IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 96-CR-68

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TERRY LYNN NICHOLS,

Defendant.

REPORTER'S TRANSCRIPT
(Trial to Jury: Volume 142)

Proceedings before the HONORABLE RICHARD P. MATSCH, Judge, United States District Court for the District of Colorado, commencing at 9:00 a.m., on the 24th day of December, 1997, in Courtroom C-204, United States Courthouse, Denver, Colorado.

Proceeding Recorded by Mechanical Stenography, Transcription Produced via Computer by Paul Zuckerman, 1929 Stout Street, P.O. Box 3563, Denver, Colorado, 80294, (303) 629-9285

APPEARANCES

PATRICK RYAN, United States Attorney for the Western District of Oklahoma, 210 West Park Avenue, Suite 400, Oklahoma City, Oklahoma, 73102, appearing for the plaintiff.

LARRY MACKEY, SEAN CONNELLY, BETH WILKINSON, GEOFFREY MEARNS, JAMIE ORENSTEIN, and AITAN GOELMAN, Special Attorneys to the U.S. Attorney General, 1961 Stout Street, Suite 1200, Denver, Colorado, 80294, appearing for the plaintiff.

MICHAEL TIGAR, RONALD WOODS, ADAM THURSCHWELL, REID NEUREITER, and JANE TIGAR, Attorneys at Law, 1120 Lincoln Street, Suite 1308, Denver, Colorado, 80203, appearing for Defendant Nichols.

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PROCEEDINGS

(In open court at 9:00 a.m.)

THE COURT: Be seated, please.

Good morning.

MR. TIGAR: Good morning.

THE COURT: There was filed earlier this morning a motion of the defendant to preclude a sentencing hearing pursuant to 18 United States Code Section 3591 on grounds of collateral estoppel.

Also filed earlier this morning is a report of the United States regarding sentencing allegations.

And there is before me an earlier-filed -- on

December 22 -- renewed motion of Terry Lynn Nichols to strike the notice of intention to seek the death penalty.

So I believe those go together. But I assume that you've exchanged these new pleadings that were filed.

MR. TIGAR: Yes, your Honor.

THE COURT: All right. And I've reviewed them, so we're ready to proceed.

The Government's report regarding sentencing allegation, I guess, in a sense, is an amendment to the notice of intention to seek the death penalty and eliminates some of the -- well, it eliminates 3591(a)(2)(A) and (B) as intent factors and then also modifies the aggravating -- statutory aggravating factor.

So Mr. Tigar, we'll proceed on your motion to preclude a sentencing hearing. And if you want to also address the same matters that are in the renewed motion to strike, you may, of course, do so.

ARGUMENTS RE SENTENCING HEARING

DEFENDANT'S ARGUMENT

MR. TIGAR: Well, if your Honor please, the Court on September 25, 1996, described the procedure that would be followed in the event of convictions in this case. And at page 15 of your Honor's opinion, you said that the jury will proceed in a sequential manner, first determining whether the Government proved one of the four intentions described in

Section 3591(a)(2)(A) through (D). And then the Court said -- and followed this up with instructions in the McVeigh case -- that if the jurors are not unanimous in finding that one of these intentions existed, their task is complete and the Court will sentence according to the sentencing guidelines.

Thus, the threshold issue is whether or not the Government is precluded at this procedural hour from going to the four intentions that are described in 3591(a)(2)(A) through (D).

This morning, in a notice of intention -- excuse me -- in a report to the Court, the United States has withdrawn from (A) and (B), leaving (C) and (D).

THE COURT: Right.

MR. TIGAR: Now, it is well settled that different stages of a bifurcated proceeding require the Court and the parties and a jury, if there is one, to give full respect to and effect to findings made by the jury in the first part. That is a rule that applies both in civil and criminal cases.

For example, in the case of Butler vs. Pollard, in 800 F.2d 223, Judge Lee West down in Oklahoma had tried a case that involved both legal and equitable issues.

Under Beacon Theaters vs. Westover, Judge West tried the legal issues first to a jury, resulting in a defense verdict and findings. He then said that despite that, he thought the plaintiff was entitled to an injunction and went

ahead and issued findings and issued an injunction. And the Tenth Circuit in the case cited said that preclusion applies to prevent that.

In criminal cases, of course, the doctrine has a constitutional dimension. In Ashe vs. Swenson, the case that we cite, the Court told us how this is supposed to work. You'll recall that the defendant there was charged with the robbery of six different people and the theft of a car as a result of a card game. He was acquitted of the first count with respect -- on the first trial with respect to the first victim, and the state sought to retry him with respect to the second victim. The Supreme Court said no; that using the analysis, that is not just the jury's verdict but looking at the whole record, it was clear that the jury's acquittal with respect to the first victim established facts that were inconsistent with the Government's theory in the second case.

That was followed up by the Supreme Court's decision in Simpson vs. Florida. In Simpson, which is at 403 U.S. 384, Simpson was convicted of robbing a manager of a store and a customer in the store. His conviction for robbing the manager was overturned. He goes back, he's tried again for robbing the customer, and then the state wants to prosecute him again for robbing the manager; held no, you can't do it; that is to say that the jury's finding necessarily implicates the finding that he didn't commit a robbery while he was in the store.

This doctrine, which is -- starts in Ashe, has special application to capital cases as the Supreme Court held in Bullington vs. Missouri. These are cases that are cited in our memorandum.

But the point here is that the jury in this case has found guilt on Count 1, in which there was no requirement that they find an intent to kill and in which the Court specifically instructed the jury that even minor participation would be sufficient.

Then the jury found that the defendant had only that mental state described as sufficient for voluntary -- or involuntary manslaughter at page 20 of the Court's instructions, which is a lawful act done without due caution which might produce death and the defendant knew that such conduct was a threat to the lives of others, essentially a negligent or gross negligence standard.

In addition to that, the jury, having convicted on Count 1, acquitted on Count 2 and 3. The significance of the acquittal on Count 2 is that Count 2 is under the identical statute, 2332a, except that it proceeds on an aiding and abetting theory and not on a conspiracy theory. And when we examine the jury's work, we can also examine the notes that the jury sent on this. But the Court affirmed at page 20 of the instructions that the defendant had to participate in the conduct and seek by his actions to make it succeed. Those are

two of the four elements of aiding and abetting at page 20. So the jury acquitted on that.

Now, using that as a backdrop, let's turn to the question of how in the world the Government is going to have a -- a trial here about 3591(a)(2). "Intentionally participated in an act contemplating that the life of a person would be taken or intending that --" legal "-- lethal force would be used in connection with a person." That standard is inconsistent with the jury's acquittal on Count -- on first-degree murder and second-degree murder.

There are cases, like Schiro vs. Farley, in which the jury doesn't fill out the verdict form -- and it might have happened here. The jury would simply leave blank the first-degree and second-degree and they'd go right to involuntary manslaughter. Here, they didn't. They acquitted the defendant of all forms of intent-to-kill homicide, including implied-malice homicide under second-degree murder, the common-law doctrine that intent to kill can be shown by a certain kind of wanton disregard.

That, by the way, we take not only as a statutory guideline, but we've cited again Enmund and Tison; that is, the Court is making a decision here at the juncture of two important constitutional provisions. There cannot be a death sentence without proof of major participation and an intent that rises at least to the level of second-degree murder,

depraved-heart murder, which is the Model Penal Code equivalent of old-fashioned second-degree murder or malice aforethought.

Turning then to (D) -- The second of those constitutional provisions, of course, is this double jeopardy notion, which while the contours of the right are clear, what we're talking about is not something that can be corrected afterwards: go through a trial, hear 120 witnesses, many of whom have already given press conferences saying that they despise this jury's verdict and they don't like it and so on, putting the families through the trial, both the families, to testify for the prosecution and Mr. Nichols' family and afterwards say, well, let's take a look at it.

The double jeopardy issue says that Mr. Nichols now has a right not to face this prospect at all because the jury's verdict in the first phase is preclusive.

So now we come to (D), intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person.

Now, the Government's difficulty with attempting to rely on this is twofold: First, the defendant has to engage in an act of violence, not contemplate it, not agree to it. He must engage in it. And the jury has acquitted the defendant of engaging in every act of violence that was charged in Counts 2 and 3 of the indictment.

The jury has also acquitted the defendant of the

mental element that's covered under (D).

So what we have here, your Honor, is a situation in which the threshold finding simply cannot be made.

Now, when your Honor wrote the opinion back in September of 1996, I don't know that any of us contemplated exactly what procedural situation we would face. But the Court in that process -- that opinion and its earlier one -- did hold that intent to kill was not going to be required for proof in Counts 1, 2 and 3. It would, of course, be required in Counts 4 through 11, and that the Court also recognized that essentially the process of capital sentencing is a three-phase process in the second half. The first phase is that if any one juror -- if you put it to the jury -- says, well, we just don't find beyond a reasonable doubt one of these four things, the process is over, the jury goes home, which is why we have the alternative proposal, since there doesn't appear to be new evidence here with the exception of something we'll get to, if we need to, about Brady issues.

We ask the jurors: Does any one of you think that they haven't proved that beyond a reasonable doubt? If so, we're done; that is to say, do as Judge Berrigan did and bifurcate the bifurcation so as to avoid the spectacle. But that's only alternative relief. The fact is these are threshold findings. The Government repeatedly referred to them as "gateway findings." If the Constitution and the finding of

the jury, which the Government says it fully accepts, prevents that gateway from being crossed, then that's the end of the matter.

Interestingly, your Honor, the Government has conceded that this is so; that is, I thought I was going to have to come in here and argue to the Court that your Honor has a power that the Government would say your Honor does not possess to stop this thing right now. But I don't have to, because the Government -- albeit in a procedurally defective report which I'll get to if we need to -- has withdrawn any reliance on (A) and (B), no doubt in some interpretation of the jury's verdict. Thus, your Honor's power to intervene here has been conceded by the Government; that is to say, the Government recognizes that it cannot put itself in the position of walking up to that jury rail there or standing here and saying: Well, members of the jury, it was all very nice these three months, but we think you did a bad job here and now we want you to find something that you didn't find. Nobody in the process is free to do that.

And so if the Court please, we respectfully submit that the jury's verdict is binding and it is conclusive; that is to say that it fails as a matter of the Eighth Amendment to establish a Tison/Enmund threshold and fails as a matter of statutory interpretation to give the Government any comfort and indeed amounts to a finding of reasonable doubt that precludes the Government as to every single one of these elements.

Now, that is our argument, your Honor, with respect to the first phase.

We also have an argument with respect to the second phase. I can withhold that, or I can go on now.

THE COURT: Meaning the aggravating factors?

MR. TIGAR: Yes, your Honor. With respect to these -- the adequacy of the Government's notice and the aggravating factors.

THE COURT: Well, let's withhold that and talk about 3591(a)(2)(C) and (D). Then we'll come to that if necessary.

Mr. Connelly, are you going to address this?

MR. CONNELLY: Yes, your Honor. Thank you.

THE COURT: All right.

PLAINTIFF'S ARGUMENT

MR. CONNELLY: The jury found in Count 1 of the indictment beyond a reasonable doubt that Terry Nichols had conspired to bomb the Murrah Building and the persons inside. They further found that that crime of conspiracy resulted in the deaths or at least one death of another person, and they further found that those deaths were foreseeable.

The jury found in Counts 4 through 11 -- or failed to find that he had acted with intent -- premeditated intent to kill or malice aforethought for second-degree murder.

Tison and Enmund -- the Supreme Court's decisions in Tison and Enmund cases hold that a felony murderer -- which, in

effect, this is a felony murder; it's a felony that resulted in deaths of others, foreseeable deaths of others -- may be sentenced to death even though he personally did not commit the act and even though he personally did not intend to kill. And that, we would submit, is a fair reading of what the jury found in Counts 4 through 11.

The question therefore is where in this spectrum of intent would the jury find that Terry Nichols acted. And there is no finding on that. They found on the one hand that he foreseeably caused the deaths of others. They found on the other that he personally did not intend to kill. Tison and Enmund says there is an in-between area in which the death sentence can constitutionally be imposed; and those, we submit, are, in effect, the intent elements in Section (C) and (D) of 3591(a)(2).

We are entitled, your Honor, to ask the jury to make those findings. Those findings have not been made. We agree that under the doctrine of collateral estoppel applied in criminal cases that if the defendant proves or carries the burden -- and it is his burden of trying to preclude the Government from going forward in the case -- if he shows that the jury necessarily decided an issue adversely to the Government that we would not seek to relitigate that. And we accept that even on intent to kill. So we are not seeking to relitigate did he intend to kill the persons inside the Murrah

Building. We are entitled, however, to ask the jury to find that the deaths that they found were foreseeable, were the result of a callous and wanton action taken with reckless disregard for life. And that finding has not been made adversely to the Government by any of the jury verdicts.

And again, I think it's hard it to read these verdicts in some ways. The Supreme Court has made clear that the jury has the right to return inconsistent verdicts and that -- that fact may be the result of compromise, may be the result of a lot of other reasons, and it's not for any of us to speculate as to why the jury returned the verdicts they did. The question is did the jury necessarily find that the Government did not prove the intent elements set forth in Section 3591(a)(2)(C) and (D), and we submit they clearly did not because that question was not submitted to them.

THE COURT: What's the definition of an act of violence under (D)?

MR. CONNELLY: I think 18 U.S.C. Section 16 talks about "crime of violence"; and the Tenth Circuit just a couple of months ago in the Lampley case said that a conspiracy to build an explosive device was a crime of violence. And that's a case out of eastern Oklahoma and decided in October of '97. So the Tenth Circuit did say that a conspiracy -- the same type of conspiracy that this defendant is charged with -- I think in that case was to blow up a building in Houston that never

proceeded to fruition, but there was a conspiracy to use and build an explosive device. The Tenth Circuit said that is a crime of violence within the meaning of the statute.

I don't think "act of violence" is specifically defined; but 18 U.S.C. Section 16 does define "crime of violence." And I think that the case law is clear in this circuit and elsewhere that this type of conspiracy is an act of violence.

THE COURT: Well, what's the Government going to argue to the jury?

MR. CONNELLY: That the -- well, there are different stages of argument, obviously --

THE COURT: Well, I mean for these two points.

MR. CONNELLY: As to the intent, that he engaged in a conspiracy to bomb the Murrah Building and the persons inside; that that was an act of violence and that it was undertaken with wanton and reckless disregard for human life such that the death penalty is appropriate; that the jury need not find intent to kill; that they can find this in-between element. They found, as I said, on the spectrum that the crime foreseeably resulted in death. They have found, on the other hand, that he did not premeditate and intend the death of these persons, so there is that -- that in-between area, that Tison/ Enmund area that still remains open and a matter to be litigated.

THE COURT: Let's assume -- because it does seem to me fair reading here -- that the jury may have believed in determining the elements of the offenses here as they did that Mr. Nichols participated with Mr. McVeigh in a conspiracy; that the objectives were as described but that -- in the indictment but that the objectives were not so specific as would be specifically to the Murrah Building.

MR. CONNELLY: I guess we could all speculate as to what they found. The indictment --

THE COURT: Well, I want you to take my assumption.

MR. CONNELLY: Okay.

THE COURT: And therefore that Mr. Nichols' intent was to participate in the construction of a weapon of mass destruction, expecting that Mr. McVeigh and/or others would use it but did not have the specific intent that it be used against the Murrah Building but that it be used as an act of terrorism as we have defined it, and that is to intimidate or coerce a government.

Now, if that be the approach, does that meet subsection (C) and (D), intent?

MR. CONNELLY: I think it does. And I will, of course, accept the Court's premise. I don't think that's a necessary reading. I think the burden is on the defendant to show that they necessarily decided that way. I agree that could be a reading.

THE COURT: I'm not saying that it's necessary. I obviously -- what we have to consider, though, is a set of facts that's already here and that could then be amplified at the penalty phase hearing that would be -- would reach (C) and (D). And what I'm asking you is in your view that when it says "contemplating that the life --" I'm talking about (C) now -- "contemplating that the life of a person would be taken or intending that lethal force would be used against a person" that here again it doesn't have to be a specific target.

MR. CONNELLY: We know from the jury finding that they found that the crime that they did convict him on foreseeably resulted in death. So it was foreseeable. So the question is on top of foreseeing that death resulted, could he have contemplated -- or not could he have: Did he contemplate that death would result? And I would submit that that is not a finding that's necessarily been made by the jury.

THE COURT: It doesn't have to be a specific death.

MR. CONNELLY: It does not have to be; and then, certainly, when you get down to (D), you talk about "such that it created grave risk of death."

THE COURT: "Grave risk of death."

MR. CONNELLY: And I think that anybody that participated in that kind of explosive device that the jury found he conspired to build, foreseeing that death resulted, I think it's a fair inference to ask the jury to find that he

knew that there was a grave risk of death presented by that conduct. So I think that, certainly, what we're asking to go to the jury on in the sentencing phase is consistent, fully consistent with what they've already found and certainly is not precluded by anything that they have found adversely to the Government. So I think as a matter of Ashe vs. Swenson or collateral estoppel that we are entitled to go forward.

I would point out -- I've accepted the Court's premise, obviously, of what they might have found; but the instructions on page 8 of the instructions say what the Government must prove is that the defendant, Terry Lynn Nichols, and at least one other person did knowingly and deliberately arrive at some type of agreement that they and perhaps others would use a weapon of mass destruction against the Alfred P. Murrah Building in Oklahoma City and the persons in it. So I think assuming the jury followed the instructions, as I think the case law requires us to do -- I think the jury found more than what the Court is postulating they may have found. But even assuming they only found what the Court says they may have found, I think that's sufficient under Section (C) and (D) to go forward.

THE COURT: Okay. Mr. Tigar?

DEFENDANT'S REBUTTAL ARGUMENT

MR. TIGAR: The Government invokes the felony murder doctrine. Five times in this court, the Government has

deliberately disavowed felony murder as a basis for proceeding here. And now they want to revive felony murder as a basis for going forward into a penalty phase.

The Government is precluded. They've never alleged felony murder. They've affirmatively led us to believe that this is not a felony murder case; and therefore, any such theory has got to be set aside.

And to claim that involuntary manslaughter can be somehow assimilated to felony murder, of course, completes the -- what we'd submit is the absurdity of Government's position.

So let's turn to our burden under Ashe vs. Swenson.

In Ashe, there were six victims. In Simpson, there were two victims. The fact that this jury found no intent to kill with respect to any of the eight victims in Counts 4 through 11 necessarily implicates a finding that Mr. Nichols did not possess the intent to kill with respect to anybody else that was killed in the Murrah Building or near it or by that device. That is the rationale of Ashe vs. Swenson. There is only one transaction here. The transaction is the alleged construction of a bomb. We know a bomb was constructed. The question is what is Mr. Nichols' role.

Given the fact that there is a single transaction just as in Ashe, you can't divide up the intent into geographical or temporal phases and get away from the proposition that this

jury acquitted Mr. Nichols of first-degree and second-degree murder.

THE COURT: Well, by your interpretation of the jury's findings, though, they couldn't have found him guilty of the conspiracy, either.

MR. TIGAR: No, your Honor, that is not true.

THE COURT: Well, why isn't it?

MR. TIGAR: Because, your Honor -- if I can get the instructions -- the elements of the offense, your Honor, to which the jury looked are that two or more persons, including the defendant, agreed to use an explosive bomb in a truck as a weapon of mass destruction against the Murrah Building and the persons inside it; then that the defendant knowingly and voluntarily became a member with the intent to advance or further it; that the achievement would have affected interstate commerce. Then what the Government quotes is that the defendant did reach an agreement at some point in time that they would use such a device.

Under conspiracy law, there is no concept of locus poenitentiae; that is to say, a defendant, even if he affirmatively proves withdrawal, has a great problem once the unlawful agreement is formed. And thus if we're looking for ways to make the jury's verdict consistent, what we see here is that when the jury actually talks about agreement, they conclude that at some time, an agreement is formed, but they

also conclude when they get to Count 2 and the Government has to prove beyond a reasonable doubt that the defendant took some action beyond mere agreement, they acquit him. So it isn't just the 4 through 11; he's acquitted on Count 2, your Honor. And the only way to make the verdict of acquittal on Count 2 consistent with the verdict of conviction on Count 1 is to recognize that as your Honor said at page 20 of the instructions, you know, they had to prove all four of those things there, which includes an act.

That, of course, is crucial to our argument with respect to the term "act of violence" in (D). Act of violence is not the same thing as crime of violence, if you read the statutory provision. An act -- the law knows the difference between a crime and an act. The term "act" explains itself and is indeed "sought by his actions . . ." The Court has talked about acts in Count 2, and that's what we were acquitted on.

So the jury's verdict, if we are to regard it as consistent, says essentially that at some point, Mr. Nichols participated in an unlawful agreement that had a certain objective but that when it came time to do actions, he lacked the intent to kill.

Now, that is significant in two senses. And now the Government -- and the Government wants to overlook that. First is, of course, the Tison standard of some depraved-heart murder, being the baseline. Second is the Enmund standard;

that is, if we're to read these verdicts as consistent, we have to look at a time when an agreement was formed, but the jury in 1, 2, 3, 4 -- in Counts 2, 3, 4, 5, all the way through 11, saying we acquit Mr. Nichols with respect to actions, which, of course, implicates the so-called "major participation" element. At least in Tison and Enmund, you know, the state was told, you know, you can't convict somebody, you can't subject them to a death penalty unless you get them close enough to the -- to the action that they can actually have the intent to kill and fulfill that requirement of major participation.

Your Honor --

THE COURT: Well, let me take that -- I want to make it clear because I think it may be confusing to the public that the law is clear that the validity of the jury's verdict does not depend upon its internal consistency. The jury is entitled in a criminal case to have an inconsistent verdict. I'm not saying this verdict is inconsistent. I don't want to be misunderstood about that. But now we're talking about something different.

MR. TIGAR: Yes, your Honor. Of course, we understand that position.

THE COURT: If we read Section (C), subsection (C) of 3591(a)(2) to say this: The defendant intentionally participated in an act and the act becomes agreement in an agreement contemplating that the life of a person would be

taken or intending lethal force would be used and the victim die, doesn't that fit what you've just been talking about?

MR. TIGAR: Well, your Honor, if you change the word "acts" to "agreement" --

THE COURT: Yes.

MR. TIGAR: -- then you get closer. So let me first begin by suggesting that "act" is a word chosen by the Congress and the reason the Congress chose the word "act" and not "agreement" is that there has never been a case since Furman was decided in which any Federal Court has upheld a death penalty based upon mere agreement; that is to say, the conspiracy. There has never been one. It flunks the Coker test.

As your Honor repeatedly told the jury in voir dire, you know, basically, when we talk about the death penalty, we are talking about murder; that is, homicide committed with some kind of intention with respect to resulting death. And I can prove it to your Honor.

You cannot rewrite this statute, your Honor, by substituting the word "agreement" for "act," I respectfully submit. After all, if you look at 3592, which the Government relies on, you look at (C), aggravating factors for homicide -- that is to say the Congress, in defining aggravating factors that would apply to this situation, speaks of "homicide." And that so -- if there is any doubt as to whether the word "act"

has to be read to be act and not agreement, that should dispel it. The Congress, by using the word "homicide," doesn't refer to some agreement to do homicide.

THE COURT: Well, the statute says, 3591(a)(2), "Any other offense for which a sentence of death is provided," and a sentence of death is provided for the crime of conspiracy under 2332a(a).

MR. TIGAR: Yes, your Honor, provided that the Government is not precluded from going forward by jury findings of no intent to kill; that is to say, the constitutionality of 2332a depends upon satisfying Enmund and Tison. A minor participant in the conspiracy -- and your Honor permitted this jury to convict based on minor participation. You told them they could.

THE COURT: Well, but, you know, you're talking about two different things now. You're talking about the Constitution, which of course, we have to be concerned about, and also the statutory interpretation. But if we deal first with the statutory interpretation here, isn't it true that the plain language of the statute provides under 3591 for a penalty of death where the underlying statute -- that is, this conspiracy statute -- specifies a penalty of death. "If death results as" is the language of the act in 2332a(a); and then obviously, we must come back to these intentional forms of intent. But one of the forms of intent is participated here in

an act contemplating the life of a person would be taking -- taken or lethal force used.

Now, you know, the jury says that there was an agreement to bomb the Murrah Building.

MR. TIGAR: Your Honor, let me take those a step at a time. First let us suppose that the jury had not returned 16 not guilty verdicts on Counts 4 through 11, which they did. But let's assume they didn't. Then it would be open to the Government to prove beyond a reasonable doubt if it had obtained a conviction only on Count 1 and that was the sole count charged -- they could prove that the defendant did intentionally participate in an act contemplating that the life of a person would be taken or intending that lethal force would be used.

Now, they'd be free to try to prove that. That's not the question here.

The question is: Are they precluded?

Now, the first point is if your Honor is going to read the term "act" to include agreement, then, quite frankly, we disagree with the Court. The act requirement is an additional requirement over and above the agreement requirement for the conspiracy charge. If the Congress had intended to say "agreement," they would have said agreement. In the next sentence, they say "act of violence."

Then "contemplating that the life of a person would be

taken or intending that lethal force would be used against a person": If the Government were free to argue -- that is to say without the verdicts on 4 through 11 -- they might present evidence with respect to that. But a contemplation that the life of a person would be taken or intending that lethal force would be used is flatly contrary to what the jury found by acquitting Mr. Nichols on first-degree and second-degree murder on Counts 4 through 11; so whatever else there may be, in the abstract, your Honor, that decision, that verdict stands and is entitled to the respect of all the parties here.

THE COURT: Why isn't the entry into an agreement an act? It is the act of entry into an agreement, isn't it?

MR. TIGAR: Your Honor, that is a possible reading; however, it is foreclosed by the language of the statute, which uses "act" and "act of violence"; and it's also foreclosed, your Honor, by your Honor's own instructions to this jury and by the jury's questions asking what had to be shown for a conviction under Counts 2 and 3. The Court's instructions could not have made clearer the distinction between "agreement" and "act" with respect to Count 1 and Count 2, because after all, Count 1 is a single object conspiracy. Having made the distinction clear to the jurors, the jurors having responded by saying we find agreement but not action to go through with it, the Government is foreclosed from the argument that it wished to make even if one wanted to say that the statute shouldn't be

read literally.

THE COURT: Well, it's your position that it's a violation of the principle of Tison for a death penalty to result from a conspiracy where the -- where the conspirator on trial did not participate in a killing?

MR. TIGAR: Major participation and depraved-heart intent with respect to resulting death are Tison/Enmund ingredients. In addition, your Honor, with respect to making conspiracy without these additional gateway findings, not waiving our earlier position that they had to be instructed on earlier, by making a conspiracy, a criminal conspiracy of any description, having a person death-eligible raises Coker vs. Georgia problems; that is to say, there has got to be some form of an offense called "homicide" and those elements that are like homicide have to be proved at some point or another.

THE COURT: All right.

Mr. Connelly, do you want to -- this -- procedurally, of course, it's a -- the defendant's motion; but I'll permit you to address it further.

PLAINTIFF'S SURREBUTTAL ARGUMENT

MR. CONNELLY: Thank you, your Honor.

I think the Court has framed the analysis well. I think there are two issues here. One is a matter of statutory construction, one is a matter of constitutional interpretation. The matter of statutory construction, the statute could not be

clearer, we submit: Section 2332a, the offense of conviction in Count 1, could not be clearer that a conspiracy may give rise to the death penalty if death results. And I think in light of 2332a, the Court's interpretation of 3591 that an act of violence may be an agreement to commit a crime of violence -- that, in other words, the agreement may be the act -- is clearly the correct interpretation. I think that's consistent with general conspiracy law that the agreement is the act, entering into the agreement is an act, and I think that's made -- confirmed by the fact that 2332a contemplates that a conspiracy itself that results in death may give rise to the death penalty.

So I think the question then for -- and secondarily to that, I think it can't be assumed in any way that the jury found that all Mr. Nichols did is agree and performed no acts in furtherance of that agreement. The only way to infer the agreement is to examine the acts; so I think we have to assume that the jury at least found that Mr. Nichols engaged in some, if not all, of the overt acts in order to support the conspiracy conviction.

So I think for two reasons, (1) that the agreement is the act, the statute is satisfied and second of all, because there are acts in addition to the agreement that we have to assume that the jury found.

Now, we don't have to debate did they find that he

bought ammonium nitrate but not this or that. But certainly, I think it's fair to assume that the jury found that Mr. Nichols engaged in some acts in furtherance of the conspiracy so that the conspiracy itself is the act and that he also engaged in acts.

The question then becomes is the statute constitutional as applied to this case? And we submit that there is no basis for holding that the Eighth Amendment bars the Government from going forward in this case. The defense certainly has cited no case that would say the Eighth Amendment bars it.

We have proceeded on the felony murder doctrine on Counts 1, 2, and 3, and I'd like -- if we just go back and talk about what our position has been throughout the case. We originally charged all 11 crimes as capital crimes. The defense -- I think it was the McVeigh defense joined in by the Nichols defense said that the murder crimes are duplicitous; that is that, in effect, the counts 1, 2, and 3 are felony murder crimes; that is a felony that resulted in death. Therefore, they're felony murder and therefore, it's duplicitous with the first-degree murder charges in Counts 4 through 11.

In that context, we said we will not be proceeding in Counts 4 through 11 as felony murder counts. We are seeking to prove premeditation. We could, under the statute, arguably

have said we don't have to prove premeditation on the murder counts. All you have to find is that death resulted from his commission of a felony, and we have consistently said -- and the jury instructions that went back to the jury reflected this -- that we did not ask the Court to instruct on felony murder, which is a subset of first-degree murder. So the jury's finding of first-degree murder was simply that there was not a premeditated intent to kill, and we did not seek to go on the alternative to the jury that even if you don't find that, you can find the scienter necessary for first-degree murder if you find that he engaged in a felony knowingly and willfully and that death resulted as a result of that. So that is the context in which we said this isn't a felony murder case.

I think it's certainly clear that Counts 1, 2, and 3 as applied to the death penalty are, in effect, felony murder crimes. They are felonies where death resulted as a foreseeable result of the crime. So I think for counsel now to say we have changed our position is just not true. We have said murder counts are not felony murder. We've always said that, and that's the theory that the jury decided on; that they were not presented with a choice of felony murder. But these, in effect, are felony murder. And I think that is the context in which Tison applies. If a defendant participated in a felony and death resulted and the felony was committed with wanton disregard for life such that he knew there was a grave

risk of death, then the death penalty may be imposed.

Now, there is an issue that's been raised -- and we argued it earlier as well -- in terms of Tison -- in addition to requiring the scienter requires that there be major participation, and that is true as a matter of Eighth Amendment law. It is not true under the statute. The jury does not have to make that finding and the Supreme Court has held in several cases -- Cabana vs. Bullock and other cases -- that this major-participation finding, like the scienter finding, is not constitutionally required to be decided by the jury. Most recently, the Tenth Circuit in the Hatch vs. Oklahoma case said that the state trial judge properly found major participation even though it was not submitted to the jury. So that's not a jury element. It's an element that this court, assuming there is a death sentence, would have to determine as a matter of Eighth Amendment law is the sentence proportional to the crime.

THE COURT: On a post-sentencing verdict motion? Is that what you're saying?

MR. CONNELLY: That's correct. That's correct. I think -- first of all, you have to apply the statute as written unless the statute is unconstitutional, and it's not unconstitutional for failing to require a jury finding on that. That much is clear.

The only constitutional requirement is that some point in the process -- and it can be done at trial level or

appellate level or anywhere else -- we would submit that obviously, this court should make the finding in the first instance, but in a post-verdict finding would have to satisfy itself that the sentence of death, assuming one is returned by the jury, is proportional to the crime; that is, Mr. Nichols' acts; that the Court would find what acts they were in connection with the conspiracy were sufficient that it is not disproportionate to hold him responsible for his life when his acts knowingly brought about the deaths of 168 people. That is a judgment the Court would have to make as a matter of Eighth Amendment law; but that is not a finding that any case suggests the jury needs to find, and it's not a finding in the statute. In fact, minor participation is a mitigating factor in the statute, but the defendant bears the burden of proving; and that, again, is constitutional.

I think McKoy, a Maryland case -- McKoy, a Supreme Court case out of Maryland, held as much. It might have been North Carolina. But in any event, that finding, the Supreme Court has made clear in Cabana vs. Bullock, is one that need only be made by a court at some point; and since it's not, as a matter of statutory law, a matter the jury is asked to pass upon, we submit it is premature at this point. But we submit when it is appropriate to make it that the Court could amply find that the death penalty is not disproportionate to the crime of conviction.

THE COURT: Okay. Mr. Tigar, I'll give you the last argument on the point.

DEFENDANT'S FURTHER ARGUMENT

MR. TIGAR: Your Honor, at the Government's insistence, your Honor did not charge that any overt act was required to be proved. So they didn't have to find any overt acts for this conspiracy.

THE COURT: Right.

MR. TIGAR: And you also did not charge that any intent to kill was required even under Count 1, conspiracy. So now the Government interprets the conspiracy convictions as necessarily implying (a) that overt acts were committed, which is ridiculous, because the Court doesn't instruct on that and (b) that intent to kill can be inferred. Counsel just said: well, knowingly caused death.

They can't live with these involuntary manslaughter verdicts, your Honor. That's the problem. And to ask this jury to speculate now is an insult to the jury's deliberative process that they went through to come to all of those not guilty verdicts on first- and second-degree murder as well as, of course, subjecting all of the parties here to something that, given that it's unnecessary and forbidden by the statute, would be unnecessarily cruel.

THE COURT: Well, do you have a response to the suggestion made here that the constitutional question can be

resolved in the event of a death sentence by the Court making findings post-verdict?

MR. TIGAR: Yes, your Honor. I have -- we've already briefed that issue. And the first is that to say that we have the burden of proving minor participation essentially --

THE COURT: No, I don't believe that was the point. I believe that what is said here is that the fact-finding with respect to the role, the major vs. minor participation, is not -- does not have to be made by a jury.

MR. TIGAR: Your Honor, the Congress has chosen to have jury sentencing.

The fact that in particular state systems, these findings are made in different ways or that there is a matter -- there is a way to repair the record doesn't answer it. The Congress has said that minor participation is a mitigator.

Now, we've attacked that on constitutional grounds; and I respectfully submit that is relevant. If the jury -- if the jurors find minor participation or if a substantial number of them do, then -- and we got to that phase, then we respectfully submit your Honor's hands would be tied; that is to say that that would be a dispositive mitigator; that your Honor couldn't go ahead and say well, now I'll look at the evidence and make some sort of a decision. That would be forbidden by the principles of Bullington vs. Missouri and the

other cases about looking at what the jury does.

THE COURT: Well, of course, we could anticipate that such a jury finding would also result in a sentence other than death.

MR. TIGAR: Well, and if it does, of course, that's moot; right? But right now, what we're arguing about is what can -- you know, is the Government fully accepting what the jury did. And it's clear to us that they are not. All I have to do is look at the transcript of the chambers conference where your Honor decided to give lesser includeds. Then the Government was telling the Court that it was ridiculous. I'm not going to quote it. It's a chambers conference. That to do this -- after all, it's only a six-year felony.

Well, the jury came in with it, and that's the reality that the Government now wants to relitigate in the face of the acquittals on Counts 2 and 3 as well as on 4 through 11 on the top two parts.

RULING

THE COURT: Okay. Well, on the defendant's motion to preclude a sentencing hearing that 3591 now (a)(2)(C) and (D) could not be submitted to the jury here -- I'm denying the motion.

MR. TIGAR: Your Honor, we have an alternative motion to bifurcate.

THE COURT: Yes. And I haven't heard the Government

address that as yet.

Mr. Connelly, are you going to talk about that? I mean, are you prepared to talk about it?

PLAINTIFF'S FURTHER ARGUMENT

MR. CONNELLY: Sure, your Honor.

We ask the Court to follow the statute that is written by Congress and follow it the way it did in the McVeigh case and follow it the way that every other court to have considered it has done it. There are levels of findings that need to be made, and the instructions very clearly inform the jury of that. The first level is the intent element. After that, the instructions inform the jury that they must find at least one statutory aggravating factor; and from there, it tells them how to consider non-statutory aggravators, how to consider mitigating factors, and how to govern their deliberations.

The statute is clear. It's bifurcated in two sections, not three. There is no basis, we submit, for rewriting the law that Congress passed in this case and applying it any differently than this court has already applied it and that other courts have applied it in similar cases.

THE COURT: Well, Mr. Tigar, do you want to address it? I just have trouble seeing that bifurcation is a practical approach because I don't know how you separate out the -- what we now call "information."

DEFENDANT'S FURTHER ARGUMENT

MR. TIGAR: Well, your Honor, the -- Judge Berrigan had bifurcated in that case in Louisiana, the name of which escapes me at the moment; so it's been done by a federal judge.

Let's look at the practicalities of it. Neither party suggests that with respect to this so-called "gateway finding" there is going to be evidence; right? That is to say, maybe there will be an exhibit or two -- and we're going to argue about that -- but neither party suggests that that really gets into what the Government is about.

The Government's witness list, your Honor, is victim impact evidence. That's what they're going to present. And it's exactly like a situation, your Honor, in which there is a real dispute about liability and there is very heart-wrenching testimony on damages. The risk of an improper jury determination given the dubiety of proceeding this way at all is really significant here.

And to put the parties to the expense and difficulty and emotional trauma and all of these witnesses and families to the expense and difficulty and emotional trauma of 60 people getting on this witness stand on one side and 60 people getting on this witness stand on the other side and telling what everybody knows, the disastrous effect that this had, when that may be unnecessary if we simply ask these jurors, well, what do you think about this -- and you can do it with an opening statement, an exhibit or two, and a short closing argument; you

can do it in a day -- seems to us, your Honor, to be irresponsible. I'm not -- I'm -- asking for a ruling that irresponsible. I'm not trying to argue with the Court or characterize the Court's actions at all.

It seems to us, your Honor, that to put folks through that when it may very well turn out to be unnecessary and when by doing this alternative procedure, we really do save time is nothing more than the exercise of the discretion that the Court customarily exercises with respect to the consideration of questions in cases civil as well as criminal.

THE COURT: All right. Well, I've assumed here that the Government is going to offer more than victim impact testimony. Now, is that an incorrect assumption?

PLAINTIFF'S FURTHER ARGUMENT

MR. CONNELLY: Yes. We're going -- no, it is not an incorrect assumption. We're going to offer --

THE COURT: Intent testimony.

MR. CONNELLY: -- testimony -- well, testimony that shows the effects of the crime in terms of physical effects, not just victim impact testimony; and obviously, the jury can infer intent from the effects of the crime as well.

We have a couple of matters that we've asked to be allowed to present, but it will be similar to the type of sentencing case presented in the McVeigh case.

RULING

THE COURT: All right. I'm going to deny bifurcation.

Now, there are other issues --

MR. TIGAR: Yes, your Honor.

THE COURT: -- one of which relates to your argument regarding the procedural approach of the Government.

DEFENDANT'S FURTHER ARGUMENT

MR. TIGAR: Yes, your Honor. We have the report of the United States regarding sentencing allegations which fails to comply with the statute. We're entitled to a notice, your Honor. And the notice we're entitled to is one that can be amended on leave of court. A report to the Court of a unilateral decision by the United States is not a notice.

THE COURT: Well, is it -- isn't this the functional equivalent of an amended notice of intention?

MR. TIGAR: If the Court wishes to so construe it, then the Court could. It would be our submission that we're entitled to certain procedural protections, such as review by the Attorney General with respect to the notice. If the Court rejects that, we are at the very least entitled to the courtesy of a signature by the United States Attorney and not by some special assistant.

The Court has already dealt with Roman Numeral I --

THE COURT: But there is no disadvantage to you here by the treating this as an amendment, because it's a reduction,

an elimination of some of -- well, both the intent allegations, statutory, and the aggravating factors. So it's a reduction in the Government's approach.

MR. TIGAR: It is, your Honor. And it fails to comply with the statute. If the Court -- if the Court decides to the contrary, then I have a substantive objection to it as well.

THE COURT: Well, we'll deal with these things one at a time.

The statute does contemplate that the notice be given by the United States Attorney. The United States Attorney is here. The United States Attorney for the Western District of Oklahoma. This report is signed by Mr. Connelly.

Mr. Ryan, what is your -- do you take the position as the United States Attorney for the Western District of Oklahoma that Mr. Connelly's signed report constitutes an amended notice of intention to seek the death penalty?

MR. RYAN: Yes, your Honor. I mean, I spoke to Mr. Connelly about it. We worked on it in concert and it certainly is -- expresses my views.

If the Court feels that it's necessary for me to send a revised notice to Mr. Tigar, I will do so today.

THE COURT: Well, I'm -- you know, you're speaking here in open court. You're speaking as the United States Attorney from the relevant district. It is you who issued the notice of intent to seek the death penalty in this case

originally.

MR. RYAN: Yes, your Honor.

THE COURT: And do you now in your official role accept this report as an amendment to that notice?

MR. RYAN: Yes, your Honor.

THE COURT: Then I believe that complies with the statute.

MR. TIGAR: Shall I turn to the substantive points?

THE COURT: Yes, please.

MR. TIGAR: Roman II, your Honor.

THE COURT: Yes.

MR. TIGAR: "The deaths or injuries occurred during the commission of an offense . . . Transportation of explosives in interstate commerce." Your Honor, the acquittal on Count 2 bars that factor. There is simply no way that a transportation of explosives in interstate commerce -- that is to say, the exploded bomb -- can be consistent with the jury's acquittal of use of the weapon of mass destruction; i.e., a truck bomb in Count 2.

Also, it's inconsistent with the jury's acquittal on Count 3; that is, you can't have -- you know, the bomb had to get there somehow, and the indictment alleges it got there in a truck. So the jury's finding is necessarily inconsistent with 844(d). And 844(d) is nothing more than another subsection of the sub -- of the statutory section involved in Count 3.

Next: "Knowingly created a grave risk of death to one or more persons in addition to the victims of the offense." This is subject to the same objection; that is to say, the acquittals on Count 4 through 11 preclude that element because the defendant did not knowingly create a grave risk of death; that is to say, he -- the most intent he had was that provided by the involuntary manslaughter statute.

Third, the Government has -- you notice the ellipses, your Honor, in (3)? What the Government has done is to state a -- words written by the Congress that are in the conjunctive and simply eliminate them. And so now that we know what the Government has eliminated, let's turn to the statute.

"The defendant committed the offense after substantial planning and premeditation to cause the death of a person or commit an act of terrorism." Now, an act of terrorism is not simply any act of -- that is to say, you know, some act of protest protected by the First Amendment. An act of terrorism is an act that presumably involves some harm to individuals. That's what we understand by "terrorism." And the statute, if you read this in pari materia, planning and premeditation to cause the death of a person or commit an act of terrorism involves this kind of substantial risk and premeditation, the jury has expressly found did not exist.

So that elimination of that -- of that language omits the fact that the statutory provision read as a whole deals

with acts that have to do with risk of -- to human life and that there is premeditation.

Well, a jury has determined that there was no premeditation; that the defendant did not premeditate.

And planning -- and "substantial planning and premeditation" are in the conjunctive. The jury's verdict says no premeditation.

Then (4): "The defendant committed the offense against one or more federal law enforcement officers because of their "status as federal law enforcement officers." Well, that, your Honor, essentially relitigates. What it says is that it's an aggravating circumstance that the defendant committed involuntary manslaughter against law enforcement officers. That is a constitutionally insufficient aggravating circumstance, your Honor. And the offense against one or more because of such victims' status -- that implicates the acquittals that we -- the acquittals that we have spoken about earlier.

When we get down to non-statutory aggravating factors -- that's also Roman Numeral II, your Honor, so there are two Roman Numeral IIs here -- "the offense committed resulted in the deaths of 168 persons." That one, your Honor, is permissible under the standards established by the Supreme Court.

"In committing the offense caused serious physical and

emotional injury including maiming, disfigurement to numerous individuals." Your Honor, we've already -- we've already challenged that. Your Honor has rejected our challenge, and your Honor has also rejected our challenge to the victim impact evidence as a statutory and constitutional matter.

THE COURT: All right. Well, final ruling here will await the conclusion of the Government's case in the penalty phase, but I am -- I would like you to address No. 4 here on page 2; that is, one or more federal law enforcement officers because of the victims' status as federal law enforcement officers. Now, I recognize that that is different from "while they were performing their duties."

PLAINTIFF'S FURTHER ARGUMENT

MR. CONNELLY: I think the major difference we'd rely on is the offense is different. The offense is the conspiracy offense. That's the only capital offense left for this jury. The jury, in 4 through 11, found that he did not premeditate the murders of those law enforcement officers. But I think it's certainly fair to say that he committed the offense of conspiracy against those law enforcement officers, and we'd be prepared to prove that it was because of their status as public servants.

So I think we're not trying to relitigate that he intentionally killed and premeditatedly killed those eight law enforcement factors, but I think it's an aggravating factor,

since the offense is not the murders but the conspiracy. Was a conspiracy committed against them as well as against the building and the persons inside? In fact, they were the persons inside; so I think, in a sense, the jury has already -- you know, may well have found this already: that the conspiracy was committed against the Murrah Building and the persons inside. Assuming they find that the federal public servants were persons inside, this is not at all inconsistent with their verdict.

The others, I have a similar response to. I point out that Mr. --

RULING (RESERVED)

THE COURT: Well, I'm going to reserve ruling on whether these aggravators go to the jury or not until the evidence, information, is in; and then it's a question of how I instruct the jury on it.

MR. CONNELLY: If I could -- do you want me to just address the one that we've made a change on? Mr. Tigar said that the --

THE COURT: Yes. The ellipses.

PLAINTIFF'S FURTHER ARGUMENT

MR. CONNELLY: Yes. Mr. Tigar interestingly said the statute is written conjunctively; and then he read it, and he went on to say "or." And in my lexicon, "or" is disjunctive. We have simply charged conjunctively as you normally do, but

you can prove it disjunctively. That's a well accepted rule of law, and we are not required to prove both the elements that are written disjunctively. We can prove one or the other. We've simply dropped one of them and are proceeding on the other one, which by itself is sufficient under the statute to establish that aggravating factor.

An act of terrorism, we don't have to guess what Congress meant. It's defined in Section 3077 of Title 18; and the Court instructed on that in the McVeigh case, and I think this case fits well within that. So I think all of these are valid on their face, and we can talk in terms, as the Court said at the time of submitting them to the jury, you know, what gets submitted. But I think all of them certainly are valid on their face and are supported by evidence.

THE COURT: All right. I'm going to reserve ruling on these factors.

Now, there are some other matters dealing with evidence, and I'd like counsel to approach the bench on that with respect to scheduling.

(At the bench:)

(Bench Conference 142B1 is not herein transcribed by court order. It is transcribed as a separate sealed transcript.)

(In open court:)

THE COURT: I just was discussing with counsel the timing with respect to my reviewing some of the exhibits and discussing some of the evidence which is intended to be offered and as to which there is an objection and because -- or there are objections; and because, of course, these matters relate to things that may never be in evidence, it is consistent with my original sealing order, as it's sometimes called, to do that in chambers. And that's what I intend to do, and I will be meeting with Counsel later this morning to discuss the evidentiary issues.

With that, then, as far as the open court proceedings, we're going to recess until 8:45 Monday morning.

(Recess at 10:08 a.m.)

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REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Dated at Denver, Colorado, this 24th day of December, 1997.

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Paul Zuckerman