UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: MELVIN PARKER; LERAH PARKER.	)	No. 09-70529
	)	D.C. No. 9:05-cr-00007-DWM
MELVIN PARKER; et al.,	)	District of Montana
	)	Missoula
Petitioners,	)	
v.	)	
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA (MISSOULA),	)	
Respondent,	)	
W. R. GRACE & CO.; et al.,	)	
Real Parties in Interest.	)	
In re: UNITED STATES OF AMERICA.	)	No. 09-70533
	)	D.C. No. 9:05-cr-00007-DWM
UNITED STATES OF AMERICA,	)	District of Montana
	)	Missoula
Petitioner,	)	
v.	)	DISTRICT COURT RESPONSE
UNITED STATES DISTRICT COURT	)	

FOR THE DISTRICT OF MONTANA (MISSOULA),	)
	)
Respondent,	)
	)
W. R. GRACE & CO.; et al.,	)
	)
Real Parties in Interest.	)

As the trial judge in this complex case expected to last between three and five months, I appreciate the panel's invitation to respond to the sixty-three page petition asking this Court to compel me to second guess my ruling on Defendants' invocation of Rule 615 of the Federal Rules of Evidence. That said, I find myself in an awkward position. Historically, the trial judge in a criminal case presides over a dispute involving the coercive power of the government brought to bear on one or more individuals accused of committing criminal offenses. The rules of procedure and evidence serve the purpose of ensuring a fair adversarial process in a two-party advocacy system. Contrary to this basic feature of our legal tradition, I find implicit in this issue the suggestion that I must advocate for one party or another. This makes it near impossible, in the middle of trial, to explain why my rulings ultimately have little impact on any person who deems him- or herself a victim.

The first day of trial eight persons, designated by others as "victims,"

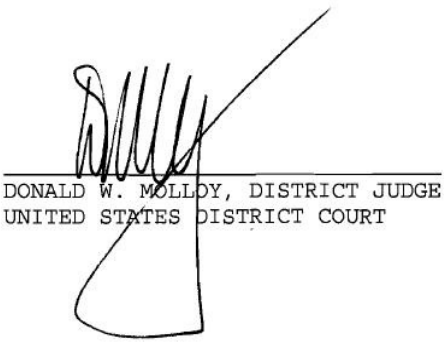
testified as witnesses and were thus excluded from the courtroom under Rule 615 until they were called to testify. As is my custom, at the conclusion of each witness's testimony I released him or her from the subpoena and invited each to stay and listen to the trial. None of the eight witnesses wished to do anything but go home. None stayed in the courtroom. It is noteworthy as well that the government, during its opening statement explained to the jury that it would call witnesses out of order. The entire issue here is resolved if the government does what it has so far and call the proclaimed "victims" to testify, after which each may stay for any part, or the whole, of the trial.

I am absolutely convinced my pretrial ruling, based on the issues and complexity of the case, was correct. I have stated my legal reasoning for concluding that Rule 615 extends to those lay witnesses the United States believes are victims in this case despite the provisions of 18 U.S.C. § 3771, and will not repeat that analysis here. Apart from the 34 witnesses designated by the government, the hundreds of people the government has deemed victims are welcome to attend the trial proceedings.

Times, dates, and locations are critical to the government's proof in the case. In light of the testimony of the eight witnesses who have testified I have no doubt that if any of the witnesses is allowed to sit in the courtroom to listen before

testifying, it will significantly impact the ability of any of all of the defendants to cross examine witnesses to point out lack of memory, bias, confusion, and any other matter inherent to the notion that cross examination and confrontation are the crucible in which the truth must be tested. I made no determination in my ruling regarding Rule 615, and in denying the government's request for reconsideration of whether the witnesses might have altered testimony if not excluded under Rule 615. If I am asked to make that determination I would have to find, by much more than clear and convincing evidence, after listening to eight lay witnesses try to remember times, dates, and places from as long as thirty or forty years ago, that allowing the witnesses to listen to other testimony before testifying would impact their memories and recall. This in turn would raise serious questions about the defendant's rights to confrontation and cross examination.

Respectfully submitted this 25th day of February, 2009.



DONALD W. MOLLOY, DISTRICT JUDGE
UNITED STATES DISTRICT COURT