ORAL ARGUMENT REQUESTED

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

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

REPLY BRIEF OF APPELLEES/CROSS-APPELLANTS

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The *Family* submits this *Reply Brief* in further support of their *Cross-Appeal.*

SUMMARY OF ARGUMENT

Supreme Court Justice Brandeis said:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be in peril if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; and invites every man to become a law unto himself. . . .

Olmstead v. United States, 277 U.S. 438, 485 (1928). In *Trentadue*, however, the *Government* was unrestrained by oaths, rules or even the law. In *Trentadue*, perjury was not only tolerated, it was encouraged and even rewarded by the *Government*. The destruction and fabrication of evidence by the *Government* went unchecked and, more importantly, unremedied by the District Court. Witnesses, both inmates and non-inmates, were openly threatened by the *Government*.[1] An unbiased assessment of this aspect of the *Trentadue* case can be found in a letter written by Assistant Oklahoma Attorney General, Patrick T. Crawley, to the *Government*.

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[1] The *Family* addressed the destruction of evidence, fabrication of evidence, threats to witnesses and perjury in their *Opening Brief*. Due to space limitations, the *Family* did not discuss all such misconduct by the *Government*. There were many more examples, including attempting to cremate Trentadue's body. (*XIX*, 6753-55; *III*, 1088-90; *II*, 596-620; *III*, 1135-52; *VII*, 2260-88; *XI*, 3151-64). As to suborning perjury, the *Government's* counsel represented BOP employees Garza, Freeman, Mier, and Groover, all of whom admitted they lied. Garza said he had been told to lie (*Con. App*. 314-331). Because of the *Confidentiality-Protective Order*, neither Garza nor the others could be prosecuted.

Crawley wrote to address the *Government's* harassment of the Medical Examiner and his staff. (*VI*, 1943). Crawley said that:

> In the investigation into the death of Kenneth Trentadue all the rules seem to have been set aside. In a sort of 'Alice Through the Looking Glass' set of circumstances, truth has been obfuscated by the agendas of various federal agencies (mostly your clients) . . . the absurdity of this situation is that your clients outwardly represent law enforcement or at least some arm of licit government . . .. The real tragedy in this case appears to be the perversion of law through chicanery and the misuse of public trust under the guise of some aberrant form of federalism. In a succession of either illegal, negligent or just plain stupid acts, your clients succeeded in derailing the Medical Examiner's investigation and, thereby, may have obstructed justice in this case . . . [I]t appears that your clients, and perhaps others within the Department of Justice, have been abusing the powers of their respective offices. If this is true, all Americans should be very frightened of your clients and the DOJ.

(*VI*, 1956-58). Defendants insist this conduct was irrelevant since both the District Court and jury found against the *Family* on their claim that Trentadue was murdered and that crime covered up. Notwithstanding Defendants' contentions, Kenneth Michael Trentadue and his family were denied *due process*, and a reasonable person reviewing this record would be left with the definite and firm conviction that a terrible injustice has occurred.

THE DISTRICT COURT ERRED BY NOT APPLYING THE "*PHYSICAL FACT*" RULE

It is undisputed that the noose left around Trentadue's neck after he was allegedly "cut down" by guards was "**not cut**." Douglas J. Perkins, a fabric expert with the Oklahoma State Bureau of Investigation, testified that the noose was not cut, and his report was

introduced into evidence as Exhibit 492. To emphasize this fact, Perkins wrote on Exhibit 492 that the noose "**around neck**" had "**no cuts**." (*XIV*, 5022-24).[2] Defendants argue the *Physical Fact Rule* should not be applied because **"every witness present on the scene uniformly testified that Trentadue was found hanging**" and that he was "**cut down**." (*Govt.'s Brief*, p. 40).[3]

But that argument is defective for three reasons. First, the District Court and jury were bound by Perkins' testimony. *See Ford Motor Co. v. Milburn*, 615 F.2d 892, 897 (10th Cir. 1980); *Johnson v. Arkansas State Police*, 10 F.3d 547, 553 (8th Cir. 1993).[4] Second, not every witness so testified. Roger T. Groover admitted he did not see either Trentadue's body hanging in A-709 or a noose. (*XIV*, 4982-83, 4987-96, 5010-12). Third, undisputed physical evidence cannot be overcome by the testimony of "eye witnesses." *See Ortega v. Koury,* 227 P. 2d 941,942-43 (N.M. 1951). As a matter of law, the District Court and jury could not find that Trentadue was hanging and cut down as Defendants contend.

EVIDENCE WAS INTENTIONALLY DESTROYED

The District Court's finding that evidence was not intentionally destroyed cannot be reconciled with the undisputed facts. For example, Trentadue's cell was a "**secured scene,**

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[2]A copy of Exhibit 492 is included at Page 1 of the *Addendum* to this *Reply Brief.*

[3]Lee adopts the *Government's* arguments. This *Reply Brief*, therefore, applies to both Defendants.

[4]The *Family* requested instructions to that effect (*IX*, 3044-45), which the District Court refused. (*Id*. 3099-3127).

sealed with crime tape within the custody and control of the FBI." (*XII,* 4170). Chief Investigator Kevin Rowland was in Trentadue's cell on November 16, 1995, accompanied by FBI Agent Jenkins, and the FTC administration. When Rowland saw the alleged suicide note, he told Jenkins to have the handwriting analyzed. (*XVIII*, 6387-90, 6393). But the note was subsequently painted over. (*Id.* at 6400). Consequently, the FBI Crime Lab was unable to do an analysis of the writing. (*XI*, 3878). The destruction of that note was obviously intentional.

Similarly, the BP-292's and *Cell Rotation Log*, which would have shown Alden Gillis Baker's exact location within the FTC at the time of Trentadue's death "**disappeared**." (*XII,* 4164-65; *XV,* 5311; *XVII,* 6196-98; *XII*, 4190).[5] The *Cell Rotation Log* "**disappeared**" after it was turned over to the FBI. (*XVII,* 6196-98; *Supp. Con. App.* 187; *XII*, 4190). Pages from the *Operation Lieutenant's Log*, which would also have shown Baker's location at the time of Trentadue's death "**disappeared**." (*XV,* 5477). These documents were permanent records which, by law, the *Government* was required to maintain! (*XIII,* 4607-09; *XV*, 5476; *XI,* 3619). Trentadue's bloodstained clothing "**disappeared**." (*XV*, 5479-88, 5549-50; *XVI*, 5882-83; *XVII,* 5978, 6139, 6220, 6263; *XVIII*, 6488). Also "**disappeared**" was the blood

[5]The BP-292 is a multi-copy form maintained at various other locations within the BOP system. The originals and all copies of Baker's BP-292's "**disappeared**."(*XII*, 4164-65; *XV*, 5311).

and hair evidence in Trentadue's cell. (*XVIII,* 6590). The loss of this evidence was clearly intentional. Moreover, the *Government* does not offer any explanation for the loss.[6]

Defendants argue that the *Family* was not prejudiced by loss of evidence because a handwriting expert was able to testify that the note was written by Trentadue and, most importantly, investigators, including the Medical Examiner, were eventually able to rule Trentadue's death as "suicide." (*Govt.'s Brief*, pp. 25-26). But the "handwriting expert" was a highly paid expert witness for the *Government* and Lee (X, 3291)*;* whereas the FBI Crime Lab, left with nothing but several photographs of the writing to analyze, reported: "**Due . . . to the lack of detail in the submitted photographs. . . [it] is doubtful if this handwriting will ever be identified with hand printing of a known individual**." (*XI,* 3878).

The Medical Examiner did eventually rule Trentadue's death "suicide," but that determination was based upon the available evidence, which was the testimony of BOP guards. (*XVII*, 6060-63; *XI*, 3929).[7] If the *Government* destroys physical evidence that would establish Trentadue's death as homicide, and the District Court does not fashion some remedy to address the loss of that crucial evidence, those acts of spoliation will result in a

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[6]The *Family* moved for a hearing to determine what happened to the missing evidence (II, 596), which *Motion* the District Court denied. The most significant evidence destroyed was the crime scene, or Trentadue's cell, which is the subject of discussion *infra*. at page 23.

[7] Defendants claim that the Medical Examiner was the *Family's* expert and that his "suicide" determination should be binding upon them. But the Medical Examiner was a fact witness, and clearly designated as such in the *Pretrial Report*. (*VIII*, 2682). Furthermore, the Medical Examiner's Office was not told about the noose not being cut, or that blood spatter and another person's blood were found in Trentadue's cell. (*XVIII*, 6427-29).

finding of "suicide." That is why the District Court's failure to provide remedies or sanctions for the *Government's* spoliation of evidence was so significant to the outcome of this case.

THE DISTRICT COURT ERRED BY NOT IMPOSING SANCTIONS

Evidence need not be intentionally destroyed before a court can provide a remedy to the innocent party. *See Jordan F. Miller Corp. v. Mid-Continent Aircraft Service, Inc.,* 139 F. 3d 912, 1998 W.L. 68879 at *4 (10th Cir. 1998). *Due process* requires that courts have available a wide range of sanctions to combat spoliation, including the spoliation presumption, striking pleadings, precluding testimony, shifting the burden of proof, etc. (*Id.* at *4 and 7; *Barker v. Bledsoe*, 85 F.R.D. 545 (W.D. Okl. 1979); *Welsh v. United States*, 844 F. 2d 1239, 1245-49 (6th Cir. 1988); *Sweet v. Sisters*, 895 P.2d 484, 492 (Alaska 1995). The rationale for imposing sanctions even when the loss of evidence is due to negligence is succinctly stated in *Headley v. Chrysler Motor Corp.,* 141 F.R.D. 362, 366 (D. Mass. 1991) wherein the Court noted that by the destruction of evidence, a party can convert **"what otherwise might have been a 'no win' proposition into the proverbial horse race."** (*Id. at* 366). By destroying evidence, the *Government* did make the manner of Trentadue's death a horse race.

Alden Gillis Baker's location at the time of Trentadue's death was a crucial question. If Baker shared Cell A-709 with Trentadue, then he did witness Trentadue's torture and murder by guards. But with the loss of all records showing Baker's exact location at the time of Trentadue's death, the *Government* could claim and did claim Baker was not in the SHU

Unit when Trentadue died.[8] Another crucial issue was whether any of the blood and hair in A-709 belonged to someone other than Trentadue. With the loss of that blood and hair evidence, the *Government* could claim and did claim it belonged to Trentadue. Similarly, with the loss of Trentadue's bloodstained clothing, the *Government* could claim and did claim Trentadue was alone in the cell and the blood was his blood. By destroying the crime scene itself, along with all physical evidence of homicide in that cell such as blood spatter, the *Government* could rely and did rely upon the perjured testimony of its employees to establish Trentadue's death as "suicide." Under these circumstances, it was an abuse of discretion for the District Court not to have imposed some sanction like the spoliation presumption.

THE DISTRICT COURT ERRED BY NOT APPLYING THE SPOLIATION PRESUMPTION

The spoliation presumption is triggered by "**willful**" destruction or suppression of evidence. *Beverly v. Wal-Mart Stores, Inc.,* 3 P. 3d 163, 165 (Okla. App. 1999). Moreover, the "**willful**" requirement can be met in many ways. Baker's BP-292's, *Cell Rotation Log,*

[8] Items in that cell (*i.e.* extra toiletries such as two toothbrushes and two tubes of toothpaste, when SHU inmates are only allowed one of each) indicated Trentadue was not alone. (*XI*, 3628, 3630; *XV*, 5299-5300; *XVII*, 6080, 6137; *XIII*, 4728-29). Defendants contend and the District Court found that during the 17 hours prior to death Trentadue used a string or "fishing line" to acquire these items from inmates in nearby cells. (*X*, 3200). But it was undisputed that no such string or fishing line was found in Trentadue's cell. (*XIII*, 4728-29). Neither did the *Government* offer evidence to show why Trentadue wanted someone else's toothbrush or why another inmate would give Trentadue his only toothbrush.

and *Lieutenant's Log* were permanent records which the *Government* was required to maintain. The *Government's* destruction of this evidence triggered the spoliation presumption. *See Hicks v. Gates Rubber Co.,* 833 F. 2d 1406, 1419 (10th Cir. 1987). The FTC was subject to Oklahoma law. 80 O.S. §4.2. Oklahoma law required that the crime scene (Cell 709A) not be cleaned or destroyed without the medical examiner's approval. 63 O.S. § 940. BOP policy likewise required that Trentadue's cell and evidence in that cell be "preserved." (*XII*, 3996-97). Under the *Hicks* rationale, destruction of the crime scene triggered the spoliation presumption. So, too, did the painting over of the note in Trentadue's cell and the destruction of Trentadue's clothing. The willful destruction of this evidence is also established by the fact that the *Government* failed to come forward with any "reasonable rationale or good faith explanation for the destruction of the evidence." *See United States v. Bohl*, 25 F. 3d 904, 912-13 (10th Cir. 1994).

The *Family* asked for a spoliation instruction. (*IX*, 3052). Lee contends that there is no proof he destroyed evidence. (*Lee Brief*, p. 19). But this presumption is triggered by acts other than the destruction of evidence, acts such as falsification of evidence, fabrication of evidence, etc.[9] Lee knowingly transmitted *Memoranda* from his staff to superiors containing

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[9]The spoliation doctrine is triggered by a party or their agents' false statements about the matter in litigation, whether made before suit or on the witness stand; the fabrication and falsification of evidence; use of undue pressure, threats, bribery, intimidation, etc. to influence a witness; destruction and concealment of evidence as well as the attempt to do so; and subornation of perjury. *See McQueeney v. Wilmington Trust Company,* 779 F. 2d 916, 921-22 (3rd Cir. 1985); *Shapak v. Shertle*, 629 A. 2d 763, 772 (Md. App. 1993). When a party has destroyed evidence or fabricated evidence or committed other acts of obstruction

false statements that Trentadue received CPR (*XVI*, 5686-88); and Lee was present but did not correct Mier's false statement to paramedics that Trentadue had been given CPR.(*XV*, 5335; *XVI*, 5710, 5712, 5626; *IV*, 1384). These lies about Trentadue having received CPR would trigger a presumption that Trentadue should have received CPR and that he was, in fact, revivable.

TRENTADUE'S INJURIES WERE NOT ALL SELF-INFLICTED

It was undisputed that the bruise to Trentadue's anal verge occurred as a result of an **"assault"** (*XV*, 6276-77, 6688-89), and that the fingertip bruises on Trentadue's biceps occurred as a result of his being restrained. (*XVII,* 6026-27, 6276). Both the District Court and the jury were bound by that undisputed evidence and could not find to the contrary. *See Milburn*, 615 F.2d at 897. It is also undisputed that, prior to being placed in A-709, Trentadue was stripped and physically inspected for injury and the District Court found that **"the only injury noted on Trentadue's body was a blister on his heel."** (*X,* 3199). These two non-self inflicted injuries clearly establish that Trentadue was indeed assaulted regardless of the manner of his death and that guards did have access to him.

THE DISTRICT COURT ERRED BY NOT APPLYING THE PRESUMPTION OF CONTINUATION OF LIFE

Under Oklahoma law, presumptions shift the burden of proof and they must be rebutted by "**clear and convincing**" evidence. *Brown v. Oklahoma Transportation*

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of justice, it is error not to apply the spoliation presumption. *Alexander v. National Farmer's Organization*, 687 F. 2d 1173, 1205-06 (8th Cir. 1982).

Company, 588 P. 2d 595-601 (Okl. App. 1978). Thus, the question becomes: "Did the District Court err by not applying the presumption of continuation of life?" The *Family* submits that the District Court did err based upon authority such as *Rodak v. Fury*, 298 N.Y.S.2d 50, 52-53 (N.Y. App. 1969); *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*, 487 F. Supp. 67, 70-71 (D.N.H. 1980), which uniformly hold that the presumption of continuation of life arises when time of death is an issue.

This presumption places upon the party asserting death the burden of proving the time of death. *Rodak*, 298 N.W.S.2d at 52-53. The burden of proof is placed upon the party asserting death because the presumption of the continuation of life provides that the victim is presumed to have lived until his or her death is conclusively established. The *Family* made a *Motion for Judgment as a Matter of Law* at the close of all the evidence. (*XIX,* 7749-50). If the District Court is correct in its finding that "there was no evidence from lay witnesses or experts that Trentadue could have been revived even had such attempts been made" (*X,* 3211), then it also erred by not granting judgment in the *Family's* favor since neither Defendant overcame the presumption of continuation of life.

THE DISTRICT COURT ERRED BY NOT PLACING THE BURDEN OF PROOF ON REVIVABILITY UPON DEFENDANTS

Defendants contend that Trentadue committed suicide and when discovered, he was already dead and not revivable. It is the *Family's* contention that Trentadue was murdered and that the Defendants had the burden of proof on both suicide and non-revivability, which

is borne out by the *Pretrial Reports*. Both the *Government* and Lee assert Trentadue "**committed suicide**" and was "**irreversibly brain dead**" when his body was discovered. These assertions appear in the "*Contentions and Claims*" portions of the *Pretrial Reports*, wherein a defendant sets out the claims on which he or she has the burden of proof. (*VIII*, 2614-15; *IX*, 2808-09).

Placing the burden of proof of non-revivability upon the *Government* and Lee would also foster important public policy concerns regarding the health and safety of inmates. If it were otherwise, any time an inmate needs medical attention guards could let him die and then argue that the victim's family could never prove causation. But the burden of proof can be and is often shifted for reasons of policy or fairness. *Welsh*, 844 F.2d at 1245. It is typically shifted in medical malpractice cases when the healthcare provider has either destroyed evidence or failed to maintain the evidence that a plaintiff needs to establish causation. *Id.* at 1245-46; *Sweet*, 895 P.2d at 492. Trentadue's revivability or non-revivability could only be established medically if he had been immediately cut down and CPR administered, which was not done. When Lee arrived on scene, he ordered the guards to remove the key from the door to Trentadue's cell, waited seven minutes before giving the order to open the cell door and when the door was opened, Lee ordered Physician's Assistant Mier not to administer CPR. (*XV*, 4752, 5457-58; *XIV*, 4774-75, 4800). Because of Lee's actions, the burden of proof on non-revivability should be upon the Defendants. It is also appropriate that the burden of proof on non-revivability shift because Lee's superiors were

forewarned that he had vowed not to cut down or perform CPR on any inmate found hanging. (*XVIII*, 6432-38).

THE DISTRICT COURT ERRED BY NOT APPLYING THE OKLAHOMA DEFINITION OF DEATH

"**Death**" in Oklahoma is defined by law. 63 O.S. §3122. Pursuant to that law, Trentadue was not declared dead until 5:06 a.m. on August 21, 1995. (*XI,* 3781). Section 3122 specifically provided that before Trentadue could be declared dead, "all reasonable attempts to restore spontaneous circulatory or respiratory functions" had to be made. The District Court erred in not applying 63 O.S. §3122 both to determine the time of Trentadue's death and to shift the burden of proof on revivability to Defendants because of their duty to administer CPR.[10]

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[10] Citing *Rich v. City of Mayfield Heights*, 955 F.2d 1092, 1097, 1098 (6th Cir. 1992), Lee argues that "the law is well established that there is no duty on the part of jail officials to immediately cut down a prisoner hanging in a cell. (*Lee Brief*, p. 21). But *Rich* was subsequently distinguished and modified by *Heflin v. Stuart County*, 958 F.2d 709, 717-18 (6th Cir. 1992) (a case on point in which the 6th Circuit stated: ". . . *Rich* did not present the scenario of the ranking county official present directing that the victim not be cut down until photographs could be taken. . ."). *See generally Murphy v. Morgan,* 914 F. 2d 846, 851 (7th Cir. 1990) (holding that "there has never been a Section 1983 case accusing welfare officials of selling foster children into slavery; [but] it does not follow that if such a case arose, the officials would be immune from damages liability.")

Like the officers in *Heflin*, Lee and other FTC guards were instructed and BOP policy required that an inmate found hanging was to be immediately cut down and given CPR. (XVI, 5761-62). Besides, irrespective of whether Lee had a duty to attempt to save Trentadue's life, he could not legally interfere with the efforts of others to do so by ordering the guards not to enter Trentadue's cell, and by ordering Physician's Assistant Mier not to administer CPR, all of which Lee did.

THE *GOVERNMENT'S EX PARTE* COMMUNICATIONS DEPRIVED THE *FAMILY* OF *DUE PROCESS*

The *Government* argues that its contacts with the District Court were not "*ex parte"* because the *Family* knew the District Court was receiving evidence and other materials from the *Government.* But even though the *Family* knew these contacts were occurring (without having access to the "**information**" being provided to the District Court) they were still *ex parte* and a violation of *due process*. *See United States v. Hildebrand*, 928 F. Supp. 841, 853-58 (N.D. Iowa 1996). This was especially true of the *OIG Report*.[11]

The *Government* argues that these submissions were fully justified in order to preserve privileges, for safety of witnesses or to provide the District Court with information. (*Govt.'s Brief*, p. 47). But these were not court-ordered submissions for *in camera* review. These were instances in which the *Government* intentionally gave the District Court information or evidence to contravene the *Family*'s position and/or case. These contacts included discussions with the District Court (*Supp. Con. App. 1)*, as well as the submission of

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[11] That *OIG Report* and the other submissions which the District Court received from the OIG were "*extra judicial*" (*i.e.* not of record) and never subsequently received into evidence. In that *Report,* the OIG purports to review and discount all of the evidence the *Family* had gathered in support of their contention that Trentadue was murdered. The OIG solicited this evidence from Trentadue's family under the guise of "investigating" his death. (*Supp. Con. App.*, p. 36). The OIG then secretly provided that evidence to Bevel, who was helping both the *Government* and Lee defend the *Family's* civil suit.(*XXI*, 7602-03, 7735). The *OIG Report* itself was subject to an *Order* precluding its disclosure. (*VIII*, 2483). Nevertheless, the OIG released an extensive "summary" of its *Report* on the Internet (*Id*. at 2467) which absolved the *Government* of wrongdoing in Trentadue's death. Prior to trial, the *Government* contacted the Oklahoma City media and provided them with a videotaped re-enactment of Trentadue's alleged suicide. (*Id*. at 2487-89).

evidence, including an OIG *Report* (*Id. at 21)* exonerating the *Government* of responsibility for Trentadue's death that was prepared by Defendants' expert witness, Tom Bevel. (*XIX,* 7602-03, 7735).[12] These were *extra judicial* submissions intended to influence the District Court in its rulings, including the ultimate determination of "suicide."

THE *CONFIDENTIALITY-PROTECTIVE ORDER* IS UNCONSTITUTIONAL

The *Government* obtained from the District Court a *Confidentiality-Protective Order* to prevent the *Family* from going to federal prosecutors and/or Congressional oversight committees with evidence of crimes committed by *Government* employees. The *Government* claims this *Order* was proper and within the scope of the District Court's duty to oversee the discovery process. (*Govt.'s Brief*, pp. 48-49). But it was unconstitutional for the *Government* to seek and for the District Court to enter such an *Order*. *See Vasquez v. Hernandez*, 60 F.3d 325 (7th Cir. 1995).

Government employees confessed to perjury. The Supreme Court has stated that:

> All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore, it cannot be denied that it [perjury] tends to defeat the sole ultimate objective of a trial.

In re Mitchell, 326 U.S. 224, 227 (1945). The fact that the guards were represented by the *Government's* counsel and that prior to trial the District Court entered an *Order* protecting

[12]The *Government* contends that the *Family* made similar "*in camera*" submissions. (*Govt.'s Brief*, p. 45). That is not true. The *Family* made no *in camera* submissions to the District Court not required by an *Order* from the District Court.

these witnesses from prosecution assured perjury would continue at trial. That perjury did continue is evident from the trial testimony of Freeman, Mier, Garza and Groover, among others.[13]

EXCLUSION OF *GOVERNMENT* RECORDS AS HEARSAY WAS PREJUDICIAL ERROR

Exhibit 38 (*XI*, 3825) was an official *Report* prepared by a BOP *Board of Inquiry* into the circumstances of Trentadue's death, which the District Court excluded on the basis of hearsay. Members of that *Board of Inquiry* visited Trentadue's cell, saw the alleged suicide note and reported in Exhibit 38 that it read, **"My mind is no longer its friend, love Paul."** (*XI*, 3830). The note did not read **"Love ya familia**,**"** as the *Government* and District Court now contend. Thus, Exhibit 38 would have contradicted the *Government* as to authorship of that note and precluded the District Court and jury from finding this was a suicide note by Trentadue. (*X*, 3208-09). Exhibit 83 was admissible under *Federal Rule of Evidence* 803(8).

Exhibit No. 178 (*XI,* 3927) were the notes which BOP investigator Michael D. Hood made of his interview with SHU guard Ellis about the discovery of Trentadue's body. Ellis told Hood Trentadue was "**gurgling**" when found. The relevance of "gurgling" was

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[13]The *Family* requested an instruction on perjury (*IX*, 3046), which the District Court refused to give. The District Court's seeming lack of concern over the admitted perjury undoubtedly had a corrupting influence upon the jury. So, too, did the District Court's lack of concern over destroyed evidence. The District Court's benign acceptance of perjury and destroyed evidence left jurors with the impression this was a normal occurrence for the *Government* and, therefore, nothing of consequence should be read into these acts. Simply put, the District Court's demeanor took away any adverse inference which the jury may otherwise have naturally given to these acts of obstruction of justice.

communicated to the District Court in the *Family's Court-Ordered Statement of Claims and Evidence*: the fact that Trentadue was "gurgling" when his body was discovered meant he was alive and revivable as a matter of law. (*VIII*, 2529; *III*, 1153). *See Starkenburg v. State*, 934 P. 2d 1018, 1031 (Mont. 1997) (holding that "gurgling" was, as a matter of law, proof of life). If Trentadue was gurgling when found, then he was alive and revivable.

Exhibit 211 (*XI*, 3942) was the *Affidavit* which Lee signed within 10 days of Trentadue's death, stating therein that he had given "instructions" to wait "7 minutes" before opening the door to Trentadue's cell and to do no CPR; that Mobley and Morris had cut Trentadue down, not Ellis; and that there **"was blood on his [Trentadue's] clothes."** (*XII,* 3942-45). The *Family* was allowed to "refresh Lee's memory and impeach him" with this document. But refreshing memory and impeachment is not the same as the substantive evidence contained in this *Affidavit*, especially when Lee continued to deny these matters and went to extreme lengths to explain any discrepancies between his trial testimony and *Affidavit.* (*XV*, 5554-55; *XVI*, 5686-88).

Exhibit Nos. 234 and 370 (*Addendum to Opening Brief*, pp. 102-103), are identical *Memoranda* prepared by guards Morris and Mobley at the direction of Lee. In these *Memoranda*, Morris and Mobley falsely state that Mier had provided medical attention to Trentadue. Lee gave these *Memoranda* to his superiors. These exhibits were relevant to the

Family's conspiracy claims and they also were evidence that CPR should have been administered and that Trentadue was revivable.[14]

Exhibit 402 (*X,* 4053) was a transcript the *Government* prepared of Trentadue's conversation with his sister-in-law that had been falsified to indicate Trentadue had "**AIDS**." The *Government* argues that the District Court properly excluded the fraudulent transcript because it was "corrected" implying the conversation was mistakenly transcribed, and the mistake was subsequently discovered and corrected. That is untrue. The copy of the non-falsified transcript without the "AIDS" reference was introduced as Exhibit 11 and it bears a fax transmittal date of September 12, 1995, (*XI,* 3763); whereas the fraudulent-falsified transcript bears a fax transmittal date of March 12, 1996. (*XII,* 4053). Obviously, the fraudulent transcript was prepared much later.

The *Government* argues there is no evidence the fraudulent transcript was circulated. But the fraudulent transcript was attached to a fax cover sheet showing that BOP attorney Tran sent it to "special agent" Doug Hill. (*XII*, 4049). The *Government* also argues that the falsified transcript should be excluded because it cannot be held liable for defamation. (*Govt.'s Brief*, p. 53). The dead cannot be defamed, however. *Restatement (Second) Torts §560.* Furthermore, the same act of perjury by a *Government* official can give rise to both a claim for defamation that is not actionable under the *FTCA* **and** an actionable claim for

[14]The *Family* asked for a jury instruction on this issue which the District Court refused to give. (*IX*, 3052).

intentional infliction of emotional distress. *See Block v. Neal*, 460 U.S. 289, 298 (1983) *Chandler v. United States*, 875 F. Supp. 1250, 1266 (N.D. Tex. 1994). This transcript, therefore, was relevant to the *Family's* intentional infliction of emotional distress and cover-up conspiracy claims. *See McQueeney*, 779 F.2d at 921-22.

Exhibit 700 (*XII*, 4105), is a report prepared by Norman I. Perle, a consultant to the OIG regarding the Groover videotape. Perle concluded that the videotape had been erased and provided the OIG with Exhibit 700 to that effect. (*XII,* 4105). The *Government* argues that Perle's report should not be considered as the admission of an agent because the OIG is not part of the Department of Justice. That is not only literally untrue, but factually the OIG assisted the *Government* in defense of the *Trentadue* case, including obstructing the *Family's* access to crucial evidence. (*XII*, 4311, 4314-16, 4348). Perle's report was an admission by an agent or an adopted admission under *Rule* 801(d)(2). But even if hearsay, Perle's report should have been admitted under *Rules* 803(8) and 807.

THE DISTRICT COURT ERRED BY NOT ADMITTING MORTUARY PHOTOGRAPHS

The only photographs of the majority of Trentadue's injuries were taken by his *Family* at the mortuary. These photographs, Exhibit 297A, B, D, E, F, G, H, J, K, L, M, N and O, are set forth in the *Addendum* to the *Family's Opening Brief* commencing on page 53 therein. The District Court admitted these photographs against the *Government* but not Lee. (*XX*, 7510). The *Family* authenticated these photographs. (*Id.* at 7505-09). Lee's pathology expert, Dr. Smialek, testified that these photographs accurately depicted Trentadue's injuries

and did not include any injuries caused by improper embalming. (*XVII*, 6273-74). Lee's crime scene expert, Bevel, concurred. (*XXI*, 7729-31).

Lee argues that because the District Court found Trentadue had not been in a fight, these photographs would not have been persuasive to the jury. The *Family* disagrees with that assertion. But even if true, the *Family* was certainly entitled to cross-examine Lee's expert, Bevel, on these photographs, since he considered them in arriving at his opinions and they depict injuries which Bevel had never seen. (*XXI*, 7729-32). *See United States v. A&S Council*, 947 F. 2d 1128, 1135 (4th Cir. 1991).

THE DISTRICT COURT ERRED BY REFUSING TO MAKE ADDITIONAL EMOTIONAL DISTRESS FINDINGS

While the District Court did find certain acts committed by the *Government* to be of such an extreme and outrageous nature as to produce emotional distress, there were numerous other outrageous acts recklessly or intentionally committed by the *Government* which would similarly support a claim for emotional distress. Leaving a potentially revivable Trentadue hanging in his cell without medical treatment would be an act of such an outrageous nature as to inflict emotional distress. *See Nichols v. Busse*, 503 N.W.2d 173 (Nev. 1993). Perjury committed by employees of the *Government* during the course of official investigations into the manner of Trentadue's death would be outrageous conduct of an intentional nature guaranteed to produce severe emotional distress. *See Chandler*, 875 F. Supp. at 1266. "Outrageous" would likewise describe undressing Trentadue and losing his bloodstained clothing, sanitizing A-709 before it could be examined by a crime scene expert,

falsifying a "*suicide watch report*," releasing altered transcripts of Trentadue's telephone call with his sister-in-law to falsely reference "AIDS," and the destruction of evidence, the effect of which was to materially disrupt and interfere with the *Family's* attempts to determine how and why Trentadue died.[15]

The result of such outrageous conduct was perhaps best stated by the Oklahoma State Medical Examiner in a *Uniform Media Statement*:

> From the outset, the Federal Government through its refusal to cooperate in allowing a thorough technical scene investigation by a competent police technical investigation unit assured that adequate scientific answers to how Mr. Trentadue received his myriad injuries would never be available. The refusal further assured that we will never be able to prove to a reasonable certainty Mr. Trentadue hanged himself or if another asphyxial mechanism came into play. . . . Kenneth Trentadue died a violent and unusual death. The mechanisms of which will never be satisfactorily explained.

(*X*, 3231; *XI*, 3929). It is not knowing how and why Trentadue died or if he was revivable when found that both haunts and torments the *Family* and leaves the loss of their husband, father, son and brother a festering wound that will never heal. It is for this reason the District Court abused its discretion by not making these additional findings of intentional infliction of emotional distress.

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[15]Freeman and the other *Government* employees who committed these acts were "investigative or law enforcement officers" within the meaning of 28 U.S.C. §2680(h). (*VIII*, 2536). Because of the *Government's* authority and power to affect the life and well-being of its citizens, the tort of intentional infliction of emotional distress is easily found when there has been abuse or misconduct by prosecutors and law enforcement officers. *See Restatement (Second) Torts §46(e).*

The *Government's* only argument in opposition is that: "the District Court's finding that the *Government* did not intentional destroy (or fabricate) evidence is not clearly erroneous. Accordingly, there was no basis for the Court to find that such acts constituted the intentional infliction of emotional distress." (*Govt.'s Brief*, p. 56). For reasons previously stated, the *Family* disagrees with that argument. But, regardless of whether this Court reverses that finding, the District Court certainly abused its discretion by not making additional findings of emotional distress based upon such outrageous conduct.

THE DISTRICT COURT ERRED BY REFUSING TO MAKE FINDINGS WITH RESPECT TO GROOVER'S PERJURY

The *Family* requested the District Court to make additional findings involving the perjury of Roger T. Groover. (*X*, 3227-30). A finding of perjury by Groover would destroy the testimony of his fellow guards who all stated that they saw Groover videotape Trentadue's hanging body, which delayed cutting Trentadue down. The *Government* argues this is an issue of a witness's credibility and "there is no reason to believe that the Court made an inaccurate assessment of Groover's credibility." (*Govt.'s Brief*, p. 56).

The *Family* disagrees with that assertion, especially since Groover admitted he did not see or videotape Trentadue's body hanging in A-709. Yet, the District Court continued to credit the testimony of this witness on these very matters, and it clearly erred in doing so, given the undisputed fact that the noose was not cut. *See Bullard v. Cercon Corp.*, 846 F. 2d 463, 466 (7th Cir. 1988).

THE DISTRICT COURT ERRED BY SEVERING

CLAIMS RELATED TO HAUSER

The District Court erred by severing Jesse C. Trentadue's claim for the intentional infliction of emotional distress resulting from the *Government's* efforts to indict him through the perjured testimony of an FBI operative named James Ray Hauser or to hear evidence about that matter. The *Government* argues that this claim was not included within the scope of the *Family's Administrative Claim*. Consequently, the District Court lacked subject matter jurisdiction under the FTCA. (*Govt.'s Brief*, p. 57). The *Family's Administrative Claim* did contain a claim for the intentional infliction of emotional distress. (*I*, 114-209). The District Court found that this *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).[16] But even if the Court lacked subject matter jurisdiction on this claim, the *Government* does not dispute that it tried to indict Jesse C. Trentadue through the perjured testimony of Hauser. Such evidence was a powerful admission, which the District Court and jury should have heard. *See McQueeney*, 779 F.2d

[16] A claim under the *FTCA* is sufficient if it contains enough information for the agency to commence an investigation. *See Santiago-Ramirez v. Secretary of Defense*, 984 F.2d 16, 19 (1st Cir. 1993). A claimant need not state the legal theory for recovery. *Rooney v. United States*, 634 F. 2d 1238, 1242 (9th Cir. 1980). A claimant need not affirmatively plead each theory of liability. *Bush v. United States,* 703 F. 2d 491, 494 (8th Cir. 1983). Moreover, if a claimant does set forth a legal theory in the administrative claim, that is "surplusage" and does not jurisdictionally limit theories and subsequent court actions based upon the theories set forth. *FGS Constructors, Inc. v. Carlow*, 823 F. Supp. 1508, 1513 (D. S. D. 1993).

at 921-23. That evidence was also highly relevant to the family's claims for declaratory and injunctive relief involving civil rights violations. See *Vasquez,* 60 F. 3d at 325.

THE DISTRICT COURT ERRED BY GRANTING SUMMARY JUDGMENT AS TO FREEMAN

The *Estate of Kenneth Michael Trentadue* cross appealed from the District Court's grant of summary judgment in favor of Kenneth W. Freeman on its civil rights and conspiracy claims. (*X*, 3390-91). Freeman orchestrated the destruction of the evidence in Trentadue's cell by not allowing the medical examiner's investigator into Trentadue's cell, by falsely telling the FBI the cell had already been cleaned, and by falsely telling his superiors the FBI had released the scene to him. (*XVIII*, 6352-53; *V*, 1510; *VI*; *IV*, 1276). Freeman confessed to having lied to the FBI and his superiors in order to carry out destruction of that evidence. (*Supp. Con. App.* 144).

Freeman's destruction of evidence assured that neither Trentadue's family nor anyone else would know the exact manner or circumstances of his death. (*XVII*, 6060-63; *XI*, 3929-38). When found out, Freeman showed no remorse for his actions, bragging that, "**if I have to take a hit for it, so be it.**" (*Con. App.* 144). Freeman does not enjoy *qualified immunity*. *See Bohl,* 24 F. 3d at 904.

Freeman argues that no harm was done to the *Estate* as a result of his obstruction of justice. But Freeman's actions interfered with the *Estate's First* and *Fifth Amendment* rights. *See Bell v. City of Milwaukee,* 746 F. 2d 1205, 1261 (7th Cir. 1984); *Ryland v. Shapiro*, 708 F. 2d 967 (5th Cir. 1983). Also, acts done to cover up wrongdoing of others is evidence of a conspiracy. *See Stump v. Gates*, 777 F. Supp. 808, 820 (D. Colo. 1991); *Stone v . City of Chicago*, 738 F. 2d 896, 900 (7th Cir. 1984); *DeLew v. Wagoner*, 143 F. 3d 1219, 1223 (9th

Cir. 1998); *Brever v. Rockwell International Corp.*, 40 F. 3d 1119, 1127-28 (10th Cir. 1994). Freeman thus would have been liable for the acts of his co-conspirators. *Wright v. Cies*, 648 P.2d 51, 53 fn. 2 (Okl. App. 1982).

Finally, Freeman argues that even if the District Court improperly granted summary judgment, the *Estate's* claims are now barred by 28 U.S.C. §2676. The *Estate's* claims against Freeman were a property right, which can not be summarily extinguished. *See Bush v. Reid,* 516 P. 2d 1215, 1219 (Alaska 1973).

THE DISTRICT COURT ERRED BY NOT GRANTING DECLARATORY AND INJUNCTIVE RELIEF

The *Family* asked for declaratory and injunctive relief for violation of their civil rights. The *Government* argues that the *FTCA* only allows for monetary damages. The *Family*, however, did not seek declaratory and injunctive relief under the *FTCA*. They sued under the *Constitution*. (*II*, 514-15). Furthermore, the *Government's* knowing and continuous use of perjured testimony and destruction of evidence were violations of the *Family's* civil rights. *See United States v. Koelzer*, 457 F.2d 892 (3rd Cir. 1972); *Bohl*, 24 F. 3d at 904; *Vasquez*, 60 F.3d at 325. So, too, were the *Government's* attempt to indict Jesse C. Trentadue through the perjured testimony of an FBI operative and its *ex parte* communications with the District Court. *See Salamon v. Gonzalez*, 948 F.2d 1131 (10th Cir. 1991); *Hildebrand*, 928 F. Supp. at 853-58. The District Court was required, as a matter of law, to grant the requested relief. *See Adamson v. C.I.R.*, 745 F.2d 541, 546 (9th Cir. 1984).

CONCLUSION

The *Judgments* entered in favor of the *Family* and against the *Government* and Lee should be affirmed. The *Family* should prevail on its *Cross-Appea*l with the challenged *Orders* and *Judgments* reversed and those matters remanded to the District Court for trial or such additional proceedings as this Court or justice require.

DATED this 9th day of January, 2003.

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ADDENDUM