it is important, I think, to emphasize that the legislation in question here does not dictate a rule of decision in the case. It is, in my view, the equivalent perhaps of an amendment to Rule 615 of the rules of evidence. The Supreme Court has recognized that Congress has a constitutional authority in the matter of the rules of evidence, the Rules Enabling Act, the normal process by which the rules of evidence were developed and are developed in that they come from the judicial conference, then the Supreme Court, then to the Congress. And in essence the Congress has negative veto, but also the power to amend and the power to initiate rules on their own proceeding, their own legislative process.

Now, I therefore do not consider it to be an ex post=20 facto issue, nor do I consider it to be a violation of the separation-of-powers principle.

So it comes down to really the question of whether

there are Eighth Amendment and Fifth Amendment implications to permitting testimony during the penalty phase hearing from persons who attended or observed the trial; and, of course, what the statute says -- and this should be emphasized -- is that the fact that a victim attended or observed the trial shall not be construed to pose a danger of unfair prejudice, confusing the issues, or misleading the jury.

The most important word there, in my judgment, is "danger." It is not a statute that says that the Court does not have the inherent power and authority to determine that any particular witness's observation of the trial has so influenced or affected that witness as to put the testimony of that witness into the category of being a matter that could unfairly prejudice the jury, confuse the issues, or mislead the jury.

As I indicated in anticipation of the possibility of this moment in my earlier opinion, that matter can be determined factually when we have the Government proffering these witnesses. And accordingly, it's my intention to permit the defense, prior to the testimony of any witness who has attended or observed the trial, to determine whether that witness has indeed -- and his or her testimony has indeed been influenced in some way by what he or she observed during the trial.

It's my understanding that the persons who may be offered as witnesses here by the Government have not seen the entire trial; and therefore, it is with respect to what particular testimony or parts of the trial they saw. And also, it relates to what their testimony will be here, because there are limits as to what any victim/witness can testify to, whether that person has observed any portion of the liability trial or not. And that's a matter that has been raised by these motions in limine filed by the defense.

Care must be taken here to ensure that this next phase of the trial be one within the proper constraints of the Eighth Amendment and the Fifth Amendment as the Supreme Court of the United States in varying opinions filed by the several justices in Payne vs. Tennessee caution; that, you know, a penalty phase hearing cannot be turned into some kind of a lynching and that the people who testify with respect to the area of victim impact that's mentioned in the statute, the death penalty act -- that this cannot become such a matter of emotion and testimony which would inflame or incite the passions of the jury with respect to vengeance or the passions of the jury with respect to empathy for grief or those human emotions that are inappropriate in making a measured and deliberate moral judgment as to whether the defendant should be put to death. That's the issue to be presented to the jury.

And I do not intend any of the evidence -- "information," as it's called -- be presented to this jury to permit them to exercise anything other than a disciplined moral judgment in the process that's already been described in my previous opinion, that sequential process that the jury must go through, as they will be instructed in closing instructions after the death penalty information has been presented.

So what I'm going to require here is that the Government identify in advance of the appearance of these

witnesses who they are, what they did see -- I mean those portions of the trial that they observed, either here in this courtroom or through the closed-circuit transmission, television transmission to Oklahoma City, and then what it is that their testimony is proposed to cover at the trial.

And we'll deal with that outside the presence of the jury when we have that information. So that's the ruling.

Our second matter is the request for prepenalty phase voir dire of the jury. I've considered that, and no response has been required. I believe that I understand the point of it, and do you wish to present argument in support of it?

MR. COYNE: Your Honor, we're happy to rest on the pleading on that.

RULING ON MOTION FOR VOIR DIRE OF JURY

THE COURT: All right. Well, I don't intend to do a new voir dire of the jury. What I do intend to do, however, is to give them some preliminary instructions. And both sides have submitted some, and I have now prepared some prehearing instructions which I'll provide to counsel at the morning recess. Actually, I don't have to wait till the morning recess. I have them right here.

You, Ms. Hasfjord, distribute those to both sides.

I don't intend to have you stop and read them right now; but we'll discuss them yet today, of course. I have taken some from the proposals made by each side. And what I intend to do is to give these prehearing instructions to the jury, all 18 jurors and alternates, advising them as to what's ahead, a process that we'll go through the stages of it and also what the ultimate question -- questions are in general. And then I propose to simply ask all 18 of them the general question: Now, are there any of you who for any reason feel that you are unable to proceed and fairly deliberate and decide the issues to be presented to you in accordance with this overall instruction?

And if any persons answer yes, we will pursue those answers individually with whoever responds yes, excusing the other persons and do that type of voir dire. And that's the process I intend to follow.

Now -- so the motion for a full voir dire is denied.

There's also a motion for brief recess between the Government's presentation and the Defendant's presentation of information here in the penalty phase. This, too, was submitted with the authorities supporting the proposal included. I don't know if you wish to be heard further on that, Mr. Jones.

MR. JONES: Very, very briefly, your Honor.

THE COURT: Please proceed.

DEFENDANT'S ARGUMENT ON MOTION FOR RECESS

MR. JONES: May it please the Court, I would not argue the law that we cited because, of course, the Court has read it. I simply wanted to state to the Court that the motion is

filed in an abundance of caution because, of course, the Court has not yet ruled on the respective motions in limine. We do not know what perimeters the Court will formally adopt with respect to the Government's evidence in chief in the second stage, nor do we know what the Court's ruling will be with

stage, nor do we know what the Court's ruling will be with respect to the Victim Rights Clarification Act as it relates to the individual witness; and finally, we do not know how the witness will respond once the questions begin and the answers are given.

So in an abundance of caution, we filed this motion to suggest to the Court -- and we ask for five days, and it may very well be that the circumstances will dictate a lesser time, or perhaps even a greater time -- so that the Court will be aware in advance of our thinking on this matter.

From what I understand in speaking with Government counsel, they anticipate that even with opening statements -- that they believe they can present their testimony in three days, as I understand it. If that is in fact the case, then we would not commence before Monday morning, which would allow, of course, at least two days. Should they rest early sometime on Friday, then at a minimum, we would request that the Court recess and we be permitted to begin Monday morning; and if they go over to Monday, then I'm sure the Court can make the appropriate adjustments there if it feels that it is necessary.

Nevertheless, in an attempt not to interfere with the orderly process of the trial and to not waste the time of the jury or the Court, we wanted to present our concerns at this point so that the Court would have them in mind as it hears the Government's first stage evidence.

RULING ON MOTION FOR RECESS

THE COURT: All right. Well, I'm not going to rule in advance that there will be any delay between the Government's introduction of information and the Defendant's. Obviously, if I determine as a result of what happens in the Government's part of the case that there should be a time-out for whatever reason, I'm perfectly prepared to do so; but I believe as you have recognized, Mr. Jones, it all depends. And as I understand it, the motion is presented for purposes of protecting the record and advising the Court in advance that it may be necessary to sort of have a deep-breath time-out, not that the defendant is not prepared to go forward with the evidence.

MR. JONES: Your Honor, you're right.

THE COURT: Because I understand you are prepared to go forward.

MR. JONES: We are, your Honor.

THE COURT: All right. So with that clear understanding, I'm formally denying the motion but will obviously consider any motion presented as a result of what happens in the trial.

Now, we have these several motions by the defense and also some motions or a motion by the Government asking the Court to rule in advance on some parts of the proposed information to be submitted both in writing and testimonially.

Necessarily, there have been sealed submissions here, because just as was the case with discovery before the trial and also certain evidentiary matters raised before the trial, the sealing was appropriate to avoid publicity about these matters until we know what is going to be actually produced.

A preliminary discussion here and indeed the Government's response to these motions in limine indicate that

the earliest information which was exchanged here has been revised, in that the Government's plans have been changed somewhat from the initial identification of what information would be provided to the defense.

So I'm not sure what exactly is at issue now, excepting, of course, this matter of the scope of victim testimony. So I'm not entirely sure how most efficiently to proceed, whether to -- let me just ask first off of Government's Counsel: Have you brought Defense Counsel up to date, as it were, with respect to what you intend to present?

MR. CONNELLY: We have, your Honor. Last night, we had several phone conversations; and throughout the past week, we have had. And I think we've really narrowed the issue substantially.

THE COURT: And, Mr. Burr, are you going to address these matters?

MR. BURR: Yes.

THE COURT: Well, perhaps you can identify what is at issue and I'll attempt to respond.

MR. BURR: I'll be glad to do that, your Honor.

THE COURT: And, of course, I know what's at issue the other way around, because the Government's motion to exclude some of your information has been pretty well identified as your response -- and have you received the Defendant's response --

MR. CONNELLY: We did this morning.

THE COURT: -- filed this morning?

All right. Well, Mr. Burr, then, if you want to tell me the concerns that now exist in light of what you've learned most recently.

DEFENDANT'S ARGUMENT ON DEFENDANT'S MOTION IN LIMINE

MR. BURR: Your Honor, I think the -- the primary concerns I will deal with first, and then there are some odds and ends in some other categories.

But what has not been addressed in any detail thus far is the concerns about testimony, partly because the summaries of the testimony were brief and partly because the guidelines as to what would limit the testimony are emerging as we all work through this. This is, as we've all recognized, a new area and a difficult area because of the lack of guidance and the lack of precision of guidelines.

But I would like to sketch out some concerns we have about testimony first. And I have grouped those concerns into several groups for this reason: We have a number of concerns about every witness. And rather going through each witness, seriatim, it seemed to make more sense to talk about them in subject matter groupings.

THE COURT: Yes, I agree with that.

MR. BURR: First is a concern that some of the testimony appears to be the equivalent of eulogies, overall detailed statements about the person's life, childhood, antemortem honors, accomplishments, postmortem honors, such as entry into Heaven, which imply comparisons of victims' worth, and overly idealizing, as we all do, in eulogies to our loved ones, idealizing the person and presenting a sentimental view.

Those -- the examples that particularly struck us about anticipated problems in this area involved the statement -- shall I mention the names of witnesses?

THE COURT: No, I don't think so. I want to be protective of their families --

MR. BURR: That's one area.

THE COURT: -- and their own dignity --

MR. BURR: Yes.

THE COURT: -- which I understand is a part of your motion as well. But if you can address the subject matter without identifying particular witnesses, I think it would be appropriate.

MR. BURR: That is one concern that reaches over several witnesses.

Akin to that is a second concern, which is not so much eulogizing, but is more memorializing the kind of testimony -- or kind of statements that one might make at a funeral, designed to invoke empathetic identification with the person who has been lost, not dealing with the facts of the loss. And again, there are several examples of that problem that may arise.

A third area is very detailed and graphic testimony about the nature of the injuries that caused death. That is the verbal equivalent of gruesome photographs, designed or not, likely to evoke highly emotional and visceral responses upon the articulation of those descriptions. We submit that that is the equivalent of admitting postmortem photographs.

A fourth area --

THE COURT: Well, the law does permit, as I understand it -- the constitutional law, and that's -- and therefore the statutory law involved here, some information about the circumstances of the killing in an ordinary -- I mean if we had a one-to-one murder case -- and I'm just bringing that up because that's where most of the law is, since Payne; and of course, as it happens, a good deal of the law has come out of the Oklahoma Court of Criminal Appeals, I note in the reading briefs. But the nature of the killing in a rape/murder or something like that has been permitted in the death sentencing, hasn't it?

MR. BURR: Yes, your Honor, it has. But I think even there, there still are some limits. And there is -- there are certainly ways of describing injuries generally and ways of describing them graphically; and at some point, there is a line of risk that gets crossed, I think. It's odd: Much of this, I think, is almost in the eye of beholder.

THE COURT: Well, are we talking about -- well, I'll have to ask Government counsel; but I assume part of this testimony is from the medical examiner.

MR. BURR: Some of it may be. Some of it may be of survivors of deceased victims themselves. There are some examples -- there are some examples -- a couple of examples that we've noted; but there are more from victim impact witnesses themselves, not from the medical examiner's office. But it could come from either source.

Another category of concern is, for lack of a better description, highly charged emotional statements, such as the receipt of a particularly poignant card with a voice message in

receipt of a particularly poignant card with a voice message in it; a poignant poem that was circulated; descriptions of details about the deceased victims' mourning that seemed to go beyond the necessary description to depict the person as an individual. Yet it's a little hard to describe it without some concrete examples, but there are some statements that seem simply to go beyond the limit of emotional content and risk upsetting the balance between emotion and reason.

Another category that we would submit is unnecessary is testimony about vulnerability. As the Court is well aware, as we all are, there are a number of small children, young children killed in this incident. The mere recognition of that is certainly sufficient to establish the statutory aggravating circumstance that deals with victims who are particularly vulnerable.

What it adds in terms of --

THE COURT: What is your legal position on that aggravating factor that has been identified in the notice and is in the statute?

MR. BURR: Well --

THE COURT: Early on, there was some discussion about that with respect to what is required to be shown with respect to the defendant's knowledge and awareness.

MR. BURR: Your Honor, I think we took the position early on that an incident of this sort pretty much makes everybody equally vulnerable. Obviously, young children and older folks and people with disabilities have some vulnerability to any incident in life that people not in those categories do not have.

In terms of the proof as to whether or not our client intended this or had knowledge sufficient to infer intent, I don't think the record established -- at least my recollection of it; I was not here for all the trial proceedings -- but I don't think the record established that our client had that kind of foreknowledge from which intent might be inferred.

THE COURT: Well, are you moving to strike that aggravating factor, or -- I'm asking what your position is with respect to that factor's applicability.

MR. BURR: Your Honor, yes, to the extent that that foreknowledge is required; and I believe that we did argue in connection with our attack on that facially that it did require some foreknowledge, as the Eighth Amendment generally does. We would submit that the Government has not demonstrated, at least in the evidence so far, sufficient knowledge that one might infer intent and certainly no evidence of intent with respect to vulnerable victims.

THE COURT: Unless it be that all of the occupants in the building were vulnerable.

MR. BURR: Well, certainly that's true; but I would guess at that point that then something like that ceases to become an aggravating factor.

THE COURT: Why not? Why isn't it? Because you're saying that -- and, of course, I'll hear the Government speak for themselves -- but you're saying that normally the -- the vulnerable victim law, as I understand it, is that cases come out of the sentencing guideline because vulnerable victim is an enhancement factor under the guideline sentencing structure.

And those cases do speak to that you pick out the vulnerable, the aged, the infirm. Most of those cases seem to come up in the securities fraud and that type of crime.

But it seems to me that the occupants of the building, without particular regard to age, infirmity, and so forth, could be considered vulnerable victims, in that here they are doing their job, no warning, suddenly there's an explosion.

MR. BURR: Your Honor --

THE COURT: It seems to me the factor could be still in the notice and sitting there but without separating out the occupants of the building according to age, infirmity, and the like.

MR. BURR: Of course, as it was noticed, it did separate out those categories of people.

THE COURT: Yes.

MR. BURR: And even construed as your Honor has -- and indeed, it's consistent with what we have argued all along -- the fact that all the victims may have been relatively equally vulnerable, I think does not add something -- does not pick out an aspect of this incident that is aggravating, any more than the nature of the incident itself. I mean, the explosion of this device which killed 168 people and injured over 500 people is a part of the nonstatutory aggravating factors. And it doesn't seem to me that you add a distinct aggravating element by construing that aggravating factor in that fashion.

THE COURT: All right.

MR. BURR: Another area of concern about testimony is one that perhaps the Government counsel could clarify in their response. The statements that we have been given, the summaries, is difficult to know who wrote them, whether they were prepared by counsel, whether they were prepared personally by witnesses, whether there was a combination of effort. And it raises the question as to whether or not if the testimony tracks the statements it will be the testimony of the witness or in essence the presentation of something written by counsel.

We've not been able to determine that; and perhaps clarification with respect to that would be useful.

A couple of other smaller categories, because there's less concern in terms of numbers of witnesses. There will be testimony concerning, I think, two law enforcement officers who died. And there may be a rather extensive -- it's hard to tell again from the summary -- explanation of the careers of these people, in part because it may be necessary to show that they had been law enforcement officers; but, indeed, the history and length of employment as a law enforcement officer is not a part of the aggravating circumstance. It appears to cross the line between giving too much information about the life of the deceased person that again risks changing the focus in the way that, that Payne and the statute guide against.

THE COURT: Well, on that point, would you agree that one of the appropriate things to be considered here is the effect of the loss of the life of the victim; the effect in terms of impact on the community? I mean, what this person would be doing today if he or she were still alive. And do you agree with that?

MR. BURR: I think in a limited factual way, yes, if

there's a function that person served that is sorely missed.

THE COURT: Yeah, and --

MR. BURR: That could certainly be referenced.

THE COURT: With respect to law enforcement people, then, the work they were doing and what their loss means to the agency employing them seems to me to be something that's appropriate. And in part, their record of accomplishments stated in an appropriately objective way, what they had done with the agency when they were living, could be used to project what they would be expected to do if they were still living.

MR. BURR: I suppose if there's a connection between the two.

THE COURT: Yes.

MR. BURR: And a limited explication of the history, that would be appropriate. It's, again, from the statement in the summary we've gotten -- it's hard to know whether that limitation will be observed.

THE COURT: All right.

MR. BURR: Two other -- oh, one other very small category is testimony of a minor. For -- we have asked for a copy of this minor's statement for some time and have not yet been provided it. The minor's father originally was scheduled to testify; and then the minor was substituted, apparently for the father.

THE COURT: On the loss of the mother, or what --

MR. BURR: Yes.

THE COURT: All right.

MR. BURR: Yes. And again, it's hard for us to evaluate the risks involved with this testimony, other than to note that it comes from a relatively young minor.

THE COURT: How old?

MR. BURR: 12.

THE COURT: All right.

MR. BURR: There are two or three other limited categories that I need to mention. The Government is planning to present the testimony of Dr. Jordan, the chief medical examiner; and it is our understanding that that testimony has been narrowed considerably from its initial notice; that Dr. Jordan will testify about the deaths and cause of deaths of 16 people, one person who did not die instantaneously, one person from each of the 11 federal agencies in the building, one person from the credit union, one from the day-care center, one person who was a visitor in the Murrah Building, and one person outside the Murrah Building. That is certainly in our view an appropriate narrowing of the testimony about cause of death, and it is also our understanding that the Government has asked Dr. Jordan to choose who he would testify about on the basis of presenting a kind of cross-section of causes of death, as it were.

And we don't object to that. In fact, we appreciate the Government's effort to limit that testimony.

What we are concerned about, however, is the scope of the testimony and again whether or not either with charts, graphics, or verbal description the words would paint a picture that would become overly graphic and perhaps gruesome.

The Government has offered to let us talk with

Dr. Jordan before he testifies, and we'll take up that opportunity; but I do think there is a pretty strong risk that this testimony could cross the limit. And in our conversations with the Government in raising these concerns about it, we have not been able to get a very definitive description of the limits of his testimony.

THE COURT: Of course, we've heard from him as a witness in this case; and it seems to me that he certainly has the ability, professionally and with objectivity, to put on testimony that is appropriate. I mean, obviously we're going into a different area there; but he also necessarily had to testify at the trial just completed about cause of death to some extent and the deaths.

So I, you know -- I think this is somebody who is an experienced witness and could understand general guidelines and follow them.

MR. BURR: Your Honor, we just alert the Court to the risk.

Two more categories of testimony I'd like to mention. The Government intends to call four or five rescue workers to provide testimony. And we have several concerns about that. The first is that insofar as the rescue workers talk about their efforts at rescuing persons who were direct victims of the bombing, we think that that's duplicative of the testimony given by their comrades, their colleagues, in the guilt phase of the trial.

THE COURT: Now, on that point, I take it -- and I don't remember asking you that directly; but you'll see in these instructions that I'm proposing to instruct the jury specifically that they can consider all of the evidence that they heard as jurors and alternate jurors through the trial. You agree with that?

MR. BURR: Oh, yes; and we were advised the Court would do that and have no objection to that.

THE COURT: All right.

MR. BURR: Which I guess emphasizes the point. None of the same witnesses are testifying. They are different rescue workers who will be testifying during the penalty phase. But it appears from the summaries of testimony that we've gotten the content of their testimony insofar as it relates to victims of the bombing directly would be duplicative of the testimony of their colleagues in the guilt phase, which will in a sense be republished to the jury by the Court's instruction.

There is a secondary concern or a second distinct concern about the testimony of these witnesses. And it really has to do with the -- harkens back to an argument that we made about the vagaries associated with Congress delegating to the prosecutor the ability to define nonstatutory aggravating circumstances. Because the second area of these witnesses' testimony will be to testify about the impact of their rescue efforts on them, on them personally -- the grief, the emotion, you know -- one could easily have experienced posttraumatic stress symptoms, for example, from working in the kind of situation that these folks had to work in.

And certainly, that is a kind of pain and emotional distress and suffering that bears some relation to this incident; but it is not at all like the people who were

incident, but it is not at all like the people who were directly affected, those people who were physically or emotionally impacted at the instant that the bomb exploded.

And I suppose the larger question that it raises is if people who are indirectly affected, even grievously, by an incident, can be allowed to give victim impact testimony about their own condition, where does the line get drawn? For example, there has -- there has been an epidemiological study done in Oklahoma City to assess the effects of this on the entire population in the city. I don't have the study at hand, but my recollection was that some --

THE COURT: Well, we're not, there's no indication they're going to put that in evidence.

MR. BURR: No, no, no. But my concern is that there is only a difference in degree and not between the people, the people who -- the rescue workers who were impacted indirectly and people who were several miles away and suffered traumatic effects over the next several months.

THE COURT: Well, it seems to me, though, there is a clear -- pretty clear line of distinction between those who had to come to the scene to effect or attempt to effect rescue of persons trapped and injured as compared with more peripheral effects, not to suggest that those aren't real; but, you know, it's kind of a foreseeability aspect. Obviously a bombing of this type is going to require direct and immediate response of the type that we know happened here.

Now, without permitting the matter to get cumulative, it seems to me that some aspect of the experience of those who were called to the scene qualifies them as victims within the concept here of victim impact testimony. But there have to be limits on it, as there must be in all of this material, to avoid this becoming incendiary and prejudicial.

MR. BURR: I guess the third concern really relates to what you've just said, and that is: Not only is the description of what these folks were doing duplicative of -- for the most part of the trial testimony, it has in almost all of these folks' summaries -- it's quite clear that they will be painting quite graphic pictures in words of the scene that they found and of the experiences they had.

The final area of concern is as to one witness, the person who, from the medical examiner's office, came to the Victims Assistance Center at least daily to provide briefings for family members there awaiting some word about -- about lost family members. That person, as we understand it, will be testifying about the responses of the people at the Victims Assistance Center to the information he was providing.

To the extent that it tracks any of the testimony that Dr. Jordan may give about conversations with family members of deceased people, it will be duplicative -- or could be duplicative. It also, I think -- depending on the manner in which it's presented, the detail in which family members' reactions are recounted and the emotionality that is inherent in those accounts, it risks tipping the balance between emotion and reason.

And again it's not something we're saying cannot be presented altogether, but it's an area that we have real concern about risks from.

Excuse me.

We have, I think -- those are the areas of concern about testimony which we had not really detailed in the pleadings but had simply talked about guidelines for.

We have made -- on the question of exhibits, we have made considerable progress, I think, in discussions with Government counsel; but there do remain some questions about exhibits, if I could address those briefly.

THE COURT: All right.

MR. BURR: As to photographs which we think are -- cross the line of being graphic or gruesome, we still have concern -- we have concerns about a number of the photographs that intend -- that Government intends to admit through the epidemiologist witness. And these are photographs -- Exhibit No. 1405, depicting an injured victim; 967, which was a photograph admitted at the -- in the guilt/innocence part of the trial that the Government intends to republish.

THE COURT: What is it?

MR. BURR: It's a photograph of Daina Bradley buried in the rubble.

THE COURT: All right.

MR. BURR: Exhibit No. 975, and Exhibit 978, 980, and 1016. These will all be admitted, as we understand it, through the epidemiologist witness, and would object to them as crossing the line of graphic and emotion-evoking quality.

THE COURT: Do I have copies of these?

MR. BURR: I think you do, your Honor, but I'm not certain.

THE COURT: I'm going to recess before hearing from the Government, so please make sure I have copies of them.

MR. BURR: In the same regard, we have an objection to Exhibit 1436 depicting the injuries of a person who survived. I'm not certain whether he will be associated with the epidemiologist witness or not.

And the final concern about the graphic or distorted photographs has to do with a newly provided copy of Exhibit 1410 in which the color seems to have been changed to a pretty unnatural state from the original photograph.

Your Honor, Mr. Tritico informed me that my description of Exhibit 967 is not quite accurate; that that is the photograph of the child who was -- that was admitted to show dust, I think the --

THE COURT: Oh, yes.

MR. BURR: -- the drywall dust on some of the victims.

A second concern -- continuing concern about photographs has to do with pictures, photographs of people prior to death, in-life photographs. As the Court will recall, a portrait-type photograph of every victim was admitted in the guilt phase of the trial.

THE COURT: Well, every decedent.

MR. BURR: Yes, I'm sorry. Every deceased person. And there are a number of additional photographs, portrait or other activity in-life photographs that the Government intends to offer in this portion of the trial. We've made our objection known in the papers about that. We've made no progress to my knowledge in negotiating about this, so that's

still an issue for resolution. And the concern there is duplicative and again focusing more than the law suggests is proper on the life events of the deceased person.

In addition, we were provided three new exhibits this morning, which are additional portrait exhibits of three deceased victims. 1129A, 1208A, and 1208B are the new exhibit numbers.

Several other areas I can cover very quickly. Funeral photographs: There are two or three of those that we object to.

Journals of deceased and injured people: There are two of those kept during the course of hospitalization. We object to them.

Poems: There are poems that we are aware of in connection with two deceased persons; one written by a deceased person, the other written by the father of a deceased person, highly emotional, and I think likely to tip the balance at least in that small respect between emotion and reason.

Videotapes: We object to two. One is a portion of a tape taken by a credit union employee during the course of the morning -- a morning at work, depicting a number of co-workers, some working, some chatting, some just sort of office -- office demeanor and office activities that one might find in an ordinary office. That does not reveal much in particular about any person but seems to cross the line, at least in our view, of emotion.

And then the second videotape we object to is -- I'm sorry. The number for the first one I mentioned, the credit union tape, is 1483.

And the second one is 1444, which is news television station video footage of victims in hospitals, emergency rooms, halls, trauma centers in the immediate aftermath of the event.

And finally, some exhibits that are sui generis, but we think cross the line as to emotionality, and I'll just give you those numbers: 1478, 1485, a group 1507, 1508, 1509, 1510, and 1515, all dealing with the same subject matter.

And then finally, to the extent that the epidemiologist's article will be introduced as an exhibit, it contains irrelevant material concerning the increase in terrorist activity and so on which this person is not qualified to give and was simply a part of the article she wrote for her technical professional journal.

I think that's it as to the specifics, your Honor.

THE COURT: All right. Well, I'm going to take a recess before we hear the Government's response to this. Two things, though, that I want to urge before the recess. One is that it is -- and I understand how difficult it is for defense counsel to raise objections to offers of testimony in the course of the hearing. This is quite different from my usual approach where I attempt to sort of screen the evidence and rule in advance, and of course in the course of this trial I required of counsel that they raise their objections in the open and both ways and ruled in the open.

Here just the making of the objection can have an influence on the jury, and I recognize that. So that's why I think we need to go to some pains to talk about what the limits are going to be. And certainly a number of the things raised

are going to be. And certainly a number of the things raised by Mr. Burr are of great concern to me. I think they're inappropriate.

The second thing is that I'm going to take a longer than usual recess so that Government counsel can caucus a bit with respect to this, having heard that. Perhaps a half an hour --

MR. HARTZLER: That's fine.

THE COURT: -- will be of assistance to that, and we'll come back then in a half an hour and hear the response and proceed on the motion the other way and also the preliminary instructions I want to talk about before the day is over, anyway.

MR. HARTZLER: Thank you.

THE COURT: We'll take a half an hour.

(Recess at 10:17 a.m.)

(Reconvened at 11:08 a.m.)

THE COURT: Be seated, please.

All right. We extended the recess to give an opportunity for counsel to consider these matters.

And I take it, Mr. Connelly, you're going to speak to the issues.

MR. CONNELLY: Thank you, your Honor.

And the time was helpful in terms of responding to the objections, and I think we have narrowed the focus in several ways.

THE COURT: All right.

PLAINTIFF'S ARGUMENT ON DEFENDANT'S MOTION IN LIMINE

MR. CONNELLY: Just as a general matter, I'd like to start out with the notion that we are not trying to in any way inflame the jury or create an issue in this case. We have, I think, put on a very focused case that will help the jury make its reasoned moral judgment as the conscience of the community as to the appropriate punishment.

One of the -- Where we do have differences with the defense is in terms of the notion the defense has that we need to prove these facts in the least prejudicial manner, in the sense that if we could prove a technical aggravating factor, that's all we need to do. And I think the difference comes from Payne, where the court said we're entitled to the moral force of the evidence as well. And I think we have done it in a way that is not gruesome. For example, we have not sought to offer any postmortem evidence of any of the deceased. We're not looking to inflame the jury, to have them decide this case on passion, but rather to make a reasoned moral judgment.

One thing I'd like to address at the outset is there was some complaint about the summaries we prepared. I'd like to just give the Court a background in terms of the preparation of the summaries of the expected testimony. Back many months ago there was some dispute that FBI 302's had not been created for the victim impact witnesses; so basically, what the prosecutors did in interviewing the witnesses was just put down everything the witnesses had to say. There was no effort made to decide is that permissible impact or otherwise. It was basically prosecutors' functioning, as FBI agents would, in terms of saying, Describe to us what happened in the aftermath of the bombing, and that is what we presented to the defense;

and it is clearly more detailed and in a lot of subject matter areas we don't intend to go into.

What we do intend to do with victim impact testimony is to call some 40 to 45 witnesses of a variety of categories, including obviously surviving victims who were injured, victims who lost deceased loved ones, and people in other categories to offer objective factual testimony about the circumstances of the offense and the effects they felt from the offense.

Turning to the first category, which I'm going to lump together, Mr. Burr, I believe, complained about testimony that will be in the nature of eulogies and memorials. We don't intend to offer anything like that. What we do intend to offer, as we're entitled to, I believe, under the statute and under Payne and the Constitution, is an objective story regarding a brief snapshot and understanding of the identity of the victim and the background of the victim. For example, the Court mentioned law enforcement officers. Some surviving spouses or family members of a law enforcement officer may get up and say that the person had a 25-year career in this or that federal agency and these are the types of things that the person did and this is the way that I interacted with the person during life and this is the effect the person had on the community.

And it will be brief. None of this testimony I would expect to be more than 10 or 15 minutes in scope. It will certainly be far less extensive about the background of any one individual or even all the individuals that we offer combined than the defendant will present about himself. The jury will certainly know more about the defendant individually at the end of the process than it knows about any one of these victims or even, I would say, the victims who testify all together. There will be far less known about all of them together than there is known about the defendant.

There were 168 deceased victims, as the Court knows. We have culled from that list a very small number proportionally; like I say, 40 to 45 total. But of the deceased victims, a much smaller number of those go to a deceased victim. Maybe 25 to 30 at most go to actually a deceased victim. So we are presenting simply a small representative sample of the type of impact that this crime had. We're not trying to belabor the proceedings, as Mr. Jones, I believe, referred to. We expect that our testimony including opening statement will last a total of three court days.

So it is not anything that we're trying to belabor the proceedings or be repetitive or even present the story about everybody affected by this crime. It's a much smaller number.

In terms of how we intend to present that number, like I say, it will be basically a brief summary of the person's background so you cannot only identify the victim but also understand the effect of the loss on the survivors and also on the community.

I mentioned the example of law enforcement officers. Another example would be a surviving person who worked in the building for a federal agency that in her spare time worked for crisis hot lines as a volunteer and answered the phones in

crisis hot lines and the type of community service that person provided.

Another example might be a person that explained their generosity; that after the bombing, they discovered that this person had bought several savings bonds for different members of the family. It will basically just be very objective factual testimony so the jury gets a brief snapshot of the person who died in the bombing and a snapshot and understanding briefly of the effect in a very objective fashion upon the surviving family members and friends and community of that victim.

THE COURT: Now, you say "snapshots." You're speaking of a testimonial snapshot; right?

MR. CONNELLY: Yes. Well, that's -- I am speaking of testimonial snapshot, but there will be literally one snapshot per victim, maybe two.

THE COURT: We already have them.

MR. CONNELLY: Not of the family members. There will be, for example, a -- and I give the Court examples. 1437 is an example. We handed up a book beforehand to the Court of the types of -- of the entirety of the exhibits we intend to offer. 1437 is a family portrait of actually one of the people killed in the bombing and -- it was a child killed in the bombing and the family members.

THE COURT: All right.

MR. CONNELLY: Another example is 1439. Just a snapshot, a single snapshot, will be offered in each testimony of the married couple, one of whom is deceased.

So it would be basically one per person.

THE COURT: These are not special occasion photographs. They're just ordinary photographs.

MR. CONNELLY: Some may be. One -- there will be a couple of wedding photographs.

THE COURT: No, there won't.

MR. CONNELLY: Okay. Well, we'll have to substitute for that, but -- it will be mainly family occasions. It could be family gathered at a holiday, where they all got together and the family was together, could be just a portrait of the family done professionally --

THE COURT: I have no problem with the family as a unit; but where there is an additional aspect to it, like Christmas or a wedding ceremony, those things have implications that go beyond just what the family unit consisted of.

MR. CONNELLY: Okay. With that understanding in mind, we'll go back and try as best we can to substitute photographs; and they will be different than the ones on the list, with the Court's permission. But it will simply be a single or in some cases two at most, if we don't have the whole family involved, to give an example and a snapshot in addition to the testimonial snapshot of the surviving family members with their loved one.

The next area of -- so that's basically the testimonial snapshot we'll give; and that will be, with the Court's ruling, the photographic snapshot that we intend to offer.

The next category of challenged information was

graphic portrayals. Like I've told the Court -- and I'll get to the exhibits later -- we don't intend to offer any postmortem photographs. We do intend, as Mr. Burr indicated, to have Dr. Jordan testify as to a representative sampling of the causes of death. And like Mr. Burr represented and like we told him, there will be a total of 16 categories of people that he will distill his sample from: the 11 agencies, the day-care center, the credit union, the visitors to the building.

THE COURT: Well, how many different causes of death? Are we going to be talking about crushing injuries, also the blast effects, dismemberment, and that sort of thing as another category and suffocation as a category? That type of thing?

MR. CONNELLY: Right. We have not categorized, but we have asked him to do a representative sampling of the types of people, the types of causes of death; and they span that spectrum of causes; plus there was trauma and others, but there will be different types of death. There will be a 16th person that he will testify in his opinion did not die instantaneously, as some people did not die instantaneously; and he will testify based on the 16th person, based on gravel in the lungs and perhaps blood in the lungs, that there were indications that there was breathing going on after the bomb. And he will say that just as a representative sample -- that would be a 16th category of people -- that this person did not die instantly, nor did everybody else, but that will be his example of --

THE COURT: I take it he's going to be using understandable medical terminology, not Latin, but --

MR. CONNELLY: No, certainly to make it as explainable and understandable to the jury as possible; and he may make some reference to an anatomical chart, but there will be no postmortem or any kind of graphic or any photos at all of the postmortem victims.

There was also an argument -- and there will also be in this area -- there may be some victims who testify how they identified their loved ones and what they saw and that they identified their loved ones. There won't be a lot but there may be a victim or two that --

THE COURT: What does that go to?

MR. CONNELLY: I think it goes to the effect of the offense; and that's under Payne and under the statute -- it's one of the effects of the offense that is part of the offense. It caused not only the death but also the surviving family member to have to come identify the deceased. And it -- we don't intend to do it in an overly graphic manner, but there will be a -- a description of what they witnessed and how they identified their loved one.

THE COURT: Well, what do you mean what they witnessed?

MR. CONNELLY: Well, the condition --

THE COURT: Give me an example of what you're talking about.

MR. CONNELLY: Somebody that came in after the bombing and when their loved one was identified, the condition of the body and the arrangements that had to be made in terms of identifying the person and then in terms of putting the person to rest.

to lose.
THE COURT: The funeral arrangement.
MR. CONNELLY: Well, no -- well, as part of the process of the funeral arrangements that they had to make the identification --
THE COURT: I'll exclude that.
MR. CONNELLY: Okay. So it will just be Dr. Jordan in that area.
THE COURT: Yes.
MR. CONNELLY: The next category is the emotional -- what the defense claims is overly emotional testimony and exhibits. And I think there has really been one particular exhibit that's identified, and that's Exhibit 1472, which should be in front of your Honor; and that is -- the defense called it a poem. They mentioned two poems. One poem they objected to, we don't intend to offer, which was a poem actually by a deceased before their death. But 1472 is a poem by the father of a victim -- not a poem. It's really a one-page writing. The Court can read it, if it would like.
THE COURT: That's excluded.
MR. CONNELLY: Next area that's been objected to are rescue workers, and I'd like to -- and it will not be representative of what the Court and jury heard. First, I'd like to give two examples of the type of testimony that we intend to offer from two different rescue workers; and they're both, I believe, members of the Oklahoma City Police Department.
The first will testify about entering the building and holding a woman's hand who was alive when he was holding it, and he literally felt the pulse stop and she died. That will be one story that the rescue worker will talk to.
Another member of the Oklahoma City Police Department will talk about being with a victim as he died as well. And that victim -- the first victim is not known. The woman who died, this rescue worker doesn't know who that was. The second rescue worker does know the name and identity of the victim. And there will also be testimony -- some testimony about the emotional effects that these rescue workers, who otherwise are fairly hardened people, felt as a result of what they were exposed to.
THE COURT: The two you've just mentioned.
MR. CONNELLY: Yes. And there will -- I think there may be a total of five -- four -- a total of four rescue workers that went in. The two I mentioned will testify to those stories that I just discussed.
THE COURT: And are they going to testify to some course of treatment, or something like that?
MR. CONNELLY: I don't believe --
THE COURT: Or are they simply going to give their own perception of their own experience?
MR. CONNELLY: One will talk about nightmares that they've had, recurring nightmares. There will certainly be no psychiatric -- it will just be the effects that it had on them --
THE COURT: All right.
MR. CONNELLY: -- in a nonprofessional sense.
THE COURT: So you're putting them forward as victims,

also.

MR. CONNELLY: As victims, also --

THE COURT: And that's the legal premise.

MR. CONNELLY: Not exclusively. Obviously, that is certainly an important legal premise; but I think it also goes to the effect of the offense on the victims that they -- that they encountered in the building.

THE COURT: Well, yeah. I'm separating out the effects on the rescue workers from their narrative of the experience of death as they perceived it of two of the deceased.

MR. CONNELLY: I think the rescue workers will go on both those points.

THE COURT: All right.

MR. CONNELLY: The next category of testimony that's been objected to is testimony by a -- actually, the director of operations of the Oklahoma State Medical Examiner working under Dr. Jordan; and in that person's official capacity, that person -- part of his duties was to give twice-a-day briefings for the approximately 15 days that recovery efforts were underway in the Murrah Building until -- I believe it's May 5 when the building became too unsafe for any further recovery efforts. That person would brief the survivors on the status of the recovery efforts and would twice a day give a briefing in which he would be asked questions about how many people were recovered today and have you found -- have you recovered this person or that person. There was a woman every day that would ask, "Have you recovered any more children?" And she had lost her son. And every day he would have to say, "No, ma'am." It will be a very objective, factual recitation of his experience in terms of dealing and discharging his official responsibilities as an employee of the medical examiner's office.

THE COURT: Will that include some description of the response of the persons being briefed?

MR. CONNELLY: I think -- well, I think to the extent it's factual and they say that they asked this question and this is the type of question, yes.

THE COURT: But I mean a description of the emotional response?

MR. CONNELLY: I think it will be more factual in terms of testimonial: They asked this, they asked this, and there were X number of people here that day typically. It will be very factual. No, he will not be trying to characterize their emotions.

THE COURT: All right.

MR. CONNELLY: The next category that was challenged -- and I just got from our office and I can hand up to the Court and to the defense, because they don't have it -- is testimony from a minor who lost his mother. And I'd like to give the Court some background on how that came about. We did not seek to introduce any testimony from children. Obviously, there are a lot of children that if we wanted to seek testimony from, we could have done so. We are not trying to put this person on because this person is a child.

We had originally asked the father to testify about

the impact of the crime on himself and his older son and loss of their mother and wife; and the father came to us and said, "It's very important to my son to testify;" and he would like to do so, and he's worked on preparing a statement that he would like to offer to the Court -- to the jury at sentencing.

And we asked him last night -- he was in our office, and we asked his son last night to just go alone to a typewriter and to type up a statement of what he would want to say about his mother.

THE COURT: You propose that he read it?

MR. CONNELLY: In a sense, yes. I think we propose that first we call the father very briefly, not to describe the impact but just to say, "Was it important to your son? Is your son the one who wanted to testify?" and very basically briefly say that "Yes, it was my son's decision that he wanted to testify, nobody asked him to testify," and then just take the father off the stand and then bring in the son and ask obviously a couple of background questions: "How old are you? Where do you live?" and then say, "You know, did you --" I don't want to -- I think Mr. Ryan will put it on, but I think, "Did you lose your mother in the bombing and can you describe the effect of that?" And he might actually just literally read this. So I'd like to hand it up to the Court. It was just prepared yesterday by the son.

THE COURT: How old is he?

MR. CONNELLY: The son -- excuse me -- Mr. Burr said he was 12. Actually, he's 10. He was 8 at the time of the bombing and is 10 now.

THE COURT: All right. Well, have you visited with this youngster?

MR. CONNELLY: I met him briefly, and Mr. Ryan has visited a fair amount.

THE COURT: What is his level of maturity? You know, in the old days, we used to operate on the presumptions of capacity to testify, and now we don't have that anymore in the law; but generally, from 7 to 14 there is a presumption against it. I just ask for your assessment of this youngster.

MR. RYAN: We were very nervous about any children testifying, and I was initially opposed to this child and -- except as Mr. Connelly indicated, his father wanted him to do it. I know this child. I've met with him half a dozen times, not in connection with his testimony but just in connection with the aftermath of the bombing. And he's a very mature little boy. And he is still a little boy, but he is a mature person --

THE COURT: Understands . . .

MR. RYAN: -- has never cried, never shed a tear yesterday, your Honor, when I was with him and when he was typing this statement out. He has been through a lot, but I don't think that you'll see an emotional breakdown by this child.

THE COURT: And understands the obligation of an oath?

MR. RYAN: We went over that with him, your Honor.

THE COURT: All right.

MR. CONNELLY: I think that addresses all the testimonial issues that were raised. If I missed any, I'm sure Mr. Burr will remind me.

Mr. Burr will remind me.

Then the objections turn to exhibits. And the first category -- oh -- I'd like -- there is a broad category of not testimony so much as category of impact, an aggravating factor. As the Court knows, we've alleged that, as provided by the statute -- that one of the five aggravating factors under the statute is that the deaths occurred to particularly vulnerable victims who were vulnerable because of several reasons. As of now, we're just saying they were vulnerable because of their youth, and that would be the children in the building. There was some discussion the Court initiated in terms of the legal elements of that. I'd like to address that briefly, if I could.

THE COURT: All right. Sure.

MR. CONNELLY: It's our position that the defendant does not have to know that the victims were particularly vulnerable. The statute itself, in contrast to the federal Sentencing Guidelines, has no knowledge requirement. Congress obviously knew how to put a knowledge requirement in. They did so: For example, "knowingly created a grave risk of death." They know how to use the word "knowingly." There is no suggestion in there it had to be "knowing."

Under Payne, the teaching of Payne is that a murderer takes his victims as he finds them and doesn't have to know all their life circumstances; and the fact that victims were particularly vulnerable, we submit, is a valid aggravating factor apart from any scienter as to that element. Scienter obviously has to be an intentional killing; but if you intentionally kill somebody or a group of people in a mass murder, there is no scienter requirement.

And I contrast the statute with the aspect of the federal Sentencing Guidelines that the Court referred to, which says -- I think it's a two-level enhancement of the sentence if the defendant knew or should have known that his victims were particularly vulnerable.

So here again, although that's not drafted by Congress, it's drafted by an administrative agency with a layover provision to Congress.

THE COURT: Well, Congress has the veto.

MR. CONNELLY: Right. And it doesn't go into effect until Congress --

THE COURT: And presumably Congress knows what "vulnerable" means.

MR. CONNELLY: I think they do, and I think -- they certainly know a scienter requirement when they want to, not only in the guidelines but in other parts of the aggravating factors.

THE COURT: Well, I don't need any argument on that. You have to show an awareness that children were there, if you're going to use children.

MR. CONNELLY: Okay. I'd like to address that. I think there is evidence from which you can infer that. Can I inquire of the Court of whether it will be like the guidelines: "know or should have known"?

THE COURT: Yes.

MR. CONNELLY: Okay. There is plenty of testimony in this case from Richard Williams and others talking about how

the day-care center -- you could see the children as -- from the street, from the street front. There was a glass-front enclosure. It was on a low floor. And there is plenty of testimony from which you could infer that anybody in front of the building knew or should have known. I would say "know" but admittedly --

THE COURT: I'll tell you I've considered it at some length. The "particularly vulnerable" will not be applied to the children. You may argue that the "particularly vulnerable" applies to the entire -- all of the occupants, because there they are in a very vulnerable building; and one of the premises of this case, as I understand it from the prosecution, is that that building was selected because of its vulnerability, the glass front.

MR. CONNELLY: Would that be a statutory aggravating factor, or nonstatutory at that point?

THE COURT: Well, it's the aggravating factor that you've put in your notice, which is a statutory factor. That's my interpretation of the statute.

MR. CONNELLY: Okay. We accept that interpretation.

The -- that's the end of the testimonial part, I think, of the challenges.

The next challenges are to what the defense calls "gruesome photographs."

THE COURT: Well, what about these videotapes?

MR. CONNELLY: Okay. The videotapes: We intend to offer only five videotapes. Three are not contested. The two that are contested, the first one is Exhibit 1483 and will be approximately 7 to 8 minutes. It's a home video taken by one of the victims at the credit union. It shows a typical day in the life of the credit union; and on that video are, I think, about six -- herself and six people that ultimately were deceased victims of the bombing. And it's just basically a quick day -- typical day in the life video that was taken some months before the bombing.

THE COURT: What's the value of that? What does that prove?

MR. CONNELLY: I think again under Payne and under the statute, it identifies six of the victims and provides a brief snapshot, in the words of Payne, of a typical day in their life.

THE COURT: Exclude it.

What's the other one?

MR. CONNELLY: The other one is Exhibit 1444. That is about a 3-minute tape taken by a news station. There is no challenge to authenticity. It is a tape to show the serious bodily and physical injury to all these people as surviving victims. I don't think it's graphic in any way. It's not a pleasant sight, to be sure.

THE COURT: Give me a little more identification of it. Is it at a hospital?

MR. CONNELLY: It is at a series of locations around Oklahoma City, a couple of hospitals, a couple of informal rescue sites.

THE COURT: Was it shown on local television?

MR. CONNELLY: I don't know that it was shown in its

entirety. It is an outtake of --

MS. BEHENNA: Your Honor, if I could, just to address this issue, it is an edited version of raw footage taken at one of the news stations in Oklahoma City that shows scenes immediately outside hospitals. One was St. Anthony's Hospital in downtown Oklahoma City. The other was University Hospital. Some of the footage was played on TV. It shows scenes of ambulances arriving to the emergency rooms and the ambulance -- or the medical personnel then coming out to the ambulances to treat the injured and then being wheeled in gurneys and wheelchairs and walked into the hospitals for treatment.

THE COURT: So it simply shows people being taken into a hospital?

MS. BEHENNA: Yes, your Honor.

THE COURT: Well, I don't see any prejudice to that. I mean, that happened. As long as we're not talking about people outside the hospital being interviewed about their loved ones being in surgery and that sort of thing.

MS. BEHENNA: No, your Honor. There is none of that.

THE COURT: All right. All right.

MR. CONNELLY: The next category, unless the Court wants to address something else, are exhibits, "gruesome exhibits" -- that are claimed to be gruesome.

THE COURT: This is what I have up here?

MR. CONNELLY: Yes. They should all be in the book. Did you pull the ones --

THE COURT: Well, someone pulled these; and I think these are the ones identified by Mr. Burr.

MR. CONNELLY: Okay. I'd like to give some background on that. All of those photographs, along with about 15 others that are not challenged -- Just by way of background, when we came in this morning, we only understood that they challenged three photographs; and we agreed to remove two of those three, and there was only one that was a matter of dispute. These are additional photographs that they've now identified as objectionable.

By way of background, they will go along with the testimony of an epidemiologist from the Oklahoma Department of Health, who did the Journal of the American Medical Association study. We don't intend to introduce the study, the actual exhibit that was objected to, but we do intend to introduce her testimony; and her qualifications, obviously, among others, are that she did this study, and each of these photographs --

THE COURT: These are primarily injured persons?

MR. CONNELLY: These are people that she will testify that are among two people that suffered near-fatal injuries, to prove the element that the defendant knowingly caused a grave risk of death to persons other than those who were actually killed.

THE COURT: Yes.

MR. CONNELLY: Every one of those people survived. Every one of these people, the 29 photos or the 29 people on our list, survived; and there are many other photos, one per person. There are about 20 to 25 photos in total.

THE COURT: What are these -- I'm looking at 1208A and 1208B and 1129A. Do you have those?

MR. CONNELLY: These are the ones that we just

MR. CONNELLY: Those are the ones that we just presented today. Those are not part of the testimony. Those are just taken from the charts that were introduced during the guilt phase, and they would just correspond when a survivor or a witness testifies with respect to one of their loved ones. So that's just really something that's already been introduced before.

THE COURT: Yeah. So why are we doing it again?

MR. CONNELLY: Because it's an individual photograph, that will be a snapshot that they will identify: This is the person I'm talking about.

THE COURT: I see. All right.

MR. CONNELLY: As opposed to the group photographs.

THE COURT: Then there is one that Mr. Burr suggests is different coloration.

MR. CONNELLY: We did that in order to provide a copy so everybody could see. And it's just -- the copy machine made change of coloration, but that is not the actual exhibit.

THE COURT: 1410 is the actual.

MR. CONNELLY: Yes.

THE COURT: And this shows some facial disfigurement of a survivor.

MR. CONNELLY: Yes. And it will all be -- it will all be testimony going along -- introduced at time of this epidemiologist in a -- obviously a professional scientist who will say that "I found that these were the 29 examples of near death and here --"

THE COURT: "This is what this man has to live with."

MR. CONNELLY: Right.

THE COURT: All right.

MR. CONNELLY: So that is -- those photographs.

Another category challenged was funeral photographs. We don't intend to introduce any funeral photographs. We originally intended to introduce -- there were two on it that we are not calling, then; that we were trying to introduce those two photographs.

There is a third one that they've lumped in the category of funeral photographs, and that's Exhibit 1527. And we'll be happy to withdraw that.

I'd like to give the Court some background, though, in terms of the testimony we expect to elicit on that point; and the Court may want to look at that photograph, even though we don't intend to introduce it. That's 1527. We will withdraw that, if there is an objection to it. But background of that is simply that one of the people killed in the building had not been recovered. And as of the time the building became unsafe for any further recovery efforts on May 5, the surviving family member -- in this case, the mother -- and some of the other surviving family members went down there, were allowed inside by the people on the scene, and placed a rose at the location of the person, their loved ones, where they thought the body remained, because they could not take the body out at that time; and they came out in front of the building and then had a dove service where they simply released a single dove into the air. And that will be -- we don't offer the picture. We would like to offer that testimony as part of the effect. It will be simply objective: The body was not recovered --

simply objected. The body was not described
THE COURT: Well, what's the difference between that and any funeral ceremony?
MR. CONNELLY: Well, I don't think it's actually -- I think it is the effect of the person. They are similar. It is not a funeral service --
THE COURT: Well, it's the same thing. It's mourning response, loving-memory-type thing; and I don't deny the importance of that to the persons affected, but I don't believe that's the type of thing that the jury should consider.
MR. CONNELLY: We had thought we were entitled to offer it, and we will not, with the Court's ruling.
THE COURT: All right.
MR. CONNELLY: The -- there are no poems. That's another category that's been challenged. The one that we want to offer, the Court has already ruled on, 1472.
We will not seek to offer any journals of -- there were two that we had intended to offer, and we will withdraw them.
THE COURT: All right.
MR. CONNELLY: The -- there are two, I think, other exhibits that are challenged, and I don't think I'm missing any others. I think there two left. One is 1478. That is a birth certificate and should be in the Court's packet.
THE COURT: I think I saw that.
MR. CONNELLY: The father or mother, one or the other, we would expect would testify -- and that is a certificate to one of the young victims -- and would testify that as part of the identification process, they were asked to provide that with a copy of the person's --
THE COURT: I don't see why the exhibit is necessary. The testimony is all right.
MR. CONNELLY: Very well. And the last -- and the last -- we won't offer the exhibit. We will not -- we will withdraw that.
The last exhibit which we think we are entitled to offer clearly is 1485; and that is there will be a witness who testified that his wife took that photograph a week before the bombing -- it was a photograph of the children -- and then he developed that photograph after the bombing.
THE COURT: Is this in the day-care center?
MR. CONNELLY: Yes.
THE COURT: This is all the children there?
MR. CONNELLY: Yes. Not all of them are deceased, but it is all the children who were present on that day.
THE COURT: All right. I'll admit that.
MR. CONNELLY: I don't think, unless the Court has any further issues it wants to discuss --
THE COURT: How many -- so how many are you putting on from the injuries, the maimed and disfigured and so forth?
MR. CONNELLY: I want to say five. Five to -- people who were actually injured you're talking about --
THE COURT: Yes. I mean people who have been injured and -- you had the captain -- the Marine captain who lost his eyesight and was -- his career was terminated and so forth, people like that.
MR. CONNELLY: I would anticipate about five, unless

somebody wants to correct me.

We'll get a better number for you. This is of the 45 total, your Honor.

THE COURT: All right.

All right. Well, Mr. Burr, do you have any response? I've already ruled on some of these things.

MR. BURR: Yes, your Honor.

THE COURT: With respect to the others, it seems to me that it's within the law to do as they intend. On these photographs, I'm assuming that there is adequate testimonial support for the photographs; but, you know, we can't sanitize this scene. Some of the photographs, although they are disturbing, of course, are representative of what occurred.

MR. BURR: Your Honor, I just had a very short odds and ends. May I just stand here?

THE COURT: Well, whichever is more comfortable.

DEFENDANT'S REBUTTAL ARGUMENT ON DEFENDANT'S MOTION IN LIMINE

MR. BURR: I did not hear a response to Items 1507, to 1510 and 1515.

MR. CONNELLY: I'm sorry, your Honor. There was no -- we're withdrawing those.

THE COURT: All right.

MR. BURR: And, your Honor, I did have -- I had one set of photographs I'd like to draw the Court's attention to, which I had not done before. They're a series, 1392, 1393, and 1394, which are -- I'm sorry.

1393 was withdrawn, so it's 1392 and 1394. They are -- they are before-and-after photographs of an injured victim to which we do not object in principle but do have a particular concern.

THE COURT: What is it?

MR. BURR: That is the before photograph of -- appears to be -- I don't know if it's a glamor photograph or what, but it's a kind of an artfully done portrait which all of us like to have.

THE COURT: I don't see 1393 here.

MR. BURR: I think 1393 was withdrawn.

MR. HARTZLER: Correct.

THE COURT: Oh, 1392 and 1394 don't match up as the same person.

MR. HARTZLER: I think they do.

THE COURT: Oh, I see. All right. I'm sorry.

MR. BURR: And our objection -- if there were sort of a normal photograph of the pre-injury, we would have no objection; but this does not appear to be a normal photograph. I'm not sure how else to describe it other than --

THE COURT: I don't have any problem with it. I understand your objection, but I believe it's legitimate.

MR. BURR: And, your Honor, we would ask as -- there was a particular set of testimony that we would ask the Court to review by way of summaries. Actually, I'm not sure the Court has summaries.

THE COURT: No, I don't, excepting for the one just provided, which is the statement to be read by the youngster.

MR. BURR: It's the summary of the rescue worker

testimony, which we would like to provide to the Court to examine because of the vivid -- the vivid and graphic descriptions of what these folks say they will testify to. I believe if there were pictures that matched the words, the Court would exclude them; and the only --

THE COURT: Well, these are the two who are going to testify about the last moments of life of two of the persons in the wreckage? Is that right?

MR. CONNELLY: Your Honor, I think what we could do is work informally with Mr. Burr and come up -- these, as I said, were over-inclusive. They were summaries --

THE COURT: Yes, that's what you said.

MR. BURR: We'll try to work that out.

THE COURT: The subject matter is obviously admissible. The -- you know, to the extent that the description of it goes beyond what is appropriate, you ought to obviously caution the witness with respect to it so that it is as objective as possible without -- and of course you said that you intend, and I would permit, the person to testify about his or her reaction to this event. That's a part of what I believe to be appropriate victim testimony.

MR. BURR: Your Honor, I think just one other matter I did not hear addressed were the photographs associated with the epidemiologist. We had objected to a number of those, and I don't recall Mr. Connelly responding to that in particular.

MR. CONNELLY: I thought as I was talking, the Court was looking at them; that the seven or so that were objected out of the 20 --

THE COURT: That's showing injuries?

MR. CONNELLY: Yes.

THE COURT: Yes. I'm going to admit those.

MR. BURR: I'm sorry. I misunderstood.

THE COURT: As I said, that was what I meant when I said we can't sterilize all of this effects. That's part of, you know, what occurred. And I assume their testimony will, of course, again be professional as an epidemiologist in the description of what these injuries consist of.

All right.

Well, I'm not suggesting that you remove your objections. Your objections stand. But I'm trying to give this guidance to both sides so that we can move through this without putting either in the position of having to argue these things.

How about the statement of this, as I understand it, now 10-year-old youngster? Do you have that? I'm going to permit it. You object to it. I'll permit it.

MR. HARTZLER: Your Honor, may I double-team with Mr. Connelly to invite reconsideration of just one item?

THE COURT: Yes.

MR. HARTZLER: One of the values that we found from that videotape from the credit union is it depicts a number of people, and what we're trying to do is to use, in effect, representative survivors; and frankly, we can show very brief live -- it's a second on the video film of -- I think it's six people who were working in the credit union to show them while they were alive. And I just wonder if you would consider

they were alive. And I just wonder if you would consider looking at the videotape.

THE COURT: No, I'm not going to admit it. It's not a day in the life of the credit union that's going to come in.

MR. HARTZLER: Thank you.

THE COURT: Their identities are here, their photographs are here; and I don't think that how they acted on a particular day or interacted is probative of anything of value here.

And let me say also publicly that I appreciate the efforts made by Government counsel here to resist what I'm sure is strong effort by those most directly affected here to tell the whole story. I mean, I understand that. That's part of the response. That is a human response to this event and this -- all of the aftermath. But of course, what these lawyers representing the Government know and what they're doing here is to acknowledge and try professionally to accommodate that interest but also their obligation to the law and to the Court to ensure that this hearing be conducted in a manner that is consistent with the limitations that the Constitution commands, knowing that those limitations are not at all clear.

Payne vs. Tennessee involved, you know, cautions given by every justice who wrote; and almost every justice wrote in that case. And there simply is no clear guidance as to where the line between appropriate, particularly victim-impact testimony ends and an appeal to passion, the human reactions, emotive reactions of revenge, rage, empathy -- all of those things -- begins.

So I know that these rulings are not going to be consistent with the views of many; but nonetheless, we have to guard this hearing to ensure that the ultimate result and the jury's decision be one made as truly a moral response to appropriate information, rather than an emotional response. So I appreciate the work that counsel has obviously done in attempting to comply with the guidance given.

Mr. Burr?

DEFENDANT'S ARGUMENT FOR VOIR DIRE OF WITNESSES

MR. BURR: There was one other matter I wanted to address briefly. We had asked in our initial motion in limine that the Court consider a procedure similar to that promulgated by the New Jersey Supreme Court in such cases, where there would be some preliminary voir dire procedure with respect to witnesses, perhaps even a reduction of the testimony to writing, so that there would be clarity and no risk or less risk about unexpected emotion overtaking people.

RULING ON DEFENDANT'S MOTION FOR VOIR DIRE OF WITNESSES

THE COURT: Well, with all due respect to that court, that's an appellate view of things, and it's not a trial judge's view of things. We can't do dress rehearsals, so I'm not going to do that. The only voir dire we're going to have is those who have been attendant at the trial and observing the trial.

I believe that this discussion this morning provides the necessary opportunity to address it, and I'm confident that if we proceed according to what's been identified here as appropriate that the outcome will be consistent with the constitutional limitations, so --

Now, we have one other matter -- two other matters. One is these preliminary instructions, and the other is the objections to the defense proffer; and we have the defense response to that that was filed earlier today. Now, I'm not -- you know, I don't know how much you want to argue that. I have a view with respect to it and am inclined -- I'm looking for the response here -- you've generously endowed me with paper here. I have a little difficulty -- here it is.

RULINGS ON PLAINTIFF'S MOTION IN LIMINE

THE COURT: Yes. The use of the scale model that's described on page 8 at paragraph 6: I'm not going to permit the use of the scale model. But with that exception, I believe that the other matters that are identified here -- and what I'm talking about in particular is given the testimony that was presented and the arguments that were presented at the trial here with respect to the significance of the material that's been introduced in evidence in this case, the defense is correct that they should have the opportunity to present where these beliefs came from and what the -- you know, the evidence came in as motive evidence -- to also show circumstantially perpetration (sic) and intent, and the full context of that should come in.

I note, for example, one of the exhibits used in argument here powerfully was 454, the one "When the government fears the people, there is liberty. When the people fear the government, there is tyranny. Maybe now there will be liberty." It was argued at great length; and I believe that in context, that can come in.

Why, you know, it was asked at times here in voir=20 dire -- well, it was asked rhetorically, in a way -- "How could anyone do such a thing?" And I believe one of the jurors mentioned, looking at Mr. McVeigh, "How could such a nice-appearing young man do such a thing?" I believe that the defense is entitled to put on an explanation.

And with respect to the T-shirt that was also used in argument here -- the back of it, the "tree of liberty" quotation from Thomas Jefferson -- I'm enough of a student of history to know that that was written in response to the Daniel Shays' Rebellion in Massachusetts in 1786, which was certainly an insurrection against the then-existing government and particularly in opposition to farm foreclosures; so that's some background, not that you have to put on history. But the fact that there are persons in our country who have those beliefs is a fact that I believe can come in and be considered.

But we're not going to try what actually happened at Waco or at Ruby Ridge or any of those things. It's an issue of perception, a matter of perception, not a matter of what the actual facts were; and I believe that your response today reflects that. And the -- as indicated in that response, I have already instructed defense counsel in the course of an ex=20
parte submission under 848(q) as to what some of these limits were and therefore precluded the use of resources for some of these purposes except to the extent necessary to develop a proffer for the record.

So I'll incorporate that -- those 848(q) colloquies

into this record for purpose of any appeal.

MR. JONES: Yes, your Honor. And so the record is clear -- I think it is; but just to formally state it, I understand the ruling your Honor has made today -- and I assume that's without prejudice to our objection to --

THE COURT: Of course.

MR. JONES: -- to proceed in the manner outlined in the proffer and what we originally submitted in the 848.

THE COURT: Yes. Have you developed a written proffer, too?

MR. JONES: There will be one, your Honor. We're working on it now.

THE COURT: All right. But I think this is awkward, because the Government didn't participate. They couldn't participate, because this was expressly under 848(q); but I believe that my response to the requests made -- and the requests made should be made a part of the court record, which, of course, will, after this next phase is completed, be a matter that can be known to the Government. But rather than going through all of that, through the adversary process, it seems to me to be simpler to just incorporate that. My rulings are there, and essentially they are that I do not intend to have a trial of what happened at Waco and I don't intend to have a trial of what happened at Ruby Ridge. Those events have already been the subject of trials.

Now, there is one other aspect to this, and it's on page 18 of the response; and I think that what it simply is saying is that the Court should not require as a predicate for this type of testimony and submission of information that there be testimony from the defendant with respect to his views and beliefs. And I don't know that the Government was going to take that position; but I'm, I think, still enough of a lawyer to know that the question of whether a defendant should take the stand in a sentencing hearing and testify -- whether that has an effect on his rights of appeal is a serious question.

It's one thing when a defendant stands up in the normal sentencing hearing and exercises his right of allocution. And under those circumstances, I don't know of any court of appeals that ever has held that because a person in exercising the right of allocution may admit the offense that he loses his appeal. I don't know what the situation is, however, when a person testifies in front of a jury at a sentencing hearing.

And I'm not going to require that any defendant -- and certainly am not going to require it of Mr. McVeigh -- that he make a choice between an appeal and the opportunity to testify at a sentencing hearing.

Therefore, I'm not going to require as a predicate for this evidence that he testify that these were his beliefs. The indirect testimony will be the sufficient predicate.

Now, I'm asking the Government to accept that, but I just thought I might cut right to it and avoid a lot of discussion that I don't think is going to persuade me to any different view and give you an opportunity to prepare for tomorrow better.

MR. JONES: Judge, it's always a concern in this case that you're too subtle.

that you're too subtle.
THE COURT: All right.
MR. HARTZLER: I do think the one thing we would like to do is possibly propose an appropriate instruction to the Court when this material comes in as to --
THE COURT: Instruction to the jury.
MR. HARTZLER: Yes. We would propose to the Court an instruction to the jury.
THE COURT: Yes. I'll consider that. A limiting instruction, really.
MR. HARTZLER: Right.
DISCUSSION RE PRELIMINARY INSTRUCTIONS
THE COURT: Speaking of the instructions, have you read what I intend to give as a preliminary?
MR. CONNELLY: I did, your Honor, quickly; and there was only one thing that I'd like to comment on, if the Court will take comments.
THE COURT: All right.
MR. CONNELLY: I think it's the initial -- want me to take the podium?
THE COURT: Yes. Probably.
MR. CONNELLY: It's the -- actually, it's the second paragraph, and I think it comes from a proposed instruction that the defense submitted.
THE COURT: Yes, it is. I took their No. 2.
MR. CONNELLY: I would just urge the Court to avoid any talk about presumption. I think this is read such that it maybe presumes that a sentence other than death is appropriate. I know if you parse the words, it doesn't say that. I just would ask if the Court would consider that the law does not propose that Mr. McVeigh should be sentenced to death; that he should receive -- or that any other -- there is no presumption, in effect, and that the jury should begin with an open mind and consider all the -- open mind, give meaningful consideration to all possible sentences. It's just the part "presumption" -- I think if you parse it, it's probably correct; but it's possibly written in a way and possibly intended to be written in a way that --
THE COURT: I see what you're saying.
Why don't we just say, "Even though you found Mr. McVeigh guilty of charges which carry a possible death sentence, the law requires that you approach the sentencing proceeding with an open mind."
MR. CONNELLY: I think that would be very appropriate.
MR. NIGH: I would agree with that, your Honor.
THE COURT: All right. That's the way I'll modify that.
Do you have any other objection?
MR. CONNELLY: Nothing that I -- I didn't have the chance to read it that I would have liked, and I apologize. But the rest of it looks like it's --
THE COURT: Well, it's very short. You're a fast reader.
MR. CONNELLY: A lot of people have opinions, though. I think it looks fine.
THE COURT: All right. Mr. Nigh?
MR. NIGH: Your Honor, there were two other objections

that we had. On page 3, the second full paragraph beginning "Your role."

THE COURT: Yes.

MR. NIGH: We think that that sentence should end after "moral judgment" and not include about the life -- about "the worth of a specific life," etc.

THE COURT: Well, this language is taken from an opinion -- from an authority that I recognize more than others: Mine. And I intend to give it. I believe that's the issue.

MR. NIGH: I certainly recognize that authority more than others, too, your Honor.

THE COURT: Yes. Well, I'm not asking you to agree with it. Your objection is noted.

MR. NIGH: Thank you, your Honor. These are not so much objections as requested perhaps modifications.

In that last paragraph on that page, it indicates that counsel for the Government and the defendant will make opening statements. We may wish to reserve --

THE COURT: Oh, all right.

MR. NIGH: -- opening statement. And then it also indicates that the Government will be allowed rebuttal. It doesn't make any provision for the potential for surrebuttal --

THE COURT: There isn't going to be any. I don't know that there is any procedure for surrebuttal in the admission of information as we call it. My understanding of this hearing is that it proceeds in exactly the same format as the trial, and the Government does have the burden of proof beyond a reasonable doubt before a death sentence can be returned, recommendation.

MR. NIGH: That would be --

THE COURT: So I'm not going to include surrebuttal, but I'll certainly modify the opening statements.

MR. NIGH: Thank you, your Honor.

THE COURT: I assume that counsel for the Government is going to make an opening statement; and the defense, then, can either make an opening statement at this time or reserve it until the time for them to present information, and that's what I'll say.

MR. NIGH: Thank you, your Honor.

THE COURT: All right.

MR. BURR: We have two other brief matters, if I could address them.

THE COURT: Go ahead.

DEFENDANT'S OBJECTIONS TO PLAINTIFF'S EXHIBIT 1531

MR. BURR: These have to do with an exhibit that we just got Sunday from the Government. It's actually a revised exhibit, Government's Exhibit 1531. Does the Court -- it's a chart of statutory aggravating factors.

THE COURT: I don't have that.

MR. BURR: May I hand my copy to the Court?

We have several objections to this. One is that while certainly Counsel is able to argue the law, we think that --

THE COURT: Well, obviously one of them is no longer applicable: The young children.

MR. BURR: Yes. In general, we would object to the Government having a chart of the aggravating factors in advance of the jury being instructed.

THE COURT: Well, actually, this doesn't compare to the aggravating factors that the Government is relying on.

MR. BURR: Our other objection is that, your Honor, the language is quite different.

THE COURT: This is different language.

MR. CONNELLY: This is basically, your Honor, trying to be laymen's language but yet be accurate, and I don't know that there is any inaccuracy; and it avoids some of the verbiage --

THE COURT: The verbiage is a part of the law, and I'm not going to allow this paraphrase of the law.

DISCUSSION RE "GRAVE RISK OF DEATH"

MR. BURR: Your Honor, the last thing is this: The Government, I believe, has given a different interpretation to the statutory aggravating circumstance concerning grave risk of death. If I could just -- it will take just a moment to explain this. But I think it has created a problem of duplication.

The statutory language is "The defendant, in the commission of the offense," skipping immaterial language --

THE COURT: This is one of the four? 3591?

MR. BURR: This is 3592(c)(5).

THE COURT: 3592. Yeah.

Well, wait a minute. I'm not going to suggest that you would misquote the statute, but I'd like to have it in front of me.

MR. BURR: It's important to follow the language exactly, because --

THE COURT: Yes. Now I have it.

MR. BURR: The material part I wanted to focus on was "created a grave risk of death to one or more persons in addition to the victim of the offense."

The Government has now interpreted this statutory aggravator as applying -- has interpreted the word "victim" to mean only people who have died.

THE COURT: How else should you interpret it?

MR. BURR: Well, in the Court's opinion in response to our challenge to the death penalty statute, I believe the Court interpreted it as someone who was neither killed nor hurt but within the zone of risk, as it were, geographic zone --

THE COURT: Right --

MR. BURR: -- same zone as those who were.

The Government has now interpreted it as being satisfied by showing serious injury. And now because of that interpretation, it now duplicates the non-statutory aggravating circumstance in our view that covers people who were seriously injured, so that there is in effect a double-counting of injured people in the weight of aggravation.

THE COURT: Well, this is a homicide. The purpose of the aggravating factors here, by statutory aggravating factors -- and the non-statutory, too -- is the aggravation of the homicide, right?

the homicide; right?

MR. BURR: Yes, sir.

THE COURT: So necessarily for this purpose under this section, it seems to me the victim means the decedent.

MR. BURR: If that is so, then, your Honor -- then I think there is a double-counting; because to satisfy the statutory aggravator we're just talking about, you show that people were injured: There was a grave risk death to others --

THE COURT: Yeah.

MR. BURR: -- reflected by serious injuries to people.

That same evidence then goes to establishing the non-statutory aggravating factor focused upon people with serious physical and emotional injuries. I think that's the double-counting problem that we're attempting to point out.

THE COURT: I see what you're saying.

Well, I take it, Mr. Connelly, if you will address this -- I take it that I've just stated your position that because this is an aggravation of a homicide, therefore the victim has to be dead, and therefore it's the grave risk of death to people who were not killed.

MR. CONNELLY: Persons other than the homicide victim. That's correct, your Honor. That's our interpretation of the statute and has always been.

THE COURT: That could include -- are you putting it forth that those are the persons who were injured?

MR. CONNELLY: No, no. The category in this would be with Sue Mallonee, again. There are 29 people that she has identified as suffering near-fatal injuries. Many, many other people were substantially injured but didn't suffer near-death injuries.

THE COURT: And some people weren't injured at all physically --

MR. CONNELLY: Right.

THE COURT: -- who were in the zone of death.

MR. CONNELLY: Right. And we've identified I think in Exhibit 1401, consistent with this Court's instruction way back to identify for the defense a zone of risk of death. We have done that, and that's Exhibit 1401; and that identifies particular buildings and the zone where there was a grave risk of death.

THE COURT: Well, I don't think there is a duplication, there.

MR. CONNELLY: Your Honor, could I ask clarification on one purpose? And that was the chart that was solely going to be demonstrative in terms of walking the jurors through the aggravating factors. If we were to use that chart in verbatim language from the statute as to the statutory factors and then verbatim language from the notice as to the non-statutory factors, would that be acceptable?

THE COURT: Yes. I don't have any problem with that. That's like showing them the elements.

MR. CONNELLY: Thank you.

THE COURT: But you're going to modify No. 1 from the -- we're not going to just hand to the jury the notice like we would an indictment.

MR. CONNELLY: I wouldn't expect. I'd hope we'd do the Special Verdict Form E, special findings form.

the special verdict form B, special findings form.

THE COURT: That's right. And I'm waiting to see what both sides give me on that, which I guess you asked for tomorrow to do.

MR. CONNELLY: And the Court was very indulgent.

THE COURT: Yeah. But modify the language -- my concern here is with not the use of this but with the simplification of the language, because I think we need to have the language of the law here as you have used it in the notice.

MR. CONNELLY: It will be verbatim, then.

THE COURT: All right.

Mr. Jones?

MR. JONES: The only other matter I have is I wonder if I might approach the bench with respect to a proffer and the mechanics of it. This is something the Court has previously excluded.

THE COURT: All right. Come up.

Somebody from the Government?

MR. JONES: It will just confuse it, Judge.

(At the bench:)

(Bench Conference 131B1 is not herein transcribed by court order. It is transcribed as a separate sealed transcript.)

(In open court:)

RULING ON "AGE AND INFIRMITY"

THE COURT: All right. As a result of a brief conference here, I'm also now ruling that the -- it's been pointed out to me that the vulnerability provisions here as an aggravating factor include the age and infirmity and therefore it doesn't comport with that to say that everybody in the building is vulnerable; but I want to make clear that my ruling is based on an implied element of scienter, knowledge, which can include "reasonably should have known." And because of that requirement and considering that there would have to be a showing here based on the evidence that we've already had -- and there isn't any additional evidence, as I understand it, that could be offered that would add to what we already have in the trial evidence -- there is not enough proof that Mr. McVeigh knew or should have known of the existence of the child-care center and the -- any other persons who would come within the statutory parameters. And therefore I'm excluding that aggravating factor.

Now, one other thing that I want to say -- and of course, there will be people here tomorrow who aren't here now, but it is very important here, just as I said when we returned

the verdict in this case, that the people in attendance in the courtroom, all people in attendance in the courtroom, must be restrained and avoid showing audible or visible reaction to the testimony, knowing that it will be emotionally powerful even within the limits that I have defined in this hearing today. And therefore, I would expect that all persons will avoid those reactions and expect to react myself if anybody does, you know, essentially editorialize through their reactions. I can't permit it.

We'll be in recess till 9:00 tomorrow morning.

Mr. Hartzler?

MR. HARTZLER: We have two witnesses that might need to be voir dired. Did you want to do that at 8:30?

THE COURT: Are they going to be here to testify tomorrow?

MR. HARTZLER: Correct.

THE COURT: All right. 8:30.

Recess.

(Recess at 12:25 p.m.)

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REPORTERS' CERTIFICATE

We certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Dated at Denver, Colorado, this 6th day of June, 1997.

_____

Paul Zuckerman

_____

Kara Spitler