

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE DISTRICT OF MONTANA  
3                   MISSOULA DIVISION

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4 UNITED STATES OF AMERICA,

5                   Plaintiff,

6                   vs.

CASE NO.  
CR 05-07-M-DWM

7 W.R. GRACE & COMPANY, HENRY A.  
8 ESCHENBACH, JACK W. WOLTER,  
9 WILLIAM J. McCAIG, ROBERT J.  
10 BETTACCHI, and ROBERT C. WALSH,

Missoula, Montana  
Monday 03.02.2009  
8:57 a.m.

11                   Defendants.

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13                   JURY TRIAL - VOLUME 5  
14                   TRANSCRIPT OF PROCEEDINGS  
15                   BEFORE THE HONORABLE DONALD W. MOLLOY,  
16                   UNITED STATES DISTRICT JUDGE, and a jury.

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23                   Proceedings recorded by mechanical stenography and  
24                   transcript produced by computer by Daina B. Hodges,  
25                   United States District Court Official Court Reporter  
                 Missoula/Helena/Butte Divisions

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Appearing on behalf of **Plaintiff USA.**

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I N D E X

DIRECT      CROSS      ReD

WITNESSES FOR  
THE PLAINTIFF

NONE

DIRECT      CROSS      ReD

WITNESSES FOR  
THE DEFENDANT

NONE

EXHIBITS

OFFERED

RECEIVED

NONE

COURT REPORTER'S CERTIFICATE on Page 26

1           **BE IT REMEMBERED** that on Monday, March 2, 2009,  
2 at 8:57 a.m., in the Russell Smith Courthouse, Missoula,  
3 Montana, before the Honorable Donald W. Molloy, United States  
4 District Judge, the following proceedings were had:

5           **(Whereupon, the following proceedings were held in open**  
6           **court with counsel present, the defendants present and**  
7           **the trial jury not present.)**

8           THE COURT: This is the time and place set by the  
9 Court to comply with the mandate issued by the Ninth Circuit  
10 directing me to vacate my February 13th, 2009 order, which I  
11 have done, and to conduct further proceedings so that I may  
12 make particularized findings with respect to each of the 34  
13 victim witnesses consistent with 18 U.S. Code 3771(a)(3).

14           That provision of the law provides that there is a  
15 right not to be excluded from such public court proceeding  
16 unless the Court, after receiving clear and convincing  
17 evidence, determines the testimony by the victim would be  
18 materially altered if the victim heard other testimony at that  
19 proceeding.

20           The order, which was entered in this case -- I'm not  
21 entirely sure when the Ninth Circuit entered its order, but it  
22 was Friday -- and the statute requires me to act quickly, so  
23 Friday afternoon I filed an order which requires the United  
24 States to bring each of the prospective remaining 26 witnesses  
25 listed in document No. 897-3 who have not yet been called to

1 testify and then to present their direct examination, including  
2 specific reference to any exhibits to be used in the witness's  
3 testimony before the jury.

4           If those witnesses are here and prepared to testify  
5 this morning, the courtroom will be closed to the public and to  
6 all other witnesses and only the parties and counsel, support  
7 staff and the government's case agents will be present.

8           The jury is not present this morning. That is  
9 consistent with the mandate of the Crime Victims Rights Act,  
10 which mandates that a crime victim has the following rights:

11           The right to be treated with fairness and with  
12 respect for the victim's dignity and privacy.

13           Mr. McLean, I've read all of your pleadings from the  
14 weekend. You may be heard.

15           MR. McLEAN: Your Honor, as we tried to notify the  
16 Court over the weekend in our pleadings, the government made  
17 efforts to contact the remaining 26 witnesses which were listed  
18 in the government's attachment B, noted in the Court's order.  
19 Our contact with those witnesses revealed that while many of  
20 them would have preferred to be present during the course of  
21 trial, that after receiving the Court's order describing the  
22 process for the hearing, to determine if their testimony could  
23 be materially altered, they have decided that they will, in  
24 fact, waive their right to be present during the course of  
25 trial and that they won't be in the courtroom until after

1 they've testified.

2 And so on that basis, we ask the Court to determine  
3 that this issue is now moot and we can proceed to trial.

4 THE COURT: It isn't moot, there's a mandate from  
5 the Ninth Circuit. You obtained a mandate compelling me to  
6 conduct the inquiry. I have no choice. I can't say to the  
7 Ninth Circuit, *Kris McLean says I don't need to follow your*  
8 *mandate.*

9 Are you going to petition the Ninth Circuit to  
10 revoke the mandate?

11 MR. McLEAN: Your Honor, we -- I don't believe so.

12 THE COURT: Well, then, where are the witnesses?

13 MR. McLEAN: They could not be here today for many  
14 reasons, including the fact that they have determined that they  
15 just -- they do not want to be here. They don't want to be  
16 here and go through the process described by the Court before  
17 they testify.

18 THE COURT: It's not a process I made up.

19 MR. McLEAN: I understand, Judge.

20 THE COURT: Yeah. It says in the Ninth Circuit  
21 case, which is the one case on point, 453 F.3d. 1137, *A crime*  
22 *victim, however, does not have an absolute right to witness a*  
23 *trial at the expense of the defendant's rights.* In a footnote  
24 four, the court says the problem with what the district court  
25 did there was, *The district court did not consider the victim*

1 *witness's intended testimony and there is no evidence of the*  
2 *contents of that testimony in the record before us.*

3           Just exactly how am I supposed to figure that out?  
4 Am I the great Carsini? Do I hold an envelope up to my head  
5 and say, *Whoa! I think that witness may not tell the truth.*

6           What am I supposed to do other than the procedure  
7 that's set forth?

8           MR. McLEAN: I appreciate the Court's concern, and  
9 we were wondering that ourselves, what is Judge Molloy to do in  
10 order to make these findings required by the Ninth Circuit?

11           But I think, perhaps, the resolution of the matter  
12 is that these witnesses will not be here during the course of  
13 trial, making this finding, no longer required.

14           THE COURT: But the context that is in these  
15 pleadings, is that it's my fault, that I'm trying to exclude  
16 those people.

17           Let's get something straight here. This is supposed  
18 to be a fair proceeding. And if you read Rule 615 -- I don't  
19 know if you've read it or not, but I'll read it to you.

20           It says, first, *At the request of a party, the Court*  
21 *shall -- I don't have any room -- shall order the witnesses*  
22 *excluded so that they cannot hear the testimony of other*  
23 *witnesses. And it may make the order on its own motion.*

24           Which I never do. I always ask counsel, and you  
25 know this from 13 years of being here, there's not a single

1 trial you've ever had that I haven't asked, *Does either party*  
2 *intend to invoke Rule 615?*

3 I told you four years ago if this was going to be an  
4 issue to raise it. In October of last year, I told you if this  
5 was going to be an issue, raise it. In January of this year, I  
6 ruled on it. You did nothing. The rule was invoked by the  
7 defendants in February. And then at the last minute this goes  
8 up to the Circuit and now we have a mandate telling me what to  
9 do. And you're telling me to ignore the mandate. How do I do  
10 that?

11 MR. McLEAN: Your Honor, I hope you're not  
12 misunderstanding our position. We're not asking you to ignore  
13 the mandate, we're just asking you to consider that, in fact,  
14 since these witnesses will not be here during the course of the  
15 trial, that there is no reason to make the findings required by  
16 the mandate, to make those findings.

17 THE COURT: That's not what you put in your  
18 pleadings. You put in your pleadings because of this procedure  
19 and the impediments that I have created, I'm keeping them from  
20 exercising their rights. And now I have forced them to waive  
21 their rights under that statute.

22 That is not the case. And you know it.

23 And I don't know what you're filing in your  
24 pleadings. That question number five, *Are you interested in*  
25 *attending trial proceeding before you testify or not?*

1           Did you ever ask them before you filed a petition in  
2 the Ninth Circuit in their behalf? Are you going to tell me,  
3 other than the Parkers, that you contacted every one of those  
4 people and said, *You have a right to be at trial and I want to*  
5 *know if you are going to exercise your right to be at trial.*  
6 *Because if you are, we may have some issues we have to take up.*

7           MR. McLEAN: Your Honor, the government's position  
8 in that petition, which we were litigating in the Ninth  
9 Circuit, was the Court's determination that there were no  
10 identifiable victims.

11           THE COURT: Yes.

12           MR. McLEAN: And so we did not ask each witness  
13 before that petition was filed. We did notify them in writing  
14 of the ruling, but we took issue with the Court's determination  
15 that there were no identifiable victims.

16           THE COURT: Well, but when you took issue with that,  
17 did you think it through and say, *Well what happens if the*  
18 *Circuit says, Gee, there are? We haven't identified them, but*  
19 *maybe there are.*

20           MR. McLEAN: We did try to think it through, and we  
21 tried to imagine what procedure this law requires. And,  
22 frankly, yours may be a fine one, but whatever the procedure  
23 is, these witnesses have decided that they -- they do not want  
24 to sit through the trial and listen to testimony.

25           THE COURT: Frankly, it would surprise me with my

1 common sense, in an economy that exists now, in the depredation  
2 that is with labor, with the forest industry, with mining, it  
3 would surprise me if somebody wanted to sit here for three  
4 months or five months or whatever it's going to take. But that  
5 exercise has nothing to do with trying to comply with the law.

6 Now, you've suggested that the Parkers, in  
7 consultation with that lawyer that represented them, want to be  
8 here. But because of what I've done, they can't come, they're  
9 being forced to waive their rights. And that's not going to be  
10 the case.

11 I don't want the community of Libby thinking that  
12 this process is somehow tainted. This is a public process.  
13 And there are rights that the defendants have, believe it or  
14 not. And it's going to be a fair process.

15 I'm trying to do the best that I can to take a  
16 confusing area of the law and to make it work for everybody.

17 Now, you have an obligation, and your obligation is  
18 to ensure, to the extent you can, that the Parkers have a right  
19 to be here. And the way you're going to do that is when  
20 Mr. Peronard's testimony is completed, you're going to call the  
21 Parkers as your next witnesses.

22 I'm going to read to you from the Federal Rules of  
23 Evidence manual by Steven Saltzburg and others, *Even if a crime*  
24 *victim is subject to sequestration, this does not mean that the*  
25 *victim should be sequestered for any substantial part of the*

1 criminal trial. Any conscientious prosecutor dealing with a  
2 victim who wishes to be present at public court proceedings  
3 related to that victim's harm should make his or her best  
4 effort to call the victim first and then argue about -- that  
5 the victim has a right to remain in the courtroom during the  
6 rest of the trial.

7 You know, from your 13 years of being in front of  
8 me, that every time a witness is called, at the conclusion of  
9 the examination I ask counsel, *Can the witness be excused?*

10 What we're going to do here, when Mr. Peronard's  
11 testimony is done, you're going to call, in the order that you  
12 select, Mr. and Mrs. Parker. And then they will have the right  
13 to be here. And if there is -- you had a footnote in one --  
14 footnote one in one of the pleadings, the second one, you said  
15 there was another individual who wanted to -- he had said he  
16 was going to exercise his rights. I don't know who that is,  
17 he's not named. Do you know who it is?

18 MR. McLEAN: Yes, sir.

19 THE COURT: Who's that?

20 MR. McLEAN: Jeff Evjene.

21 THE COURT: Is he in Libby?

22 MR. McLEAN: He's in Troy -- Eureka.

23 THE COURT: Then call him after the Parkers. Are  
24 there any others?

25 MR. McLEAN: One of the issues that we have,

1 Mr. Evjene's exposures were pre-1976. Since we've learned the  
2 Court's position on the relevance of those, we had determined  
3 not to call Mr. Evjene as a witness based on what he learned  
4 last week. So we think that he's not going to be testifying.

5 And, Your Honor, if I could just try to clarify a  
6 little bit here. Our representations about the Parkers'  
7 position were obtained entirely through their attorney. Their  
8 attorney wanted us and required us to make those particular  
9 representations in our pleadings so that the record was clear  
10 with respect to his clients. And so those representations were  
11 obtained through counsel for the Parkers, about their desire to  
12 go through the process and what it meant to them.

13 THE COURT: Well, that's the problem with the mix of  
14 the law and politics. I don't question the motives of that  
15 lawyer, he's been on a mission to accomplish certain things  
16 through statutory enactments which have occurred. The Parkers  
17 become a means to an end for him. And then it interferes with  
18 you and the presentation of your case.

19 And I know from discussing with that particular  
20 individual, not in court, on other matters, there is a  
21 concerted effort to alter the structure of the way the  
22 sovereign deals with an individual charged with crime. And  
23 there are political answers to that, which is reflected in the  
24 Crime Victims Rights Act, but what that person seems to be  
25 looking for is a case from the Circuit, one or the other

1 circuits, which upholds a district court's exclusion of  
2 witnesses because in that instance the Court of Appeals is  
3 obligated to give a reasoned written opinion, which then is  
4 fodder to take the issue higher, if it can go higher, to the  
5 Supreme Court of the United States.

6           The problem is that the dispute here is between the  
7 sovereign and the individuals named, it's not between the  
8 victims. And the law I agree with, absolutely, in principle,  
9 because it's never been different. This has always been a  
10 public proceeding. It is a public proceeding.

11           We have 15 people from this community that represent  
12 the citizens of United States that are going to decide this.  
13 And when it starts getting to the point where political issues  
14 interfere with your right to prosecute this or these  
15 individuals' right to defend themselves, then I have little  
16 concern for it.

17           But I still have the law to deal with. And what I'm  
18 going to do is I'm going to require that if you're telling me  
19 you're not going to call the third witness, that's fine, but  
20 you will have to call the Parkers. I know it's not in the  
21 order you want to call them, but I'm sorry, I'm not going to be  
22 the boogeyman here. I'm trying to find the law.

23           And I find it a little bit disconcerting that the  
24 individual who insists that you put that in your pleading --  
25 who is it that you represent? You don't represent him. If he

1 wants to put something in a pleading, tell him to put it in  
2 himself. You're letting him twist you around. And it's  
3 inappropriate. And it leads to gamesmanship, and I'm tired of  
4 it. This case has been going on too long. And it has been  
5 delayed, delayed, delayed. And it's going to get tried. And  
6 it's going to get tried in accordance with the procedures that  
7 have been around in this country for over 200 years. Despite  
8 the crime victims rights statute and the complications that  
9 that creates. I will deal with it. I have a mandate from the  
10 Circuit that tells me.

11           Now, I don't know what we're going to do about that  
12 mandate. It seems to me that you have an obligation to file a  
13 pleading with the Ninth Circuit asking them to withdraw the  
14 mandate because you have elected, of your choice, to not follow  
15 the procedure which is mandated by the Ninth Circuit and  
16 suggested at least implicitly in the language of footnote four  
17 of the Mikhel case, that, *Because the district court did not*  
18 *consider the victim witness' intended testimony, and there's no*  
19 *evidence of the contents of that testimony in the record before*  
20 *us, we're sending it back.*

21           We have a mandate. And if you need me to read it to  
22 you, I'll read it to you again. But what it says is, *The*  
23 *district court is instructed to vacate its February 13th, 2009*  
24 *order and to conduct further proceedings so that it may make*  
25 *particularized findings with respect to each of the 34 victim*

1 witnesses consistent with 18 U.S. Code 3771(a)(3).

2 Now, we have that mandate. It tells me I have to do  
3 it with respect to each of those people.

4 MR. McLEAN: Your Honor, that really only requires  
5 it if the witnesses want to be in the court, and they have said  
6 they do not want to be in the court until after they've  
7 testified. And they will not be in the courtroom so,  
8 therefore, that procedure is not necessary for those witnesses.

9 THE COURT: But it's not -- I want it to be clear,  
10 as I have said repeatedly in this case, the entire community of  
11 Libby is welcome to come here. If they want to be here, I want  
12 them to be here. I do not want to exclude anybody. I want to  
13 recognize the rights of these people that are on trial here.  
14 And to balance that in accordance with the law.

15 Now, how am I supposed to tell the Circuit, *I don't*  
16 *need to do what you tell me?* I don't understand that. Do I  
17 just ignore it because you say it's okay? Because why?  
18 Because they're waiving their rights?

19 MR. McLEAN: Yes, sir, because they are waiving  
20 their rights.

21 THE COURT: And are they waiving their rights  
22 because of something I did?

23 MR. McLEAN: Well, many of them, when we inquired,  
24 had no desire to come down and be here during the course of the  
25 trial. Some of them did. That particular group, upon

1 reviewing your order, and the fact that they just had to be  
2 here today and then come back some day and testify, twice, that  
3 was a consideration. One of them is -- you know, there are  
4 reasons why they just simply could not be here today, personal  
5 reasons for those victims, where they decided, *Well, I don't*  
6 *need to sit through the course of trial that bad, I'll just go*  
7 *about my business and then when the government calls me as a*  
8 *witness, I'll be there to testify.*

9           And I think it was the Parkers, alone, to the best  
10 of my knowledge, that actually wanted to sit and listen to a  
11 lot of the testimony. I don't know if they were going to be  
12 here every day because we were going to call them as our last  
13 witnesses. But they were the only two that said, *I want to sit*  
14 *there and listen to Dr. Whitehouse, I want to sit there and*  
15 *listen to Peronard and the witnesses that are coming up.* So  
16 that's the result of our survey of the witnesses that are  
17 listed on attachment B.

18           THE COURT: Who's the group? I've heard the  
19 Parkers. Who else is in the group? Because I don't want them  
20 to think --

21           MR. McLEAN: Yeah, right.

22           THE COURT: -- they -- this procedure is set up for  
23 them. And it is a closed procedure to recognize their right to  
24 privacy. That's mandated in the statute. And I have not  
25 allowed any defense lawyer the opportunity, nor would I, to

1 cross-examine them. I just need to know what they're going to  
2 say if they're going to be here. Then the rest of it takes  
3 care of itself because then there's a record of their testimony  
4 and if, in fact, they alter their testimony, that can be  
5 pointed out to the jury and then the jury is the one who makes  
6 the determination whether they have altered their testimony and  
7 what significance that has in the course of this trial. So ...

8 MR. McLEAN: The group is only the Parkers that  
9 wanted to be here during the course of the trial, prior to  
10 their testimony.

11 THE COURT: Well, I think we can accommodate them by  
12 the procedure which is when Mr. Peronard's testimony is  
13 concluded -- and I'm not going to interrupt the  
14 cross-examination of Mr. Peronard by the defendants. As soon  
15 as he's finished, then you call whomever, in which order, Mr.  
16 or Mrs. Parker, and then they will proceed and they will be  
17 allowed here for any purpose.

18 This is, Mr. McLean, something that should have been  
19 taken up some time ago so that we didn't waste a day. We've  
20 now wasted a day. We lost a day -- we're imposing on 15  
21 people. We're asking them to serve for the paltry sum of \$40 a  
22 day to give up their livelihood to be here to do their civic  
23 duty in a very complicated and complex matter. And it just --  
24 I don't think we do the system good, I don't think we do the  
25 Parkers or anybody else in Libby any good, I don't think we do

1 the defendants any good, we certainly don't do the community  
2 any good by these unneeded, undesirable delays.

3 All right. Well, you may be seated, unless you have  
4 something else you want to take up.

5 MR. McLEAN: No, thank you, Your Honor.

6 THE COURT: I feel compelled to make some  
7 observations beyond what I have just stated.

8 In this case, Rule 615 provides that, *At the request*  
9 *of a party, the Court shall order witnesses excluded so that*  
10 *they cannot hear the testimony of other witnesses. And it may*  
11 *make the order of its own motion. This rule does not authorize*  
12 *the exclusion of a party who's a natural person -- that means*  
13 *the defendants have a right to be here -- or an officer or an*  
14 *employee of a party which is not a natural person designated as*  
15 *its representative by its attorney -- over the defendants'*  
16 *objection in this case, I allowed the government to have more*  
17 *than one representative -- or a person whose presence is shown*  
18 *by a party to be essential to the presentation of the party's*  
19 *cause -- again, over the objection of the defendants, at least*  
20 *Mr. Peronard's been allowed to be here the entirety of the*  
21 *time -- and then finally, the conundrum which is -- or a person*  
22 *authorized by statute to be present.*

23 The Ninth Circuit Court of Appeals, in the case of  
24 In re Iouri Mikhel, M-I-K-H-E-L, considered a district court's  
25 exclusion of witnesses as that relates to a murder case, and in

1 that case Judge Thomas noted, at the beginning, it's a per  
2 curiam order -- I should say, it was Judge Hawkins, Judge  
3 Thomas and Judge Silverman. In talking about 18 U.S. Code  
4 3771(a)(3), it says, *A crime victim, however, does not have an*  
5 *absolute right to witness a trial at the expense of the*  
6 *defendant's rights. A district court may exclude a*  
7 *victim-witness from the courtroom if the court finds by clear*  
8 *and convincing evidence that testimony by the victim would be*  
9 *materially altered if the victim heard other testimony at that*  
10 *proceeding.*

11           The Court went on to state that, *A mere possibility*  
12 *that a victim-witness may alter his or her testimony as a*  
13 *result of hearing others testify is therefore insufficient to*  
14 *justify excluding him or her from trial. Rather, a district*  
15 *court must find by clear and convincing evidence that it is*  
16 *highly likely and not merely possible that the victim-witness*  
17 *will alter his or her testimony.*

18           The Circuit disagreed with my view that there are no  
19 identifiable victims in this case and I abide by their  
20 determination, though I don't agree with it.

21           But the Court went on to say that, in curing the  
22 error on remand, the district court was required to consider  
23 the testimony of the victim witnesses.

24           The procedure I set up accomplished the goals of  
25 protecting the witness, getting a basis to make a determination

1 about whether or not the testimony would be altered and, I  
2 think, protected the defendants' exercise of their rights under  
3 615.

4           It is clear that, *Excluding witnesses serves two*  
5 *main purposes. The first is to prevent testimony by one*  
6 *witness from being tailored by what he hears in testimony by*  
7 *another. Where one of two witnesses called by the same party*  
8 *and generally in sympathy with the cause hears testimony by the*  
9 *other, the one may consciously or subconsciously mold his*  
10 *testimony into greater consistency with that of the other, or*  
11 *his memory may be unconsciously shaped by what he has heard.*  
12 *Where the sympathies of the witness are aligned with opposing*  
13 *sides, similar distortions may occur, this time increasing*  
14 *conflicts and inconsistencies between the stories. The second*  
15 *reason is to assist the parties in detecting error or falsehood*  
16 *by the witnesses. In the Biblical story of Susanna and the*  
17 *Elders, Daniel exposed falsehood by insisting that the two*  
18 *accusers separately describe the place where the alleged*  
19 *adultery occurred; When the two described different places,*  
20 *Susanna was belatedly released. Federal Rule of Evidence 615*  
21 *generated no controversy, undergoing no change during the*  
22 *rule-making phase and no substantive change in the hands of*  
23 *Congress.*

24           Early on, the United States Supreme Court considered  
25 the authority of the district court to preclude discussions

1 between witnesses and even their own counsel. In the course of  
2 deciding that case, which is Geders vs. United States, that is  
3 reported at 425 U.S. 80, the Court made observations about Rule  
4 615 and the authority of the district court.

5 Justice Marshall said, *Our cases have consistently*  
6 *recognized the important role the trial judge plays in the*  
7 *federal system of criminal justice. The judge is not a mere*  
8 *moderator, but is the governor of the trial for the purpose of*  
9 *assuring its proper conduct and determining questions of law.*

10 The trial judge must meet situations as they arise  
11 and to do this must have broad power to cope with the  
12 complexities and contingencies inherent in the adversary  
13 process. To this end, he may determine generally the order in  
14 which parties will adduce proof; his determination will be  
15 reviewed only for abuse of discretion.

16 Within limits, the judge may control the scope of  
17 rebuttal testimony and he may refuse to allow cumulative,  
18 repetitive or irrelevant testimony. And may control the scope  
19 of examination of witnesses. If truth and fairness are not to  
20 be sacrificed, the judge must exert substantial control over  
21 the proceedings.

22 The judge's power to control the progress, and  
23 within the limits of the adversary system, the shape of the  
24 trial includes broad powers to sequester witnesses before,  
25 during and after their testimony.

1                   Wigmore notes that centuries ago, the practice of  
2                   sequestration of witnesses already had in English practice an  
3                   independent and continuous existence, even in the time of those  
4                   earlier modes of trial which preceded the jury and were a part  
5                   of our inheritance of the common Germanic law.

6                   The aim of imposing the rule on witnesses, as the  
7                   practice of sequestering witnesses is sometimes called, is  
8                   twofold. It exercises a restraint on witnesses tailoring their  
9                   testimony to that of earlier witnesses and it aids in detecting  
10                  testimony that is less candid.

11                  In order to comply with the Crime Victims Rights  
12                  Act, as it has been now determined to apply by the Ninth  
13                  Circuit, the process and procedure that I am ordering is going  
14                  to be how we will proceed.

15                  Is there anything further, Mr. McLean?

16                  MR. McLEAN: Your Honor, I was just taking a few  
17                  moments there to let your order soak in about requiring the  
18                  Parkers to testify and we were considering, if there was some  
19                  way we could make a proffer to the Court about what they would  
20                  testify about, in order to put them back in the order of  
21                  testifying last. And just reiterate to the Court that I think  
22                  it's pretty clear that it's fine with the Parkers if they're  
23                  not here during the course of the trial, and they won't be here  
24                  to suffer any possible alteration of their testimony by  
25                  listening to other people testify.

1           THE COURT: I think not. They have to testify. And  
2 that way I'm not thrown in the midst of trying to say whether  
3 or not they would alter their testimony whenever. I don't know  
4 what they would read, I don't know what they would hear, I  
5 don't know what they would discuss. They can testify and then  
6 they will be welcome to be here for the entirety of the balance  
7 of the trial.

8           MR. McLEAN: That's all I have, Your Honor.

9           THE COURT: Mr. Bernick, is there anything you need  
10 to bring up?

11          MR. BERNICK: No, sir.

12          THE COURT: All right. I apologize to counsel  
13 for -- all of you. We've lost a day. And that is something  
14 that should not happen.

15                 But I've spoken, I've made my rulings and we will  
16 begin tomorrow morning at 8:30, not at 9:00, at 8:30 tomorrow  
17 morning, with the conclusion of Mr. Peronard's  
18 cross-examination and redirect by Mr. Cassidy, and then we'll  
19 move to the next witness, either Mr. or Mrs. Parker, as chosen  
20 by the United States.

21                 And I'll tell you now -- and, Mr. McLean, I don't  
22 know what this issue is going to be for you, but Mr. Sherwood  
23 has filed these motions. I'm going to deny the motion for  
24 leave to file the motion to intervene. You can't intervene in  
25 a criminal case. I'm uncertain about the motion to alter the

1 subpoena. That seems to be within the contemplation of the  
2 Rules of Criminal Procedure. And I don't know what discussions  
3 you and he have had, but I would encourage you to resolve  
4 whatever the issue is so that we don't waste any more trial  
5 time with our jury.

6 We'll be in recess.

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8 (Whereupon, court was in recess at 9:34 a.m., to  
9 reconvene at 8:30 a.m. on Tuesday, March 3, 2009.)

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C E R T I F I C A T E

STATE OF MONTANA            )  
                                  )  ss.  
COUNTY OF MISSOULA        )

I, Daina B. Hodges, Official Court Reporter for the United States District Court, District of Montana, Missoula/Helena/Butte Divisions, and Notary Public for the State of Montana, residing in Missoula, Montana, do hereby certify:

That I was duly authorized to and did report the proceedings of the jury trial in the United States of America vs. W.R. Grace, et al., CR 05-07-M-DWM, Volume 5.

That the foregoing pages of this transcript constitute a true and accurate computer-aided transcription of my stenotype notes of the court proceedings.

I further certify that I am not an attorney nor counsel of any of the parties; nor a relative or employee of any attorney or counsel connected with the action; nor financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on this the 2nd day of March, 2009.

/s/ Daina B. Hodges  
Daina B. Hodges  
Official Court Reporter  
U.S. District Court, District of Montana  
Residing in Missoula, Montana