ORAL ARGUMENT NOT REQUESTED

Case Nos. 05-6406 and 06-6011

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

Plaintiffs-Appellees/Cross-Appellants

vs.

UNITED STATES OF AMERICA, *et al.*,

Defendants-Appellants/Cross-Appellees.

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

BRIEF OF APPELLEES/CROSS-APPELLANTS

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STATEMENT OF PRIOR AND/RELATED APPEALS

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

PARTIES

On August 20-21, 1995, Kenneth Michael Trentadue died a violent and mysterious death while incarcerated at the Federl Transfer Center ("FTC") in Oklahoma City, Oklahoma. Plaintiffs-Appelless/Cross Appellants are: Trentadue's wife, Carmen Aguilar Trentadue; Trentadue 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, who recently died during the pendency of this appeal and whose *Estate* will be substituted pursuant to *Fed. R. App. P.* 43(a); Trentadue's sister Donna Trentadue Sweeney; and his brothers Lee Frederick Trentadue and Jesse C. Trentadue (collectively referred to as the "*Family*"). Defendant-Appellant/Cross-Appellee is the United States ("*Government*").[1]

II.

RECORD ON APPEAL

In *Trentadue, et al v. United States, et al,* 397 F.3d 840, 857 (10th Cir. 2005), this Court held that "The District Court properly determined that Plaintiffs had proven the first, second, and third elements of the tort of emotional distress, intentional or reckless conduct, outrageousness and causation" (*Id.* at 857), but remanded to the District Court for "additional findings on whether the emotional distress suffered by each Plaintiff was

[1] Charles P. Sampson, Jesse C. Trentadue's law partner and the attorney who tried this matter with R. Scott Adams, recently died.

severe under Oklahoma law."[2] (*Id.* at 858.) On remand, the District Court made those additional findings. Without a hearing or receipt of new evidence, the District Court found that, "Under Oklahoma law, the emotional distress suffered by each Plaintiff was severe", and reinstated its *Judgment* in favor of each member of the *Family*. The *Government* has appealed from that decision.[3]

The *Government* has submitted an *Appendix* as part of its appeal. That *Appendix* will be cited by "*App*." followed by the page number on which the document or testimony appears. The *Family* has also included as part of their *Brief* an *Addendum* containing various portions of the record. That *Addendum* will be cited by the reference "*Add."* followed by the page number on which the document or testimony appears.

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[2] It is important to note from the outset that this Court did not vacate or reverse any of the District Court's findings. In fact, this Court affirmed the District Court's findings in their entirety. That fact is significant because those findings, which are at the heart of the *Government's* current appeal, have not been included as part of the record even though required pursuant to *10th Cir. R.* 10.3(C) and 30. But that is not the *Government's* only violation of 10th *Cir. R.* 10 and 30. Also missing from the record is the *Pre Trial Order* containing stipulated fact, etc., referred to as a "*Pre-Trial Report*" (*See App. 89* Docket Entry No. 994) as well as crucial testimony and other evidence upon which the District Court relied in making the additional findings on remand. These omissions are more than problematic for the *Government*. They are fatal to the *Government's* appeal. *See Travelers Indemnity Co. v. Accurate Autobody, Inc.,* 340 F.3d 1118, 1121 (10th Cir. 2003).

[3] The first appeal will be referred to as "*Trentadue I*" and the current appeal will be referred to as "*Trentadue II*."

III.

STATEMENT OF JURISDICTION

The *Family* adopts the *Government's Statement of Jurisdiction,* but adds that: the *Government* filed a timely *Notice of Appeal* on December 22, 2005 *(App.* 792); the *Family* requested Court approval to file a *Notice of Cross Appeal* (*App.* 795); the District Court entered an *Order* allowing the *Family* to cross appeal (*App.* 797);[4] and on December 29, 2005, the *Family* did file a timely *Notice of Cross Appeal* (*App.* 798) pursuant to *Fed. R. App. P.* 4(a)(3). This Court has jurisdiction under *28 U.S.C.§1291.*

IV.

STATEMENT OF ISSUES

Set out below are the *Family's* rebuttal to the *Government's Statement of Issues* and the issues raised by the *Family* on its *Cross-Appeal*:

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

The *Family* submits that the following is a more accurate *Statement of the Issues* raised by the *Government's* appeal:

[4] Before the District Court the *Family,* but not the *Government*, was required to obtain prior Court approval to file anything of record, including its *Notice of Cross Appeal*. *See Trentadue*, 397 F.2d at 865. That filing ban was the result of a request by the *Family* to the District Court for the imposition of the sanctions against the *Government* which had been repeatedly promised to them by the District Court. (*App.* 439-52 and 454).

(1) Whether the *Government* misrepresents the District Court's ruling on intentional infliction of emotional distress and/or the scope of this Court's *Mandate* on remand?

(2) Whether there are other grounds in the record sufficient to support the District Court's decision as a matter of law, such as the *Government's* failure to marshall the evidence, including its failure to provide a complete record for appellate review, and the *law of the case doctrine s*ince the arguments advanced by the *Government* in this appeal were raised and rejected by this Court in *Trentadue I*.

B. <u>Issues Raised on Cross Appeal</u>.

During the trial, the District Court refused to hear evidence on the *Family's* intentional infliction of emotional distress claim related to the *Government's* illegal efforts to indict Jesse C. Trentadue with fraudulent evidence. The *Government's* stated purpose for doing this was to prevent the *Family* from pursuing their inquiry into Kenneth Michael Trentadue's death, including their civil suit. On appeal, this Court affirmed the District Court's refusal to hear evidence on that claim. *Trentadue,* 397 F.2d at 866.

On remand, the *Family* requested permission to move for dismissal of that claim without prejudice. (*Add*. 609). The *Government* objected to that request in a lengthy *Memorandum*. (*App.* 612.) Thereafter, the *Family* requested prior Court approval to respond to the *Government's* objection and arguments. (*App.* 7.) The District Court, however, refused to allow the *Family* to respond to the *Government's* arguments, to move for dismissal of that claim without prejudice and/or to dismiss the claim without

prejudice. (*App.* 756.) The *Family* has appealed from that ruling. (*Add*. 798.)[5] On this *Cross Appeal*, therefore, the issue is: Whether the District Court abused its discretion or otherwise violated the *Family's* constitutional rights by not allowing the *Family* to move to dismiss their remaining claim without prejudice, including not allowing them to respond to the *Government's* arguments in opposition and/or by refusing to dismiss that claim without prejudice?

V.

STANDARD OF REVIEW

With respect to the *Government's* appeal, the District Court's application of the *Mandate* is reviewed under an abuse of discretion standard. *See Procter & Gamble Co. v. Haugen*, 317 F.3d 1121, 1125 (10th Cir. 2003). The District Court's findings of fact are reviewed under a clearly erroneous standard. *Raydon Exploration, Inc. v. Ladd*, 902 F.2d 1496, 1499 (10th Cir. 1990).[6] Under this standard of review, the District Court's findings

[5] A copy of the District Court's ruling is also included at page l of the *Addendum* to this *Brief.*

[6] The *Government* contends that the standard of review on whether Plaintiffs have proven the fourth element of the tort of intentional infliction of emotional distress is *de novo*. (*Government's Brief*, *Trentadue II,* p. 11.) That is incorrect. Under Oklahoma law, the District Court must assume a gatekeeper role with respect to intentional infliction of emotional distress claims by making a threshold legal determination that the Defendant's conduct may reasonably be regarded as sufficiently extreme and outrageous to meet the *Restatement* section 46 standards. *Trentadue*, 397 F.3d at 857 fn. 7. If the District Court concludes that reasonable persons could differ in the assessment of the disputed facts, the District Court submits the claim to the tryer of fact to determine whether the Defendant's conduct should result in liability. *Id.* Similarly, the District Court makes an initial determination whether, based upon the evidence presented, severe emotional distress can be found and the tryer of fact determines whether such distress in fact existed. *Id.* It is those

are presumed correct. *Id.* Furthermore, this Court reviews the evidence in the light most favorable to the District Court's ruling. *Exxon Corp. v. Gann*, 21 F.3d 1002, 1005 (10th Cir. 1994). A finding is only clearly erroneous when, although there is evidence to support it, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been made. *Anderson v. Bessemer City,* 470 U.S. 564, 573 (1985). And deference to the District Court's fiindings is at its greatest when those findings are based on determinations regarding witness credibility. *Anderson,* 470 U.S. at 575. Finally, this Court is free to affirm the District Court 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).

With respect to the *Family's* cross appeal, the District Court's refusal to allow the *Family* to move to dismiss its remaining intentional infliction claim, including not allowing the *Family* to respond to the *Government's* objections to that request, and/or returning to dismiss that cause of action without prejudice is reviewed under the same standard applicable to a *Motion to Dismiss*, which is *de novo*. *Yousef v. Reno*, 254 F.3d 1214, 1219 (10th Cir. 2001). Insofar as the District Court's rulings deprived the *Family* of

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initial determinations by the District Court which this Court reviews *de novo* and did review *de novo* in *Trentadue I.* This Court does not review *de novo* the District Court's findings as to the intentional infliction of emotional distress. In fact, with respect to the sufficiency of the evidence to support the District Court's finding of severe emotional distress as to each member of the *Family*, it is the *Family's* contention that that issue has already been disposed of in *Trentadue I* and is now the *law of the case*.

due process and/or access to the courts, that decision is also reviewed *de novo*. *United States v. Boigerain*, 155 F.3d 1181, 1185 (10th Cir. 1998).

VI.

STATEMENT OF THE CASE RE: 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. He arrived at the FTC on August 18, 1995. He was dead two days later. The *Family* contends that he was murdered. The *Government* claims that Trentadue committed suicide. But, because of the *Government's* spoliation of evidence, intimidation of witnesses, subornation of perjury and numerous other acts of obstruction of justice, no one, including the *Family* will ever know how or why he died. Simply put, because of the *Government's* misconduct the *Family* was unable to prove that Trentadue had been murdered which does not mean that his death was a "suicide."

Nevertheless, based upon the reckless way they had been treated by the *Government* in the aftermath of Kenneth Michael Trentadue's death, the District Court found that the *Government* had intentionally inflicted emotional distress upon the *Family* and awarded them a *Judgment* of $1.1 million. *Trentadue I* resulted in that *Judgment* being vacated and a remand to the District Court for additional findings on whether each member of the *Family* had suffered severe emotional distress as a result of their over all treatment by the *Government. Trentadue I* did not set aside any of the District Court's findings with respect to the *Family's* intentional infliction of emotional distress claim.

See Trentadue, 397 F.3d 857-58. Following remand and after making the additional findings of severe emotional distress as to each member of the *Family,* the District Court reinstated that *Judgment.*

The *Government* now claims that the District Court's finding of the intentional infliction of emotional distress was based soley upon the *Government* having "recklessly failed to inform the *Family* before they received Trentadue's body of the existence of extensive injuries and that an autopsy had been performed" and that this finding is not supported by the evidence. (*Government's Brief*, *Trentadue II*, p. 4.) In other words, the *Government* is trying to narrow the scope of the District Court's ruling to these two acts (*i.e.* failure to inform about autopsy or injury) being the only basis for the finding of intentional infliction of emotional distress, and to challenge the sufficiency of the evidence to support a finding of severe emotional distress on these acts with an inadequate appellate record. The *Government* is even attempting to do this without having included in the record on appeal the District Court's original *Findings of Fact and Conclusions of Law,*[7] which remain intact notwithstanding the remand.

But even without the District Court's *Findings* being before this Court as part of the appellate record in *Trentadue II*, it is obvious from the language in the *Trentadue* decision that the District Court's ruling was not that narrow. The District Court, for

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[7] Instead of including those all important *Findings of Fact and Conclusions of Law* as part of the record in *Trentadue II*, the *Government* includes only the original *Judgment* (*App.* 456), the additional findings on remand (*App.* 754), and the reinstated *Judgment* (*App.* 759).

example, is quoted in the *Trentadue* decision as having found that: "**Evidence at trial established that the plaintiffs suffered severe emotional distress as a result of the reckless way in which they were treated by the United States in the aftermath of Trentadue's death.**" 397 F.3d at 857(Emphasis added). Furthermore, even without the District Court's *Findings* and other testiomnial and documentary evidence being part of the record on this appeal, it is clear that the District Court based its finding of intentional infliction of emotional distress upon more than the *Government's* failure to advise the *Family* about Trentadue's injuries or autopsy.

Consider, for example, the *Government's* filing of a *Rule* 59(e) *Motion* to amend the District Court's *Findings* on May 14, 2001. (*App.* 458). In that *Motion,* the *Government* challenged the sufficiency of the evidence to support a finding of intentional infliction of emotional distress based upon its "failure to inform" the *Family* about " the condition of Trentadue's body and the performance of the autopsy." (*App.* 479). The District Court, though, rejected that contention. The District Court said that not only was the *Government's* characterization of the intentional infliction of emotional distress claim "too restrictive", but the District Court stated that "the government should be held liable for the intentional infliction of emotional distress suffered by plaintiffs as a result of **their treatment** by the United States **in the aftermath of Trentadue's death**." (*App.* 600-01)(Emphasis added). In denying that *Motion,* the District Court went on to state that "**[t]he court's rulings are not dependent only upon statements or failures to speak,**

but focus on the totality of the actions taken by the United States." (*App.* 601) (Emphasis added).

The District Court clearly stated that its finding of intentional infliction of emotional distress was broader than the two acts asserted by the *Government*. Moreover, on appeal the *Government* argued that its "failure to inform the *Family* of Trentadue's injuries and that an autopsy had been performed" would not, as a matter of law, support of claim of intentional inflictional of emotional distress. (*Government Brief*, *Trentadue I*, pp. 27-34.)[8] Like the District Court, this Court rejected that argument.. In affirmng the District Court, this Court stated that:

> We agree with the District Court that the *Government* acted in deliberate disregard of the high probability that its actions would cause the Trentadue's emotional distress. The Trentadue's were a grieving family searching for answers in the wake of Kenneth Trentadue's untimely death. The BOP's **overall treatment of the Trentadue family**, including [but not limited to] its intiial nondisclosure of the unusual circumstances of his death, its obstinance concerning authorization for an autopsy, and its failure to inform the Trentadue's of the body's battered condition, amounted to outrageous conduct that 'needlessly and recklessly' intensified the family's emotional distress. Thus, the District Court properly determined that plaintiffs provded the first, second and third elements of the tort of emotional distress, intentional or reckless conduct, outrageousness and causation.

Trentadue, 397 F.3d at 857. (Emphasis added).

The *Government*, therefore, misrepresents the scope and breadth of the District Court's ruling with respect to the intentional infliction of emotional distress and this

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[8] The relevant portions of the *Government's Brief* in *Trentadue I* are included in the *Addendum* to this *Brief*, commencing on page 6.

Court's concurrence with that ruling. The *Government* did so in *Trentadue I* and it has done so again in *Trentadue II*. And by doing so it has committed two fatal errors consisting of (1) not having fully addressed in either appeal the "totality of the actions" that resulted in the District Court's finding of severe emotional distress with respect to each member of the *Family*; and (2) not having provided this Court with the necessary record evidencing the "totality of the actions" that resulted in the District Court's ruling in favor of the *Family*, especially the finding of extreme and outrageous conduct by the *Government*, which, as this Court noted, is "in many cases . . . important evidence that the distress has existed." *Trentadue*, 397 F.2d at 856.[9]

The *Government* similarly misrepresents the *Mandate* that issued from this Court to the District Court. The *Government* contends that the *Mandate* which issued from this Court required the District Court "to make explicit findings as to the severity of each individual plaintiff's emotional distress." (*Government Brief*, *Trentadue II* p. 4.) While it is true that this Court did say that the District Court had failed to make "explicit findings as to each individual plaintiffs's emotional distress, that was apparently said in reference to why this Court could not make a determination about whether the fourth element of the tort of intentional infliction of emotional distress had been met. *See Trentadue*, 397 F.3d

[9] The *Government* acknowledges in its *Brief* this principle of law but nonetheless insists that "severe distress must be proved" apart from the outrageous character of its actions. (*Government Brief*, *Trentadue II,* p. 20.) It cites to this Court's decision in *Trentadue* to support that claim, specifically 397 F.3d 856. But the *Family* sees no such statement of law by this Court in that opinion.

at 857-58. That language and this Court's decision in *Trentadue I* was not a directive for the District Court to weigh or measure each member of the *Family's* emotional distress by degrees or percentages as the *Government* contends.[10]

VII.

STATEMENT OF THE CASE RE: PROCEEDINGS BELOW

The *Government* omits from its statement of "*procedural history*" some material events in the record of this case related to its conspiratorial efforts to disrupt the *Family's* search for the truth as to the cause and manner of Trentadue's death, the *law of the case doctrine* and the inadequate appellate record in *Trentadue II*.

A. Conspiracy To Disrupt

The *Government* ignores the scope of the *Family's* intentional infliction of emotional stress claim, namely, the *Government's* efforts to indict Jesse C. Trentadue. This claim was contained in the *Amended Complaint* as part of the *Seventh Claim for Relief* for the intentional infliction of emotional distress. It arose out of the *Government's* efforts to deter or prevent the *Family* from discovering the manner and circumstances of Kenneth Michael Trentadue's death by fraudulently and illegally attempting to indict Jesse C. Trentadue for obstruction of justice. (*App.* 254-55, 261-62.)

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[10] The *Mandate* that actually issued from this Court was as follows: "We vacate the FTC judgment in favor of plaintiffs and remand for additional findings on whether the emotional distress suffered by each plaintiff was severe under Oklahoma law." *Trentadue,* 397 F.2d at 858. And as will be subsequently shown, on remand the District Court complied with that *Mandate*.

At trial, when the *Family* attempted to introduce evidence of this conspiratorial plot as part of their intentional infliction of emotional distress case through the testimony of FBI agent Thomas Linn, the Court sustained the *Government's* objections and refused to hear that claim. Specifically, the Court stated that it had:

> [C]ompleted a review of the issues involved in Agent Linn's testimony, and the Court is not unmindful that the fact that these issues are of great concern to Jesse Trentadue, but have felt – I felt since they were first raised and continue to feel that they are issues collateral to the damage claims in this case and as far as it relates to the issue relating to the questioning as to when the Grand Jury terminated, and so forth, the Court feels that that would be more an appropriate issue if sanctions are requested. Because of some professional misrepresentation by the *Government* or their attorneys to the misrepresentation to the Court as it related to the progress of this trial and that is collateral to the damage issues and the central issues involved in this case of Mr. Kenneth Trentadue's death.[11] The Court likewise feels that the subject of the inquiry when we recessed of Agent Linn would deal with issues that are not part of any claim in this lawsuit and would be totally collateral to this litigation and certainly might be the subject of litigation of Mr. Jesse Trentadue against the *Government* in some way, but not really a part of this lawsuit, and so I feel that they are – the questioning of Agent Linn or the questioning of other witnesses relating to these two issues are really not part of the big claims of this lawsuit and are collateral to this lawsuit, and therefore, the Court sees no further need of any questioning on these areas of concern.

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[11] The "misrepresentation" by the *Government's* attorneys to which the District Court referred concerned an earlier *fraud upon the Court.* Within several month's of the commencement of this lawsuit, the *Government* sought a stay of discovery by representing to the District Court that to allow the *Family* access to evidence would interfere with the ongoing grand jury supposedly investigating Trentadue's death. The Court granted that *Motion* on September 23, 1997 (*App.* 22.) It subsequently came to light, however, that the grand jury had actually concluded on or about August 1, 1997. (*App.* 3608.) Yet, the *Government* did not announce the conclusion of the grand jury until October of 1997. (*App.* 3608) Meanwhile, the *Government* used that stay of discovery to destroy evidence. (*App.* 1003-04)

(*App*. 3615-16.) The line of questioning by the *Family's* attorney which the Court felt was somehow unrelated to the claims in this lawsuit was directly related to the *Government's* attempts to undermine the *Family's* efforts to investigate Trentadue's death, including the prosecution of the instant case by trying to indict Jesse C. Trentadue though the knowing use of perjured testimony from James Hauser, a secret *Government* operative. (*App*. 3610-11.)

The *Family* appealed that ruling and this Court affirmed the District Court stating that: "The District Court properly concluded that these allegations were collateral to the issues before the Court involving Kenneth Trentadue's death and declined to make additional findings. Moreover, the Plaintiffs' allegations are primarily centered around the conduct of the *Government's* trial counsel during discovery and are not evidence of misconduct by federal officials investigating Trentadue's death." *Trentadue*, 397 F.3d at 866. This Court concluded, therefore, that "We see no abuse of discretion by the Court in limiting evidence on this issue." *Id.*

Shortly after the *Mandate* from this Court issued in *Trentadue I*, the *Family* received a partial response to its *Freedom of Information Act* requests for documents related to the *Government's* efforts to disrupt their inquiry into the cause and manner of Kenneth Trentadue's death, including the prosecution of their civil suit against the *Government* by indicting Jesse C. Trentadue. (*App*. 746.) Those documents revealed, among other things, that the "sole purpose" of the efforts to indict Jesse C. Trentadue was to interfere with *Family's* investigation of Trentadue's death, includng the prosecution of

its civil suit. (*App.* 750.) Upon receipt of this evidence, the *Family* promptly requested permission of the District Court to move for dismissal without prejudice of that claim. (*App.* 609.) The *Government* filed a lengthy response (objection) to that request. (*App.* 612.) The *Family* requested prior approval from the District Court to respond to the *Government's* objection to the request to dismiss. (*App.* 730.) The District Court denied both requests from the *Family*. (*App*. 756.) The *Family* has appealed those rulings.

B. *Law Of The Case*

Another material omission from the procedural history of this case is the fact that the same arguments which the *Government* is making in its current appeal, *Trentadue II*, were made and rejected by this Court in *Trentadue I*. On May 1, 2004, the Court entered its *Judgment* in favor of the *Family* on their intentional infliction of emotional distress claim. (*App. 456.*) On May 14, 2001, the *Government* moved to amend pursuant to *Federal Rule of Civil Procedure* 59(e). (*App. p. 458.*) In that *Motion,* the *Government* argued that the evidence would not support a claim of intentional infliction of emotional distress under Oklahoma law, much less severe emotional distress. (*App. p. 480-88*.) The *Family* received permission to and did file an *Opposition* to that *Motion*. (*App. p. 565-68*.) On November 21, 2001, the Court entered an *Order* denying the *Government's Motion* stating therein:

> Here, the Court found that upon the facts presented, the Government should be held liable for the intentional infliction of emotional distress suffered by Plaintiffs as a result of their treatment by the United States **in the aftermath of Trentadue's death. The Court's rulings are not dependent only upon statements or failures to speak, but focus on the**

> **totality of the actions taken by the United States . . .** . The Court also finds that the evidence presented at trial was sufficient to support a finding of liability on the part of the United States under applicable Oklahoma law pertaining to a claim for intentional infliction of emotional distress . . . Upon thorough consideration, the Court's Findings of Fact and Conclusions of Law on this claim will remain undisturbed and the United States' Motion to Alter or Amend the Judgment is consequently denied.

(*App.* 601-02)(Emphasis added).

Thereafter, the *Government* in *Trentadue I* made the same argument about the alleged insufficiency of the evidence to support a claim for severe emotional distress under Oklahoma law:

> There is, in any case, no evidence establishing a link between the *Government's* failure to inform and the emotional distress suffered by the *Family*. As a preliminary matter, the *Plaintiffs* failed to prove that *Family* members other than Trentadue's wife (Carmen Trentadue), mother (Wilma Trentadue) and sister (Donna Sweeney) were made aware of the body's condition upon viewing. There was testimony that only these three were present to receive Trentadue's body at the funeral home and that the remaining family members viewed the body after being told of its condition. . . Under Oklahoma law, when a person is not present when the actionable injury occurs, but learns of the injury after the fact, recovery from emotional distress is not permitted. . . Once the family members had viewed the body and told other family members of the body's condition, there could be no basis for claiming they received a shock upon viewing the body due to the *Government's* failure to tell them the same information. As a consequence, the Oklahoma law precludes recovery by Trentadue's father for emotional distress, and the Court's awarded damages to them must be reversed whether or not this Court was to uphold the awards to Trentadue's wife, mother and sister.

(*Government's Brief, Trentadue I,* pp. 32-33.) This Court, however, rejected that argument and in doing so specifically found that the *Government's* "overall treatment of the Trentadue *Family*, including its initial nondisclosure of the unusual circumstances of

death, its obstinate concerning authorization for an autopsy and its failure to inform the Trentadue's of the body's battered condition amounted to outrageous conduct that 'needlessly and recklessly' intensified the *Family's* emotional distress." 397 F.3d at 857.

Simply put, this Court affirmed the District Court's finding that the *Family* had proven the first, second and third elements of the tort of emotional distress which are "intentional or reckless conduct, outrageous, and causation." *Id.* In other words, that the *Family* had suffered emotional distress as a result of the *Government's* outrageous conduct, and that the evidence did support those findings. However, because the District Court had failed to make any finding as to each member of the *Family* having suffered severe stress, this Court vacated the judgment and remanded "for additional findings on whether the emotional distress suffered by each Plaintiff was severe under Oklahoma law." (*Id.* at 858.) Contained in that holding is the ruling that the evidence before the District Court, **if believed,** would support a claim for severe emotional distress under Oklahoma law as to each member of the *Family*. If the evidence was not sufficient to support a finding of severe emotional distress, the claim would never have been submitted to the tryer of fact. Instead, this Court would have remanded with instructions to enter judgment in favor of the *Government*, but that did not happen. It did not happen because the purpose of the remand was for the District Court to find, based upon the evidence that had already survived the challenge in *Trentadue I*, whether each member of the *Family* had suffered severe emotional distress.

On remand, the District Court made the following additional findings:

> Based upon the evidence presented at trial, including the testimony of the Plaintiffs, the Court finds that each Plaintiff satisfied the fourth element of the tort of intentional infliction of emotional distress which requires proof that the Plaintiff's emotional distress was so severe that no reasonable person could be expected to endure it . . . In making this finding, the Court has also considered the intensity and the duration of the distress suffered by the Plaintiffs. In addition, in finding that the Plaintiffs had each established the fourth element, the Court determined, based on the evidence presented at trial, that the extreme and outrageous character of the Defendants' conduct is important evidence that the distress existed. . . Because each Plaintiff suffered severe emotional distress and the fourth element of the tort has been met, the Court reinstates its judgment in favor of Plaintiffs and against Defendant United States of America on their claim for intentional infliction of emotional distress . . .

(*Add.* 754.) Based upon that finding, the District Court entered *Judgment* in favor of the *Family*. (*App. 759*.) And the *Government* has appealed the District Court's ruling. (*App. 792*.)

In *Trentadue II*, the *Government* makes the same arguments it made for reversal in *Trentadue I.* Although the District Court found and this Court affirmed in *Trentadue I* that the *Government's* actions were the proximate cause of emotional distress to the *Family* in that it "needlessly and recklessly intensified the *Family's* emotional distress" (397 F.2d at 357), in *Trentadue II,* the *Government* argues that the *Judgment* should be vacated and set aside because the District Court failed to "make specific findings that the emotional distress suffered by each plaintiff was linked [proximately caused] to conduct by the BOP. . . ." (*Government's* Brief *Trentadue II* p. 15). But as the *Family* will shortly demonstrate, the *Government* cannot resurrect that argument because of the *law of the*

case doctrine. That is – proximate cause was argued and ruled upon in *Trentadue I*; that ruling was adverse to the *Government;* and the *Government* cannot re-argue that position in *Trentadue II*.

Neither can the *Government* resurrect the argument that "[t]hose Plaintiffs who were not present at the funeral home when the condition of Trentadue's body was first discovered are simply not entitled to recover for emotional distress under Oklahoma law. [And] the evidence does not support a finding of severe emotional distress with regard to any of the Plaintiffs, whether or not they were present at the funeral home when the body was received. (*Trentadue II*, *Government's Opening Brief*, p. 16.)[12] Again, the *Government* cannot revisit this argument because it raised that identical argument in *Trentadue I* (*Government's* Brief, *Trentadue I*, pp. 32-33), and it was reject by this Court when it affirmed the District Court. *See* 397 F.3d at 857-58.[13]

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[12] The *Government* relies upon *Kraszewski v. Baptist Medical Center*, 916 P.2d 241 (Okla. 1996) to support this contention. The *Government* even cites *Kraszewski* for the proposition that in order to recover for the intentional infliction of emotional distress, members of the *Family* had to be present and/or physically harmed. The *Government's* reliance upon *Kraszewski* is grossly misplaced. In *Kraszewski*, the Supreme Court of Oklahoma was discussing the intentional infliction of emotional distress incurred as a result of viewing an injury to another person. It was not a case in which the Plaintiff was the intended or likely victim of the outrageous conduct. With respect to the latter type of cases, as in the instant case, decisions such as *Nicholas v. Busse*, 503 N.W. 2d 1973 (Neb. 1993) are more appropriate. Furthermore, because the conduct at issue comes from the *Government* with the power to affect the life and well being of citizens, the tort of outrage is more easily found. *See Restatement (Second) Torts* § 46(e) 1965; *Breeden v. League Services Corp.,* 576 P.2d 1374, 1377 (Okla. 1978); *Crain v. Krehbiel*, 443 F.Supp. 202, 213 (N.D. Cal. 1978); *Doe v. Calumet City,* 641 N.E. 2d 498, 506-07 (Ill. 1994).

[13] The *Government* not only raises in *Trentadue II* the same challenges to the District Court's findings as it did in *Trentadue I*, it even relies upon the same caselaw that does not

C. Failure to Marshal and/or Present Evidence

The *Government* has challenged the sufficiency of the evidence to support the District Court's finding of severe emotional distress. On this appeal, the *Government* has the burden to provide a complete record of all the evidence which the District Court considered in arriving at its finding of severe emotional distress. *Tenth Cir. R.* 10.3 and 30. The *Government* has not done so. The testimony of numerous witnesses was submitted to the District Court by way of designated depositions, including the deposition of the FTC's acting warden, Marie Carter. (*See e.g. App.* 4436-37.) 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 that deposition testimony. (*See e.g. App.* 7747.) There were

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apply. By way of example, in both *Trentadue I* and *Trentadue II*, the *Government* cites *Slaton v. Vansickle,* 872 P.2d 929, 931 (Okla. 1994), for the proposition that Oklahoma law requires a showing of "personal injury" directly resulting from the incident causing stress. *Compare* Brief *Trentadue I* page 32 ("Under Oklahoma law, when a person is not present when the actionable injury occurs, but learns of the injury after the fact, recovery for emotional distress is not permitted.") **with** *Trentadue II* pages 17-18 ("A claim for intentional infliction of emotional distress must be based upon a personal injury directly resulting from the incident causing the distress . . . "). *Slaton,* however, has no applicability to this case. *Slaton* was a negligent infliction of emotional distress case. The *Government* also makes the same misrepresentations of fact in both *Trentadue I* and *Trentadue II*. In both appeals, for example, the *Government* claims that Carmen Agular Trentadue, Trentadue's widow, testified that she suffered no depression or other psychological problems as a result of the manner in which she had been treated by the *Government*. ***Compare*** *Trentadue I* p. 31 (Carmen Trentaude testified "that she doesn't suffer from depression") with *Trentadue II* page. 23 ("Further, she [Carmen Argular Trentadue] testified that 'I mean I don't suffer from depression.'"). More importantly, in both appeals the *Government* misrepresents Carmen Agular Trentadue's testimony about depression. She repeatedly testified that she was depressed as a result of the *Government's* conduct. (*App.* 3180-82.)

likewise dozens of letters which the *Family* had written to the *Government* trying to find out about Trentadue's death. These letters reflected the *Government's* treatment of the *Family* in the aftermath of Trentadue's death, including the *Family's* emotional distress. These letters were received into evidence along with correspondence from the *Government*. (*See e.g. App.* 4185-4223.) But they are not part of the record on appeal.

The District Court used "horror" to describe the effect upon the *Family* in discovering the injuries to Trentadue's body.[14] *Trentadue*, 397 F.3d at 857. The District Court received into evidence the photographs which the *Family* took of Trentadue's injuries. (*App.* 4196-98.) Those photographs would be highly relevant to the District Court's finding of severe emotional distress but they, too, are not part of the record on appeal.

VIII.

STATEMENT OF THE CASE RE: STATEMENT OF FACTS

From the onset, it is important to note that this has been an embarrassing case for the *Government*. It has proven embarrassing because of the "strained explanation" the *Government* has given for Kenneth Michael Trentadue's death, which even this Court found to be "troubling." *Trentadue*, 397 F.3d at 848 and 861. The *Government*, for example, alleges 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

[14] Interestingly, in *Breeden*, the Supreme Court of Oklahoma also used "horror" as an example of the emotional distress in the tort of outrage, 575 P.2d at 1378.

"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* contends 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.

It is undisputed, however, that when discovered Trentadue's body was covered in blood with head-to-toe, front-to-back trauma. 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. The *Government* contends that Trentadue's extensive trauma was all self inflicted, in a matter of approximately 20 minutes and in absolute silence so as not to alarm nearby FTC staff.

The *Government* claims 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. 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. 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.

The *Government* claims 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. The *Government* claims, too, 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. 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. This third blow to his head further dazed Trentadue, who then crawled on all fours, with his "clothing" smearing the blood on the floor.

The *Government* claims 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. 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. It is also undisputed that no sheet fibers or threads were found on Trentadue's body or in the cell. It is likewise undisputed that Trentadue's blood stained clothing was missing. The *Government* claims 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.

Equally embarrassing to the *Government* has been the perjury of its employees, destruction of evidence, the threats to and intimidation of witnesses and other acts of obstruction of justice, that were also troubling to this Court in *Trentadue I*. It is not surprising, therefore, that the *Government* would attempt to indict a member of the *Family* in order to prevent them from pursuing their quest for the truth behind the death of their husband, son and brother. The *Government* actually made two attempts to indict Jesse C. Trentadue both involving the FBI.

A. <u>Hauser Conspiracy</u>.

The *Government* first attempted to indict Trentadue's brother, Jesse C. Trentadue, through the perjured testimony of James Ray Hauser. Hauser promised to help the *Government* place a "**yoke of silence**" around Jesse C. Trentadue's neck. (*Add.* 15) Hauser was purportedly an inmate who would testify about efforts by Jesse C. Trentadue to bribe witnesses. As part of this conspiracy, the *Government* devised a plan whereby Jesse C. Trentadue would be investigated by the FBI "under the guise of investigating his brother's death." According to *Government* records, the decision was made to not list Jesse C. Trentadue as a "subject" of an investigation so that he would not have to be

advised of that status prior to being called to testify at the Grant Jury "investigating his bother's death." (*Add.* 16)

B. Baker Conspiracy.

The second attempt to indict Jesse C. Trentadue was run by counsel for the *Government*, Peter Schlossman. This attempt involved an inmate named Alden Gillis Baker, who was a violent psychopath and suspected serial killer. Baker was so dangerous that extra guards and an Operations Lieutenant were required to move him. Existing BOP records, including *logs,* show that at the time of Tentadue's death he and Baker shared cell A-709. Baker himself was dead by the time of trial. The *Government* claims that Baker committed suicide by hanging himself with a bed sheet rope in his SHU cell. Baker's deposition was taken and during that deposition he testified that guards had attacked and murdered Trentadue. Baker said that he could hear **"moaning"** coming from Trentadue's cell. (*App.* 1780, 1805-10.) A short time later, Baker said that "**I heard like sheets being ripped."** (*App.* 1805-06.)

Thereafter, the *Government's* counsel Schlossman recruited other inmates to make Baker recant his testimony.[15] Baker telephoned Schlossman to ask for protection. According to Baker, he was told by Schlossman that he [Baker] would receive no protection unless Baker retracted his testimony about having witnessed Trentadue's murder. When Baker refused, Schlossman said "I have nothing further to say to you" and

[15] The *Government* made a practice of threatening witnesses, both inmate and non-inmate witnesses. (*See e.g. App.* 2074-78; 3488-90.)

hung up the telephone. Baker then brought the matter to the *Family's* attention.[16] (*App.* 414-16.)

When the *Family* heard from Baker about Schlossman's attempts to obstruct justice, they took the matter to the District Court. On September 24, 1999 the following exchange took place between the *Family's* counsel R. Scott Adams and the Court on the threats being directed towards Baker by Schlossman:

> Mr. Adams:
>
> Your Honor, the only other thing and it was included in the Joint Report and I am a little bit uncomfortable about bringing it up; however, I would like to visit about it and it's in regard to Alden Gillis Baker . . . It's where we received a very disturbing phone call, or Mr. Sampson did, from Alden Gillis Baker about a week or so ago where he stated - - of course, he is the only inmate who is willing to testify that he saw the guards enter the cell and effectively murder Mr. Trentadue.
>
> Mr. Baker stated that a lawyer from Justice by the name of Mr. Schlossman, along with an unknown FBI agent, had arrived in Florence, Colorado and attempted to procure two other inmates to wire up and go in and get Mr. Baker to retract his previous sworn statement by deposition. Mr. Baker was extremely nervous and upset . . .
>
> In concerns to Plaintiffs very much in regards to the witness intimidation that has happened in the past with what has happened with Mr. Arcabaso Martino and other individuals such as Garrett who have all been in one or another threatened, which the Government has admitted in their briefs had been threatened. And it is the concern to the plaintiffs, and would ask the Court to allow us during this period of time that we have now to visit with Mr. Baker and find out exactly what happened and also for Mr. Schlossman to disclose the names of the individuals that were – that he attempted to

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[16] The *Family* moved to protect Alden Gillis Baker. (*App.* 397.) Ten months after that *Motion* was filed and several weeks after Baker's death, it was denied as moot. (*See App.* 434-35.)

> have wired up and what was promised or induced to them to do that, along with any other witnesses that they have done this with. If there is anyone else out there that they have done this with, we certainly would like to know, and that's the relief that we are asking for.
>
> And we gave Mr. Schlossman**,** Your Honor, this is not done with any vengeance toward Mr. Schlossman. Mr.Sampson called him twice. First asking him whether or not this occurred, and he said "no comment." The second time Mr. Sampson called, he said "All he had to do was deny it happened and we will not bring it up," and he again was not allowed to talk about it. I felt uncomfortable about bringing it up, but with the past intimidation and threats to the witness I thought it was something we ought to address here in Court today.

(*App.* p. 1054-56.)

The Court then addressed Schlossman and asked:"Mr. Schlossman, are you representing as an officer of the Court that neither you nor any FBI agent has made any threats to Mr. Baker?" (*App.* p. 1058.) Schlossman answered "Yes, sir." The Court then asked: "Or have talked to him about changing his testimony?" (*App.* p. 1058.) Schlossman's response. "**Absolutely.**" (*Id.*) (Emphasis added.)

But Schlossman's efforts in this matter did not stop with Baker. He, along with the FBI, devised a scheme whereby Baker would be coerced into saying that Jesse C. Trentadue had induced him to lie. This scheme is laid out in a serious of FBI teletypes, which show that the purpose of trying to indict Jesse C. Trentadue was to disrupt the *Family's* civil suit. These documents likewise show that what eventually derailed the scheme was Schlossman's recorded statements to his superiors that the purpose was to effect the outcome of the civil suit and not because of any criminal acts or misconduct on the part of the target, Jesse C. Trentadue.

The first teletype, dated May 14, 1999, involves a request by Schlossman to record a conversation with an inmate "by some other means than a transmitter." (*App.* 748.)[17] The second teletype, dated May 24, 1999 concerns the previous request. According to this document, the United States Attorney's Office had recommended that approval be denied for the requested "monitoring of conversation." The teletype goes on to state that: "Aside from the unusual nature of the Civil Chief involving himself in this matter, the facts incorrectly states that **the requested monitoring was solely in furtherance of a civil case**." The teletype discloses that the request came from Schlossman. (*App.* 749.) (Emphasis added.)

The third teletype is dated May 26, 1999, and it, too, references Schlossman's request to secretly record an inmate. The document discloses that someone from the United States Attorney's Office had apparently contacted Schlossman concerning his statements that the "sole purpose of the requested recordings were in furtherance of his civil case." The author of this document indicates that he or she contacted Schlossman to get Schlossman to say that this was incorrect. That is – that there was some legitimate law enforcement purpose to this acitivity rather than to further the *Government's* interest in a civil suit involving the *Family*. Schlossman, however, apparently refused to modify his request. (*App.* 750.)

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[17] Copies of all the teletypes are also included in the *Addendum* to this *Brief* commencing at page 18.

The fourth teletype is dated September 28, 1999, just four days after Schlossman had been asked by the District Court about any contacts, direct or indirect, which Schlossman had had with Baker related to Schlossman having attempted to pressure Baker into changing his testimony with the help of other inmates. This document references a conversation the author had with Schlossman "concerning the ongoing civil trial in *Trentadue v. U.S."* . . . "and that Schlossman indicated that the trial had been continued from October 12, 1999 until November 8, 1999." (*App.* 751.) The teletype goes on to record Schlossman's reporting of the misstatements he had made to the District Court about his attempt to coerce Baker into changing testimony:

> At the conclusion of a hearing last week, Plaintiff's counsel asked him [Schlossman] if he had wired an inmate during a meeting with Baker. During that same hearing, Plaintiff's counsel advised the judge that they believed Schlossman was intimidating potential witnesses at Florence FCI. Schlossman denied both charges without revealing the existence of this investigation. Schlossman believes that the plaintiffs still intend to call Baker as a witness at the civil trial. Due to plaintiffs' increased suspicion and the importance of the civil case, no further attempts to approach Baker were made until after the conclusion of the afore-mentioned trial.

(*App.* 751.)

The next teletype is dated December 12, 1999, and states, in pertinent part, as follows:

> On September 8, 1999, CDC [redacted] received a redacted copy of the OIG's report into the circumstances surrounding the death of Kenneth Michael Trentadue. That report is highly critical of the Bureau of Prisons and this office's handling of that investigation. Taking those two events into consideration, it is requested that this case be placed in a pending inactive status until after the afore-mentioned civil trial has occurred.

(*App.* 752.) The last teletype is dated May 24, 2001 and states that due to the May 2001 filing by Judge Leonard wherein he found against the Depart. of Justice and the Bureau of Prisons in *Trentadue v. United States,* "it is requested that this case be closed." (*App.* 753.)

IX.

SUMARY ARGUMENT RE: GOVERNMENT'S APPEAL

The District Court did not disobey the *Mandate* from this Court on remand. As instructed, the District Court weighed the testimony and other evidence and found that under Oklahoma law, each member of the *Family* had suffered severe emotional distress. Moreover, contrary to the arguments which the *Government* made in *Trentadue I* and *Trentadue II*, 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 or that an autopsy had been performed. The finding of intentional infliction of emotional distress was based on the reckless way in which the family was treated by the *Government* in the aftermath of Trentadue's death.

In *Trentadue I*, the *Government* argued that the evidence would not support a finding of severe emotional distress under Oklahoma law. This Court obviously disagreed. It disagreed because it found that the *Government's* overall treatment of Trentadue's family including [but not limited] to its initial nondisclosure of the unusual circumstances of death, its obstinance concerning authorization for an autopsy, and its failure to inform the Trentadues of the body's battered condition amounted to outrageous

conduct that 'needlessly and recklessly' intensified the *Family's* emotional distress. Thus, the District Court properly determined that the "Plaintiffs proved the first, second and third elements of the tort of emotional distress, and intentional and reckless conduct, outrageousness and causation." *Trentadue,* 397 F.3d 857. This Court then remanded "for additional findings on whether the emotional distress suffered by each Plaintiff was severe under Oklahoma law." *Id.* at 858.

Included in this Court's ruling was the determination that the evidence presented would, if believed, support a finding of severe emotional distress under Oklahoma law as to each member of the *Family*. Otherwise, this Court would have entered judgment in favor of the *Government* as a matter of law. More importantly, this Court's determination in *Trentadue I* that the evidence, if believed, would support a finding of severe emotional distress as to each member of the *Family* is now the *law of the case* and cannot be relitigated in this second appeal. But even if the *Government* could raise this issue a second or third time, the evidence supports a finding of severe emotional distress as to each member of the Family. The *Family* testified about their emotional distress. That was a matter of credibility and the District Court found severe emotional distress based upon that testimony and other evidence, including the testimony of the *Government's* own psychological expert, Dr. Ron Maris, who testified that members of the *Family* were extremely depressed.

In addition, the *Government* had the burden to provide a complete record of all evidence on appeal related to the *Family's* emotional distress claim. Yet, the *Government*

failed to do so. The *Government* has omitted from the appeallate record both documentary evidence and testimony that went to the *Family's* claim of severe emotional distress. And that omission also forecloses appellate review.

X.

SUMMARY OF ARGUMENTS RE: FAMILY'S CROSS APPEAL

The *Family's* claim for intentional infliction of emotional distress based upon the *Government's* efforts to disrupt their inquiry into the circumstances of Kenneth Michael Trentadue's death by seeking to indict Jesse C. Trentadue through the perjured testimony of FBI operatives was preserved in the *Amended Complaint*. While this Court did affirm the District Court's refusal to hear evidence on this claim (*Trentadue,* 397 F.3d at 866), that ruling did not allow the District Court to leave that claim in limbo. That claim is a property right under the due process clause of the *Fifth Amendment.* The District Court's refusal to allow the *Family* to dismiss that claim without prejudice and refusal to allow the *Family* to respond to the *Government's* objection to that request were violations of the *Family's* right of *due process*. More importantly, the District Court's refusal to dismiss that claim without prejudice or to allow the *Family* to litigate that claim is a deprivation of their substantive due process rights as well as a violation of their *right of access* to the Courts.

XI.

THE DISTRICT COURT DID CARRY OUT THE MANDATE OF THIS COURT ON REMAND

The *Government* argues that the District Court was required to but did not make "explicit findings as to the severity of each individual Plaintiff's emotional distress. (*Trentadue II, Government's Brief,* p. 13.) This, the *Government* contends, violated the *Mandate* from this Court on remand. But that is not true. The District Court did not, as the *Government* contends, simply substitute the words "*Plaintiffs*" for the words "*Family Members*" in its original findings. (*Government's Brief*, *Trentadue II,* p. 14.). That the District Court did not do this is easily seen by the following comparison of the District Court's initial findings in *Trentadue I* with the District Court's additional findings on *remand*.

Original Findings

> Evidence at trial established that the Plaintiffs suffered severe emotional distress as a result of the reckless way in which they were treated by the United States in the aftermath of Trentadue's death. The Court finds that Plaintiffs' understandable emotional reaction to Trentadue's death was needlessly and recklessly intensified by the United States' failure to inform the *Family* in advance as to the existence of the extensive injuries on Trentadue's body and that an autopsy had been performed. Throughout the trial, the Court heard no explanation for Defendants' silence in this regard. In the face of the evidence regarding the emotional distress of the Plaintiffs, the Court finds that Plaintiffs have met their burden on their claim for intentional infliction of emotional distress and are entitled to judgment on this claim.

Trentadue, 397 F.3d at 857.

Findings on Remand

> Based upon the evidence presented at trial, including the testimony of the Plaintiffs, the Court finds that each Plaintiff satisfied the fourth element of the tort of intentional infliction of emotional distress which requires proof that the Plaintiffs' emotional distress was so severe that no reasonable person could be expected to endure it . . . In making this finding, the Court has also considered the intensity and the duration of the duress suffered by the Plaintiffs. In addition, in finding that the Plaintiffs had each established the fourth element, the Court determined, based on the evidence presented at trial, that the extreme and outrageous character of the Defendants' conduct is important evidence that the distress existed . . . Because each Plaintiff suffered severe emotional distress and a fourth element of the tort has been met, the Court reinstates its judgment in favor of Plaintiffs and against Defendant United States of America on their claim for intentional infliction of emotional distress.

(*Add.* 1-2.)

The *Government* also argues that the District Court failed to make specific findings that the emotional distress suffered by each Plaintiff was linked to its conduct. (*Id.* at p. 15.) The causation or proximate cause issue was determined in *Trentadue I. See, Trentadue*, 397 F.3d at 857. And, as will be shortly shown, falls within the *law of the case doctrine*.

XII.

THE *LAW OF THE CASE DOCTRINE* PRECLUDES THE *GOVERNMENT* FROM AGAIN CHALLENGING THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT FINDINGS OF SEVERE EMOTIONAL DISTRESS UNDER OKLAHOMA LAW

In deciding the *Government's* appeal, the procedural history of this case is crucial. It is crucial because of the *law of the case doctrine* which provides that "a Court should not reopen issues decided at earlier stages of the same litigation." *Augustina v. Felton*,

521 U.S. 203, 236 (1997). The *law of the case doctrine* prevents questions already considered and decided once in a case from being reargued at every subsequent stage of the litigation. *Hale v. Gibson*, 227 F.3d 1298, 1328-29 (10th Cir. 2000). In other words, under the *law of the case doctrine* an issue of fact decided upon appeal may not be reexamined either by the District Court or by the Appellate Court on subsequent appeals. *United States v. Beccera*, 155 F.3d 740, 752 (5th Cir. 1998).

The *law of the case doctrine* applies to issues previously decided, either explicitly or by necessary implication in the prior ruling. *Guidry v. Sheet Metal Workers, Int'l*, 10 F.3d 700, 705 (10th Cir. 1993). Whether the evidence presented to the District Court was sufficient, as a matter of law, to support a claim for severe emotional distress was at the heart of the *Government's* appeal in *Trentadue I.* As previously shown, in *Trentadue I*, the *Government* argued that as to each member of the *Family* the evidence presented to the District Court would not, as a matter of law, support a claim for the intentional infliction of emotional distress. The District Court rejected the *Government's* claim that the evidence would not support a finding of severe emotional distress and so, too, did this Court.

In doing so, this Court noted that the District Court had the responsibility to make an initial determination about whether severe emotional distress could be found based upon the evidence and that the District Court had correctly made that determination. *Trentadue*, 397 F.3d at 857 fn. 7. Included in that determination, which this Court

affirmed, was the determination that, if believed, that evidence would support a finding of severe emotional distress under Oklahoma law.[18]

In other words, the issue of the severity of the Plaintiff's emotional distress under Oklahoma law does not even go to the tryer of fact until the District Court determines that there is evidence to support that finding of severe emotional distress, if believed, and that finding was made and affirmed in *Trentadue I*. *Accord, Breeden*, 575 P.2d at 1377-78 ("Likewise, it is for the Court to determine, in the first instance, whether based upon the evidence presented, severe emotional distress can be found. It is for the jury to determine whether, on the evidence, severe emotional distress in fact existed"). That finding is now the *law of the case* and cannot be relitigated in *Trentadue II.* So, too, is the District Court's finding that the *Family* proved the first three elements of the tort of intentional infliction of emotional distress, including proximate cause.

The *Government* next argues that "those Plaintiffs that were not present at the funeral home when the condition of Trentadue's body was first discovered simply are not entitled to recover for emotional distress under Oklahoma law. . . (*Trentadue II, Opening Brief*, p. 16.) The *Government* raised that same argument in *Trentadue I*. In *Trentadue I,*

[18] Even if that was not the express holding in this Court's decision in *Trentadue I,* the question of whether the evidence before the District Court was sufficient to support a finding of severe emotional distress as to each member of the *Family* would certainly have been implicit in that decision. *See Gudry*, 10 F.3d at 707 (holding that an issue is implicitly resolved in a prior appeal if: (1) resolution of the issue was a necessary step in resolving the earlier appeal; (2) resolution of the issue would abrogate the prior decision and so must have been considered in the prior appeal; and (3) the issue is so closely related to the earlier appeaal; its resolution involves no additional consideration and so might have been resolved but unstated).

both the District Court and this Court rejected that argument. That ruling is now the *law of the case* and it cannot be reargued in *Trentadue II*. Furthermore, the *Family's* claim of intentional infliction of emotional distress were broader than their experiences at the funeral home; it included accusing the *Family* of having inflicted the trauma upon Trentadue's body, stating that Trentadue had killed himself because he had AIDS, the press release stating that Trentadue's death was a suicde when the investigation of that death had not even commenced and other actions taken by the *Government* in the aftermath of Trentadue's death. *See Trentadue*, 397 F.3d 851.

XIII.

THE *GOVERNMENT* HAS FAILED TO PROVIDE A COMPLETE RECORD ON APPEAL OF THE EVIDENCE CONSIDERED BY THE DISTRICT COURT IN RULING ON THE *FAMILY'S* EMOTIONAL DISTRESS CLAIM, BUT THE RECORD ON APPEAL, AS IT EXISTS, DOES SUPPORT THE DISTRICT COURT'S FINDING OF SEVERE EMOTIONAL DISTRESS AS TO EACH MEMBER OF THE *FAMILY*

It was the *Government's* responsibility to designate a record on appeal that is sufficient for considering and deciding the appellate issues. (*10th Cir. R.* 10.3(A) and 30(A)(1)). When a party asserting an issue fails to provide a record sufficient for consdering that issue, the Court may decline to consider it. (*Id*. at 10.3(B) and 30.1(A)(3)). In the instant case, not only did the *Government* fail to include those matters required by *10th Cir. R.* 10.3(C), it failed to include all the evidence necessary to consider the District Court's finding of severe emotional distress. Under these circumstances, the District Court should be affirmed. *See Travelers Indemnity Co.*, 340 F.3d at 1121.

Equally egregious, however, is the *Government's* misrepresentation of the record on appeal.

The *Government*, for instance, in summary fashion purports to state the evidence at trial related to each member of the *Family's* emotional distress and then argues that this evidence is inadequate or insufficient as a matter of law to support the District Court's finding of severe emotional distress as to each member of the *Family*. (*Government Brief, Trentadue II*, pp. 22-26.) In doing so, the *Government* not only omits crucial evidence related to emotional distress of the members of the Family, it mistates that evidence with an example of one such mistatement of evidence being the *Government's* claim that "Jesse C. Trentadue did not testify that he personally experienced severe emotional distress . . ." *Id.* at p. 24. Although the *Government* makes that claim, the following is an example of evidence of Jesse C. Trentadue's depression that was introduced at trial:

> **Q:** Tell me about the mental health problems that you have been experiencing. I understand you have identified some of them, but if you could to the best of your ability list them separately.
>
> **A:** It is the anger. It's the rage being on the point of near exploding all the time. I have been depressed all the time whe you have to make an effort to be up for your family and your wife. Its not being able to concentrate. Its having a picture of my brother's body burned in my brain . . . I hit my wife. I've never touched a woman in my life physically.

(App. 3917.)

The District Court heard extensive testimony from the *Family* about how they had been treated by the *Government* in the aftermath of Trentadue's death and how that had affected them emotionally. (*See App.* 3422-51, 3452-72, 3491-3561, 3561-3665, 4186-4230, 4230-37, 4237-46, 4246-51, 4251-66). The District Court thus not only heard the testimony of the *Family*, it had an opportunity to observe them throughout the trial which would have been further evidence to support of their respective claims and the District Court's finding of severe emotional distress. But perhaps among the more telling evidence of the severe emotional distress suffered by each member of the *Family* came from the *Government's* own psychological expert, Dr. Ron Maris.

Maris testified extensively about the *Family's* mental state, including their depression. (*See e.g. Add.* 3842-4023.) Maris even testified that members of the *Family* were on a par with the Hemingways when it came to depression:

> **Q:** Is it a fair statement to say [Dr. Maris] that you still are of the opinion that the Trentadue family is similar to Ernest Hemingway in regards to depressiveness and suicides or just depressiveness?
>
> **A:** **In terms of just depressiveness, yes.**

(*Add.* 3954) (Emphasis added.)

Of course, Maris said the *Family's* depression, in his opinion, was due to their inability to accept Trentadue's suicide rather than to the *Government's* treatment of them in the aftermath of Trentadue's death. (*Add.* 3992-93.) But the District Court did not have to believe that conclusion by Maris and the District Court obviously did not believe

Maris on that issue. Given this evidence, as well as the evidence which the *Government* failed to include as part of the record on appeal, and the presumption of correctness, it cannot be said that the District Court's finding that each member of the *Family* suffered severe emotional distress is without factual support in the record. Nor would that evidence leave this Court with a definite and firm convinction that the District Court was mistaken in arriving at this finding.

XIV.

THE DISTRICT COURT ERRED BY NOT ALLOWING THE *FAMILY* TO MOVE FOR DISMISSAL OF THE CLAIM ARISING OUT OF THE *GOVERNMENT'S* EFFORTS TO INDICT JESSE C. TRENTADUE WITHOUT PREJUDICE AND BY NOT GRANTING SUCH MOTION

It was abuse of discretion for the District Court not to allow the *Family* to move to dismiss their remaining intentional infliction of emotional distress claim arising out of the *Government's* efforts to disrupt their civil suit by attempting to indict Jesse C. Trentadue, including not allowing the *Family* to respond to the *Government's* objections to that request and by not granting such a motion. In addition, the District Court's actions in this matter were a violation of the *Family's* procedural and substantive due process rights under the *Fifth Amendment* as well as a violation of their right to petition under the *First Amendment*. *See Saavedera v. City of Albuquerque*, 73 F.3d 1525 (10th Cir. 1996) (due process requires an opportunity to respond); *Jefferson Bank & Trust v. United States*, 894 F.2d 1241, 1244 (10th Cir. 1990) (chose in action is a property right); *Hunter v. School Dist. of Gale-Ettrick*, 293 N.W. 2d 515 (Wis. 1980) (chose in action is a property right

protected under the procedural and substantive ***due process*** clause of the ***Constitution***). The *Family's* constitutional rights were violated in this instance because it has been deprived of a valid claim or chose in action against the *Government* without due process. *See, e.g. Heywood v. United States*, 585 F.Supp. 590 (D. Mass. 1984) (agent's false testimony before grand jury would support a claim for intentional infliction of emotional distress).

XV.

CONCLUSION

This Court should affirm the District Court's *Judgment* against the *Government* for intentional infliction of emotional distress and award of $1.1 million to the *Family.* With respect to the *Family's cross appeal,* this Court should reverse the District Court and remand with instructions to allow the *Family* to move to dismiss, without prejudice, their intentional infliction of emotional distress claim arising out of the *Government's* efforts to indict Jesse C. Trentadue and to grant that *Motion.*

XVI.

ORAL ARGUMENT NOT REQUESTED

The issues presented in this appeal and cross appeal are simple. The law is well established. Nothing would be gained by oral argument.

DATED this 10th day of July, 2006.

/S/
Jesse C. Trentadue

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of July, 2006, I caused two true and correct copies of the foregoing **BRIEF OF APPELLEES/CROSS-APPELLANTS** and one digital form copy, on compact disc, to be served via first class United States mail, postage prepaid, upon:

Mr. Stephen Handler
P.O. Box 888
Benjamin Franklin Station
Washington, D.C. 20044

Mr. Michael E. Robinson
U.S. Department of Justice
601 D Street NW, Room 9061
Washington, D.C. 200530

I further certify that (1) all required privacy redactions have been made and, with the exception of those redactions, every documents submitted in Digital Form or scanned PDF format is an exact copy of the written documents filed with the Clerk, and (2) the digital submissions have been scanned with the most recent version of a commercial virus scanning program (AVG Anti-Virus 7.1, updated April 10, 2006) and, according to the program, are free of viruses.

/S/
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CERTIFICATE OF COMPLIANCE

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