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1 APPEARANCES
2 LARRY MACKEY, SEAN CONNELLY, BETH WILKINSON,
AITAN
3 GOELMAN, and KRISTINE TOLVSTAD, Special Attorneys to
the U.S.
4 Attorney General, 1961 Stout Street, Suite 1200,
Denver,
5 Colorado, 80294, appearing for the plaintiff.
6 MICHAEL TIGAR, ADAM THURSCHELL, REID
NEUREITER, JANE
7 TIGAR, and SUSAN FOREMAN, Attorneys at Law, 1120
Lincoln
8 Street, Suite 1308, Denver, Colorado, 80203, appearing
for
9 Defendant Nichols.
10 KARAN BHATIA, 2445 M Street, N.W., Washington,
D.C.
11 20037, appearing for Marsha Kight and Martin Cash.
12 PAUL G. CASSELL, University of Utah, College

of Law,
and 13 Salt Lake City, Utah, 84112, appearing for Marsha Kight
14 Martin Cash.
15 NORMAN S. EARLY, JR., Attorney at Law, 3598
South
16 Hillcrest, Denver, Colorado, 80237, appearing for
Marsha Kight
17 and Martin Cash.
18 MAUREEN CAIN, Attorney at Law, 150 East Tenth
Avenue,
19 Denver, Colorado, 80203-2740, appearing for Marife
Nichols.
20 * * * * *
21 PROCEEDINGS
22 (In open court at 1:30 p.m.)
23 THE COURT: Be seated, please.
24 We're convened in 96-CR-68, United States
against
25 Terry Lynn Nichols. And we're here as a result of an
order

3

1 entered April 21, setting this hearing for
consideration of the
2 briefing that began with the brief of the United States
3 regarding restitution and the motion of victims for
compliance

4 with revised Rule 32 and mandatory restitution
provisions.

5 Also, I don't know how far we'll get with it,
but we

6 have the motion from Marife Torres Nichols for return
of

7 property which was supplemented, supplemental motion,
and now

8 since the hearing was set a motion by Mr. Nichols, also
for

9 return of property.

10 Appearances.

11 MR. MACKEY: Good afternoon, your Honor.

12 THE COURT: Good afternoon, Mr. Mackey.

13 MR. MACKEY: Larry Mackey on behalf of the
Government.

14 With me, your Honor, is Ms. Beth Wilkinson; and she'll
make the

15 presentation concerning restitution, Rule 41; also, Mr.
Sean

16 Connelly; also for the Government Ms. Kristin Tolvstad,

17 T-O-L-V-S-T-A-D, and Mr. Aitan Goelman.

18 THE COURT: And Mr. Tigar?

19 MR. TIGAR: Good afternoon, your Honor.
Michael Tigar

20 for Terry Lynn Nichols. Mr. Nichols is present in
court.

21 With us today is Adam Thurschwell, Reid
Neureiter,

22 Susan Foreman, and Jane Tigar.

23 THE COURT: All right. And Ms. Cain for Ms.

Nichols?

24 spelled

MS. CAIN: Yes, your Honor. Maureen Cain,

25 C-A-I-N, on behalf of Mrs. Nichols.

4

1 THE COURT: Mr. Cassell?

Paul

2 MR. CASSELL: Good afternoon, your Honor.

3 representing

Cassell, along with Karan Bhatia and Norm Early,

4 Marsha Kight and Martin Cash today.

5 divide these

THE COURT: All right. I think we might

6 applicability

issues a bit and start with the question of the

7 public law

of the Mandatory Victims Restitution Act, a part of

8 the time

104-132, enacted in 1996 and therefore subsequent to

9 involved in the conspiracy in this case.

10 course. The

There has been briefing on that issue, of

11 Witness

11 difference here between that statute and the Victim and

12 new

12 Protection Act, preexisting, which is in 3663, and the

13 between the

13 mandatory act in 3663(a) and 3556 -- the difference

14 two statutes, as I see it fundamentally, is one is
15 discretionary, the other is mandatory.

16 With respect to the mandatory provisions in
the 1996
17 act, the court is not to consider ability to pay,
present
18 assets, or future ability to pay and must consider the
impact
19 of the crime on victims.

20 So I'll hear further from counsel on that. As
I say,
21 I think the issue has been briefed extensively and the
relevant
22 cases cited. And the disagreement, of course, about
what, if
23 any, relevance the Tenth Circuit opinion in the U.S.
vs.
24 Hampshire case has for this; and the issue that has
been raised
25 by the defense as to the inapplicability of the act is
that it

5

1 would constitute ex post facto legislation, a violation
of the
2 constitutional prohibition on ex post facto laws. And
the
3 Government, as I understand it, conceded that --

4 MS. WILKINSON: That's correct, your Honor.

turn to 5 THE COURT: -- in its paper. So I guess we
6 Mr. Cassell on that.

7 RESTITUTION: EX POST FACTO ISSUE

8 KIGHT'S AND CASH'S ARGUMENT

9 MR. CASSELL: Thank you, your Honor.

10 Well, your Honor, just by way of brief
introduction,

11 the Defendant Nichols apparently agrees that he has
significant

12 earning potential in the form of some sort of story
that he

13 might sell to tabloid journalists. His solution to
that

14 problem is what I think can be --

15 THE COURT: Well, I'm not talking about that.
I'm

16 talking about the legal issue as to whether the
Mandatory

17 Victim Restitution Act is applicable in this case.

18 MR. CASSELL: Yes. It is applicable, your
Honor.

19 First of all, the statutory terms apply; and the only
question

20 is the ex post facto question that you highlighted.

21 U.S. vs. Hampshire is of considerable help to
us here.

22 Hampshire decided in 1996 that the Victim Witness
Protection

23 Act could be applied retrospectively; and the 1996
amendments

24 that your Honor referred to are, of course, procedural
25 amendments to the Victim Witness Protection Act.

6

opinion 1 Now, Hampshire -- Hampshire -- the Hampshire
2 gives us two reasons for believing that ex post facto
3 considerations do not apply here. First of all,
Hampshire
4 tells us that the ex post facto clause is designed to
give fair
5 notice to criminal defendants. And here --

6 THE COURT: Well, now they're really applying
the
7 Child Support Recovery Act. I mean what they did was
apply the
8 victim -- or approve the district judge's use of the
9 restitutionary provisions in the Victim and Witness
Protection
10 Act to require past child support to be paid predating
the
11 Child Support Recovery Act.

12 MR. CASSELL: Yes, your Honor. But the
important
13 point to remember is the order that was in front of the
Tenth
14 Circuit in Hampshire was an order issued under the
Victim
15 Witness Protection Act; and so the court had in front

of it the

16 question of how to interpret the Victim Witness
Protection Act.

17 And the critical point that we pull from Hampshire is
this:

18 Should we call restitution penal, or should we call it
19 compensatory? And in Hampshire, they say that
restitution
20 orders are primarily compensatory.

21 Now, perhaps you could argue there is some
technical

22 distinction in Hampshire that deals with child
restitution

23 orders or something like that. But it's important to
recognize

24 that Hampshire stands within a long line of Tenth
Circuit

25 authority that says restitution orders are
compensatory.

7

1 THE COURT: But those are all discretionary
orders.

2 MR. CASSELL: Well, your Honor, the critical
point is
3 if restitution is compensatory, then ex post facto
4 considerations do not apply.

5 THE COURT: I understand that, but how is it
6 compensatory when there is no regard to be paid to the

ability

7 to pay?

8 MR. CASSELL: First of all, your Honor --

9 THE COURT: I mean, that seems like some of
the fines

10 and forfeiture cases that caused us so much trouble a
while

11 back on double jeopardy issues, where the Supreme Court
began

12 to say, at any rate, that forfeitures in drug cases
constituted

13 punishment and civil forfeiture was punishment.

14 MR. CASSELL: Your Honor, it's not accurate to
say

15 that ability to pay does not factor into this court's
decision.

16 It factors in at a later stage in the process. Ability
to pay

17 goes into determining the payment schedule that your
court --

18 that this court would establish. So once the order of
19 restitution is in place, then ability to pay factors in
on the

20 payment schedule. That's precisely what the victim --
21 Mandatory Victim Restitution Act requires. So I think
to

22 characterize it as penal is simply to overlook that
fact.

23 The other point is where would the money go.

24 here is to make sure that Mr. Nichols does not profit
from his

25 crimes. That's not penalizing him. That's giving --
that's

8

1 simply preventing him from taking advantage of the
notoriety
2 that comes from having committed one of the most
notorious
3 crimes in the 20th Century.

4 THE COURT: How is that compensatory?

5 MR. CASSELL: It's compensatory because of
where the

6 money would go. Where would the money go? If he
starts to

7 earn money, it would go to the victims, it would go to
the

8 Government, or the proposal that we're happy to endorse
today

9 is that the Government would suggest that you enter an
order.

10 That order will then be -- with restitution. That
amount would

11 then be assigned to the victim fund that the federal
government

12 maintains.

13 THE COURT: Which has nothing to do with the
victims

14 of -- in Oklahoma City.

15 MR. CASSELL: Well, your Honor, some of those

funds

16 have been used to pay for certain expenses that have
arisen out

17 of this litigation.

18 THE COURT: But a primary use of those funds
is for

19 domestic violence cases now.

20 MR. CASSELL: They're used to satisfy a number
of

21 urgent victim concerns. But the question -- that's
simply a

22 proposal that's on the table to simplify matters.
We're happy

23 to endorse that proposal as a straightforward way to
go.

24 We have also, however, provided information
about the

25 exact losses that our victims have suffered; so the
point is

9

Nichols 1 where would the money go? The first dollar that Terry

2 earns that goes to a restitution order is going to go
to

3 satisfy a victim service or a victim or a victim of
this crime

4 in some way. And what Terry Nichols' position is at
bottom is

5 that because he has committed such a terrible crime

with such

6 staggering losses that your Honor should not enter an
order.

7 If he were a burglar that had stolen a TV set,
I have

8 no doubt that your Honor would enter an order of
restitution

9 requiring him to return the TV set. But he has done
something

10 thousands of times worse than that; and, of course,
then, your

11 Honor should enter a restitution order, just as you
would in a

12 routine case. And that's what the Mandatory Victim
Restitution

13 Act requires.

14 And the only question on ex post facto
considerations,

15 then, is whether it's a penal act or a compensatory
act. If

16 the order is going -- if you enter a restitution order
and

17 those dollars are going to pay victims -- and we can
talk about

18 exactly how to structure that -- that's not going to
penalize

19 Terry Nichols. That's going to compensate victims of
his crime

20 or victims of other crimes. That is a compensatory
program,

21 it's not a penal program; and that's what the Tenth
Circuit has

22 told us in the Hampshire case: It says that

restitution orders

23 are primarily compensatory in nature. But Hampshire
isn't the

24 only case.

25 There was the Artunoff case, a 1993 decision
again

10

1 under the Victim Witness Protection Act that says
restitution

2 orders are compensatory in nature. And if you follow
those

3 decisions -- and of course, they're binding on this
court --

4 you have to conclude that a restitution order is
compensatory

5 in nature. And once that conclusion is reached, then
ex post

6 facto considerations are out the window. There is no
ex post

7 facto problem with entering a compensatory order.

8 Now, there is a second reason for reading
Hampshire in

9 the same way. Hampshire says that the ex post facto
clause is

10 designed to give fair notice to criminal defendants of
their

11 potential penalties. When Terry Nichols conspired to
set the

12 bomb, he knew that he could potentially be ordered to

pay full

13 restitution. He was on notice of that fact. And all
that the
14 1996 amendments do is change various procedures around.
As I
15 pointed out, you can still consider ability to pay; you
are
16 just directed to consider that in a later point in the
process.

17 So these are procedural changes; and because
they are
18 procedural changes, simply changing the order in which
the
19 court considers various factors -- again, there is no
ex post
20 facto consideration. It's hornbook law that procedural
changes
21 do not run afoul of the ex post facto clause even if
they
22 operate to the disadvantage of a criminal defendant.

23 And here again, there is guidance on this
point. The
24 Sixth Circuit has reached exactly that conclusion in
upholding
25 the Mandatory Victim Restitution Act's application to a

11

1 retrospective situation.

2 So under both of those readings of Hampshire,
first

3 that it's a compensatory order that's under
consideration
4 today, not a penal order, and secondly, that Terry
Nichols was
5 given fair notice at the time he committed his crimes
that he
6 could potentially be subject to this, under either of
those
7 readings of Hampshire, the Mandatory Victim Restitution
Act
8 must be applied. And so we would urge the Court to
follow the
9 act.

10 I could then discuss -- we think once you
follow the
11 Mandatory Victim Restitution Act, you can follow on
precisely
12 the approach that the Government has suggested, enter a
13 \$14 million restitution order to make sure that Terry
Nichols
14 never profits. And my clients are delighted to endorse
that
15 proposal. It seems like a straightforward and simple
way of
16 resolving all of these issues.

17 I mean, even Terry Nichols agrees that it
would be a
18 terrible tragedy if he were to somehow profit from his
crime
19 and the --

20 THE COURT: That isn't the issue now. Please.
I

21 asked you to address the ex post facto issue. I take
it you've

22 done so.

23 MR. CASSELL: Yes, your Honor.

24 THE COURT: All right.

25 Defense.

12

1 DEFENDANT'S ARGUMENT

2 MR. TIGAR: Your Honor, I won't respond to the
3 comments that counsel made on other than the ex post
facto

4 issues. We have plenty to say about that.

5 I'd like to start with the statute, your
Honor, under

6 3663A(a)(1) that begins, "Notwithstanding any other
provision

7 of law" and then the language a little further on, "In
addition

8 to or in lieu of any other penalty authorized by law."
Now,

9 the words "other penalty" have a clear meaning; that
is,

10 what -- they're talking about a penalty that's going to
be

11 imposed under this statutory provision, and it's to be
in

12 addition to any other penalty. So strictly as a

textual

13 matter, your Honor, reading the statute, it is penal in
nature.

14 We've cited Sheinbaum and the Supreme Court's decision
in Kelly

15 vs. Robinson to that effect, and that ought to end the
matter.

16 But let's look at Hampshire, which is the case
17 principally relied on by Professor Cassell. Hampshire
involved

18 an order under the Child Support Recovery Act, the
CSRA. And

19 the court, the Tenth Circuit, said under the clear
import of

20 the CSRA, restitution is not a punishment.

21 Now, it's important to note what happened in
22 Hampshire. Hampshire at the time that he was -- that
this

23 statute was passed was subject to a valid order of a
stated

24 court that he pay child support in a certain amount;
that is to

25 say, there was a judgment out there, a civil judgment,
and so

13

1 all that happened in that case was that the court held
that

2 there is an additional remedy to collect the civil
judgment for

3 which he was already liable.

Child
4 Under those circumstances, limited to the
5 Support Recovery Act, it's permissible and logical to
say that,
6 as the court did, past due support is a form of
restitution but
7 limited in the very statute construed by the court to
-- at
8 page 1005-1006 of Hampshire to circumstances in which
there is
9 a preexisting valid judgment that's simply being
enforced by
10 this additional order.

11 So for those reasons, your Honor, we
respectfully
12 submit that the ex post facto concerns here are real
and that
13 the proposed application of this mandatory provision
would be
14 improper.

15 RULING

16 THE COURT: All right.

17 Well, I, of course, have reviewed this since
receiving
18 the filed papers on it and considered the cases that
have been
19 filed and also some legislative history with respect to
this
20 1996 enactment to the extent that it's reported in the
21 Congressional and Administrative News Service, which

includes

22 the statements made in the committee reports. And
certainly,
23 there is an aspect of the need to compensate victims;
and of
24 course, it reflects the increasing sensitivity of the
Congress
25 to the victims of crime and the need to recognize their

14

1 interests in the prosecution of criminal cases and in
2 sentencing.

3 But it is my view that the significant
difference
4 between these two statutes and the reason for the
change is
5 that this is a mandatory restitution order. It is not
6 dependent upon ability to pay now or in the future. It
does
7 not relate really to the situation of the defendant at
all but
8 focuses directly on the victims and what is needed to
9 compensate them for the consequences of the crime for
which
10 sentence is being imposed.

11 I think that is different. I think that is
different
12 in its thrust and effect; and accordingly, it is not to
be

13 applied in this case because to do so would be
increasing the
14 punishment for a crime in violation of the ex post
facto
15 prohibition in the Constitution.

16 So we're going to turn to the statute, the
Victim and
17 Witness Protection Act, and Section 3663 in the case.

18 here, the Government has made a suggestion that we take
the

19 value of the Alfred P. Murrah Building, at least its
original

20 cost at \$14 1/2 million, and apply that as a measure of
the

21 loss, and not, as I understand it, proceed to determine
the

22 loss to each individual family, each individual person
who was

23 injured, other property consequences, and thereby avoid
what

24 the defendant has pointed out is a problem here, and
that is

25 the delay in sentencing resultant from the need to
calculate

15

1 the loss with more specificity. And also, of course,
this

2 ability to pay would be, as the Government proposes,

based

again, we 3 essentially on future earnings potential so that,
4 wouldn't be delayed.

with 5 I'm not quite sure where the Government is
that 6 respect to execution on existing assets; and of course,
7 gets us to the other matter that was noticed and the
problem of 8 trying to decide choice of law, really a division-of-
property 9 type of thing between Mr. and Mrs. Nichols.

you're going 10 So Ms. Wilkinson, I heard from Mr. Mackey
11 to address restitution.

12 MS. WILKINSON: I am, your Honor.

13 THE COURT: All right.

14 RESTITUTION

15 PLAINTIFF'S ARGUMENT

16 MS. WILKINSON: You have succinctly stated our
17 position, and I will just elaborate on some of the
issues that 18 you've raised for us.

impose a 19 First of all, we are asking for the Court to
Circuit 20 restitution order of \$14.5 million. Based on the Tenth
21 case law, we believe you have no problem doing that,
which is

22 coming up with this simple, almost formulaic analysis
of the
23 loss. Under United States vs. Davis in this circuit,
appellate
24 courts have approved using a formula and using a
reasonable
25 estimate.

16

1 We believe, of course, the loss in this case
was much
2 greater; but there is no need to calculate the loss to
all the
3 victims, the injured, the families, the economic loss
in
4 Oklahoma City, because we believe it is much larger
than 14.5
5 million, and we have no reason to believe that Mr.
Nichols
6 would come into -- would have any potential earnings
greater
7 than approximately 14.5 million. And that's why we
urge the
8 Court to adopt that rather simple analysis for the
first part
9 of the restitution proceeding, which is the
Government's burden
10 to prove the loss or the value of the loss. And we
believe we
11 have done that. And we have an affidavit, if it's
necessary

12 for the Court, on the value of the building; but I
don't
13 believe that the defense disputes that that's the value
of the
14 Alfred P. Murrah Building.

15 THE COURT: The value measured by original
cost?

16 MS. WILKINSON: Correct. Not the value of
replacing
17 it today, but just what we paid to build it originally.
If
18 they do dispute it, we'll be happy to supplement the
record
19 with the affidavit.

20 The second analysis the Court must do is the
21 defendant's ability to pay. And we don't believe the
property
22 issues come into play right now for your analysis, and
I'll
23 tell you why. First, the defendant has recently filed
a return
24 of property motion, claiming that everything that was
taken
25 from him belongs to him. In addition, he claims that
the

17

1 materials that he turned in to us after the searches,
which

and the
are
proved that

2 include a box of the Colombian -- pre-Colombian jade
3 semi-precious stones also should be returned to him and
4 his. Clearly, we disagree and we believe we have
5 that property belongs to Mr. Moore and his associates.

that
ability
agree, if
assets;
they do
out and
his

6 But we don't believe the Court has to make
7 determination today, because your only analysis is his
8 to pay. So for purposes of this hearing, we would
9 the defense would like, to consider all of those his
10 and that would only increase his ability to pay. If
11 not want to do that, we can take all of those assets
12 you can just reduce the amount of the restitution or
13 ability to pay by not considering those assets.

we are
those assets
we would
those
of

14 But to make the process easier for the Court,
15 willing, for this limited purpose, to agree all of
16 are his for the analysis for the ability to pay. And
17 estimate -- and this is again a rough estimate -- that
18 assets are valued somewhere between 20- and \$40,000.
19 course, the Court knows, depending on when the firearms

are

20 sold or the coins, the Colombian jade, the value of
those items

21 could go up or down, if you assume again that those are

22 Mr. Nichols' property, which we don't.

23 But as the Court pointed out, that is just a
very

24 small amount of what we consider is the basis for Mr.
Nichols'

25 ability to pay. His real ability to pay or his
potential

18

1 earnings are unfortunately because of the asset that he
now

2 has, which is the story he can tell and sell over his
lifetime.

3 And the value of that asset is very difficult to
calculate.

4 But we know, unfortunately, that many other less
notorious

5 criminals have sold their stories to the tabloids and
received

6 millions of dollars and that people just associated
with these

7 cases have sold book stories and movie rights and
received

8 millions of dollars.

9 Mr. Nichols, unfortunately, could be in a more

10 profitable position if he were to withhold his story
until
11 after Mr. McVeigh's execution, and he would be left as
the only
12 person living who knew the story. We cannot calculate
for the
13 Court the exact value of that asset, but we believe
that it is
14 in the range of several million dollars and that with a
15 restitution order of \$14.5 million, the Court would be
ensuring
16 that Mr. Nichols would never personally benefit if he
chose to
17 sell his story at any time and in any form.

18 And we believe this is the time for the Court
to do
19 that. I believe your Honor mentioned briefly the
statute, the
20 special forfeiture statute which was passed several
years ago.
21 I think it's 18 U.S.C. 3861 or 3681 -- 3681, which
allows the
22 Government to collect any proceeds if the defendant
benefits
23 from his crimes.

24 We would urge the Court not to put the burden
on the
25 Government and the victims by using that statute, for
several

1 reasons. One is that that statute is of questionable
2 constitutional basis, and it is consistent or at least
similar
3 to the Son of Sam laws, which have been held as
4 unconstitutional in various jurisdictions. It also
puts --
5 only allows proceeds to be collected if there is
already a
6 money judgment obtained by the victims, which means the
victims
7 would have to go into a court -- either in Federal
Court or
8 state court -- and obtain a civil judgment against the
9 defendant.

10 It can be used to pay a fine imposed by a
Federal
11 Court; but again, that goes back to this analysis of
his
12 abilities to pay under restitution or fines; or moneys
can be
13 collected to repay his legal representation in a
criminal case.

14 So if you were not to order restitution and
ask us to
15 rely on this statute for any future benefits Mr.
Nichols would
16 receive, we would be incurring more litigation costs at
the
17 state and federal level, and I think the Court is in
the best
18 position right now to resolve all these disputes and to

assure

19 everyone that no matter how long Mr. Nichols waits to
sell his 20 story that he will never benefit from doing so.

21 The affidavit that he has submitted to suggest
to your 22 Honor that he would not benefit or that if he did, he
would 23 assign those benefits to certain groups of victims, is
24 unenforceable. It's not a contract, and we should not
have to 25 be put to the burden to go and litigate that affidavit
if

20

1 Mr. Nichols did file it and a court accepted it.

2 Furthermore, we are -- "offended" may be too
strong of 3 a word, but we reject the idea that Mr. Nichols should
have any 4 right to assign those benefits. That is appropriate, I
5 believe, for the Court to do and not for Mr. Nichols,
who 6 perpetrated the crime.

7 The other things the Court must consider are
the other 8 assets, as we said, which are minor and then, more
importantly, 9 his obligations to his dependents. He has a wife and

two small

10 children and a son who is close to the age of majority.
We

11 believe that Mr. Nichols decided not to support his
family back

12 on April 19, 1995, but he has no ability or very little
ability

13 other than working in prison to support his family for
the rest

14 of his life. But he also has a wife who is able and
educated

15 to support those two children; and we believe that
women across

16 the country every day are sole supporters for their
children,

17 and Mr. Nichols should not be claiming that some of his
assets

18 that could go to compensate victims of this crime
should go to

19 his family.

20 That being said, your Honor, we are willing to
return

21 the property that Mrs. Nichols has requested in her
limited

22 motion. That is, the property that was found under the
bed,

23 several coins, and the remaining cash without any
dispute. And

24 we can resolve that Rule 41(e) motion, the original
one, today

25 with that agreement. And we have always agreed to
that. And I

1 think we should make it clear to the Court that,
unfortunately,
2 we were quite surprised when Mrs. Cain filed an
affidavit
3 saying the Government had never agreed to return the
property.
4 I had personally spoken to her before she filed that
affidavit
5 and told her we would be willing to return the property
as long
6 as she was willing to give up any potential interest in
the
7 other assets Mr. Nichols had.

8 Therefore, your Honor, the only thing that
really
9 remains is for Mr. Nichols, if he wants, to take a
position on
10 whether you should consider the assets that are in the
11 Government's possession as part of his ability to pay.
And if
12 he does that, as I said, we are willing to consider,
for this
13 purpose and for this hearing only, that they are his
assets and
14 that they are valued somewhere between 20- and \$40,000.

15 THE COURT: You, in the proposal made here,
talk about
16 directing that the amount of restitution be, by the
court,

17 designated to go to the Crime Victims Fund. Why isn't
it more
18 consistent with the law and directly to say that the
money goes
19 to the General Services Administration, which, of
course, was
20 the agency that suffered the loss of the property?

21 MS. WILKINSON: That's a very good point, your
Honor.

22 We've discussed this among counsel and within the
Government
23 have decided that the Government would like to assign
any
24 benefits it's getting or compensation to the victims
and put
25 that in the Crime Victim Fund.

22

1 THE COURT: Well, but it doesn't go that way.
I mean,
2 the Crime Victim Fund, as I understand it -- very
limited
3 understanding -- is a discretionary fund to be
essentially
4 passed out to the states to fund programs in the
respective
5 states; and it's been my understanding in the past that
that
6 largely goes to victims of domestic abuse.

Honor; 7 MS. WILKINSON: I believe you're right, your
was not 8 and part of that is from the brief that we filed, which
first 9 complete enough on that fund. You're right that the
and 10 \$10 million goes to, I think, child molestation cases
states. 11 related cases; but after that, the money is sent to the
money 12 And in this case, we have three examples of where that
City 13 from the Crime Victim Fund went directly to Oklahoma
for the 14 victims. The first moneys were used to defray costs
on the 15 children's medical bills, some of the children you saw
wages to 16 videotape who were injured; second to provide lost
it was 17 workers injured in the buildings near the blast; third,
victims to 18 used to fund travel for some of the survivors and
was used 19 come here to Denver to see the trials, and fourth, it
both in 20 for counseling services for victims during the trials
who 21 Denver -- I mean, here in Denver and also for people
22 attended the closed-circuit broadcast.

just, 23 THE COURT: Well, you made that clear; but I'm

the 24 you know -- logically, if we're applying this on who is
here on 25 victim and what's the loss and given what has been said

23

Cassell, 1 behalf of the victims who have been represented by Mr.
this type 2 their willingness to see their interest be served by
3 of a restitutionary order, it is, it seems to me, more
loss is 4 consistent to say it's a property loss and the property
5 the Government's through the GSA.

Honor. 6 MS. WILKINSON: I think you're right, your
we're 7 It's consistent if you were just looking at the number
million 8 giving you. But the reason we're giving the \$14.5
the 9 number is because the loss to all the victims, which is
horrible 10 Government plus the human beings who incurred such
11 loss, is a number so great that we think it's almost
put our 12 incalculable; but we're using that to substitute and
restitution 13 interest, the Government's interest, in receiving
14 to the victims where it can be used. And so I guess if

we were

15 to adopt the money -- your solution of the money going
to GSA,
16 we feel like the Government would be getting the money
back,
17 when we would really have it rather go back to the
crime
18 victims.

19 THE COURT: I don't know what they can do
about
20 assigning it over to somebody; but I am troubled when I
have a
21 statute to apply and a determination to be made about
loss and
22 victim of creating something different from a
straightforward
23 analysis.

24 MS. WILKINSON: I believe both statutes, the
mandatory
25 statute and the Victim Witness Restitution Act, provide
that

24

1 the victims can assign their rights. And we have
written to
2 all the victims; and no one has objected to us
assigning or
3 turning over this restitution, if you order it, to the
Crime
4 Victim Fund. So I don't -- because I think everyone

5 recognizes --

6 THE COURT: Well, you can do that. I don't
think I
7 should do it.

8 MS. WILKINSON: So in other words, you're
suggesting,
9 perhaps, that you order it to GSA and we can turn it
over
10 ourselves?

11 THE COURT: Yeah. If it's to be done, that
seems to
12 me to be consistent with the statutory policy that's
involved
13 here.

14 MS. WILKINSON: Well, as long as we're not
prohibited
15 from turning over our interest to the --

16 THE COURT: You'd have to collect it first.

17 MS. WILKINSON: That's the issue you were
raising, the
18 property issue about Mr. Nichols; and we don't believe
you need
19 to get to those property issues, because until you
order the
20 restitution, we can't decide which assets we would go
after of
21 Mr. Nichols. For example, he has a home, but we may
decide
22 that's not an asset that we need to seize.

23 THE COURT: Well, I could, you know -- one of
the

24 things you can do with a restitutionary order --
restitution

25 order is to get a writ of execution based on that in
the same

25

1 fashion as a judgment, the way I understand the law;
but, of

2 course, I can also stay execution on the restitutionary
order

3 until matters like that are resolved so that we
wouldn't have

4 to do it. One of the things that is of concern to me
is that

5 we get a sentencing date and get this matter to final
judgment.

6 MS. WILKINSON: We are with you on that, your
Honor;

7 and we would like a sentencing date as soon as
possible. So if

8 the Court would like to stay that order of execution,
if you

9 order restitution, we would be happy to come back.
Just so you

10 know, we believe some of the property we've seized
belongs to

11 Mr. Nichols. There is a list of property we believe
does not,

12 and we have already provided that to the defense and
requested

13 from them an answer back of whether they are arguing
that some
14 of that property does, in fact, belong to Mr. Nichols.
So to
15 complete the process that you're talking about, we
would need
16 an answer from the defense as to what property they are
17 actually claiming as theirs, and then we can resolve it
with
18 the Court.

19 THE COURT: Well, what about Roger Moore and
Karen
20 Anderson? Is there some administrative procedure where
they
21 make a claim to the Justice Department? What happens
to them?

22 MS. WILKINSON: Yes, they could, your Honor.

23 THE COURT: Mr. Tigar has pointed out that he
doesn't
24 think it appropriate for the Department of Justice to
be
25 claiming on behalf of Roger Moore and Karen Anderson.

26

1 MS. WILKINSON: Well, we're not claiming on
behalf of
2 Roger Moore and Karen Anderson, but we are the
recipients of
3 the property and we have a right to return -- an
obligation, I

4 think, to return the property to the rightful owner.
5 Mr. Moore, as we believe, is a victim of a crime. And
so we
6 don't believe we are allowed to return it to Mr.
Nichols, if we
7 believe it belongs to Mr. Moore.

8 THE COURT: Yeah. Well, who adjudicates that?

9 MS. WILKINSON: Well, we believe that either
if -- we
10 can determine who the property belongs to except for
the items
11 we have agreed with Mr. Tigar that they return to us;
and that,
12 we would litigate in court. Now, if Mr. Tigar does not
agree
13 with us, he can, as he has, file that motion for return
of
14 property and claim which pieces -- we don't want to
engage in
15 more litigation. If he believes certain property that
we think
16 belongs to Mr. Moore is, in fact, Mr. Nichols', we can
try and
17 work that out. But we have not received any
notification from

18 him --

19 THE COURT: Okay.

20 MS. WILKINSON: -- that there is certain
property that
21 we believe belongs to Mr. Moore that he believes does
not.

22 THE COURT: All right. Mr. Tigar?

23 MR. TIGAR: Yes, your Honor. Did you want to
hear
24 from Mr. Cassell on this before the defense responded?

25 THE COURT: Well, I don't know that Mr.
Cassell has

27

1 standing on this.

2 KIGHT'S AND CASH'S ARGUMENT

3 MR. CASSELL: Your Honor, I can argue that.
If I
4 could have 30 seconds, I could make our point.

5 THE COURT: All right.

6 MR. TIGAR: I'm sorry. I didn't mean to --

7 THE COURT: Okay.

8 MR. CASSELL: I'll go straight to the merits
and avoid
9 the standing question. We're happy to endorse the
Government's
10 proposal.

11 THE COURT: That's what I understood you to
say
12 earlier.

13 MR. CASSELL: With respect to ordering it to
GSA,
14 we're comfortable with that. We're confident in the

15 Government's ability to work out the internal transfers
16 necessary to accomplish --

17 THE COURT: Well, it does seem more logical,
doesn't
18 it, to say that this is a property loss; that part of
it, this
19 is the victim?

20 MR. CASSELL: It certainly seems logical. And
the
21 important point is to get the order in place. The
details can
22 be resolved within the Government later.

23 THE COURT: I understand. Okay.

24 All right. Mr. Tigar?

25

28

1 DEFENDANT'S ARGUMENT

2 MR. TIGAR: Thank you, your Honor.

3 I want to begin by responding to some of the
things
4 that Mr. Cassell had said earlier and somewhat out of
turn.

5 I was here when the jury returned its verdict.
I
6 remember counting the sconce lights in the courtroom.
There
7 are 18 of them. The jury said not guilty 18 times.

That is

8 also the Hebrew "Chai," the Hebrew word for 18. It's
also the
9 word for life. And then the jury found no culpability
intent
10 with respect to resulting death.

11 We also know that the Tenth Circuit has held
in United
12 States vs. Melton that the scope of criminal activity
jointly
13 undertaken by the defendant is not necessarily the same
as the
14 scope of the entire conspiracy. So there is this
question of
15 responsibility in some global sense.

16 The Government, I think, has decided to ignore
the
17 fact that it lost the case it brought and in deciding
to ignore
18 the fact that it lost the case it brought has decided
to do so
19 by refusing to accept the normal and logical
consequences of
20 that.

21 Your Honor had said repeatedly in lectures
given and
22 in talking to us as lawyers in the case that we share a
belief
23 in the jury as the decider of things and we share a
belief in
24 the workings of the adversary system. Your Honor said
it, and

the 25 I believed it then and I believe it now. So we come to

29

1 Court from a rather different position than that
expressed by

2 the Government and Mr. Cassell.

3 I want, first of all, then, to deal with the
4 allegation that has now three, four times been made;
and that

5 is that Mr. Nichols is in a position to profit in some
way.

6 "Tabloid journalism" was the words that were used.

7 Ms. Wilkinson went so far as to say that if
8 Mr. McVeigh were executed, Mr. Nichols would be left as
the

9 only person living who knew the story.

10 I heard in the opening statement that Mr.
Fortier knew

11 the story. I heard in the opening statement in another
case

12 that Mrs. Fortier knew the story. No restitution
orders have

13 been sought against Mr. Fortier or Mrs. Fortier. No
one has

14 said it is an insult to working women of America not to
go out

15 there and seize their trailer, throw their children
into the

those 16 street, and leave Mrs. Fortier as the sole support of
17 children.

18 I think that is a cynical argument, and we
reject it.

19 With respect to the question of this property
order,

20 I'm going to put that to one side. Mr. Nichols filed a
21 declaration. It is attached to our papers. As has so
often

22 happened in this case, every time Mr. Nichols extended
his hand

23 to the victims, with whose situation he sympathizes,
people

24 have turned away, people have mocked his initiatives.
They did

25 so when he waived his rights under Federal Rule of
Evidence 615

30

1 so that people could attend the trial, and I know the
Court

2 remembers that. So I will say here today Mr. Nichols
has no

3 intention of profiting from the sale of any memoirs or
anything

4 else to any media.

5 Your Honor knows that the approach by our
defense team

6 to the media in this case was very, very different from

the

7 approach of the co-defendant's legal team. I'm not
criticizing

8 them, your Honor. It seemed to us under directions
from our

9 client that that was the dignified and just and decent
and the

10 right way to proceed; but if it is thought that Mr.
Nichols has

11 made an offer which cannot be enforced, Mr. Nichols
wants to do

12 this today: Let Mr. Cassell, on behalf of Mrs. Kight,
draft a

13 document naming Mrs. Kight as the trustee of a fund to
be

14 distributed in her discretion as trustee to the victims
of the

15 Oklahoma City tragedy, and let him present it to Mr.
Nichols

16 now, and he'll sign it before we leave the room today,

17 assigning all proceeds from any work in any medium for
the

18 indefinite future, so that if such a thing does come to
pass,

19 the money will flow directly not through the
machinations of

20 Congress and block grants and the GSA and all of these
other

21 alphabet soup agencies, but directly to the people who
suffered

22 these losses.

23 In making that statement, Mr. Nichols does not
concede

24 the liability that the Government seeks to fasten upon
him. He
25 simply acts as a human being faced with the reality
that there

31

1 was a tragedy in Oklahoma City and that to the extent
that he's
2 able to do something about it, that's what he says he
can do.
3 And if they say that what we filed is not enforceable,
what
4 I've just described surely is.

5 But what is the Government's ultimate position
here,
6 your Honor, and what are the factors the Court is
supposed to
7 consider? The Tenth Circuit has reversed orders where
the
8 amount of restitution that was ordered so far exceeded
the
9 defendant's realistic ability to pay that the whole
thing was a
10 nonsensical exercise.

11 Again, your Honor, I worry. I worry because
they
12 haven't sought one about Mr. Fortier. They haven't
sought one
13 about Mrs. Fortier, or she wasn't charged with
anything. They

14 haven't sought one about Mr. McVeigh. They've sought
one here,
15 and they do so in terms that have inflated the rhetoric
far
16 beyond any rational consideration of what the jury's
verdict
17 could mean under the instructions that your Honor gave
to this
18 jury about the permissible basis of conviction.

19 I think, your Honor, to begin with, therefore,
that a
20 \$14.5 million restitution order is a mark of disrespect
to this
21 jury and to its verdict. I say that bluntly in that
way; and
22 your Honor, of course, may disagree. But that is our
position.

23 Second, the Government takes, quite frankly,
the
24 position that it wants a restitution order which, after
they've
25 given up the few things that were in Ms. Cain's first
list,

32

1 would essentially deprive Mrs. Nichols and her children
of any
2 opportunity to have the benefit of such meager assets
as
3 Mr. Nichols has. That, your Honor, is, in the scheme

of

4 things, fundamentally unfair.

of

5 You know, something has happened to the system

anything

6 justice in my lifetime, and I'm not sure that I can do

of us

7 about it; but I am disturbed. I recognize -- and all

City,

8 must -- that those who suffered so greatly in Oklahoma

9 whose situation we litigated here, is a matter of great

10 concern. And I recognize also that countless voluntary

been

11 agencies and the power of the federal government has

in this

12 brought to bear, spending far more money than anybody

could

13 courtroom with all their earning capacities combined

their time

14 possibly do to bring folks here, to help them out in

think, is

15 of need, to pay their expenses. And so that focus, I

16 a quite proper one on the loss that has been suffered.

of

17 But I was raised to believe that the process

convicted

18 criminal justice should not be one by which a person

rendered unable

19 of a crime is completely pauperized, completely

created;

20 to render any useful service to the family that he has

21 that he has brought into being and sworn to support;

that is,

22 the Government wants to elevate one permissible
interest to the

23 absolute exclusion of another and to do so in a way
that

24 essentially dehumanizes Mr. Nichols, having treated
with

25 ridicule his proposal with respect to any media event
that

33

1 might take place in the future. The Government then
says they

2 want to take his assets in a way that would essentially
rob him

3 of whatever right of self-respect he may have with
respect to

4 his evident and ongoing concern to see that whatever he
can do

5 for his family, he will do.

6 And that, your Honor, regardless of the
sentence your

7 Honor imposes, is something that is at war with most
basic

8 concepts of the penal system as I was raised to
understand it.

9 In short, your Honor, we do not believe that a

10 restitution order under your Honor's discretionary
power is

11 appropriate. We believe that your Honor should

authorize

12 Mr. Nichols to execute a binding legal document, which
we would
13 have done before now had we had a trustee that takes
care of
14 the media problem and that then recognizes that Mr.
Nichols'
15 limited power to deal with these issues in the future
could,
16 given the balance of assets and given the availability
to the
17 victims of other places to which they can turn and
given the
18 Government's deliberate refusal to go after anybody
else
19 preserves for Mr. Nichols a -- that scrap of dignity
that is
20 the lot, the decent and justified lot of every person,
no
21 matter what the circumstance.

22 THE COURT: Ms. Wilkinson, do you wish to make
any
23 response?

24 PLAINTIFF'S REBUTTAL ARGUMENT

25 MS. WILKINSON: Just one minor point, your
Honor.

34

1 You discussed earlier the stay of execution of
any

2 order of restitution, and we just would want to include
in that
3 a prohibition on the defendant from disposing of any
assets.
4 We know that he has his house in Kansas on the market;
and
5 obviously, we just want to make sure that between the
time that
6 you order restitution and we can actually execute on
that order
7 that he doesn't dispose of any other assets.

8 THE COURT: I didn't ask you, Mr. Tigar; but I
take it
9 you're not in a position to quarrel with the
representation
10 that \$14 1/2 million is the original cost of the
building.

11 MR. TIGAR: No. We don't quarrel with that,
your
12 Honor.

13 DEFENDANT'S SURREBUTTAL ARGUMENT

14 MR. TIGAR: A question has been raised about
15 Mr. Nichols' house.

16 THE COURT: Yeah.

17 MR. TIGAR: You know, this is beginning to
sound like
18 an execution hearing in a JP court in a rural county,
your
19 Honor. We don't intend to do anything to defeat the
purpose of
20 any lawful order of this court, and that has to do with

the

21 sale of a house or with anything else. So I really
think that

22 comment was uncalled for.

23 RULING

24 THE COURT: Well, I -- of course, this is in
25 anticipation of a judgment to be entered. And what I'm
to say

35

1 here would be incorporated into a judgment and does not
2 constitute today a judgment or order; but I thought it
prudent

3 that we have this hearing well in advance of the
sentencing

4 hearing so that it wouldn't be something -- well, for
one

5 thing, the result here would determine the time for
sentencing,

6 because if we were to go forward with hearings about
assets,

7 potential earnings, and the like, that would, of
course, have

8 to be done before a final judgment.

9 What is being proposed here is a matter that I
think

10 lends itself to this procedure in the direction to
proceed, and

11 that is to apply the discretionary statute and to find

that a

12 primary victim here has been the Government, the
General
13 Services Administration, and that it has lost the
original
14 value, at least, of this building, its construction
cost of
15 \$14 1/2 million.

16 Now, with respect to Mr. Tigar's comments
concerning
17 the jury and respect for the jury verdict, I do,
indeed, have
18 full respect for the jury verdict. I do not agree that
the
19 Government lost the case. The jury found Terry Nichols
guilty
20 of a violation of 2332(a) of Title 18 of the United
States Code
21 and made a finding beyond a reasonable doubt of the
element of
22 the offense that was given in the instruction that two
or more
23 persons including the defendant Terry Nichols agreed to
use an
24 explosive bomb in a truck as a weapon of mass
destruction
25 against a federal building and the persons inside it.
He was

it. 1 found guilty of that crime and will be sentenced for

the 2 The consideration of restitution is a part of
3 sentencing structure that is required by law. And the
4 defendant is also responsible for the conduct of other
loss of 5 co-conspirators that resulted in the destruction and
6 life and tragic injuries that resulted.

And in 7 I do not want to minimize the human cost here.

Government of 8 talking about the building and the loss to the
loss to 9 the building, I do not in any way wish to diminish the
a 10 the people. Obviously, that is a far greater loss than
today; 11 \$14-and-a-half million building, or whatever it's worth
who the 12 but when you consider the dimensions of the loss here,
of the 13 deceased were, including small children, the families
loss 14 deceased, the persons who were maimed and injured, the
15 really becomes incalculable.

reminded of 16 And you know, in thinking about this, I'm

waiting my 17 a most compelling argument that I once heard while

when I 18 turn before the Colorado Supreme Court many years ago

19 was practicing law. And the issue was the net
pecuniary loss
20 rule being applied in wrongful death where a baby was
killed.
21 And one of the justices, I recall, was outraged and
said to
22 counsel, who was arguing, "Do you mean that this baby's
life is
23 worthless?" And in a response that I will never
forget, the
24 advocate said, "No, it is not that this baby's life is
25 worthless; it is that it is priceless." And I'm
reminded of

37

1 that here; that the human suffering involved in this
case is
2 priceless. There is no way to put a price tag on it.
3 So I simply wanted to make that observation to
avoid
4 any kind of misunderstanding that the Court has some
sort of
5 callous indifference to the human suffering resultant
from the
6 crime in question.
7 It is, then, a matter of avoiding of delay and
the
8 complications of the sentencing system to say that the
9 appropriate restitutionary order in the case should be
to the

property 10 General Services Administration as the victim of the
what I 11 loss and that the amount is \$14 1/2 million; and that's
12 propose to do.

whether 13 Now, with respect to the matter of collection,
structure 14 it's due and payable immediately, what kinds of
that to 15 should be imposed here in the final judgment, I leave
16 the sentencing day.

of Marife 17 And I do want to touch, then, on this matter
18 Nichols' motion for return of property.

respond to 19 Ms. Cain, you've heard Ms. Wilkinson now
where it 20 that in court that it's conceded. Now, I'm not sure
dispute 21 is with respect to Terry Nichols and whether there is a
22 between husband and wife here.

23 DISCUSSION RE RETURN OF PROPERTY

motion, 24 MS. CAIN: No, your Honor. As to our first
to the 25 which I understand is now conceded, which applies only

which 1 coins and the \$170, Mr. Nichols has signed an affidavit

2 was attached to our motion --

3 THE COURT: That's right.

he 4 MS. CAIN: -- also signed by his counsel that

personal 5 waives any interest and agrees that that was her

accept the 6 property. That was our position all along, and we

property. I'd 7 Government's offer at this time to return that

only 8 ask that it be returned as soon as possible, because my

quickly as 9 interest here is getting the money to my client as

10 possible.

What do we 11 THE COURT: Well, does that take an order?

12 do procedurally?

take an 13 MS. WILKINSON: No, your Honor, it doesn't

14 order. We'll do it.

about the 15 THE COURT: I am reminded -- thank you --

whether 16 affidavit here. That does answer my question about

17 there was a disagreement between Mr. and Mrs. Nichols.

18 MS. CAIN: That's correct, your Honor.

asked for 19 As to our supplemental motion in which we

20 the return of the marital property, since the Court has
21 proposed a restitution order against Mr. Nichols, as I
22 understand, there can be a lien against marital
property. We
23 would pursue any claim we had to the marital property
under
24 Michigan law, which would give her an undivided one-
half
25 interest in all the property. And we want that to be
litigated

39

1 so that we would recover --

2 THE COURT: Yeah.

3 MS. CAIN: -- what is rightfully hers.

4 THE COURT: Are you confident that Michigan is
the
5 appropriate choice of law?

6 MS. CAIN: Your Honor, as a matter of fact, it
may be
7 more complicated than that --

8 THE COURT: I think so.

9 MS. CAIN: -- because I believe that the law
of the
10 state where the real or personal property was acquired
will, in
11 fact, be the law that will have to determine the status
of the

12 property and that the change in domicile does not
affect the
13 status of the property. So if they moved from Michigan
to
14 Kansas, it will be where was the laws -- where was the
property
15 acquired that will determine the nature of the property
16 interest of Mrs. Nichols.

17 THE COURT: Okay. Well, I don't know -- I
guess this
18 court has jurisdiction under 41(e) for whatever
property is in
19 the custody of the Government.

20 MS. CAIN: That's correct, your Honor. I
believe this
21 would be the best place to do that. And I --

22 THE COURT: I don't know if it's the best
place, but I
23 guess it's the right place.

24 MS. CAIN: I'm sure it's not something that
any of us
25 are looking forward to, and I don't even know exactly
all the

40

1 property that was seized; so that's why I did the
motion in two

2 parts, because I knew the Government had our personal
property.

but we 3 I'm not sure about the rest that the Government has;
date. 4 will persist in that claim, I assume at some later

counsel 5 THE COURT: And that's one of the things that
all that 6 for Mr. Nichols has suggested; that we get a list of
7 the Government has --

8 MR. TIGAR: Yes, your Honor.

9 THE COURT: -- is that right?

enter an 10 MR. TIGAR: I gather if the Court intends to
a list 11 order as part of the judgment of restitution that such
Nichols 12 is, in some measure, irrelevant as to any claims of Mr.
13 except to the extent there may be some exemptions from
14 execution.

this as a 15 THE COURT: Well, I see this -- yeah. I see
proceeding to 16 collateral-type matter that should not delay our
then 17 the sentencing hearing and the entry of judgment and
18 whatever is done with a stay of execution or the like.

19 MR. TIGAR: Yes, your Honor.

you know, 20 THE COURT: But I don't want to have this --
have 21 I don't know anything about these property laws, and I

22 never done much with marital property; that is,
adjudicating

23 it.

24 MR. TIGAR: If your Honor please, there is
only one

25 matter that is raised by Ms. Wilkinson, and that is the
house

41

1 in Herington.

2 THE COURT: Yes.

3 MR. TIGAR: It's true it's on the market. I
make a

4 commitment to the Court that nothing that will be done
if that

5 house is sold will interfere with the judgment your
Honor

6 proposes to enter. In exchange for that, I would like
a

7 commitment from the Government that they're not going
to

8 interfere with the sale, because, if they do, then the
house

9 will be lost and nobody will get anything out of it.

10 THE COURT: I think we could simply have a
stipulation

11 that the proceeds go into some sort of escrow.

12 MR. TIGAR: Yes, your Honor. We agree to
that.

13 MS. WILKINSON: That would be fine.

14 THE COURT: All right. Well, I'm sure you can
draft
15 that.

16 So we will expect the Government to proceed to
honor
17 the motion for return of property originally filed
forthwith or
18 with all -- not deliberate speed but speed -- speedily;
and
19 then we'll have to structure some kind of procedures to
deal
20 with the rest of this. I suppose -- I don't know
whether there
21 is a need to offer participation to Roger Moore and
Karen
22 Anderson or what.

23 MS. WILKINSON: I have a suggestion to get it
started,
24 your Honor, to simplify it.

25 THE COURT: Okay.

42

1 MS. WILKINSON: As I said, some of the
property, we
2 agree, is Mr. Nichols'. For example, his truck. We
have no
3 dispute that the 1984 GMC --

too. 4 THE COURT: Well, he wants damages for it,

issue. 5 MS. WILKINSON: Right. That is a different

list of 6 But the property that -- we have sent them a
to them. 7 approximately 32 items that we believe does not belong

they do 8 If we could at least start with that and see whether

property 9 have a claim to this property, that would narrow the

promise 10 you have to consider; so if we could at least have a

11 from Mr. Tigar that he would respond and say whether

know, 12 Mr. Nichols is actually claiming, for instance, you

as 13 ownership of the safety deposit box keys and items such

of 14 that. And if he doesn't, then we have a smaller number

15 property issues that the Court would have to resolve.

16 THE COURT: Do you want to address that now,
17 Mr. Tigar?

letter, 18 MR. TIGAR: Yes. I'm happy to respond to the

think that 19 but I'm not sure what the point of it is; that is, I

20 if -- the main issue here for Mr. Nichols is to protect
21 Mrs. Nichols' rights, he'll execute whatever documents

are 22 necessary to do that.

23 With respect to us filing a list of things in
which
24 Mr. Nichols says he has a property interest, I don't
know to
25 whom we would address it or with what effect unless the

43

1 property in question were thought to be exempt from
execution
2 under the law of the appropriate jurisdiction; that is
--

3 THE COURT: Well, I'm going to suggest that
counsel
4 talk to each other or among all three of you, really,
to try to
5 work out a procedure to approach this. I don't think
we need
6 to take the time now to do that because I'm saying that
that's
7 not going to interfere with going forward with the
sentencing
8 hearing.

9 MR. TIGAR: Yes, your Honor.

10 THE COURT: So it's all collateral to that, or
11 ancillary, I guess, is the word.

12 MS. CAIN: Thank you, your Honor.

13 THE COURT: All right.

14 Well, I want to set a time for the hearing;

and I know

15 that several people are involved here and have other
schedules.

16 I'd like to do it June 1. June 1. Monday?

17 MR. MACKEY: That's agreeable with the
Government,

18 your Honor.

19 MR. TIGAR: I'm sorry, your Honor. May I have
a

20 moment just to talk to my colleagues?

21 THE COURT: Sure. Of course.

22 MR. TIGAR: Your Honor, may -- I have a
comment about

23 this, but it's a personal matter. May I approach?

24 THE COURT: Yes.

25 (Bench conference sealed as separate transcript.)

48

1 (In open court:)

2 THE COURT: It's been suggested that we
instead do

3 June 4 at 1:00 in the afternoon.

4 MS. CAIN: That's fine, your Honor. That is
for

5 sentencing and not for the more complicated issues?

6 THE COURT: That's right. We will have to
structure

7 that for a different time and under a procedure yet to
be
8 devised.

9 MS. CAIN: Thank you, your Honor.

10 THE COURT: But I want to get to final
judgment in

11 this case, so we'll do it. June 4, 1:00.

12 There are some other matters, of course, that
are

13 pending here but involve other parties. We have
motions from

14 The Dallas Morning News that I'm going to have to look
at that

15 and attempt to structure some kind of an order. I
think we

16 need some sort of approach to this problem of unsealing
that at

17 least is consistent with, from my standpoint --
consistent with

18 my order on media motions back in January of '96, so
I'll

19 reflect on that and try to come up with some kind of a
20 procedure to start down that road.

21 MR. TIGAR: There is also the matter on which
your

22 Honor has shared some correspondence with us, and we
would like

23 to be heard at the appropriate procedural hour about
that. I

24 know that some persons who are interested in that are
not here

25 today.

1 THE COURT: Right.

2 MR. TIGAR: And --

3 THE COURT: And I -- you know, frankly I'm
sort of
4 puzzled as to what it is. There is no formal motion or
something
5 anything. It was by way of a letter, and it's not
letters
6 I -- I shared it with counsel. You, in turn, passed
don't know
7 back. I sent it to the source of that letter, and I
things
8 where we are procedurally. I'm not accustomed to doing
9 by letter.

10 MR. MACKEY: I think they're waiting for
further order
11 from this court.

12 MR. TIGAR: If your Honor please, it was our
13 suggestion that there are two issues. One is a
protective
14 order already signed in the case and the other is Rule
6(e).
15 Now, as I understand recent Tenth Circuit law, there is
a
16 process that should be gone through before disclosures
are made

17 and --

18 THE COURT: It's my understanding, too.

19 MR. TIGAR: -- I intend no disrespect, your
Honor,

20 but --

21 THE COURT: None taken. I'm reading a lot of
22 transcripts.

23 MR. TIGAR: I thought based on that that the
24 suggestion in our letter was indeed an appropriate one;
that

25 is, somebody should move for an order that either
directs or

50

1 permits somebody else to do something. In the absence
of that,

2 why, we're just kind --

3 THE COURT: I think what I'm -- you know, what
I was

4 asked is are you going to remove an order that affected
other

5 proceedings? Now, it seems to me that the rowing oar
here is

6 for somebody to ask for a modification of the order
with

7 standing in this case, and I assume that's the
Government.

8 MR. MACKEY: We will, your Honor.

9 THE COURT: Then we have something we can work
with.

10 I can't work with letters.

11 MR. TIGAR: We're happy with things as they
are, and

12 we'll respond to the Government's motion when they make
it.

13 THE COURT: We won't put a time on that.
Whatever you

14 choose to do.

15 MR. MACKEY: If we could, Judge -- and the
reason is I

16 think reflected in the tender of the original letter.
There

17 are proceedings that they'd like to know as soon as
possible.

18 We could certainly have a motion on file yet some time

19 tomorrow, for that matter.

20 THE COURT: All right. Whenever you get it
filed,

21 we'll take a look at it and give an opportunity for the

22 adversary process to work.

23 Okay. All right. Court is in recess.

24 (Recess at 2:37 p.m.)

25 * * * * *

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	17	REPORTER'S CERTIFICATE
transcript from	18	I certify that the foregoing is a correct
Dated	19	the record of proceedings in the above-entitled matter.

20 at Denver, Colorado, this 13th day of May, 1998.

21

22

Zuckerman

23

24

25

Paul A.