**ORAL ARGUMENT REQUESTED**

Case Nos. 01-6444, 02-6030, 02-6037, 02-6051

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**UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

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ESTATE OF KENNETH MICHAEL TRENTADUE, *et al.*,

Plaintiffs-Appellees/Cross-Appellants

vs.

UNITED STATES OF AMERICA, *et al.*,

Defendants-Appellants/Cross-Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
HONORABLE TIM LEONARD

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# BRIEF OF APPELLEES/CROSS-APPELLANTS

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**FEDERAL CASES**

**STATE CASES**

**FEDERAL STATUTES**



**STATE STATUTES**



**RULES:**

**Other Authorities**:

## STATEMENT OF RELATED CASES

Plaintiffs/Cross Appellants adopt the *Statement of Related Cases* set forth in the brief of the United States.

## I.

## PARTIES

Kenneth Michael Trentadue died a violent and mysterious death while incarcerated at the Federal Transfer Center ("FTC") in Oklahoma City, Oklahoma. Plaintiffs are the *Estate of Kenneth Michael Trentadue*, Trentadue's wife, Carmen Aguilar Trentadue and his minor son, Vito Miguel Trentadue, who was two months old at the time of his father's death. Additional Plaintiffs are Trentadue's father, Jesse James Trentadue, who died during the pendency of this action and is now represented by the *Estate of Jesse James Trentadue*, Trentadue's mother, Wilma Lou Trentadue as well as Trentadue's two brothers and sister, Lee Frederick Trentadue, Jesse C. Trentadue and Donna Trentadue Sweeney (collectively referred to as the "*Family*").

The Governmental Defendants are the United States of America, Department of Justice, Federal Bureau of Prisons and Federal Bureau of Investigation (collectively referred to as the "*Government*"). The individual defendants are Stuart A. Lee and Kenneth W. Freeman. Lee is now retired from the BOP. At the time of Trentadue's death on the night of August 20-21, 1995, Lee was the Operations Lieutenant at the FTC and the person in charge. Freeman was the Special Investigative Supervisor or SIS Lieutenant responsible for conducting the initial investigation of Trentadue's death.

## II.

## RECORD ON APPEAL

The *Government's Appendix* will be cited by the roman numeral volume number followed by a page number on which the document or testimony appears. The *Government* filed a *Confidential Appendix,* which will be cited by the reference "*Con. App.*" The *Government* also filed a *Supplemental Confidential Appendix*, which will be cited by the reference "*Supp. Con. App.*" The *Family* has included in their brief an *Addendum* containing the *Orders* from which they have cross-appealed, statutes, jury instructions and other pertinent evidence. That *Addendum* will be cited by the reference "*Add.*"

## III.

## STATEMENT OF JURISDICTION

On May 1, 2001, the District Court entered *Judgment* against the *Government.* (X, 3222). On May 11, 2001, the *Family* filed a timely *Motion*. (*Id*. 3225). When that *Motion* was denied, the *Family* filed timely *Notices of Cross Appeal*. (*Id*. 3390, 3393). This Court has jurisdiction under 28 U.S.C. § 1291.

## IV.

## STATEMENT OF ISSUES

Set out below are a rebuttal to the *Government's Statement of Issues* and the issues which the *Family* wishes to present by way of *Cross-Appeal* against both the *Government* and Lee.

### A. Rebuttal to *Government's* Statement of Issues

The *Government* misrepresents the District Court's ruling on intentional infliction of emotional distress. The *Government* contends that the sole basis for the District Court's finding of intentional infliction of emotional distress was its failure to inform the *Family* about extensive injuries on Trentadue's body and that an autopsy had been performed. The District Court entered judgment in favor of the *Family* on their intentional infliction of emotional distress claims based upon the "**reckless way in which [the Family] were treated by the United States in the aftermath of Trentadue's death.**" (X, 3218).

### B. Issues on *Cross Appeal*

Set out below are the issues raised by the *Family* on their *Cross-Appeal*:

1. Whether the District Court's finding that the *Government* never intentionally destroyed evidence was clearly erroneous?

2. Whether the *Government's* destruction of evidence denied the *Family due process* and *access to the court*?

3. Whether the District Court abused its discretion by not granting declaratory and injunctive relief with respect to the *Government's* violation of civil rights?

4. Whether the *Government's ex parte* submissions to the District Court violated the *Family's* rights of *due process* and *access to the court*?

5. Whether the District Court erred in placing the burden of proving revivability on the *Family*?

6. Whether the District Court erred by not applying the *physical fact rule* which required the trier of fact to disregard testimony in conflict with undisputed physical evidence?

7. Whether the District Court's findings of self-inflicted injuries were clearly erroneous?

8. Whether the District Court erred in rejecting the *Family's* spoliation claim?

9. Whether the District Court erred by not applying burden shifting presumptions?

10. Whether the District Court erred in not instructing the jury on burden shifting presumptions?

11. Whether the District Court erred in not applying the Oklahoma definition of "death?"

12. Whether the District Court erred in not allowing mortuary photographs into evidence?

13. Whether the District Court erred in excluding Exhibits 38, 178, 211, 234, 370, 402 and 700 as hearsay?

14. Whether the District Court erred in granting summary judgment to Freeman?

15. Whether the District Court erred in not granting the *Family's Motions to Compel*?

16. Whether the District Court erred in severing claims related to the *Government's* efforts to indict Jesse C. Trentadue through the perjured testimony of an FBI operative named Hauser and in not hearing evidence on the matter?

17. Whether *Confidentiality-Protective Order* precluding the *Family* from going to federal prosecutors or Congressional oversight committees with evidence of crimes committed by DOJ employees violated the *Family's due process* and *access to the court* rights?

18. Whether the District Court's *Order* precluding the *Family* from filing *Motions*, briefs or any other matter of record without prior court approval violated *due process* and *access to the court*?

19. Whether the District Court erred in not sanctioning the *Government* for destruction of evidence, perjury, frauds upon the court and other acts of obstruction of justice?

20. Whether the cumulative effect of the foregoing errors deprived the *Family* of a fair trial?

## V.

## REBUTTAL TO *GOVERNMENT* AND LEE'S STATEMENTS OF CASE

The *Government's* perjury, subornation of perjury, fabrication of evidence, destruction of evidence, intimidation of witnesses, and *ex parte* submissions to the District Court were rampant in the *Trentadue* case. Yet no mention of these issues is made by either the *Government* or Lee in their respective *Statements of Case*, even though these matters dominate this case.

### A. Nature of the Case

Kenneth Michael Trentadue was a parole violator (failure to appear) who was sent to the FTC in Oklahoma City for a parole revocation hearing.[1] He arrived at the FTC on August 18, 1995. He was dead two days later. The *Family* contends that he was murdered. The *Government* and Lee claim that Trentadue committed suicide. But because of the *Government's* spoliation of evidence and numerous other acts of obstruction of justice, Trentadue's family will never know how or why he died.

### B. Course of Proceedings

The *Family* sued the United States under the *Federal Tort Claims Act*, 28 U.S.C. §§ 2671 *et seq* for assault and battery, negligence in failing to protect Trentadue or provide him

[1] Trentadue's probation officer imposed a no beer drinking requirement. (XIX, 6899-6901). Trentadue appealed that condition, but lost. He then stopped reporting to his probation officer. A warrant was issued for his arrest in 1987. He was arrested in June of 1995, in San Diego, California. During the interim, he had married, paid his taxes and had a son. He did not expect to serve more than two to four months for the violation. (*Id*. 6929-30).

with medical care, spoliation of evidence, intentional infliction of emotional distress, civil conspiracy and pursuant to an Oklahoma law which provides that "any person who suffers detriment from the unlawful act or omission of another, may recover from the person at fault a compensation therefore and money, which is called damages." 23 O.S. § 3. The District Court awarded the *Family* $1.1 million on their intentional infliction of emotional distress claim, but found in favor of the *Government* on the other claims.

The *Family* also sued the Department of Justice ("DOJ"), Federal Bureau of Prisons ("BOP") and Federal Bureau of Investigations ("FBI") under the *First*, *Fourth*, *Fifth*, *Eighth* and *Ninth Amendments* to the United States *Constitution* and 28 U.S.C. §§ 2201 and 2202, asking for a declaration that the DOJ, BOP, and FBI had violated and continue to violate the *Family*'s constitutional rights and for an *Order* permanently enjoining such further and continued violations of the *Family*'s constitutional rights. The District Court refused to make findings on the *Family's* constitutional claim for declaratory and injunctive relief.

The *Family* sued Lee and Freeman for civil rights violations and conspiracy to violate civil rights pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). The District Court granted summary judgment in favor of Freeman, dismissing him from the lawsuit. The *Estate of Kenneth Michael Trentadue's* proceeded to trial against Lee on civil rights and conspiracy claims based upon excessive force, failure to protect and deliberate indifference to serious medical needs. The jury returned a verdict in favor of the *Estate* in the

sum of $20,000 on the deliberate indifference to serious medical needs claim. The jury found for Lee on the other claims.

## C. Statement of Facts

The *Government* and Lee allege that on August 20, 1995, Trentadue requested protective custody, was placed in the maximum security portion of the FTC known as the Special Housing Unit or "SHU" where he was kept in solitary confinement twenty-four hours a day, deprived of recreational and telephone privileges and fed through a slot in his cell door. The *Government* and Lee contend and the District Court found that Trentadue was alive, unharmed and in bed at 2:38 a.m. on the morning of August 21, 1995, and that at 3:02 a.m. he was discovered hanging from a vent in his cell by a ligature made from strips of bed sheet. (X, 3201).

### (1) Trentadue's Mysterious Death

It is undisputed that when discovered, Trentadue's body was covered in blood with head-to-toe, front-to-back trauma. (*Add*., 53-69; XI, 3781-3801). It is also undisputed that Trentadue's throat had been slashed and that he suffered three massive blows to his head which ruptured his scalp to the skull. (XI, 3621-45, 3781-3801). The *Government* and Lee contend and the District Court found that Trentadue's "**extensive injuries, deposits of blood and ultimate hanging and death occurred in quite a short period of time, from approximately 2:38 a.m. at the earliest to about 3:02 a.m., a space of approximately 24 minutes.**" (X, 3211). The *Government* and Lee contend and the District Court found that at

2:38 a.m. there was no blood on the floor of Trentadue's cell, there were no torn sheets and there was no ligature in his cell. (*Id*. 3201).

The Oklahoma State Medical Examiner, Dr. Fred B. Jordan, testified that in 37 years of practice he had never seen a hanging with so much trauma. (XVII, 6025). Even the *Government* and Lee's nationally recognized pathologist, Dr. John Smialek, described Trentadue's death as "weird" because of the extensive trauma and massive blood loss. (*Id*. 6275-76). "Weird" would also describe the *Government* and Lee's explanation for Trentadue's injuries.

The *Government* and Lee claim that after the guards last saw Trentadue alive and in bed at 2:38 a.m., Trentadue used a pencil to write a suicide note on the wall of his cell, but did not sign that note with his own name. (XI, 3629-31). Next, he patiently tore a sheet into dozens of strips. He then constructed a ligature from those strips of bed sheet. Once that ligature was manufactured, Trentadue re-made his bed, climbed the wall of his cell and wove the bed sheet rope into a metal vent above his sink. (*Id*. 3627-3632). Trentadue then tried to hang himself and was momentarily successful, but the bed sheet rope broke. Trentadue fell, hitting his buttocks on the edge of the sink but doing no injury to his buttocks. The impact of his body on the sink caused Trentadue to ricochet across the cell headfirst into the corner of a metal desk at the end of his bunk, producing a major wound on his forehead. (*Id*. 3622, 3638, 3644).

The Government and Lee claim that the force of that impact caused Trentadue to rotate 180 degrees and careen across his cell to smash his head into the wall, creating a second major wound on the right side of his head, leaving blood and hair on the wall of his cell and tearing extensive areas of skin off of his back. (XI, 3629; XXI, 7609-14, 7635-37, 7703-06, 7722-23). Despite striking the desk with such force, the impact does not disturb the coffee cup or any of the papers on the desk. (XI, 3634-35).

The *Government* and Lee claim that while unconscious from his two head wounds, Trentadue rolled over on his stomach and bled profusely, depositing large pools of blood on the floor of his cell. (*Id*. 3629, 3632-33). When Trentadue regained consciousness, he attempted to get up but struck the back of his head on the metal stool attached to the desk, causing a third major wound on the back of his head. (*Id*. 3624). This third blow to his head further dazed Trentadue, who then crawled on all fours, with his "**clothing**" smearing the blood on the floor. (*Id*. 3639, 3806; XXI, 7636-37, 7703, 7706).[2]

The *Government* and Lee claim that Trentadue finally got to his feet and staggered around, leaving blood deposits on the walls and floor of his cell. He then stumbled to his bed and laid down to regain his senses. After a while, Trentadue used two plastic toothpaste tubes or a plastic knife to cut his throat, leaving blood on his pillowcase, sheet and blanket. (*Id*. 3625-26, 3628, 3630, 3639, 3640-41; XIII, 4520-21, 4615-16, 4728-29; XVI, 5579; XI,

[2] Neither the *Government* nor Lee offer any explanation for the injuries to Trentadue's knuckles and legs.

3938). When that second suicide attempt failed, Trentadue reconstructed the bed sheet rope and successfully hanged himself.

It is undisputed that Trentadue's fingerprints were found on nothing in his cell but his personal papers. (XVIII, 6497-98). It is also undisputed that no sheet fibers or threads were found on Trentadue's body or in the cell. (XIV, 4923, 4929; XV, 5478-79; XVI, 5879; XVII, 6139, 6222, 6248; XXI, 7722). It is likewise undisputed that Trentadue's clothing was missing. (XV, 5479-88, 5549-50; XVI, 5882-83; XVII, 6139, 6220, 6263; XVIII, 6488). The *Government* and Lee claim that before this final successful suicide attempt Trentadue took a washcloth and wiped his fingerprints from the pencil he supposedly used to write the suicide note, from the plastic knife and/or toothpaste tubes he used to slash his throat and from every other item in that cell except his personal papers. Trentadue also carefully cleaned himself and his cell to remove all threads or fibers from the sheet torn to fashion the ligature. Trentadue then undressed and hid his blood-stained clothing so well that it has never been found. (XVIII, 6536-37, 6592).

It is undisputed that the FTC amplifies sound. (XIV, 4814; XV, 5626; XVIII, 6635-36). The *Government* and Lee claim that Trentadue accomplished all of this injury to himself in absolute silence, so as not to alert nearby inmates or guards and that Trentadue accomplished this within **17 minutes** in order to have been hanging more than six minutes, so as to have been dead and not revivable when discovered at 3:02 a.m. (XXI, 7609-14, 7635-37, 7703-06, 7722-23). Thus, Lee's actions (in ordering the guards to remove the key

from Trentadue's cell door, to wait at least seven minutes before entering and, once the door to Trentadue's cell was open, to do no CPR) caused the *Family* no injury for which either the *Government* or Lee can be liable. The difficulty with the *Government* and Lee's "suicide" scenario is that it is based upon the testimony of guards, and that testimony is in conflict with the undisputed physical evidence.

Eric Ellis, Dennis Williams, Kimberly Heath and Wiley Creasey were the guards on duty in the SHU at the time of Trentadue's death. They all swear that Trentadue was alone and that no one entered his cell. These guards also swear they found Trentadue hanging and eventually him cut down. The ligature which Trentadue allegedly used to hang himself consisted of two segments: the strips of bed sheet tied to the vent in his cell that remained after Trentadue was purportedly cut down, and the knotted 23-inch braided bed sheet noose that was around Trentadue's neck after he was supposedly cut down. (XV, 5022-27).

Ellis, the guard who claims to have cut Trentadue down, said that he cut the noose three to four inches above Trentadue's head and left it around Trentadue's neck. (XIII, 4725-26).[3] The noose was then turned over to the Medical Examiner. (XVI, 5849-50). Douglas J. Perkins, a fabric expert with the Oklahoma State Bureau of Investigation, obtained that noose from the Medical Examiner. (XV, 5018). Perkins analyzed the noose and discovered

[3] Tammi Corwine, then Tammi Gillis, was a field investigator for the Oklahoma State Medical Examiner. When Corwine came to the FTC on the morning of August 21, 1995 to retrieve Trentadue's body, she spoke with the SHU guards who told her that Physician's Assistant Carlos Mier had cut Trentadue down, not them. (XVIII, 6355). Corwine asked Mier who cut Trentadue down and he said it was the guards. (*Id*. 6352).

that it had not been cut. (*Id*. 5022-24). Perkins found two cuts on the vent portion of the ligature. (*Id*. 5024-5027). But Lieutenant Freeman testified that these cuts occurred when he cut down the vent portion of the ligature to take it into evidence. (XVI, 5850-56).

The length of the vent portion of the ligature is another undisputed physical fact. Even without the 23-inch section of ligature that formed the noose, it was uncontroverted that the remaining vent portion of the ligature hung to within four feet of Trentadue's cell floor. (XVI, 5853-56; XVII, 6091-92; XI, 3636-37). Consequently Trentadue, who was 5'8" tall, would have been standing on the floor of his cell instead of hanging.

The presence of another person's blood in Trentadue's cell was another undisputed physical fact. FBI Agent Tom Linn testified that on the mattress from the top bunk in Trentadue's cell "**we found two blood types.**" According to Linn, one blood spot was Trentadue's and the other belonged to an unknown person. (*Id*. 6509-6510, 6537-40). When asked why no effort was made to identify the person whose blood was found on that mattress, Linn said "**we did not have a suspect to take a sample from.**" (*Id*. 6540).

An equally significant physical fact was *liver mortis* on Trentadue's nose. *Liver mortis* results from the pooling of blood in the dependent or lower portions of the body after death. *Liver mortis* appears first in small capillaries. Dr. Jordan, found *liver mortis* on the tip of Trentadue's nose, which could only have been produced in one of two ways: (1) Trentadue hanging in a severely face down position or (2) Trentadue lying face down. (*Id*. 5991-96). If this *liver mortis* was produced by hanging there would be *liver mortis* in the tips of

Trentadue's fingers and toes, but Dr. Jordan found no *liver mortis* in Trentadue's fingers and toes. It took a minimum of 30 minutes for the *liver mortis* to occur in Trentadue's nose, which means that after death Trentadue would have been lying face down for at least 30 minutes. (*Id*. 6004-05). Dr. Jordan also noted the presence of *liver mortis* in the Polaroid photographs taken of Trentadue's body in the infirmary immediately after it had been removed from the SHU. (*Id*. 5995-96; XI, 3621).

The presence of *liver mortis* on Trentadue's nose in this photograph is significant because the District Court found that Trentadue was in bed and not injured at 2:38 a.m., that his body was removed from the SHU at 3:10 a.m. and taken to the infirmary, and that all of the trauma to Trentadue's body and his death occurred within "a short period of time, from approximately 2:38 a.m. at the earliest to about 3:02 a.m., a space of approximately 24 minutes." (X, 3201, 3205, 3211). The undisputed evidence is that Trentadue was never placed on his stomach or in a face down position. The guards said he was cut down and immediately placed on his back on a gurney, taken to the infirmary and remained lying on his back until the Polaroid photograph was taken. (XIII, 4725-26; XIV, 4756, 4827; XV, 5354-55). Based upon the undisputed physical evidence, the *liver mortis* in Trentadue's nose occurred as a result of him lying dead on the floor of his cell in a face down position for at least 30 minutes.[4]

[4] Trentadue lying dead on the floor of his cell is also supported by the testimony of the *Government's* crime scene expert, Tom Bevel, and the physical evidence remaining in Trentadue's cell. Bevel testified that the blood flow patterns on Trentadue's face indicated

The foregoing physical facts are in conflict with the testimony of the guards who all say that Trentadue was hanging fully suspended and cut down. But the conflict between the physical facts and the guards' testimony is not one of credibility, requiring deference to the findings of the District Court. This conflict between the physical evidence and the guards' testimony is resolved as a question of law based upon the *physical fact rule,* which requires the trier of fact to disregard testimony in conflict with uncontroverted physical evidence. *See infra* 55.

**(2) Lee Denies Medical Assistance**

Trentadue was murdered. But even if Trentadue was hanging in his cell, Lee clearly denied him medical assistance. Lee was trained in CPR by BOP employee Modesto Baca. (XV, 5465; XVIII, 6432-34). During that CPR class, Lee told Baca that if he found an inmate hanging "**he wouldn't cut the victim down.**" (*Id*. 6435). Baca told Lee that his obligation was to "cut him down immediately and start CPR." Lee said he did not care, that "**he would leave someone hanging**" and then Lee "walked out" of the class. (*Id*. 2063-64). Lee admitted that it would be "**murder**" not to provide CPR to a revivable inmate. (XVI, 5624). Yet that is exactly what Lee did.

The SHU is located on the 7th floor of the FTC. Lee was on the ground floor when he allegedly received a radio message that Trentadue was discovered hanging in his cell. Lee

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that he had been in a face down position, and this is documented in the photographs of Trentadue's body. (XIX, 7731-33; XI, 3639-43).

never asked about Trentadue's condition. (XV, 5441-42, 5450). Yet, he immediately radioed back to Ellis, Williams and the other guards present at Trentadue's cell door not to enter. (XIII, 4713-4724; XIV, 4940). Lee did this even though there were enough guards present to safely enter the cell. (XIV, 4782, 4977; XVI, 5621, 5628).[5]

Williams was at Trentadue's cell within five to ten seconds after Ellis supposedly discovered the hanging body. (XIV, 4949). Williams had the key in the door to Trentadue's cell when the "do not enter" order came from Lee. (*Id*. 4926). When Lee arrived on the scene, he asked no questions about Trentadue's condition or when Trentadue was last seen. Instead, he looked into the cell through a window in the door. (XV, 5542-43). Lee then ordered Williams to remove the key from the door. (*Id*. 4752).

Lee had been trained that death from asphyxiation occurs after six minutes. (XI, 3836; XIV, 4800; XVI, 5769-72). Lee acknowledged that he knew that "**time was of the essence**" and that the proper response was to lift hanging inmates, immediately cut them down and administer CPR. (XV, 5457-58). However, Lee waited an additional seven minutes before finally giving an order to open the cell door. Lee waited for a video camera to be brought to the cell.[6] After the door was opened, Lee ordered Physician's Assistant Mier not to administer CPR. (XIV, 4774-75, 4800).

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[5] Trentadue was a minimum custody inmate. (XV, 5308).

[6] Video cameras are not used in medical emergencies. FTC staff only use video cameras when there is a forced cell entry on an inmate or inmates. (XIII, 4719; XIV, 4817; XV, 5555).

### (3) Freeman's Destruction of Crime Scene

The State of Oklahoma had concurrent jurisdiction with the *Government* over the FTC. (80 O.S. § 4.2; XI, 3919; XII, 4073). The Oklahoma Medical Examiner had control over the death scene which could not be cleaned or destroyed without his approval. 63 O.S. § 940. BOP Policy required that Trentadue's "suicide" be investigated by a panel of psychologists from other institutions; that a detailed report of the motives and methods of Trentadue's alleged suicide, known as a "psychological reconstruction," be prepared; and that FTC personnel "**shall handle the site with the same level protection as any crime scene in which a death has occurred to insure that available evidence and documentation is preserved to provide data and support for subsequent investigators doing a psychological reconstruction.**" (XII, 3996-97).

Before 8:00 a.m. on the morning of August 21, 1995, the FTC Administration was notified by the BOP Headquarters that a psychological reconstruction team was on its way to the FTC to investigate Trentadue's death. The FTC Administration knew that this psychological reconstruction team would be at the institution that very afternoon. (XI, 3728-29, 3734; XVI, 5723-28).[7] Nevertheless, Trentadue's cell was hurriedly "sanitized" or cleaned before that psychological reconstruction team arrived. (XVII, 5969).

[7] Trentadue's alleged suicide is the only inmate "suicide" for which a psychological reconstruction was not done by the BOP. (XVI, 5756). The *Family* argued that this gave rise to an inference that the *Government* did not do a psychological reconstruction on Trentadue's death in order to conceal a homicide. (VIII, 2551).

It was Freeman's duty to do the initial investigation of Trentadue's death, including preserving evidence. (XV, 5303-04; XVII, 5802). Freeman was trained in preservation of crime scenes, including the recognition of blood spatter and blood cast-off, which result during an assault. (XVI, 5803-05). At approximately 8:30 a.m. on the morning of August 21, 1995, Freeman met with his superiors at the FTC. (XI, 3730). Freeman left that meeting and telephoned FBI Agent Jeffrey Jenkins, but Freeman did not tell Jenkins about Trentadue's wounds. (XVII, 5967). Neither did Freeman tell Jenkins about the blood in Trentadue's cell. (*Id*. 6455). Instead, Freeman told Jenkins that Trentadue's death was a suicide and that the cell had already been cleaned. (V, 1510; VI, 1895). That was not true. It would be hours before that cell was cleaned and the evidence destroyed.

Freeman likewise told Jenkins that he was going to do a report of his investigation and "fax" a copy to Jenkins. (*Id*. 1504). But Freeman admitted that he never intended to do that investigation. (IV, 1433). Jenkins never received a copy of Freeman's report because Freeman never prepared one. (V, 1504). Freeman also stated that if a guard tells him that an inmate committed suicide, there is no need for him to investigate. Freeman said that the only thing he needed to do was **"come to some kind of explanation as to how Kenny Trentadue got the head trauma.**" (XVI, 5818).

The timing of Freeman's telephone call to Jenkins was not happenstance. At 8:10 a.m. Kevin Rowland, the Chief Investigator for the Oklahoma Medical Examiner, telephoned the FTC and told Acting Warden Carter that Trentadue's death looked like a homicide. Rowland

repeatedly asked Carter to call the FBI to investigate the death and to secure the scene. Carter refused. Rowland told Carter that he was going to call the FBI. (V, 1655-56).

Freeman confessed to having lied to Jenkins and others in order to have the scene destroyed. But he showed no remorse for his actions, stating that "**if I have to take a hit for it, so be it.**" (*Con. App.* 120). The evidence at trial was uncontradicted: Freeman's destruction of that crime scene forever prevented the *Family* or anyone else from knowing the exact manner of Trentadue's death. (XVII, 6060-63; XI, 3929-38).

**(4) Trentadue's Injuries**

The Medical Examiner found a bruise on Trentadue's anal verge, the portion of the body just above the anal opening where the buttocks come together, which did not involve any injury to the surrounding buttocks. Dr. Smialek, testified that such injuries to the anal verge without injury to the buttocks only occur as a result of an "**assault.**" (XVII, 6276-77). The *Family's* forensic pathologist, Dr. Miles Jones, concurred stating that this injury to Trentadue's anal verge was most likely the result of Trentadue having been kicked. (XVII, 6688-89).

Other injuries on Trentadue's body obviously not self-inflicted were the fingertip bruises on his biceps. (*Add*. 58, 60). These injuries occurred as a result of Trentadue having been being held or restrained by the biceps. (XVII, 6026-27). Dr. Smialek said that these bruises were a result of Trentadue having been "**grabbed while . . . alive.**" (*Id*. 6276). The bruises on the bottom of Trentadue's right foot were also not self-inflicted. (*Add*. 62; XVII,

5990-91, 6002-04). Such injuries are only produced by severe accidents or as a result of torture. (XVIII, 6694). Dr. Jones testified that bruises like those on the bottom of Trentadue's foot would not occur as a result of walking or jumping. (XVIII, 6687).

Trentadue had "petechiae and purpura of the conjunctiva" which are ruptured capillaries in the eyes, a fractured hyoid bone and strap muscle hemorrhages. (X, 3209-10). Dr. Jordan testified that Trentadue is the only case of an alleged hanging in which he has found a fractured hyoid bone. (XVII, 6012-13). Dr. Jones testified that if one were taking a competency exam for a forensic pathologist and a question involved a fractured hyoid bone, strangulation would be the only correct answer. (XVIII, 6673-75). Dr. Jordan admitted that Trentadue's fractured hyoid was "**more consistent with strangulation than hanging**" and that the same was true for the injury to Trentadue's strap muscle. (XVII, 6010-12).

Dr. Jones stated that in his professional opinion, Trentadue's death was a homicide and that he died by strangulation. Dr. Jordan admitted that the ligature mark on Trentadue's neck was consistent with either strangulation or hanging. (XVII, 6007-09). Mier had a medical degree, and he was a trained doctor. (XV, 5315, 5340). When Trentadue's body was brought to the FTC infirmary, Mier did a close examination. Mier then wrote a *Memorandum* (Exhibit 232) to his superiors stating that Trentadue had died of "**strangulation.**" (XII, 3959; XV 5331).

Dr. Jordan initially ruled Trentadue's death as unknown. But on July 10, 1998, he changed the manner of death from "unknown" to suicide. Dr. Jordan stated that his

amendment of the manner of death was based upon the FTC guards swearing that they discovered Trentadue hanging and that Trentadue was alone in his cell for 17 hours prior to death. (XVII, 6027, 6062). Dr. Jordan was never told that someone else's blood was found in Trentadue's cell. (*Id*. 6020).

**(5) *Ex parte* Communications**

Set out below are examples of the *Government's ex parte* submissions to the District Court:

**(a) Groover Video Tape**

Trentadue and his cell were videotaped by guard, Roger T. Groover. The *Government* and Lee claim that Groover's camera malfunctioned and that the tape was blank. But there is a *Memorandum* from Kathleen Timmons, head of the FBI *Color of Law Unit*, stating that saw the Groover videotape and that "**there is a potential perjury issue regarding a Bureau of Prisons paramedic who indicated he administered CPR to the deceased Trentadue, and the evidence of a videotape does not indicate CPR was administered.**" (XII, 4070). The *Family* moved for production of that videotape. (III, 823). The *Government* filed a *Memorandum* in opposition. (III, p. 837). The *Government* also responded with an *Affidavit* from Timmons that was given to the District Court but not to the *Family*. (*Con. App*., 1-8).

**(b) Hauser Materials**

The *Government* attempted to indict Trentadue's brother, Jesse C. Trentadue, through the perjured testimony of a man named James Hauser. (XX, 2597-98). Hauser promised to help the *Government* place a "**yoke of silence**" around Jesse C. Trentadue's neck. (XI, 3907). Hauser was purportedly an inmate who would testify about efforts by Jesse C. Trentadue to bribe witnesses. (XI, 3905 & 3907). The *Family* later discovered that Hauser was a secret FBI operative. (XIX, 6919, 6924-26). The *Family* moved to compel production of the results

of a polygraph examination given to Hauser. (VII, 2203). The District Court granted that *Motion*. (VIII, 2369). The *Government* filed an *ex parte Motion for Reconsideration*. (*Con. App*., 33-83). The District Court granted that *Motion for Reconsideration*. Based upon those *ex parte* submissions, the District Court severed Jesse C. Trentadue's claim for the infliction of emotional distress arising out of the *Government's* efforts to indict him and refused to hear evidence about Hauser or that claim at trial. (XIX, 6924-25).

**(c) Secret Witnesses**

The *Government* also attempted to indict the *Family's* counsel. (XII, 4367). The *Government* also sought *ex parte Writs of Habeas Corpus Ad Testificandum* for three secret inmate witnesses who it claimed would implicated the *Family's* counsel in a scheme to suborn perjury. (*Con. App*., 84-92). The District Court issued *Writs* for these secret witnesses. (VIII, 2512-13).[8]

The *Family* contended that the efforts to indict their counsel gave rise to an inference that the *Government* did so in order to conceal the fact that Trentadue's death was a homicide. (VIII, 2553). But another obvious effect of this attempt was to vilify the *Family's* counsel in the eyes of the District Court. The *Government* never called these witnesses to testify at trial. Yet, the fact that the *Government* attempted this attack upon the *Family's* counsel through perjured testimony of three inmates was highly relevant evidence that

[8] These witnesses had not been identified in response to interrogatories or in the *Pretrial Order*.

Trentadue's death was a homicide. Not having the names of these witnesses, however, the *Family* could not pursue that evidence.

**(d) OIG Report**

The Inspector General for the DOJ reviewed all of the evidence which the *Family* intended to submit in support of its claims against the *Government*. The Inspector General issued a *Report* purporting to weigh the *Family's* evidence including rebutting or attempting to rebut that evidence and exonerating the *Government* from any wrongdoing in the death of Trentadue. That Report is part of the record on appeal. (*Supp. Con. App.*, 21). The DOJ placed the *Report* under seal, so it has never been released to the public or even to Congressional oversight committees. (VIII, 2454). Prior to trial, the Inspector General sent the District Court a copy of that *Report*. (*Supp. Con. App.*, 1). The *Family* has a copy of that *Report*. But the *Family* does not have the other evidence which the DOJ sent to the District Court. (*Supp. Con. App.,* 1-20).

The *Report* was not received into evidence during trial. Nevertheless, the *Report* mirrors the *Government* and Lee's defense. It literally discusses each witness and piece of evidence offered by the *Family* at trial in support of their claims against Lee and the *Government*. But that is no coincidence. The *Government* and Lee's homicide expert, Tom Bevel, was paid by both the *Government* and the Inspector General to help write the *OIG Report*. (XIX, 7602-03, 7735). Bevel's task was to help draft the official *OIG Report* so that

it discussed and diminished the evidence that the *Family* intended to offer in support of its claims.

**(6) Destruction of Evidence**

Set out below are examples of evidence intentionally destroyed by the *Government*:

**(a) Blood Spatter**

Trentadue's cell was cleaned by inmates Steve Cole, George Orellana and Antoine Gist, who were overseen in their work by BOP employees Edwina Fitz, Rosonda Chisholm and Keri Nelson. The cell was cleaned by 1:50 p.m. on the afternoon of August 21, 1995. (XVII, 6212). It is undisputed that in cleaning that cell, the *Government* destroyed crucial physical evidence such as blood spatter. Nelson, for example, testified there was blood spatter on the walls of the cell within four feet of the floor. (XVII, 6215-19, 6222). She identified that blood spatter from among several exemplars. (XII, 3960; XVII, 6215-19, 6222).[9] Just inside the door to Trentadue's cell was a panic button or an alarm button which could be used to summon help. Nelson, Cole, Orellana and Gist testified that there was a bloody hand print near but not on the button and that the hand print streaked down the wall, as though the person was collapsing trying to reach that alarm button. (XVII, 6201-02, 6219-20, 6222, 6243-44, 6258-59, 6264-65). These witnesses identified that hand print from among several hand print exemplars. (XII, 3961-62, 4101). The *Government* and Lee's

[9] Blood spatter and cast off would indicate a fight. Lee, who had also been trained in crime scene recognition and preservation, also testified that he saw cast off and spatter in Trentadue's cell. (XV, 5546-48).

homicide expert, Bevel, confirmed the presence of that hand print through a "luminol" test. (XXI, 7678-79).

The blood spatter and hand print do not appear in any Freeman photographs. There was a bloody hand print on the toilet seat in Trentadue's cell. (XVII, 6077, 6243-44). There is no photograph of that hand print. There was blood spatter on the wall near the toilet. (*Id*. 6138-39). That spatter was not photographed. There was blood and hair just inside the door to Trentadue's cell, two feet from the floor. (Id. 6160-62). There is no photograph of that evidence, either.[10] Tom Bevel, admits that Freeman did not photograph all of the blood stains in the cell. (XXI, 7660). FBI Agent Linn also conceded that Freeman failed to photograph the entire cell. (XVIII, 6489).

**(b) Handwriting**

Another key issue at trial was whether a note found on the wall of Trentadue's cell had been written by him and how that note was signed. The *Government* and Lee contend and the District Court found that the note said "**my mind is no longer its friend. Love ya familia**" and that it was a suicide note from Trentadue to his Mexican-American wife, Carmen. (X, 3208-09).

Kevin Rowland is a skilled homicide investigator. He conducts scene or field investigations for the Medical Examiner. (XVIII, 6361-67). Rowland saw that note and said

[10] Agent Linn testified that this blood and hair evidence "**disappeared.**" (XVIII, 6590).

that it was signed "**Tom Linx**." (XVIII, 6390). Yet no one will ever know what that note said, how it was signed or whether it was authored by Trentadue since that note was destroyed.

According to the *Government*, Trentadue's cell was a "**secured scene, sealed with crime tape within the custody and control of the FBI.**" (XII, 4170). Rowland went to Trentadue's cell on November 16, 1995, accompanied by FBI Agent Jenkins, BOP Captain Sheffer, Lieutenant Freeman and BOP attorney Ann Tran. In the presence of Freeman, Sheffer and Tran, Rowland asked Jenkins to have the handwriting analyzed. (XVIII 6387-6390). Rowland returned to the FTC on December 14, 1995. Rowland testified that the cell was secured with "**evidence tape**" but that the handwritten note had been painted over. (*Id*. 6400). The FBI Crime Lab, left with nothing but photographs of the writing to analyze, reported that: "**due . . . the lack of detail in the submitted photographs . . . [it] is doubtful if this hand printing will ever be identified with hand printing of a known individual.**" (XI, 3878).

**(7) Missing Evidence**

Set out below are example of "missing" evidence, the disappearance of which can only be explained as intentional destruction.

**(a) Destruction of Baker Records**

Alden Gillis Baker was a violent psychopath and suspected serial killer. (XIV, 5120). Baker was so dangerous that extra guards and an Operations Lieutenant were required to

move him. (XV, 5468). The District Court found that Baker was "**an undisputably dangerous psychopath with a history of violence.**" (X, 3200). Existing BOP records, including *logs*, show that at the time of Trentadue's death he and Baker shared cell A-709.[11]

The *SHU Admission Log* shows Baker being placed in cell A-709 on August 14, 1995. (XII, 4011). The *SHU Admission Log* shows Trentadue also being placed in A-709 on August 20, 1995. (*Id*. 4014). Trentadue is listed on this and other FTC records by the name Vance Paul Brockway, an alias he had used before his conviction in the early 1980's. BOP "inmate quarters history" show that both Baker and Trentadue occupied A-709. (XI, 3802; XII, 4079). A BOP census likewise showed Trentadue and Baker occupying A-709. (XI, 3866). The *Government* denies that Baker was in A-709. Baker's exact location is significant because he testified that Trentadue was tortured and murdered by guards. (XIV, 5083-90, 5190-5113, 5117-119).

Baker himself was dead by the time of trial. (XIV, 5076). According to the *Government*, he committed suicide by hanging himself with a bed sheet rope in his SHU cell. (VIII, 2495). But his deposition was received into evidence wherein he identified two of the guards who attacked and murdered Trentadue.[12] Baker said that he could hear "**moaning**"

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[11] Among Baker's papers, was one on which he had written "my mind is no longer its friend." (XI, 3694).

[12] One guard Baker described as a Native American with a ponytail. (*Id*. 5087-88). The other he described as having a "french name, like a foreign [surname] name" which he said began with a "De" followed by a capital letter. (*Id*. 5087-88). These guards would be later identified as Robert A. Garza, a Native American who wears his hair in a ponytail (XV, 5399-5400) and Rodney DeChamplain. Witnesses placed Garza and DeChamplain at the

coming from Trentadue's cell. (*Id*. 5089, 5114, 5118-19). A short time later, Baker said that "**I heard like sheets being ripped.**" (*Id*. 5114-115).

The *Government* claimed that Baker was celled in a different part of the institution. To support its claim that Baker was nowhere near A-709 at the time of Trentadue's death, the *Government* relied upon the *SHU Admission Log*, which showed Baker being removed from cell B-714 on August 24, 1995. (XII, 4017). The *Government* also relied upon the testimony of the guards who swore that Baker was not in A-709. But there were records that would have shown Baker's exact location within the FTC at the time of Trentadue's death. (XII, 4164-65, 4272-75; XIII, 4615; XV, 5310).

One such record was the BP-292, which is a daily record kept of each SHU inmate's activities. The BP-292 shows the inmate's cell number.[13] It is a multi-copy form, with copies going into the inmate's central file, to the warden's office and to various other locations within the BOP. It is also a permanent record. (XIII, 4607-09). Baker's 292's have all **disappeared**. (XII, 4164-65; XV, 5311).

A *Cell Rotation Log* was used to chart inmate cell changes within the SHU. (XIII, 4686, 4689-90, 4735-36; XIV, 4931-35). The *Cell Rotation Log* **disappeared**, too. But according to Captain Sheffer, that *Log* was turned over to the FBI prior to its disappearance.

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FTC at the time of Trentadue's death, and in a fight with Trentadue and/or Baker. (IV, 1457, 1459; VII, 2020-23; XV, 5245-51, 5276-79, 5399, 5405-08; XIX, 6797-99).

[13] Trentadue's BP-292 for his short stay in the SHU and BP-292s for the other inmates around him, with the exception of Baker, are at, respectively, XI, 3843, 3839-42.

(XVII, 6196-98). This was not the only evidence the FBI lost. A confidential FBI *Memorandum* disclosed that 41 "serials" or pieces of evidence were missing from Trentadue's FBI file. (XII, 4109).

Each eight-hour shift at the FTC is presided over by an Operations Lieutenant who must prepare a daily log entry for his or her watch. Inmate movements are recorded in the *Lieutenant's Log*. (XV, 5473-75; V, 1560). The *Lieutenant's Log* is a permanent record maintained for ten years within the FTC and then sent to the *National Archives*. (*Id*. 5476; XI, 3619).[14] The *Lieutenant's Log* for two of the three shifts on August 20, 1995, and all three shifts for August 21, 1995, were introduced into evidence at trial. (XI, 3589). The entries for these five shifts are all that exist of the *Lieutenant's Log* for Baker's ten-day stay at the FTC. (XV, 5473-75). The *Government* stipulated that the pages from the *Lieutenant's Log* for the rest of Baker's stay at the FTC have **disappeared**. (*Id*. 5477).

**(b) Clothing**

When Trentadue was locked into cell A-709, he had a t-shirt, pants, socks and shoes. There is no evidence that he ever left that cell. When Trentadue's body was found he was wearing a t-shirt and blood-stained khaki pants. (XIV, 4756, 4926-27; XV, 5343-44, 5549-50; V, 1606-07) (XI, 3719). Bevel looked at photographs of Trentadue's body and cell and

[14] Baker was in the SHU because he was a dangerous high maximum security inmate and dangerous. (XIII, 4510, 4541-42, 4560-61). BOP policy required Baker to be celled by himself. (*Id*. 4510). If Trentadue was in the SHU for reasons of protective custody, he too was to be celled by himself. (*Id*. 4510). It would have been a serious matter if Trentadue and Baker had been celled together. (XV, 5469-70).

reported to the FBI that "**the blood flows to the center of the chest indicate that the inmate had a shirt on causing a 'V' pattern formation from the blood flows.**" Bevel recommended that "**the inmate's clothing should also be examined to determine the type, location and distribution of any blood stains.**" (XI, 3806). Bevel also repeatedly testified during the trial that several of the blood stains on the floor of Trentadue's cell were caused by Trentadue's "**clothing.**" (XXI, 7636-37, 7703, 7706). But those pants and t-shirt have **disappeared**. When Trentadue's body was turned over to the Medical Examiner on the morning of August 21, 1995, he was wearing only boxer shorts. (XVII, 5980; XVIII, 6350). That clothing has never been found. (XV, 5479-88, 5549-50; XVI, 5882-83; XVII, 6139, 6220, 6263; XVIII, 6488).

**(8) <u>Perjury and Subordination of Perjury</u>**

The *Government*'s counsel represented all of the BOP employees directly or indirectly involved in Trentadue's death and its aftermath. The *Government's* counsel even appeared as counsel of record for them. (*Con. App*. 103, 130; V, 1532). That is undoubtedly why, without fear, these men took the witness stand and essentially confessed to perjury. (X, 3213). Another example of perjury would be the following testimony by Roger T. Groover brought out through the questioning of the *Family's* counsel:

> Q. Mr. Groover, you testified under oath before the Federal Grand Jury, you testified under oath before the Office of Inspector General, and you testified under oath in the BOP Affidavit that you saw Mr. Trentadue hanging; correct?
>
> * * *

A. Yes.

* * *

Q. Then on August 21, 1995, did you see Kenneth Trentadue hanging in that cell?

A. No.

* * *

Q. Mr. Groover, you never videotaped Kenneth Trentadue hanging; correct?

A. Correct. I did not videotape Trentadue hanging.

Q. Because you never saw Kenneth Trentadue hanging; correct?

A. I did not see Trentadue hanging.

(XIV, 4982-83, 4987-91, 5010-12).[15] Groover thus destroyed the testimony of his fellow guards, Ellis, Williams and Mier, all of whom testified that the delay in cutting Trentadue down was due to Groover videotaping the hanging body. (XIII, 4721, 4731-33; XIV, 4782, 4800, 4821; XV, 5354).

**(9) Fabricated Evidence**

Set out below are examples of fabricated evidence:

**(a) Administrative Detention Order**

[15] The *Government's* counsel also represented Groover. (XIV, 4993). The *Government's* counsel's representation of Garza, Mier, Freeman and Groover poses an interesting dilemma given *Rule of Professional Conduct* 3.3(a)(4) and *Nicks v. Whiteside*, 475 U.S. 157 (1986).

An inmate's placement in SHU requires an *Administrative Detention Order*. (XV, 5305, 5312). On November 16, 1995, Chief Investigator Rowland saw the *Administrative Detention Order* that transferred Trentadue to the SHU. Rowland said that the *Order* was blank showing no reasons or explanation for Trentadue's placement in SHU. (XI, 3758; XVIII, 6394-98). Shortly thereafter, Trentadue's *Administrative Detention Order* disappeared. (XI, 3756). It was not discovered until August 11, 1997, when two markedly different *Detention Orders* placing Trentadue in the SHU appeared, each stating that Trentadue had requested placement in SHU for personal protection because "**other inmates are out to get him.**" (XI, 3754-55; XIII, 4597-98, 4631-37).[16]

**(b) Medical Records**

Immediately following Trentadue's death, FTC staff psychologist, David K. Wedeking, met with Acting Warden Carter and others. (XVI, 5728-29). Wedeking left that meeting and prepared a "*Suicide Watch Report*" indicating that Trentadue had been on

[16] The *Administrative Detention Order* is a multi-copy form. It is a "NCR" or no carbon required form. That is – it is a self-carbon form with the carbon copies attached to the original. Like the BP-292, the original goes into the "inmate central file" with the self carbon copies being distributed to various other units within the BOP. (XII, 4020). The District Court found that "because the administrative detention order is a multi-copy form, the Court attaches no particular significance to the fact that several different versions of the form exist." (X, 3199). Baker's *Administrative Detention Order* **disappeared**, both original and copies. (XV, 5312). The District Court made no finding with respect to the disappearance of Baker's *Administrative Detention Order*. In fact, the District Court made no findings whatsoever with respect to the missing records on Baker, although findings were requested. (*Add*. 109-11).

suicide watch immediately prior to death. (XII, 4045). That *Report* was false. (XVI, 5732-38).

**(c) Fraudulent Transcript**

Inmate telephone calls are recorded. (XVII, 5952). On August 19, 1995, Trentadue telephoned his brother, Jesse C. Trentadue, his sister-in-law, Rita Reusch, and his sister, Donna Trentadue Sweeney. Trentadue's sister-in-law asked him how he happened to be in Oklahoma and Trentadue, who had been flown to the FTC with other prisoners aboard U.S. Marshal aircraft, answered "**it's that jet age stuff.**" (XI, 3763).[17] The conversation was transcribed and it shows a facsimile transmission date of September 12, 1995. (*Id*. 3763). Exactly six months later, the *Government* was distributing a transcript of that same conversation, only now instead of responding as he had done to the question, the transcript had been altered to indicate that Trentadue said "**it's that AIDS stuff.**" (XII, 4053; XVII, 6098-6103). The fraudulent transcript was being circulated by the *Government* to support its contention that Trentadue had committed suicide because he had AIDS. (XII, p. 4071).[18] The District Court would not allow that fraudulent transcript (Exhibit 402) into evidence. (XVII, 6099-6103).

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[17] Trentadue also placed a call to his mother, Wilma Lou Trentadue at 12:00 p.m. Oklahoma City time on Sunday, August 20, 1995, when Trentadue was supposedly in the SHU. It was an unusual call in that it was direct dial and not collect. It was also unusual in that Trentadue suddenly said "I gotta go" and hung up. (XIX, 6751-52, 6757-58). There is no transcript of that conversation because the tape reel for August 20, 1995, "**was recycled and taped over.**" (XII, 4073). The loss of that evidence was significant because, as previously noted, it occurred after the *Government* contends Trentadue was in the SHU.

[18] Unknown to the FTC Administration, Trentadue had a complete physical just prior to his arrest that showed he did not have AIDS. (XII, 4082; XVIII, 6454).

**(10) Suppression of Evidence**

Within several months of the commencement of this lawsuit, the *Government* sought a stay of discovery by representing to the District Court that there was a Grand Jury "**investigating possible complicity of government officials in the death of a prisoner.**" (I, 317). The Government argued that "**to the extent that the civil action is delayed for several months, that would seem to be a small price to pay to allow the Grand Jury to complete its work.**" (*Id*. 321).[19] The District Court granted that *Motion* but ordered the *Government* to immediately report the conclusion of the Grand Jury. (I, 325). The *Order* granting that stay was entered almost two months after the Grand Jury had secretly concluded. It was not until October 21, 1997, that the *Government* advised the District Court that the Grand Jury had concluded. (*Id*. 326).[20] Meanwhile, the *Government* had used that stay of discovery to implement a *roll out plan* which it termed the "*Trentadue mission*" (II, 415-16).

The *Government* also used that stay to suppress evidence, including the ligature that Trentadue supposedly used to hang himself. During the stay, the *Government* disassembled that ligature without notifying either the District Court or the *Family*. (XII, 4312-16). The

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[19] Those statements were made by the *Government's* counsel almost a month after the Grand Jury had secretly concluded. The *Government's* counsel made those statements in response to the *Family's* argument that the *Government* would use such a stay to destroy evidence, intimidate witnesses and commit other acts of obstruction of justice.

[20] According to the OIG, the Grand Jury concluded on August 1, 1997. At trial, FBI Agent Linn confirmed that the Grand Jury had concluded in early August 1997. (XVIII, 6517-18).

*Government* disassembled that ligature while there was an outstanding *request* for its production and before the *Family's* expert could inspect it for cuts.

**(11) Burden of Proof**

The *Family* contended that Trentadue was murdered. The *Government* and Lee claim that Trentadue committed suicide and that when discovered, Trentadue was already dead and not revivable. (VIII, 2614-15; IX, 2808-09). The *Family* argued that the *Government* and Lee bore the burden of proof on suicide and non-revivability. (*Add*. 134). Consequently, when the *Government* and Lee failed to put on evidence of non-revivability, the *Family* moved for a directed verdict at the conclusion of all of the evidence. (XXI, 7749-50). The *Government* and Lee contend and the District Court found that the *Family* bore the burden of proof on Trentadue's revivability and that the *Family* could not prove that Trentadue was revivable. (X, 3211). But even if the *Family* had the burden of proof on revivability, they met that burden.

Whether or not Trentadue was revivable depended upon when his carotid arteries became totally occluded. The carotid arteries supply the brain with blood. Death does not occur from hanging or strangulation until after the carotid arteries are totally occluded or blocked by the constriction of the ligature for six minutes. The undisputed testimony at trial was that "there can be carotid occlusions for hours, in the right circumstances, and the individuals could be revived." (XVIII, 6677). Dr. Smialek, who testified by way of deposition during the *Family*'s *case-in-chief,* said that it is impossible to put a time limit on

how long it takes to die by hanging and that "you could have suspension [hanging] lasting for a much greater period of time, without irreversible brain damage occurring." (XVII, 6272).

When Trentadue arrived in the SHU, approximately 17 hours before his purported "suicide," he was stripped naked and inspected for injuries. The *Government* and Lee contend and the District Court found that "the only injury noted on Trentadue's body was a blister on his heel." (X, 3199; XIII, 4565; XIX, 7022, 7079). Dr. Jordan testified that dead men do not bruise and that Trentadue had no post-mortem bruising. (XVII, 6021-23). The *Government* and Lee contend and the District Court found that all the events leading to Trentadue's death occurred in only 24 minutes. (X, 3211). The extensive trauma inflicted in a very short time frame is significant because to be dead Trentadue had to have injured himself in the manner claimed by the *Government* and Lee in sufficient time (17 minutes) to have been hanging with a total occlusion of the carotid arteries for more than six minutes.

Dr. Jordan said death requires "irreversible cessation of cardiac function, in other words, the stopping of heart function that cannot be restarted or brain death." (XVII, 6024-25). Oklahoma law specifically provided that before Lee or Mier could pronounce Trentadue dead they had to make "all reasonable attempts to restore spontaneous circulatory or respiratory functions . . .." 63 O.S. § 3122. But no attempt was made to resuscitate Trentadue.

Lee knew Trentadue was dead before he arrived at the cell. (XVI, 5611-19).[21] Lee said that after he arrived at the cell he looked at Trentadue's body through the window of the cell door to confirm that Trentadue was dead. (XV, 5456). However, Dr. Jordan said that one cannot determine death merely by looking at the victim. (XVII, 6024). And the District Court found that Lee "was not qualified to determine that Trentadue was dead by looking at him through a window." (X, 3204).

The *Government* and Lee contend and the District Court found that FTC guards are instructed that brain damage can occur in four minutes and death in five to six minutes from the start of a hanging. (X, 3205; XI, 3836). There was no evidence that Trentadue could have inflicted all of this trauma upon himself in the manner and fashion that the *Government* and Lee claim, so as to have been hanging more than six minutes when seen by guard Ellis at 3:02 a.m. on August 21, 1995. In fact, the evidence is to the contrary. Mier, for example, said that when he arrived on the scene Trentadue's body was still "**swinging**." (XVII, 6221). Blood was also dripping from Trentadue's chin. (XIV, 4995-96). But there was no blood on the cell floor underneath Trentadue's "**swinging**" body and Dr. Smialek conceded that Trentadue would not have been hanging very long given these facts. (XVII, 6275).

Dr. Smialek was retained to give an opinion that Trentadue was dead and non-revivable when seen by Ellis allegedly hanging at 3:02 a.m. Dr. Smialek was to base that

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[21] It was actually Lee's attorney who said that his client knew that Trentadue was dead before he arrived at the cell. The District Court ruled that the statement was hearsay. But it was the admission of an agent, admissible under *Fed. R. Evid.* 801(d)(2)(D).

opinion upon the examination Mier did of Trentadue after he had been supposedly cut down. Dr. Smialek was under the impression that the door to the cell had been immediately opened and that Trentadue was immediately examined and declared dead by Mier. Dr. Smialek had not been told that it had been seven minutes or more before the door to Trentadue's cell was opened and even longer before Mier conducted the examination and found Trentadue's pupils fixed and dilated. (XV, 5349-51; XVII, 6272-73). Dr. Smialek went on to say that the longer the time period before the door was open, the less certain he was about his opinion and that he was only "comfortable" giving an opinion that Trentadue was "unrevivable" if that examination had occurred within one or two minutes of Trentadue having been found hanging in his cell. (*Id*. 6273).

Lee ordered his staff to prepare *Memoranda* to submit as part of an official investigation. (XIV, 4935-39; XVI, 5516-17). Mier admits that he wrote a *Memorandum* falsely stating that he administered "CPR" to Trentadue and that he gave that document to Lee. (XV, 5329-30). Lee gave that *Memorandum* to his superiors. (XVI, 5686-88). Lee giving his superiors a *Memorandum* from Mier falsely stating that CPR had been done on Trentadue would certainly support an inference that Trentadue was revivable.

Dr. Smialek said that Trentadue may have had a faint pulse when first observed. (*Id*.). Dr. Smialek's unwillingness to say that Trentadue was dead and non-revivable when seen at 3:02 a.m. is undoubtedly why Physician's Assistant Mier lied about having administered CPR to Trentadue. Mier said that he lied about having given CPR to Trentadue in order to

"**cover**" himself. (XV, 5330, 5333). Mier also testified that CPR should have been immediately administered to Trentadue but by the time Lee allowed him access to the body it was too late. (*Id*. 5376-79). Mier's false statements about CPR give rise to an inference that Trentadue was in fact revivable.

Paramedics were called to the FTC that morning. The paramedics were dispatched at 3:21 a.m., long after Trentadue was supposedly dead, and arrived at 3:29 a.m. (XVI, 5704). Mier and Lee met the paramedics. (XVI, 5626; IV, 1384). Mier told the paramedics that CPR had been performed on Trentadue and it was unsuccessful. (XV, 5335; XVI, 5710, 5712). That was untrue. Yet Lee never corrected the statement, just like he never corrected the similar untruths in the *Memoranda* he passed on to his superiors. Lee's allowing the paramedics to be misled into thinking that Trentadue had received CPR would also give rise to an inference that Trentadue was revivable.

When she was at the FTC on the morning of August 21, 1995, the Medical Examiner's field investigator, Ms. Corwine, noticed a trail of blood leading down the hallway from Trentadue's cell. (XVII, 6355-56). The blood in Trentadue's cell was wet. (XIV, 4982-83; XIX, 7008). Trentadue's body was warm. (XIV, 4753-55). Blood was even dripping from Trentadue's chin. (*Id*. 4995-96). Witnesses testified that the gurney on which Trentadue had been placed was saturated with blood and so too was the floor of the infirmary where Trentadue's body was taken. Witnesses also said that there was more blood in the infirmary or trauma room than in Trentadue's cell and that the trash cans in the trauma room were full

of bloody bandages. (XVII, 6199-6200, 6253-57, 6237-40). The presence of the fresh blood is important because Dr. Jordan testified that dead men do not bleed. (XVII, 6022). Under the *Government* and Lee's suicide theory, this blood would be evidence that Trentadue was alive even after he was allegedly "cut down."[22]

**(12) Threats to Baker**

The *Government's* counsel recruited three inmates to make Baker recant his testimony. (XII, 4363-67).[23] The *Family* brought this matter to the District Court's attention. The *Government's* counsel denied having spoken to Baker about changing his testimony. (*Id*. 4367). Baker telephoned the *Government's* counsel to ask for protection. According to Baker, he was told by the *Government's* counsel that he would receive no protection unless Baker retracted his testimony about having witnessed Trentadue's murder. When Baker refused, *Government's* counsel said "I have nothing further to say to you" and hung up the telephone. (*Add*. 87-89). The *Family* moved to protect Alden Gillis Baker. (*Add*., 70). Ten months after that *Motion* was filed and several weeks after Baker's death, it was denied. (VIII, 2511-12).

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[22] Baker testified that one of the guards who murdered Trentadue was injured. (XIV, 5089, 5131). It is the *Family's* belief that the blood in the hallway, in the infirmary and on the bloody bandages were from the injured guard. But if one accepts the *Government* and Lee's theory, then this was Trentadue's blood and he was alive.

[23] The *Government* made a practice of threatening witnesses, both inmate and non-inmate witnesses. (XI, 3928; IV, 1457, 1459; IX, 3091; XV, 5383-84, 5413; XIX, 6797-99).

That conversation between Baker and the *Government's* counsel was recorded. The *Family* moved to compel production of that recording. (*Add*., 141). The District Court denied the *Motion*. However, the District Court ordered the *Government* to submit that recording as part of the record on appeal. (*Add*. 140).

**(13) Mortuary Photographs**

No photographs were taken by either Freeman or Lee of the trauma to the back of Trentadue's head, his back or lower extremities. (XI, 3621-45; XVI, 5603-06, 5845). When the *Family* received Trentadue's body for the funeral, heavy make-up concealed his injuries. Trentadue's family removed that make-up and took extensive photographs of the trauma he had suffered prior to death. (XX, 7505-09). These photographs, Exhibits 297 A, B, D, E, F, G, H, J, K, L, M, N and O, were powerful evidence of a fight. (*Add*. 53, 65). The District Court admitted these photographs against the *Government* but not Lee. (*Id*. 7510).

## VI.

## SUMMARY OF ARGUMENT

Set out below is a summary of the arguments submitted in opposition to the *Government* and Lee's *Appeals*, and in support of the *Family's Cross-Appeal*.

### A. Lee's Appeal

Lee argues that the *Judgment* against him is voided by 28 U.S.C. § 2676. Lee never raised that argument before the District Court, however. But even if he had done so, § 2676 does not void the *Judgment* against him because that *Judgment* was entered almost five

months prior to the *Judgment* entered against the *Government*. Lee argues, too, that there was no evidence he was deliberately indifferent to Trentadue's serious medical needs and that he is entitled to *qualified immunity*. The record does not support Lee on these claims. Lee's orders to guards not to enter Trentadue's cell, to remove the key from the cell door, to wait seven minutes before opening the cell door and to do no CPR establish actionable deliberate indifference.

Lee likewise argues that there is no evidence that Trentadue was revivable. But a more accurate statement would be that there is no evidence Trentadue was dead when discovered by the guards on August 21, 1995. Furthermore, the *Government* and Lee bore the burden of proof on this issue and the District Court erred in placing that burden upon the *Family*. But even as to that erroneously placed burden of proof, there was sufficient evidence of revivability to send the matter to the jury.

**B. *Government's* Appeal**

The District Court did not base its findings of intentional infliction of emotional distress solely upon the *Government's* failure to inform the *Family* about Trentadue's injuries and that an autopsy had been performed. The finding of intentional infliction of emotional distress was based upon the reckless way in which the *Family* was treated by the *Government* in the aftermath of Trentadue's death. The harassment, destruction of evidence, claim that Trentadue had AIDS and other outrageous conduct by the *Government* supports the District Court's finding of emotional distress.

The *Government* argues that the *Administrative Claim* did not include a claim for emotional distress for matters arising after Trentadue's death and, therefore, the District Court lacked jurisdiction. The District Court found that the *Administrative Claim* was sufficiently broad to put the *Government* on notice that the *Family* was seeking damages based upon the actions of the *Government* in the aftermath of Trentadue's death. The evidence supports the District Court's finding in this regard.

Next, the *Government* argues that there is no evidence the *Family* suffered severe emotional distress. The *Family* testified about their emotional distress, that was a matter of credibility and the District Court found severe emotional distress. In addition, the *Government* had the burden to provide a complete record of all the evidence on appeal related to the *Family's* emotional distress claim, but failed to do so. The *Government's* failure to provide a complete record on the emotional distress issue requires affirming the District Court.

The *Government* argues that the *Family's* intentional infliction of emotional distress claim is barred by 28 U.S.C. § 2680(h), which prohibits "misrepresentation" claims. Misrepresentation and intentional infliction of emotional distress, however, are different torts and implicate different harms. Thus, § 2680(h) does not apply.

**C. *Cross-Appeal***

This case was initiated by the family of Kenneth Michael Trentadue to determine the cause and manner of his death. But this has turned out to be a case about governmental

corruption. Before the District Court, the *Government* was unrestrained by oaths, rules or even the law, all of which deprived the *Family* of their rights or *due process* and *access to the court* and contributed to their emotional distress over their husband, son and brother's death.

The *Family* began this brief with reference to Trentadue's "violent and mysterious death." Because of the *Government's* actions, Trentadue's family will be forever tormented about the *Government's* role in his death. They will be tormented because Trentadue was murdered and the *Government* covered up that crime.

## VII.

## REBUTTAL TO LEE'S APPEAL

Lee argues that because the District Court entered a *Judgment* on the *Family's FTCA* claims, the *Judgment* entered against him on the *Bivens* claim is invalid under 28 U.S.C. § 2676. Lee never presented this argument to the District Court, and he cannot raise the issue for the first time on appeal. *See Hicks v. Gates Rubber Co.*, 928 F.2d 966, 970 (10th Cir. 1991).

Lee acknowledges that he never raised the § 2676 argument before the District Court but insists that it was not waived because it is jurisdictional. Lee cites no authority to support that contention. Nor could Lee, since § 2676 speaks in terms of a "bar" to any action much like *res judicata* is a bar. Section 2676 does not mention "jurisdiction." *See* 28 U.S.C. § 2676; *Gasho v. United States*, 39 F.3d 1420, 1438 (9th Cir. 1994)(holding that a claimant

suing under the FTCA and for a *Bivens* claim may secure judgments on both claims if the *Bivens* judgment is entered first).

Lee also argues that the *Judgments* against the *Government* and him were entered contemporaneously, so as to come within the scope of § 2676 which bars "entry of any contemporaneous or subsequent judgment against [the employee]". *Aetna Casualty v. United States*, 570 F.2d 1197, 1201 (4th Cir. 1978). That is also not true. Lee's *Judgment* was entered on January 12, 2001. (IX, 3134). The *Government's Judgment* was entered on May 1, 2001. (X, 3222). The Court did amend Lee's *Judgment* on November 21, 2001. (*Id*. 3332). The District Court, however, "limited" that amendment to allowing Lee to pursue costs on claims other than the claim on which the $20,000 *Judgment* was entered. (*Id*. 3373-74, 3332-33). The District Court did not amend the *Judgment* with respect to compensatory damages. Thus, the *Judgment* against Lee was entered almost five months prior to the *Judgment* entered against the *Government*. It is, therefore, not barred by § 2676. *See Gasho*, 39 F.3d at 1438.

Nevertheless, Lee argues that the mere fact that the *Judgment* is entered against the *Government* invalidates the *Judgment* against him. But that, too, is not true. A *Judgment* is a property right. As such, it falls within the protections of the *due process clause*. *Hodges v. Snyder*, 261 U.S. 600, 603 (1923). The *Estate of Kenneth Michael Trentadue* had a valid *Judgment* against Lee as of January 12, 2001, and nothing thereafter changed that fact. *See Gaines v. Gaines*, 151 P.2d 393, 396 (Okl. 1944)(amendments relate back).

Next, Lee argues that there was no evidence that Trentadue was alive and that one cannot be deliberately indifferent to the medical needs of a dead man. That is a misrepresentation of the record. *See supra* at 35. A more accurate statement would be that: there is no evidence Trentadue was dead when discovered at 3:02 a.m. on August 21, 1995. Furthermore, the *Government* and Lee, bore the burden of proof on this issue and the District Court erred in placing the burden upon the *Family*. *See infra* 54.

Lee likewise argues that there was no evidence that he intended to be deliberately indifferent to a serious medical need. The record does not support Lee on this claim. *See supra* 15. The record illustrates a *mens rea* by Lee on a par with criminal recklessness and that is sufficient to establish a violation of Trentadue's civil rights. *DeSpain v. Uphoff*, 264 F.3d 965, 975 (10th Cir. 2001).

Lee argues, too, that since the District Court found that "there was no evidence from lay witnesses or experts that Trentadue could have been revived even had such attempts been made" (X, 3211) the *Judgment* should be set aside. Under the standard for *Rule 50 Motions*, the District Court was required to submit this matter to the jury. *See Westinghouse v. Green*, 384 F.2d 298, 301 (10th Cir. 1967). The District Court's findings regarding revivability are also not supported by the evidence. *See supra* 35.

Finally, Lee argues that he is entitled to *qualified immunity* because he immediately responded to the discovery of Trentadue's body by summonsing medical assistance. However, Lee's subsequent orders to guards reeked of deliberate indifference: do not enter

cell, remove key from cell door, wait seven minutes before opening cell door and no CPR. Lee did everything he could to deny Trentadue access to medical care. Thus, cases such as *Ward v. Holmes*, 1994 WL 313624, (4th Cir. 1994) and *Rich v. City of Mayfield*, 955 F.2d 1092 (6th Cir. 1992), on which he relies to support his *qualified immunity* argument are of no assistance to him. A more instructive case would be *Heflin v. Stewart County*, 958 F.2d 709 (6th Cir. 1992).

## VIII.

## REBUTTAL TO GOVERNMENT'S APPEAL

The District Court entered *Judgment* in favor of the *Family* on their intentional infliction of emotional distress claims based upon the "**reckless way in which [the Family] were treated by the United States in the aftermath of Trentadue's death.**" (X, 3218). The District Court did not state that its finding of severe emotional distress was based solely upon the failure to inform the *Family* in advance about the extensive injuries on Trentadue's body and that an autopsy had been performed. Nevertheless, the *Government* argues that the District Court lacked jurisdiction over this claim because the *Family* did not provide notice in their *Administrative Claim* of the alleged failure to inform them of injuries and that an autopsy had been performed.

A claim is sufficient under the *FTCA* if it provides the responsible federal agency with the facts of the incident so that an investigation can be conducted. *See Barnson v. U.S.*, 531 F.Supp. 614 (D. Utah 1982). The *Family's Administrative Claim* put the *Government* on notice that it was seeking damages for destruction of evidence, fabrication of records, intimidation of potential witnesses, asserting that the injuries and trauma inflicted upon Trentadue's body had been done by his family following death, stating that Trentadue had killed himself because he had AIDS, and other acts related to the *Family's* treatment by the *Government* in the aftermath of Trentadue's death. (I, 114-209). And the District Court found that the *Administrative Claim* was sufficiently broad to put the *Government* on notice that the

*Family* was seeking damages based upon the actions of the *Government* in the "aftermath of Trentadue's death." (X, 3377). *See Santiago-Ramirez v. Secretary of Department of Defense*, 984 F.2d 16, 19 (1st Cir. 1993).

Agency investigations can also compliment the scope of the *Administrative Claim* for purposes of subject matter jurisdiction and that certainly occurred in the instant case. The *Government* specifically asked the *Family* for information and facts, which added to the scope of their claims. (X, 3327-45). *See Blue v. United States*, 567 F.Supp. 394 (D.Conn. 1983); *Williams v. United States*, 693 F.2d 555 (5th Cir. 1982); *Del Valley v. United States*, 626 F.Supp. 347, 349 (D.P.R. 1986). The sufficiency of a *Notice of Claim* under the *FTCA* is tested by whether the agency obtained sufficient written information to begin an investigation. *See Cook v. United States*, 978 F.2d 164 (5th Cir. 1992). In this case, the *Government* clearly did.

Next, the *Government* argues that there can be no claims for intentional infliction of emotional distress based on the alleged failure to inform the *Family* that an autopsy had been performed because the *Family* was told about the autopsy and, in fact, consented to an autopsy. However, the *Government* ignores the fact that the District Court's ruling was not so limited in scope but was instead based upon the "reckless way in which [the Family] were treated by the United States in the aftermath of Trentadue's death." (X, 3218).[24]

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[24] The *Government* actually told the *Family* that they could not have an autopsy without submitting a written request. (XIX, 6969-73; XX, 7497-98). The *Government* even faxed to the *Family* a *Memorandum* stating that there would be no autopsy without written

The *Government* also ignores key evidence of the "reckless way" in which the *Government* treated the *Family* by telling them that they could not have an autopsy, saying that Trentadue committed suicide because he had AIDS, issuing a press release within several weeks of Trentadue's death stating that his death was "suicide" and injuries were self-inflicted, destroying evidence and intentionally obstructing and interfering with the *Family's* efforts to determine the cause and manner of Trentadue's death. (XII, 3964; XX, 7497-7500, 7513-15, 7534-37, 7552-54, 7556-60). Simply put, the District Court heard how the *Family* was tormented by the *Government's* efforts to conceal the cause and manner of their husband, son and brother's death. The *Government* and Lee's "suicide" expert, Ron Maris, was asked on cross-examination if he could imagine anything more horrible than the cover-up and murder of a husband, son and brother, and Maris said: "**if that happened, that would be horrible**, yes." (XX, 7305). Maris went on to say that such a cover-up would be "**pretty bad**" for the emotional well-being of the victim's family. (*Id*. 7305).

The *Government's* third argument is that the evidence does not support the District Court's finding of severe emotional distress. But the District Court heard extensive testimony about the Family's severe emotional distress. (XX, 7225-30, 7301-05, 7526-27, 7534-37, 7543-46, 7566-67, 7570-75). This is a matter of the District Court's weighing the credibility

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consent. (XI, 3780). That fax was sent after the autopsy had already been completed, but the *Family* was unaware of that fact. The *Family* was also unaware that the FTC administration was attempting to have Trentadue cremated. (V, 1663). BOP policy does not allow for cremation of inmates. (IV, 1386).

of the *Family's* testimony about their emotional distress. Thus, the District Court's finding that the *Family* suffered severe emotional distress is entitled to great deference. *Thompson v. Rockwell*, 811 F.2d 1345, 1350 (10th Cir. 1987).[25]

The *Government* similarly gives too narrow a standard of review for the issues it raises on appeal. This Court is free to affirm on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the District Court. *United States v. Sandoval*, 29 F.3d 537, 542 fn. 6 (10th Cir. 1994). The *Government* has challenged the sufficiency of the evidence to support the District Court's finding of emotional distress. The *Government* had the burden to provide a complete record of all the evidence on appeal, but it has not met that burden. The testimony of numerous witnesses were submitted to the District Court by way of designated depositions. (XXI, 7746-47). Those deposition designations do not appear in the record on appeal. Also missing from the record on appeal are the rulings which the District Court made to objections to the deposition testimony. (XXI, 7747). The letters which Trentadue's *Family* wrote to the *Government* trying to find out about his death played a major role in their emotional distress case. These letters were received into evidence as Exhibits 421, 422, 424, 425, 426, 428, 429, and 430, to mention a few. (XX, 7511-18, 7520, 7523, 7525). *Government* correspondence was also

[25] The materials which the *Government* references in footnote 9 on page 30 of its *Brief* were not received into evidence at trial. Furthermore, the *Government's* description of the *Family's* emotional distress on page 30 of its *Brief* is taken totally out of context, such as Carmen Trentadue "doesn't suffer from depression." (XX, 7573).

admitted in the *Family's* emotional distress case. (Id. 7530). Yet none of this documentary evidence is in the record on appeal. These omissions are fatal to the *Government's* appeal. *See Deines v. Vermeer*, 969 F.2d 977 (10th Cir. 1992).

The *Government's* final argument is that because the District Court's award of damages for the intentional infliction of emotional distress fell within *28 U.S.C. § 2680(h)* prohibiting "misrepresentation" claims. The District Court specifically found that the *Government's* characterization of the intentional infliction of emotional distress claim as a misrepresentation was "too restrictive." The District Court stated that its ruling was "**not dependent only upon statements or failures to speak, but focus on the totality of the actions taken by the United States . . . [and that] misrepresentation and intentional infliction of emotional distress are substantively different [torts] and implicate different harms.**" (X, 3377-78). The District Court's ruling is consistent with Supreme Court precedent. *See Block v. Neal*, 460 U.S. 289, 298 (1983). It is also consistent with rulings from other courts faced with similar § 2680(h) arguments. *See e.g. Sabow v. U.S.*, 93 F.3d 1445, 1457 (9th Cir. 1996).

## IX.

## CROSS-APPEAL: THE DISTRICT COURT'S FINDING OF NO INTENTIONAL DESTRUCTION OF EVIDENCE WAS CLEARLY ERRONEOUS

Findings are reviewed under a clearly erroneous standard. *O'Connor v. R.F. Lafferty & Co., Inc*, 965 F.2d 893, 901 (10th Cir. 1992). The District Court found that "the loss of

potential evidence was a result of ignorance or incompetence as opposed to intentional behavior." (X, 3220). A finding contrary to the only testimony presented, is properly considered to be erroneous. *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, 925 F.2d 566, 571 (2nd Cir. 1991). With respect to the cleaning of Trentadue's cell, painting over the note in that cell, the missing records related to Baker and Trentadue's missing clothing, this evidence was all intentionally destroyed. The District Court's finding that this evidence was not intentionally destroyed is clearly erroneous.

## X.

## CROSS-APPEAL: DESTRUCTION OF EVIDENCE DENIED *DUE PROCESS* AND *ACCESS TO COURT*

Constitutional violations are reviewed *de novo*. *United States v. Boigegrain*, 155 F.3d 1181, 1185 (10th Cir. 1998). A litigant's *due process* rights are violated by the *Government's* loss or destruction of evidence when (1) the significance of the evidence was apparent before it was destroyed or lost and the private party is unable to obtain comparable evidence by other reasonably available means; (2) the evidence was destroyed after it had been seized or "secured" by the *Government*; (3) the evidence was destroyed after it had been demanded by the private litigant; (4) the absence of the evidence actually furthers the government's position in the law suit; (5) the government is unable to offer any reasonable rationale or good faith explanation for the loss of the evidence; **or** (6) failure to maintain the evidence is a violation of a federal regulation, policy or law. *See United States v. Bohl*, 25 F.3d 904 (10th Cir. 1994); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1418-19 (10th Cir. 1987). The

*Government's* loss or destruction of evidence in this case certainly meets all six of the foregoing standards establishing a violation of the *Family's* civil rights.

## XI.

## CROSS-APPEAL: THE DISTRICT COURT ERRED BY NOT GRANTING DECLARATORY AND INJUNCTIVE RELIEF FOR CIVIL RIGHTS VIOLATIONS

An abuse of discretion standard is applied to the District Court's refusal to make findings of fact. *Matthews v. C.E.C. Industries*, 202 F.3d 282 (10th Cir. 1999). As their *Fourteenth Claim for Relief*, the *Family* asked the District Court to declare that their civil rights had been and continued to be violated by the *Government.* The *Family* also asked the District Court to enjoin those violations of civil rights. (II, 514; VIII, 2614). The *Family* requested findings in support of its *Fourteenth Claim for Relief.* (*Add*., 121). The District Court refused those requests. (X, 3190-3221). Post-trial, the *Family* requested findings on the DOJ's violation of their rights. (X, 3231-33). The District Court refused that request. (X, 3196-3221). The District Court in erred in failing to address the *Family's* civil rights claims and in not granting declaratory and injunctive relief.[26]

[26] Through trial the *Government's* counsel expended 13,752 hours on this case. The *Government* spent almost $2 million on private counsel, with Lee's counsel receiving almost $500,000 of that sum. The *Government* incurred over $250,000 in costs, including $168,000 on expert witnesses. (X, 3291). Had they prevailed on their claim for declaratory and injunctive relief, the *Family* could have recovered their costs and fees under 28 U.S.C. § 2412.

## XII.

## CROSS-APPEAL: *EX PARTE* SUBMISSIONS VIOLATED *DUE PROCESS* AND *ACCESS TO THE COURT*

Constitutional violations are reviewed *de novo*. *Boigegrain*, 155 F.3d at 1185. The *Government*'s *ex parte* submissions were intended to influence and did influence the District Court and as such clearly violated the *Family's right of due process* as well as their *right of access to the court*. *See United States v. Van Griffin*, 874 F.2d 634, 637 (9th Cir. 1989); *Saavedera v. Albuquerque*, 73 F.3d 1525, 1533 (10th Cir. 1996); *New York Life Ins. Co. v. Brown*, 84 F.3d 137, 143 (5th Cir. 1996); *PATCO v. Federal Labor Relations Authority*, 685 F.2d 547, 570 (D.C. Cir. 1982).

## XIII.

## CROSS-APPEAL: THE DISTRICT COURT ERRED IN PLACING THE BURDEN OF PROOF ON REVIVABILITY UPON THE *FAMILY*

Questions of law are reviewed *de novo*. *Allison v. Bank One*, 289 F.3d 1223, 1233 (10th Cir. 2002). It was the *Government* and Lee's contention that Trentadue had committed suicide and that when discovered, he was already dead and not revivable. (VIII, 2614-15; IX, 2808-09). Lee and the *Government* bore the burden of proof on the issue of death and non-revivability. *See Fontenot v. Southern Farm Bureau Cas. Ins.* , 304 So.2d 690, 693-94 (La. App. 1974); *Rodak v. Fury*, 298 N.Y.S.2d 50, 52-53 (N.Y.App. 1969); *Smith v. Whitaker*, 711 A.2d 20, 31-32 (N.J. 1998); *In re: Coots*, 877 S.W.2d 245 (Mo. App. 1994); *Bowman v. Redding*, 449 F.2d 956, 961-62 (D.C. Cir. 1971); *Dustin v. Cruise*, 47 F. Supp. 67, 70-71

(D.N.H. 1980). The issue on the burden of proof was raised before the District Court. (VIII, 2553-57; IX, 2789-91; *Add*., 120, 134). The District Court nevertheless placed the burden upon the *Family* to prove that Trentadue was revivable rather than requiring the *Government* and Lee to prove that Trentadue was dead and nonrevivable. (X, 3216).

Asserting that the *Government* and Lee bore the burden of proof on revivability, the *Family* moved for judgment as a matter of law on this issue at the close of all the evidence. (XIX, 7749-50). The District Court found that "there was no evidence from lay witness or experts that Trentadue could have been revived even had such attempts been made. (X, 3211). If the District Court is sustained in that finding and if the *Government* and Lee bore the burden of proof on death and non-revivability, then the District Court erred in not granting the *Family's Motion for Judgment as a matter of law* on this issue.

## XIV.

## CROSS-APPEAL: THE DISTRICT COURT ERRED IN NOT APPLYING THE *PHYSICAL FACT RULE*

The District Court's application of the law, including the *physical fact rule*, is reviewed *de novo*. *Allison*, 289 F.3d at 1233. The uncontroverted evidence at trial established that the noose portion of the ligature was not cut, that even without the 23-inch noose, the remaining ligature in Trentadue's cell hung to within four feet of the cell floor and that the presence of *liver mortis* in the tip of Trentadue's nose resulted from him lying face down on the floor of his cell after death rather than hanging. The presence of someone else's blood in Trentadue's cell was also uncontroverted. The undisputed physical evidence

required the District Court to reject all testimony, including Lee's, about Trentadue having been found hanging and cut down. This physical evidence likewise required the District Court to reject all testimony, including Lee's, about Trentadue having been alone in his cell.

The District Court was required to reject testimony in conflict with this physical evidence because of the *physical fact rule*, which provides that uncontroverted physical evidence cannot be refuted by testimony. *See Zollman v. Symington Wayne Corp*, 438 F.2d 28, 31-32 (7th Cir. 1971). This Court recognizes the *physical fact rule*. See *Lee Motor Freightway v. True*, 165 F. 2d 38, 40 (10th Cir. 1948); *Gruggs v. Hannigan*, 982 F. 2d 1483, 1488 (10th Cir. 1993); *Kansas City Public Service v. Shephard*, 194 F. 2d 945 (10th Cir. 1950). The *Family* requested findings based upon the *physical fact rule*. (*App*., 122). The District Court denied that request and in doing so erred.

## XV.

## CROSS-APPEAL: THE DISTRICT COURT'S FINDINGS OF SELF-INFLICTED INJURIES WERE CLEARLY ERRONEOUS

Findings are subject to a clearly erroneous standard of review. *O'Connor*, 965 F.2d at 901. Findings contrary to uncontroverted evidence are clearly erroneous. *See Trans-Orient Marine Corp.*, 925 F.2d at 571. The District Court made numerous findings contrary to uncontroverted evidence, such as all of Trentadue's injuries were "self-inflicted." (X, 3208). That finding is in direct conflict with the uncontroverted testimony about the injury to Trentadue's anal verge, the bruises under his arms and the injuries to the soles of his feet.

The District Court also found that the DNA from Trentadue's cell was consistent with his injuries being self-inflicted. (X, 3208). That finding is also in direct conflict with the uncontroverted evidence that someone else's blood was found in the cell and BOP records showing Baker and Trentadue shared that cell. The fact that these injuries were not self-inflicted would support a claim for assault and battery. The District Court's finding that Trentadue's wounds were all self-inflicted, therefore, was clearly erroneous.

## XVI.

## CROSS-APPEAL: THE DISTRICT COURT ERRED IN REJECTING THE *FAMILY'S* SPOLIATION CLAIM

Interpretation of state law is subject to a clearly erroneous standard of review. *Loveridge v. Gregagoux*, 678 F.2d 870, 877 (10th Cir. 1982). The District Court rejected the *Family's* spoliation claim. (X, 3219-20). The District Court cited *Patel v. OMH Medical Center*, 987 P.2d 1185, 1202 (Okl. 1999) to support its ruling but *Patel* did not hold that Oklahoma would not recognize a tort of spoliation or *prima facie* tort for acts constituting spoliation of evidence. Rather, in *Patel* the Oklahoma Supreme Court stated that it may not consider the issue because "the conduct complained of in this action does not present a case of spoliation of evidence . . .." (*Id*.) Unlike *Patel*, *Trentadue* does present a case for spoliation.

Spoliation is the intentional destruction, mutilation or significant alteration of potential evidence for the purpose of defeating or impairing another person's right of recovery in a civil action. *Colman v. Eddy Potash, Inc*, 905 P.2d 185, 189 (N.M. 1995). The

tort has its origins in § 870 of the *Restatement (Second) Torts*, which provides that "one who intentionally causes injury to another is subject to liability to the other for the injury, if his conduct is generally culpable and not justifiable under the circumstances." (*Id*. § 870). Those states recognizing the tort of spoliation do so on the basis of § 870.

Oklahoma adopted § 870 as early in 1916. *See Hibbard v. Halliday*, 158 P. 1158, 1159-60 (Okl. 1916). The Oklahoma legislature also codified § 870 when it enacted the following law:

> [any] person who suffers detriment from the unlawful act or omission of another, may recover from the person at fault a compensation therefore, which is called damages.

23 O.S. § 3. The Oklahoma Supreme Court has held that this statute gives rise to tort liability for violations of law. *See Johnson v. Harris*, 102 P.2d 940, 941 (Okl. 1940). The destruction of evidence was certainly unlawful. Therefore, the District Court's refusal to recognize the *Family's* spoliation claim was clearly erroneous.

## XVII.

## CROSS-APPEAL: THE DISTRICT COURT ERRED BY NOT APPLYING BURDEN SHIFTING PRESUMPTIONS

The District Court's application of the law is reviewed *de novo*. *Allison*, 289 F.3d at 1233. A "presumption" is an inference which the law directs the trier of fact to draw. *Legille v. Dann*, 544 F.2d 1, 5-6 (D.C. Cir. 1976). Presumptions shift the burden of proof by imposing on the party against whom they are directed the burden of going forward with evidence to "rebut" that particular presumption. *Baker v. Bledsoe*, 85 F.R.D. 545, 547 (W.D.

Okl. 1979); *Hicks*, 833 F.2d at 1419; *Welsh v. United States*, 844 F.2d 1239, 1245-49 (6th Cir. 1988); *Sweet v. Sisters*, 895 P.2d 484, 492 (Alaska 1995). A presumption enables the party in whose favor the presumption runs to survive summary judgment, directed verdict, judgment not withstanding the verdict, and appellate review on sufficiency of the evidence. *See Welsh*, 844 F.2d at 1245-49; *Lane v. Montgomery Elevator Co.*, 484 S.E.2d 249, 251 (Ga. App. 1997).

The *Family* was entitled to numerous presumptions. There is a *spoliation presumption*, which is triggered when a party or their agents fabricate, falsify, destroy or conceal evidence or attempts to do so, and/or commit other acts of obstruction of justice. *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 921-22 (3rd Cir. 1985); *Shapik v. Schertle*, 629 A.2d 763, 772 (Md. 1993); *Baker*, 85 F.R.D. at 547. The *spoliation presumption* has its origin in *due process* considerations and its purpose is to "restore . . . [the innocent party's] right to a fair trial" that has been impacted by the opposing party's acts of spoliation. *Jordan F. Miller Corporation v. Midcontinent Aircraft Services Inc.*, 998 W.L. 68879, ¶ 7 (10th Cir. Okl). The *Family* requested the spoliation presumption. (VIII, 2250-57). The *Family* asked for findings on the *spoliation presumption*. (*Add*., 121). The District Court refused those requests and in doing so it erred. *See Alexander v. National Farmers*, 687 F.2d 1173, 1205-06 (8th Cir. 1982).

There is a presumption against suicide. *Horinek v. State of Texas*, 977 S.W.2d 696, 716 (Tex. App. 1998). Oklahoma recognizes that presumption, which places the burden of

proving suicide upon the party contending that another took his or her own life. *Modern Brotherhood of America v. White*, 168 P. 794 (Okl. 1917). The *Family* argued it was entitled to a presumption against suicide. (VIII, 2554). The *Family* requested findings on the presumption against suicide. (*App*., 120).

There is also a presumption of continuance of life which arises whenever the time of a person's death is uncertain. This presumption means that Trentadue is presumed to have lived until such time as it was proven in accordance with Oklahoma law that he was dead. *Smith v. Whitaker*, 713 A.2d 320, 322-33 (N.J. 1998); *Fontenot*, 304 So.3d at 693-94. The *Family* argued that it was entitled to a presumption on the continuance of life. (*App*., 135). The *Family* requested findings on the presumption of the continuance of life. (*Add*. 120).

It was error for the District Court not to apply the presumptions against suicide and on the continuance of life. The effect of these presumptions was to shift the burden of proof on death and non-revivability to the *Government* and Lee. Moreover, under the record in this case the *Government* and Lee did not rebut those presumptions.

## XVIII.

## CROSS-APPEAL: THE DISTRICT COURT ERRED BY NOT INSTRUCTING THE JURY ON BURDEN SHIFTING PRESUMPTIONS

The District Court's refusal to give a jury instruction is reviewed under an abuse of discretion standard, but whether the instructions, as a whole, accurately inform the jury of the issues and the governing law is reviewed *de novo*. *Harrison v. Eddy Potash, Inc.*, 248

F.3d 1014, 1024 (10th Cir. 2001). The *Family* requested jury instructions on spoliation, the presumption against suicide and the presumption of the continuance of life. (IX, 3048-3050). The *Family* also requested instructions on uncontroverted evidence and the *physical fact rule*. (IX, 3044-45). The District Court rejected those requests. (IX, 3100-27).

The District Court refused to give those instructions. (IX, 3099, 3127). Before the case was submitted to the jury, the *Family* renewed its request for these instructions. (XXI, 7792-93). The District Court erred in not giving these instructions because without these instructions, the jury was not adequately charged on the issues and the applicable law.

## XIX.
## CROSS-APPEAL: THE DISTRICT COURT ERRED BY NOT APPLYING THE OKLAHOMA DEFINITION OF "DEATH"

Questions of law are reviewed *de novo*. *Allison*, 289 F.3d at 1233. The laws of the State of Oklahoma governed the conduct of Lee in responding to Trentadue's serious medical needs. 80 O.S. § 4.2. Oklahoma law required that before proclaiming Trentadue dead, Lee and the other FTC staff had to make "all reasonable attempts to restore spontaneous circulatory or respiratory functions . . .." 63 O.S. § 3122. The *Family* argued that § 3122 placed the burden of proof upon the *Government* and Lee. (*Add*. 137). The District Court rejected that argument. In doing so, the District Court erred.

## XX.

## CROSS-APPEAL: THE DISTRICT COURT ERRED BY NOT ALLOWING MORTUARY PHOTOGRAPHS INTO EVIDENCE AGAINST LEE

Evidentiary rulings are reviewed under an abuse of discretion standard. *United States v. Hawkins*, 969 F.2d 169, 174 (6th Cir. 1992). Dr. John Smialek, reviewed Exhibits 297A, B, D, E, F, G, H, J, K, L, M, N and O. (*Add*. 53-65). Dr. Smialek testified that these photographs accurately depicted Trentadue's injuries and did not include any injuries caused by improper embalming. (XVII, 6273-74). Bevel concurred. (XIX, 7729-31). The District Court allowed these photographs into evidence against the Government but rejected them with respect to Lee. In doing so, the District Court committed a prejudicial error because these photographs were the best evidence of Trentadue having been in a fight.

The District Court's decision to limit cross examination is reviewed under an abuse of discretion standard. *Gust v. Jones*, 162 F.3d 587, 597 (10th Cir. 1998). Bevel relied on the mortuary photographs in arriving at his opinion that Trentadue's death was suicide and that his wounds were self-inflicted. The *Family* re-offered the photographs as to Lee, intending to cross-examine Bevel on them. The District Court rejected the offer even though Bevel testified that there was no evidence of a fight. (XIX, 7729-31, 7741-43). The District Court abused its discretion in restricting and limiting the *Family's* examination of Bevel in this manner.

## XXI.

## CROSS-APPEAL: THE DISTRICT COURT ERRED IN EXCLUDING EXHIBITS 38, 178, 211, 234, 370, 402 AND 700 AS HEARSAY

A District Court's decision to admit or exclude evidence on the basis of hearsay is reviewed *de novo*. *United States v. Johnson*, 71 F.3d 539, 543 (6th Cir. 1995). The District Court erred in excluding against both the *Government* and/or Lee seven key exhibits on the basis of hearsay. The District Court excluded this evidence even though the *Government* and Lee had waived that objection to six of the seven exhibits based upon *Federal Rule of Civil Procedure* 26(a)(3)(C).

On October 5, 1999, the *Family* identified their trial exhibits pursuant to *Federal Rule of Civil Procedure* 26(a)(3)(C). (*Add*., 90). The *Government* and Lee had 14 days in which to object. Failure to object within those 14 days waives all objections other than relevance or prejudice under *Rules* 402 and 403. No objections were forthcoming from either the *Government* or Lee until almost a year later, when the *Government* asserted hearsay objections to Exhibits 7, 38, 178, 234 and 370 and Lee asserted hearsay objections to Exhibits 7, 38 and 178 in their respective *Pretrial Orders*. The *Family* protested inclusion of those objections in the *Pretrial Orders*, insisting that the hearsay objections had been waived pursuant to *Rule* 26(a)(3)(C) disclosures. (XVI, 5819; VIII, 2618; IX 2812). A finding of "good cause" was required for the *Government* or Lee to assert objections to these exhibits. Fed. R. Civ. P. 26(a)(3). Nevertheless, the District Court sustained the hearsay objections without any finding of good cause.

Guards Morris and Moberly prepared *Memoranda* (Exhibits 234 and 370) falsely stating that "P.A. Mier was at the scene and provided attention to inmate . . .." (*Add*. 102-03).

Lee gave those *Memoranda* to his superiors. (XVI, 5686-88). The *Government* did not object in the *Pretrial Order* to Exhibits 234 and 370. (VIII, 2629, 2635). These documents were admissible because they were not being offered for the truth of the matter because the truth was Trentadue received no CPR. *NLRB v. J.P. Stevens Co. Inc.*, 538 F.2d 1152, 1161-62 (5th Cir. 1976). These *Memoranda* were being offered as evidence of a conspiracy involving Lee. (XV, 5531-40). These documents would also give rise to the inference that Trentadue was revivable. The District Court excluded this evidence on the basis of hearsay and in doing so erred. (XV, 5540-41).

Within a week of Trentadue's death, a BOP *Board of Inquiry* arrived at the FTC to do an official investigation. (XI, 3908). That *Board* was headed by South Central Regional counsel Michael D. Hood. Hood interviewed Ellis, and Hood's notes of that interview (Exhibit 178) revealed that Ellis told Hood Trentadue was "**gurgling**" when found. (XI, 3927). Ellis' statements were the admissions of an agent and not hearsay as to the *Government. Fed. Evid. R.* 801(2)(D). The *Family* made a formal written proffer of Exhibit 178 against the *Government*. (IX, 3093). The District Court never responded to that proffer.

That *Board of Inquiry* issued an official *Report* (Exhibit 38) of its investigation. That *Report* was issued September 20, 1995 and directed to Wallace H. Cheney, Assistant Director and General Counsel of the BOP. That *Report* contained numerous findings supportive of the *Family's* claims against the *Government* and Lee, such as: "criminal conduct in connection with . . . [Trentadue's] death was also a possibility;" that the Oklahoma Medical

Examiner's Office "do not believe that the injuries were self-inflicted;" "in a very short time, Dennis Williams . . . arrived at the cell with a key to the cell door;" "brain damage can occur in four minutes and death in five to six minutes from the start of a hanging;" "the body was still warm;" "there was no blood on the floor underneath the sheet [ligature];" Lieutenant Lee "stated that he did not immediately order that . . . [Trentadue] be cut down or lifted up since he 'knew' that the inmate was dead;" Mier's failure to administer CPR "was contrary to his medical training and accepted medical practice;" and that Trentadue's trauma could be explained by him "diving off the sink head first." (XI, 3828-30). More importantly, Exhibit 38 stated that Hood and his investigators had "visited the site of the incident" and reported that the alleged suicide note on the wall of Trentadue's cell read "**My mind is no longer its friend, love Paul.**" (*Id*. at 3830).[27]

Exhibit 38 was an official report exempt from the hearsay rule. *Fed. R. Evid.* 803(8). That document could only be excluded from evidence based upon a finding of "lack of trustworthiness." *Id.* The District Court made no finding that Exhibit 38 was untrustworthy. Nevertheless, the District Court excluded Exhibit 38 both as to the *Government* and Lee on the basis of hearsay. (XV, 5498-99). Thereafter, the *Family* proffered Exhibit 38 solely

[27] Hood, Freeman, Israel and the FTC administration, believed that Trentadue's name was Vance Paul Brockway because that was the name under which his prison records were maintained. (XVI, 5883-85; XVII, 6081-82; XII, 3963). They did not know that Trentadue had not used this alias since his conviction in the early 1980's. Once the *Government* discovered Trentadue did not use this alias, it was the OIG that came up with the theory that the note was signed "love ya familia." (*Con. Supp. App.* 103).

against the *Government*. (IX, 3092). As to the *Government*, Exhibit 38 would not be hearsay. *Fed. R. Evid.* 801(2)(B)(C)(D). The District Court never responded to that proffer.

At trial, Lee admitted that there were enough personnel present to immediately enter Trentadue's cell and to administer CPR. ( XV, 5542). But Lee denied having given orders not to enter Trentadue's cell or to remove the keys from the door. (*Id*. 5555; XVI, 5601, 5628). Lee also denied leaving Trentadue hanging in order to videotape the body. (*Id*. 5554). But within ten days of Trentadue's death, Lee signed an *Affidavit* (Exhibit 211) prepared by Hood stating, among other things, that the "cell door was open about seven minutes . . . after I arrived in SHU," "I may have given instructions to wait to open the door until the camera was operating," "no CPR was administered;" "I did not order anyone to administer CPR . . .;" "I instructed Groover to film Williams, Moberly and Morris [**no mention of Ellis**] cutting the inmate down and placing the body on the gurney;" and "there was blood on his clothes." (XII, 3942-45). The District Court excluded that *Affidavit* on the basis of hearsay even though the *Government* and Lee never raised that objection in the *Pretrial Orders*. (VIII, 2628; X, 2819; XV, 5451).

Exhibit 211 was not hearsay. As to Lee, it was the admission of a party opponent. *Fed. R. Evid.* 801(d)(2)(A). As to the *Government*, Lee's *Affidavit* was the admission of an agent. (Id. 801(d)(2)(D). The *Family* also made a subsequent proffer against the *Government*. (IX, 3093).

Exhibit 402 was the transcript of Trentadue's conversation with his sister-in-law in which the *Government* falsified Exhibit 402 to indicate that Trentadue had "AIDS." (XII, 4053; XVII, 6098-6103). It is undisputed that Trentadue did not have AIDS and knew that he did not have AIDS as a result of a physical examination done shortly before his arrest. (XII, 4082; XVIII, 6454). The *Government* was circulating that falsified transcript to support its claim that Trentadue had committed suicide because of AIDS. The *Family* was not offering that exhibit for the truth of the matter but rather as proof of the emotional distress intentionally inflicted upon them by the *Government* and for the spoliation presumption that arose from the fabrication. *See McQueeney*, 779 F.2d at 921-22 (fabrication of falsification of evidence triggers a spoliation presumption). The District Court rejected the evidence. (XVII, 6099-6103).

While Groover admitted that he never saw Trentadue hanging in A-709, he did videotape the entire cell. (XIV, 4982). Groover also said that the camera was working. (XIV, 4979-81, 5012). Groover said that he saw no ligature hanging from the vent in Trentadue's cell. (XIV, 4992). Williams said that he never saw the alleged suicide note on the wall of the cell. (*Id*. 4929; XV, 5552). Groover gave that videotape to Lee. (*Id*. 4982). When Freeman received that videotape later that morning, it was supposedly "blank." The OIG retained a respected videographer, Norman I. Perle, to determine whether that camera malfunctioned or the tape had been erased. Perle provided the OIG with a report (Exhibit

700) stating "**there is specific evidence of tampering and the testing confirms that visual and audio material were removed [obliterated]**." (XII, 4105).

By the time of trial, Perle was dead. The *Family* moved for admission of the Perle report. (*Con. App.* 202; XIV, 4962-64). In the *Pretrial Order*, the *Government* did not object to the Perle report on the basis of hearsay. (VIII, 2641). At trial, however, the *Government* objected on the basis of hearsay and the District Court sustained the objection. (XV, 4971-73). The *Family* likewise proffered this exhibit solely against the *Government*. (XI, 3093). Exhibit 700 was admissible under *Fed. R. Evid.* 801(d)(2)(D) and 803 (24). *See Collins v. Wayne Corp.*, 621 F.2d 777, 781-82 (5th Cir. 1980); *Brown & Rocking v. American Home Assn. Co.* , 353 F.2d 113, 116 (5th Cir. 1965); *Theriot v. J. Ray McDermott, Inc.*, 742 F.2d 877, 882 (5th Cir. 1984). Exhibit 700 clearly established that the *Government* destroyed the videotape.

## XXII.

## CROSS-APPEAL: THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO FREEMAN

The *Family's* civil rights and conspiracy to violate civil rights claims against Freeman were based upon his destruction of the crime scene. (III, 1182-87). The *Family* also argued that when Freeman orchestrated destruction of the crime scene he did so to protect those responsible for Trentadue's death and, therefore, joined that conspiracy as a co-conspirator. (III, 1180-87). *See U.S. Industries Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1251 (10th Cir. 1988). The District Court granted summary judgment in favor of Freeman. (VIII, 2434-37).

The *Family* asked the District Court to reconsider and set aside that *Order* once Freeman confessed to the perjury and intentional destruction of the crime scene. (*Con*. *App*. 93). The District Court refused that request. (VIII, 2508-09).

The District Court granted summary in favor of Freeman on the basis of *qualified immunity* because "there is no cause of action for cover-up in the Tenth Circuit." (VIII, 2436). The District Court cited *Wilson v. Meeks*, 52 F.3d 1547, 1557 (10th Cir. 1995) for that ruling. The District Court erred because in *Wilson* this Court found no cause of action for cover-up because there were no allegations of perjury, destroyed evidence or other acts of obstruction of justice; whereas Freeman intentionally destroyed evidence and committed perjury. *See Wilson*, 52 F.3d at 1557. Furthermore, in order to defeat a claim of *qualified immunity* "a precisely analogous case is not required . . . where the unlawfulness is apparent in light of the preexisting law." *Harris v. Maynard*, 843 F.2d 414, 417 fn. 4 (10th Cir. 1988). In 1994, this Court decided *United States v. Bohl*, 24 F.3d 904 (10th Cir. 1994)(recognizing that the destruction of evidence violated the right of *due process*). *Bohl* would defeat Freeman's *qualified immunity* claim because based upon that holding a reasonable official would understand that the destruction of evidence violated civil rights. *See Snell v. Tunnell*, 920 F.2d 673, 696 (10th Cir. 1990).

## XXIII.

## CROSS-APPEAL: THE DISTRICT COURT ERRED IN NOT GRANTING THE *FAMILY'S MOTIONS TO COMPEL*

Discovery rulings are reviewed for an abuse of discretion. *Diaz v. Paul J. Kennedy Lawfirm*, 289 F.3d 671, 674 (10th Cir. 2002). Constitutional questions are reviewed *de novo*. *Boigegrain*, 155 F.2d at 1185. The *Government's ex parte* submissions deprived the *Family* of its right of *due process* and *right of access to the court*, and the District Court erred in not ordering the *Government* to produce these items. The District Court also erred in failing to require the *Government* to produce the Baker recording.

In the record on appeal, is the recording of Baker's telephone conversation with the *Government's* counsel.(*Add*., 140). The District Court denied the *Family's Motion to Compel* that recording. In doing so, the District Court erred. That recording was not subject to any privilege against discovery. *See* 28 C.F.R. § 540.102; *Dobbs v. Lamonts Apparel*, 155 F.R.D. 650 (D. Alaska 1994). Furthermore, if the *Government's* counsel attempted to induce Baker to retract his testimony about Trentadue's murder, that would have not only been obstruction of justice but it would have triggered the spoliation presumption. *See McQueeney*, 779 F.2d at 921-22.

## XXIV.

## CROSS-APPEAL: THE DISTRICT COURT ERRED IN SEVERING CLAIMS RELATED TO HAUSER AND IN NOT HEARING EVIDENCE ON THE MATTER

The District Court's refusal to hear Jesse C. Trentadue's claim involving the *Government's* efforts to indict him through the perjured testimony of a secret operative named Hauser would be similar to a *Motion to Dismiss*, which is reviewed *de novo*. *Yousef*

*v. Reno*, 254 F.3d 1214, 1219 (10th Cir. 2001). The *Amended Complaint* alleged a claim for intentional infliction of emotional distress based upon Hauser. (II, 494-504). That claim was preserved in the *Pretrial Order*. (VIII, 2598). The District Court, therefore, clearly erred by not allowing Jesse C. Trentadue to pursue that claim against the *Government*.

Evidentiary rulings are reviewed under an abuse of discretion standard. *United States v. Hawkins*, 969 F.2d at 174. The Hauser incident was relevant to the *Family's* claims against the *Government* in areas other than the intentional infliction of emotional distress. Attempting to indict Jesse C. Trentadue through the perjured testimony of Hauser would trigger the spoliation presumption. *See McQueeney*, 779 F.2d at 921-23). The District Court refused to hear evidence on this matter, however. (XIX, 6924-25). In doing so, the District Court erred.

## XXV.

## CROSS-APPEAL: THE *CONFIDENTIALITY-PROTECTIVE ORDER* VIOLATED *DUE PROCESS* AND ACCESS TO THE COURT

The *Government* sought and obtained a *Confidentiality-Protective Order* that was specifically intended to prevent the *Family* from going to federal prosecutors or Congressional oversight committees with evidence of crimes committed by *Government* employees. (II, 449, 523-24). The *Government* only had to declare evidence "confidential" to bring it within the scope of that *Confidentiality-Protective Order*. When *Government* employees confessed to perjury, obstruction of justice or other crimes related to the cover-up of Trentadue's death, the *Government* triggered the *Confidentiality-Protective Order* by declaring that evidence confidential.[28]

The *Family* moved to set aside the *Confidentiality-Protective Order* and to have three BOP employees and one FBI agent referred for prosecution based upon their confessions to perjury and/or obstruction of justice. (*Con. App.*, 93, 122, 155 and 184). The District Court denied the *Motions*. (VIII, 2505, 2506 & 2508-10). The District Court also ordered "sua sponte and in limine" that its rulings were not to be mentioned at trial. (*Id*. 2508). That *Confidentiality-Protective Order* was unlawful. *See Proctor and Gamble Co. v. Bankers*, 78

[28] A good example of the *Government's* use of that *Confidentiality-Protective Order* to conceal criminal conduct is Robert Garza, who testified in his deposition that OIG agents had knowingly suborned perjury. The *Government* declared that deposition "confidential." (*Con. App.* 275).

F.3d 219, 227 (6th Cir. 1996). That *Confidentiality-Protective Order* also violated the *Family's First* and *Fifth Amendment* rights.

## XXVI.

## CROSS-APPEAL: THE FILING INJUNCTION VIOLATED *DUE PROCESS* AND *ACCESS TO COURT*

Shortly after the *Family* complained about the *ex parte* contacts between the District Court and the *Government*, the District Court entered an *Order* enjoining the *Family* from filing *Motions*, briefs or other matters of record in the *Trentadue* case without prior court approval. (VIII, 2493). Thereafter, the *Family* was required to obtain court permission to submit jury instructions, to submit findings of fact and conclusions of law, to make motions and even to respond to motions submitted by the *Government* and/or Lee. That filing ban remained in effect until after the trial. But it was quickly reimposed when the *Family* requested the District Court to impose upon the United States the sanctions it had repeatedly promised. (IX, 3151-64). The District Court ordered that request stricken from the record and reimposed a filing ban. (Id. 3177). That filing ban violates the *Family's* rights of *petitioning* or *access to the court* and *due process*. That filing ban is also unconstitutional. *In re: Oliver*, 682 F.2d 443 (3rd Cir. 1982); *Sires v. Gabriel*, 748 F.2d 49 (1st Cir. 1984).

## XXVII.

## CROSS-APPEAL: THE DISTRICT COURT ERRED IN NOT MAKING FINDINGS ON INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS DUE TO THE GOVERNMENT'S COVER-UP EFFORTS AND GROOVER'S PERJURY

The District Court's refusal to make additional findings or to amend the *Judgment* under Rules 52(b) and 59(e) is reviewed for abuse of discretion. *Matthews*, 202 F.3d at 282. The *Family* filed a timely *Motion* under Rules 52(b) and 59(e) requesting the District Court to make additional findings and to amend its findings of fact and conclusions of law and judgment. (X, 3225). Specifically, the *Family* requested the District Court to find that the *Government's* destruction of evidence, fabrication of evidence, perjury and other acts of a reckless or intentional nature that interfered with or disrupted the *Family's* attempts to determine how and why Kenneth Michael Trentadue died were of such an extreme and outrageous nature as to support a claim for the intentional infliction of emotional distress. (*Id*. 3230-31; *Add*. 133). The evidence and the record clearly supported those findings. Similar misconduct has been found sufficient to support a claim for the intentional infliction of emotional distress. *Nichols v. Busse*, 503 N.W.2d 173 (Neb. 1993). Furthermore, because of the *Government's* authority and power to affect the life and well-being of its citizens, the tort of outrage or intentional infliction of emotional distress is easily found when there has been abuse or misconduct by government officials. *See Restatement (Second) Torts* § 46(e)(1965); *Crain v. Krehbiel*, 443 F. Supp. 202, 213 (N.D. Cal. 1978).

The *Family* also requested the District Court to amend its findings with respect to the perjury of Mier, Freeman and Garza to include Groover. (X, 3227-30). A finding of perjury as to Groover would destroy the testimony of Groover's fellow guards who testified they observed him not only videotape Trentadue's hanging body but the videotaping delayed cutting Trentadue down.

The District Court refused to make the additional findings because the *Family's* requests were "simply another effort to persuade the Court to adopt the Plaintiffs' views regarding the facts of the case and the credibility of the witnesses." (X, 3374-75). In doing so, the District Court erred.

## XXVIII.

## CROSS-APPEAL: THE DISTRICT COURT ERRED IN NOT SANCTIONING THE *GOVERNMENT*

Rulings on motions for sanctions are reviewed for abuse of discretion. *Star v. Roche*, 33 Fed. Appx. 432, 434 (10th Cir. 2002). The *Family* repeatedly requested the District Court for sanctions or other relief based upon the *Government's* destruction of evidence and *frauds upon the court*, such as waiver of privileges against discovery. (II, 401). The *Family* filed *Motions in Limine* based upon the destruction of evidence asking that the District Court not accept oral testimony as to Baker's location within the FTC at the time of Trentadue's death, precluding the testimony of the *Government's* fabric expert about the ligature since he had disassembled that evidence and prohibiting homicide expert Tom Bevel from testifying about

the mechanism of Trentadue's injuries when the crime scene had been destroyed. (X, 2212, 2223, 2234).

The *Family* moved to have the *Government's* answer stricken, thereby establishing liability and leaving only damages for trial. (VII, 2260). The *Family* asked to have the burden of proof shifted. (VIII, 2550-57; *App*., 134). The *Family* even moved for an award of attorneys' fees based upon the *Government's* bad faith. (X, 3273). The *Family* also requested a hearing on the lost and destroyed evidence. (II, 596). All of these requests and motions were denied by the District Court. (II, 529, 531; VIII, 2372, 2504, 2515-16; X, 3370).

Some sort of remedy was necessary to rectify harm done to the *Family* by the *Government's* spoliation of evidence. The District Court was empowered to fashion broad sweeping remedies to counter the injustice done by the *Government's* spoliation of evidence. *Jordan F. Miller Corp.*, 1998 W.L. 68879; *Archibeque v. Atchison*, 70 F.3d 1172 (10th Cir. 1995); *United States v. Ford*, 737 F.2d 1506, 1509 (9th Cir. 1984). By not doing so, the District Court abused its discretion.

## XXIX.

## CROSS-APPEAL: THE CUMULATIVE EFFECT OF THE FOREGOING ERRORS DEPRIVED THE *FAMILY* OF A FAIR TRIAL

Even if the foregoing errors were individually harmless, their cumulative effect was prejudicial. The cumulative effect of these errors deprived the *Family* of a fair trial in that

they had a substantial influence on the outcome of the Trentadue case before the District Court. *See United States v. Wood*, 207 F.3d 1222, 1237-38 (10th Cir. 2000).

## CONCLUSION

The *Judgment* against the *Government* for intentional infliction of emotional distress and award of $1.1 million should be affirmed in its entirety. The remainder of that *Judgment* should be reversed and that this case should be remanded to the District of Oklahoma for a new trial against the *Government* on the *Family's* claims of assault and battery, negligence, spoliation, civil conspiracy, statutory tort and declaratory and injunctive relief. The *Family* also requests that this case be remanded for a new trial against the *Government* on Jesse C. Trentadue's intentional infliction of emotional distress claim based upon the *Government's* efforts to indict him.

With respect to the *Judgment* entered against Lee for his deliberate indifference to Kenneth Michael Trentadue's serious medical needs, the *Family* requests that it be affirmed in its entirety. The *Family* further requests that the *Judgment* absolving Lee of excessive force, failure to protect and conspiracy in the matter of Trentadue' death be set aside and that those claims be remanded to the District of Oklahoma for a new trial.

With respect to the summary judgment entered in favor of Freeman, the *Family* requests that it be vacated and set aside. The *Family* further requests that the conspiracy and civil rights claims against Freeman be reinstated and that those claims be remanded to the District of Oklahoma for a new trial.

The *Family* requests that any remand to the District of Oklahoma include an *Order* that the District Court impose sanctions upon the *Government*. The *Family* further requests that both the *Confidentiality-Protective Order* and the *Order* enjoining them from filing matters of record without prior court approval be vacated and set aside as unconstitutional.

## ORAL ARGUMENT REQUESTED

The *Family* requests oral argument. The constitutional issues raised in this appeal merit oral argument. Due to a scheduling conflict, the *Family* respectfully requests that oral argument not be scheduled during the last three weeks of May, 2003.

DATED this 21st day of September, 2002.

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**CERTIFICATE OF SERVICE**

THIS WILL CERTIFY that on the 21st day of September, 2002, two true and correct copies of the above and foregoing was mailed, first-class mail, postage prepaid, to each of the following counsel of record:

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## CERTIFICATE OF COMPLIANCE

**Section 1. Word Count**

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