IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 96-CR-68

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TIMOTHY JAMES McVEIGH and TERRY LYNN NICHOLS,

Defendants.

ÄÄÄ

REPORTER'S TRANSCRIPT
(VOLUME IX - SUPPRESSION HEARING and HEARING ON MOTIONS)

ÄÄÄ

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 15th day of July, 1996, 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

JOSEPH H. HARTZLER, SEAN CONNELLY, LARRY A. MACKEY, BETH WILKINSON, SCOTT MENDELOFF, and VICKI BEHENNA, Special Attorneys to the U.S. Attorney General, 210 West Park Avenue, Suite 400, Oklahoma City, Oklahoma, 73102, appearing for the plaintiff.

STEPHEN JONES, ROBERT NIGH, JR., ROBERT WYATT, and RICHARD BURR, Attorneys at Law, Jones, Wyatt & Roberts, 114 East Broadway, Suite 100, Post Office Box 472, Enid, Oklahoma, 73702-0472, and JERALYN MERRITT, 303 East 17th Avenue, Suite 400, Denver, Colorado, 80203, appearing for Defendant McVeigh.

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

* * * * *

PROCEEDINGS

(In open court at 9 a.m.)

THE COURT: Be seated, please.

We're convened in 96-CR-68, United States vs. Timothy James McVeigh and Terry Lynn Nichols for oral argument on motions. We'll as usual begin with appearances. For the Government?

MR. HARTZLER: Good morning, your Honor. Joe Hartzler for the United States. With me at counsel table is Sean

Connelly, Scott Mendeloff, Vicki Behenna, Beth Wilkinson and Larry Mackey. Also in the courtroom are several government employees including our two case agents. I don't believe any of the Government employees other than the two case agents would be witnesses at any hearing or the trial.

THE COURT: Thank you.

For Mr. McVeigh?

MR. JONES: Stephen Jones for the defendant, Timothy McVeigh, who is present in court; and with me at the counsel table is Mr. Richard Burr, Mr. Rob Nigh, Ms. Jeralyn Merritt and Mr. Robert Wyatt, IV.

THE COURT: And Mr. Tigar for the defendant Terry Lynn Nichols.

MR. TIGAR: Michael Tigar. Mr. Terry Lynn Nichols is present in court. With me at counsel table, Ron Woods, Adam Thurschwell, and Reid Neureiter.

THE COURT: Thank you.

And Mr. McVeigh is present, I note.

I suggest our schedule be that we have first a motion to supplement the record with respect to an additional exhibit on behalf of Mr. Nichols, then we have oral arguments on the motions to suppress; and I suggest we take argument for the motion by Mr. McVeigh first and then for Mr. Nichols. Then the Government's motion in limine regarding statement -- admissibility of Mr. Nichols' statements as against

Mr. McVeigh; then we'll discuss the Government's motion for closed circuit television transmission to Oklahoma City.

I would hope also before we're done today we could set some other hearings on some of the other matters that need to be resolved before trial.

So unless there is objection to that schedule or it presents any problems, we'll start, Mr. Tigar, with your motion for this exhibit, which as I understand it is based on telephone records that were provided; and you're offering W83;

and there is opposition to it as filed by the Government.

DEFENDANT NICHOLS' ARGUMENT ON MOTION TO SUPPLEMENT

MR. TIGAR: That's correct, your Honor. If the Court please, over the last number of months, we have received telephone records or purported telephone records in the form that W83 appears. We have spent hundreds and hundreds of hours of investigator time and Mr. Nichols' time and counsel time analyzing these. The Court will recall that these records or records in this form were widely leaked to the press and claims were made that these records fully and accurately portrayed telephone calls from one telephone to another; for instance, Mr. McVeigh to Mr. Nichols.

Thus, when in a routine check after the suppression hearing as our investigators were working, we discovered these two pages, we thought that they were important. This is not a case of us going and looking at the records after the motion to

suppress. It was one of the investigators came to us and said, Look, this is what I found; is it important?

We called the Government and the Government said, Well, these records are indeed accurate so far as we're aware. We oppose the motion.

The significance of the records is apparent from the face of our motion because it shows -- the records show that on the 21st of April, 1995, there were a number of telephone calls made to and from the Nichols' residence in Herington at a time when Mr. Nichols, Mrs. Nichols, and little Nicole were in the police station. The inference is that the FBI or other law enforcement agencies were in the house and were answering the phone.

For example, there are three telephone calls from the number of Capital Cities/ABC, one of which is 54 seconds and another of which is 2 minutes and 3 seconds. In terms of an outgoing call, it shows that at 8:40 and 45 seconds there was a 19-minute, 18-second telephone call made from that telephone to the home of James Nichols in Cass City, Michigan.

Now, at that time, 8:40 p.m., as the evidence shows, Mr. James Nichols' house had been occupied by the Federal Bureau of Investigation under a search warrant.

THE COURT: With respect to that one, the Government's response is that that is an error; that it -- instead of being 4-21, it should be 4-12.

MR. TIGAR: I'm about to show the Court that with all due respect, the Government's position simply doesn't hold water. I have before me the telephone records for 4-12, 1995. And indeed, there is a telephone call on 4-12, 1995, from the Nichols home to the farm of James Nichols there in Cass City, Michigan. The telephone call begins at 8:20 p.m., not 8:40; and it lasts for a period of -- let me make sure I get the right numbers here -- not -- for a period of some 19 minutes and a different number of seconds than the 19 minutes, 18 seconds.

So what the Government is telling your Honor is not simply that an FBI agent transposed a number but -- and I know Government counsel will admit this, because I think they've had a burst of candor about it, when they stand up; that is, that on the 12th of April, there is a call shown beginning at 8:20 and ending at 8:40. That's on the records we already have. The Government says that the other call listed on the 21st is that same telephone call. It isn't a transposition. The

Government says that they're in fact one telephone call listed twice with a different duration, a different starting time, a different code key number and reflected only once in the billing records for the 12th.

I have before me the billing record on which the call of the 12th is based, and that starts at 8:20 and goes for 20.0

So that alleged error, if the Court please, simply doesn't wash; that is, it isn't a question of somebody transposed a number. The Government is now claiming that, Gee whiz, we just listed the call twice with completely different characteristics.

The Government's other claim, your Honor, with respect Nichols residence and as soon as the telephone rings, the counter starts. Now, your Honor, these are not cellular phones; these are ordinary phones like all of us have in our house.

The only problem with the story that a telephone call that lasts for 2 minutes, 3 seconds represents the telephone ringing and nobody talking is that two lines up there is a call that is listed as zero minutes and zero seconds. Does that mean that somebody just thought about telephoning but didn't really and never did make the phone ring and that's how it's zero, whereas when the phone rings, it's 2 minutes and 3 seconds? The Government doesn't have an explanation for that, other than to say that different long distance companies bill differently.

In sum, your Honor, either there were FBI agents in that house answering that telephone and making telephone calls, which is what this record shows that the Government gave us and

to the accuracy of which they have sworn, or, for the past six months, thousands of pages of discovery have been provided to us purporting to show telephone calls to and from particular subscribers with particular durations and all of those thousands of pages upon which the taxpayers of this good land of ours have spent thousands of dollars to have investigators working are complete nonsense, they are lies and falsehoods, at the very least reckless, and we simply have wasted months of time attempting to analyze this evidence. One of those two inferences inescapably appears.

We submit, your Honor, that the internal inconsistencies in the Government's position about whether or not the agents were in that house and using that telephone require the inference be made against the person who, after all, was the sponsor of this evidence and provided it to us. And that's the reason we want that exhibit in evidence.

THE COURT: And why is it that we didn't have this on June 26 or 28th?

MR. TIGAR: Because, your Honor, we, to begin with, believed the Government that the agents were not in the house. We have, your Honor, back at our office hundreds of thousands of pages of records provided us by the Government. It is the purest fluke and accident that our investigators were working through these telephone records for this crucial period for Terry's calls to and from his house in connection with our

preparation of the defense; and when they brought it to our attention, we brought it to the Court's attention as speedily

as we possibly could.

THE COURT: And that was when?

MR. TIGAR: That was on the date that this motion was filed, your Honor, which was last week.

THE COURT: July 11.

MR. TIGAR: July 11.

In short, your Honor, we've been plowing through the records, as the Court knows, and we simply had no reason until the investigator found this to think that this sort of incursion into the Nichols home had taken place.

THE COURT: What is Cass City and its relationship to Dexter? I thought we had had the address of Dexter, Michigan, before.

MR. TIGAR: Cass City, Michigan, your Honor, is apparently the telephone company's listing of the James Nichols farm. They list it as Cass City because that's where the telephone service is provided out of. There is no dispute that that telephone number is the James Nichols farm, the very same one that FBI S.W.A.T. teams had occupied beginning, if perimeter security marks the beginning, at approximately noon on the 21st.

THE COURT: All right.

Well, Mr. Mackey, are you responding to this? You

signed the written response.

PLAINTIFF'S ARGUMENT ON MOTION TO SUPPLEMENT

MR. MACKEY: I am, your Honor.

Your Honor, I would ask the Court the same question I asked Mr. Woods when he called some 10 or 12 days after the close of the evidence in this case; and that is, what does this

go to? What does it prove about the suppression hearing? And he asserted then, as Mr. Tigar has asserted now, that this telephone record proves that there were FBI agents in Terry Nichols' house before the search warrant.

THE COURT: Or, as Mr. Tigar said, that the summary is incorrect.

MR. MACKEY: Right.

THE COURT: And apparently it was your position when you made the written response that there at least is one error.

Tell me something about this summary. I haven't looked at it. And this is a summary prepared by some FBI agents?

MR. MACKEY: Yes, your Honor. On January 17 of this year, 1996, I met with Mr. Woods and representatives for Mr. McVeigh and tendered at that time a number of summaries. And that summary is simply a document that is produced as a result of FBI personnel sitting down with the raw business records from the telephone companies and entering data, hundreds and hundreds of thousands of numbers, into a format

that all the parties hopefully can benefit from.

At the same time that we turned over the summary, we turned over an inventory that related each of those raw records to the corresponding entry so that any party would be in a position to examine the accuracy of those records.

This motion points out one innocent error in that summary. But it also points out there is a lot to know about business records when it comes from telephone companies that can lead to innocent misinterpretations. Clearly what happened in the afternoon of April 21 is news organizations got Terry Nichols' listed phone number, got on the phone and started

calling; and there is a record maintained by telephone companies that shows when that call started and when it ended, even if no one in the Terry Nichols residence answered that phone.

THE COURT: And you think they let it ring for three minutes?

MR. MACKEY: We probably could call more than one witness behind me, Judge, who would say that that afternoon they wanted to keep that line open with the hope that somebody would answer, yes.

THE COURT: Well, tell me more about this one, though, that goes to James Nichols' residence. Your written response is that that's just a transposition of numbers and it should be the 12th instead of the 21st. Mr. Tigar has gone into some

detail here with respect to the records of the 12th to say that it is not an error. I don't know -- I'm somewhat at a loss here.

MR. MACKEY: And again, I don't know how much time the Court wants to spend on this. We could submit affidavits or produce other witnesses; but the fact of the matter is on April 12 there was a long distance phone call placed from the Terry Nichols residence lasting approximately 20 minutes. It began at approximately 8:20 p.m. and ended at approximately 8:40. In entering that record about that phone call, it was inverted and shown as April 21 instead of April 12. The additional error is that it was shown twice, 8:20 and 8:40, as Mr. Tigar pointed out.

But the whole point, your Honor, is that it doesn't demonstrate to suggest that the evidence that the Court heard

during four days of suppression evidence has proven that the FBI agents were in that residence prior to the time they were authorized by warrant.

THE COURT: Well, here's what I'm going to do. I'll receive W83 for what it is. Now, if you want to supplement the record with some affidavits and explanations with respect to that, you may do so.

MR. MACKEY: With the Court's permission --

THE COURT: I don't intend to reopen the evidentiary record and pursue that in any depth.

MR. MACKEY: With the Court's permission, we'll attach, then, the raw records that the --

THE COURT: Not all of them, just the one that relates to the 12th, the 21st. All right?

MR. MACKEY: Yes, sir.

THE COURT: Okay. That's how we'll deal with it.

MR. JONES: Your Honor, I don't believe we have received a copy of the Government's response.

THE COURT: You didn't?

MR. JONES: And I've checked with counsel here at the table. I wonder if they have a copy. And I want to be sure we get copies of these supplemental filings.

THE COURT: Of course you should.

It's now been handed to you?

MR. JONES: Yes, sir. Thank you.

THE COURT: All right. We'll go forward next with argument supporting the motion of Mr. McVeigh on suppressing clothing, personal effects taken from the Noble County Jail.

MR. JONES: Ms. Merritt will make that argument.

THE COURT: All right, Ms. Merritt.

I don't think we have any factual dispute here with respect to what happened; and mostly it looks like we have a question here of what does United States vs. Edwards mean as applicable to this case and this Fifth Circuit case.

MS. MERRITT: That's correct, your Honor. I don't think the facts are in dispute. I think that the key to resolving this issue is -- probably lies in examining and identifying each of the searches and seizures involved, because it isn't just one search and seizure of his clothing. There is actually four separate searches and seizures that took place, and I don't believe, as the Court said, that the facts are in dispute.

The first search and seizure was a search incident to his arrest on April 21, when Mr. McVeigh was stopped in Oklahoma by Trooper Hanger. At that time, there was a search incident to his arrest, and a gun and a knife were taken from Mr. McVeigh. He then -- the trooper then put those in his car and transported them to the Noble County Jail. That's the first seizure. And the seizure of those items, the validity of it, is not in dispute. I mean that's clearly a search incident to an arrest.

The second search, the booking search, in which that's the search that occurred at the time that Mr. McVeigh arrived at the Noble County jail and was subjected to search of his person and personal effects -- and that is divided into two categories. There is the seizure of his personal effects for safekeeping by Officer or Jailer Moritz, and then there is the exchange of clothing whereby he was ordered to disrobe and put

his clothes in a bag which then went into the property room,

1106

where it stayed until the FBI came on April 21. And that's the clothing part of the search when he was given the jumpsuit to wear.

The third search is the search and seizure or is the transfer of the personal effects and the clothing and I assume the gun and the knife from the Noble County Jail personnel to the FBI.

And then the fourth and final search and seizure is the submission by the FBI of the personal effects and clothing and, I believe, the knife to their laboratory in Washington, D.C., for testing.

And I think what we have to do is look at each of those four searches and see whether or not an exception to the warrant requirement applies, since none of these were warrantless searches.

As I said, we don't have any quarrel with the search incident to arrest of the weapons and the knife. We can't say that the Noble County Jail overstepped its bounds in taking Mr. McVeigh's personal effects or his clothing at the time that he was booked into the jail. That happens to be under the case law, as we've submitted, a booking search, where the personal effects and clothing of the arrestee are kept for safekeeping and they're kept in such a way that the arrestee can't make any claims that there was a theft or that he didn't get all his property back.

Of course, the only other issue we've raised with respect to that is that the testimony at this hearing was that the Noble County Jail did not have routine, standardized booking procedures for this property. And in fact, that's why they changed their procedures after this case. And as the Court is aware, the case law says that in order for a booking or inventory search to be valid, it has to be done pursuant to standardized procedures. It also may not be done as a general rummaging or search for evidence. It is only for the safekeeping of property.

Where we get into the area that the Court is most concerned about, which is Edwards and that line of cases, has to do in our case, although not in Edwards, with the transfer of these items to the FBI. And that is the major difference between this case and Edwards.

In Edwards, there was one continuous offense. Edwards was arrested for a offense. He got to the jail at night. They didn't have clothing to give him at the jail at night or a jumpsuit, so they didn't take his clothing until the next morning. But the court found that that was the earliest practicable time that they could get his clothing to test it for evidence.

The two other key points in Edwards are (1) the testing was done for the crime for which he was arrested and the evidence was seized. That is not the case with

Mr. McVeigh. With Mr. McVeigh, the evidence -- the crime for which he was arrested was not having a license plate on his vehicle, not having proper proof of insurance, carrying a concealed weapon, and carrying a loaded weapon in a vehicle.

That is the crime for which he was taken to the jail and the clothing and personal effects were taken.

And if the Court will examine the rationale behind both search incident to arrest and the booking search, it is so that an arrestee cannot reach for a weapon or reach for evidence and -- to destroy. So the search incident to arrest only applies to the person of the arrestee and to the area within his immediate control within which he might be able to reach for a weapon or destroy evidence. That isn't present in this case.

What isn't present in this case that is present in Edwards, Robinson and that entire line of cases is exigency. The rationale for those exceptions is that there are exigent circumstances, the safety of the officers, the destruction of property.

In this case, there are no exigencies. Mr. McVeigh was put in custody in a jail, his clothing and personal effects removed on April 19, 1995. He did not have access to that personal -- to those personal effects or clothing at the time of his arrest on the FBI warrant on April 21, two days later.

All of the cases say that in order for a search to be

deemed search incident to arrest, it must be contemporaneous with the arrest and it must be essentially in the same place as the arrest.

That isn't -- that isn't true in this case. Mr. McVeigh was up on the fourth floor of the jail, in custody, when the FBI went there to arrest him on April 21 at 4:35 p.m., at which time they had already received his clothing and personal effects from the FBI (sic). There was no possibility

that he could have reached for his clothing or personal effects to destroy them or to reach for a weapon.

And that, your Honor, I believe is the distinguishing factor with Edwards, because in Mr. McVeigh's case, the search incident to arrest had been completed two days earlier. The booking and inventory had been completed two days earlier.

In Edwards it was ruled one continuous course of events, one continuous search and seizure, and the seizure had not been consummated until the seizure of his clothes for testing the next morning. And again, it was testing in connection with the offense for which he was arrested.

THE COURT: Well, but in this case, we do have judicial approval of this seizure by virtue of the issuance of the warrant by Magistrate Judge Howland. Now, it is true that that warrant wasn't -- or a copy of it wasn't submitted to the sheriff in Noble County? But what difference does it make? We're talking here about, you know, the whole purpose for the

suppression and the exclusion is to deter police misconduct, there isn't anywhere they go before a magistrate judge and get judicial approval before they do it.

MS. MERRITT: Okay. Can I respond to that?

THE COURT: Yes.

MS. MERRITT: I think what the court is suggesting in that case is that it is almost like inevitable discovery.

THE COURT: No, it isn't at all. It is judicial approval of what you're doing, and that's what we ask law enforcement people to do.

MS. MERRITT: Okay. Well, let me refer the Court to United States vs. Griffin, 502 F.2d 959, which is a Sixth Circuit case from 1974 that is still valid. And in that case,

the police went to the apartment to -- and they sent someone out to go get the search warrant. Before the search warrant came, knowing that the search warrant was going to arrive, the police went in and did their search, and the search was thrown out. And the court said that "we hold that absent any of the narrowly limited exceptions to the search warrant requirement, police who believe they have probable cause to search cannot enter a home without a warrant merely because they plan subsequently to get one."

THE COURT: Well, I suggest there is a strong difference between entering a home and taking the personal effects that were seized when a person was in -- was arrested

and is now in custody. What are -- what is the scope of the Fourth Amendment privacy interest of Mr. McVeigh under these circumstances?

MS. MERRITT: Well, your Honor, the Fourth Amendment, as the Court knows, applies -- it protects people as well as places. He had a privacy interest in those clothes and those personal effects because at some point when the case was over, they would have been returned to him. They were only kept by Noble County as safekeeping. They were not being kept as evidence.

And in fact, the testimony at the hearing was when Mr. McVeigh was transferred to FBI custody, those county court charges were dropped altogether. So even the gun and weapon and knife at that point weren't even going to be used as evidence. So he retained his privacy interest in those items.

THE COURT: Well, what's the scope of it?

MS. MERRITT: The scope?

THE COURT: The privacy interest.

MS. MERRITT: The scope of the privacy interest is that it is his property.

THE COURT: And it can't be turned over to the persons who are executing a subsequent arrest warrant?

MS. MERRITT: If it can be turned over to the persons executing a subsequent arrest warrant, it certainly cannot be tested and sent to a laboratory without a warrant. And that is

why I was trying to separate out the searches, because you have to go in stages. And even were the Court to determine that the Noble County sheriff could legitimately turn those items over to the FBI for -- because there is a transfer of the prisoner, they're being transferred for safekeeping -- and that certainly does not allow the FBI to put them on an airplane for Washington, D.C., without a warrant and submit them for testing.

And again, your Honor, I would just say that in that Griffin case it was not the -- whether it was a home or a person. It was the fact that the police took a shortcut.

THE COURT: Well, I think it is a difference to enter a home.

MS. MERRITT: All right.

THE COURT: I'm not persuaded by the case.

MS. MERRITT: Okay. I just want to point out one more thing about it, though, which is that it's the shortcut that the police took; and the court found that if we allow these shortcuts, we are going to basically eviscerate the exclusion

rule.

THE COURT: Well, what's the shortcut? Should they have faxed this search warrant from the magistrate judge to -- what was his name, the fella who took the material?

MS. MERRITT: Hupp?

THE COURT: Yeah.

MS. MERRITT: I think what should have been done is the FBI should have held onto the items, personal effects and clothing and not sent it to Washington for testing until they had the warrant. And that was the problem. That was the problem. That warrant was returned unexecuted. They never had relied on it. It had been issued at 3:55 in the afternoon and they just ignored it. And that's the shortcut, your Honor. They sent the stuff for testing and never relied on that warrant; and they sent the warrant back, and the warrant expired on April 28 by its own terms. So I believe that that is the shortcut that the police took.

THE COURT: All right.

MS. MERRITT: The Government has argued in addition to this search incident to arrest that good faith applies, and I would strongly disagree with that because good faith applies to a search with a warrant. This search, there is no dispute, was not conducted pursuant to warrant; and therefore good faith is not applicable. In fact, that's why Congress is right now considering that bill, HR-666 to make warrantless searches

subject to the good faith exception; but that hasn't been done yet.

So good faith doesn't apply. The only issue that they have raised is search incident to arrest -- and because of the difference in -- because of the fact that the FBI's search and seizure was not contemporaneous for the arrest for which the

effects and clothing were taken, we submit that that exception does not apply and that the Court should, if it is inclined to say that the -- it was okay for the FBI to take either the personal effects or the clothing, that it still was not okay for them to send it on for testing in the absence of a warrant.

THE COURT: All right. Thank you.

Mr. Connelly, are you responding for the Government? You signed the written response.

PLAINTIFF'S ARUGMENT ON MCVEIGH'S MOTION TO SUPPRESS

MR. CONNELLY: Yes, your Honor.

The only issue before the Court is whether the FBI properly took custody of Mr. McVeigh's personal property that had been seized by Noble County two days earlier.

THE COURT: Well, I don't think so. I think it's more than taking custody for safekeeping.

MR. CONNELLY: Taking custody and submitting it for laboratory testing.

THE COURT: Yeah. I mean I wouldn't have any problem if they just became a bailee because that happens all the time when you transfer personal effects from one law enforcement agency to another.

MR. CONNELLY: Fair enough, your Honor. And our points is that Edwards makes clear that the FBI could properly

both take custody and then submit it for laboratory testing, and that's exactly what Edwards said. Edwards also said that

it can be done not only on the very day they take custody but also on a later day.

THE COURT: Ms. Merritt makes the point that that case dealt with the same law enforcement agency that made the arrest and dealt essentially with a delay in taking these effects.

MR. CONNELLY: And Edwards went out of its way to hold and to state that the same rule applies where there is a delay between the formal -- the completion of the booking process and the taking of custody and the submission of laboratory testing. In a footnote they cited the Tenth Circuit's 1955 decision in Baskerville where they took custody on December 23 and did not submit it for laboratory testing until January 26. The only case cited to the contrary by Mr. McVeigh is the Brett case, the 1969 Fifth Circuit decision that preceded Edwards and was cited in Edwards; and Edwards said specifically that Brett is contra to the rule that they follow. And they cited Baskerville, the Tenth Circuit case; and then they noted that Brett is contra.

THE COURT: They didn't disapprove it as such, did they?

MR. CONNELLY: They cited the rule that it's well established that the authorities may submit it for laboratory testing at a later date.

THE COURT: Well, what is your position respecting the legal effect of the search warrant issued by Magistrate Judge

Howland at what, 3:30, 4:00?

MR. CONNELLY: Yes. And I think the key point is that this was issued before they actually took custody and certainly before they submitted for laboratory testing. The Fourth Amendment requires an independent judicial judgment of proper cause where a warrant is required before police can act. That's exactly what they got. An independent officer had determined that there was probable cause to seize and to submit for laboratory testing all the clothing and effects of Mr. McVeigh.

THE COURT: So should I consider this a warranted seizure?

MR. CONNELLY: Absolutely, your Honor. I think it's form over substance to hold to the contrary. I think the key is that the point of the Fourth Amendment that the framers wanted to interpose the independent judgment of a judicial officer before police officers could act in certain cases was fully satisfied here. So yes, there was a question of form. Did they formally serve it on Sheriff Cook? The answer is clearly no. He said, I've never been served with a warrant in all my history as a jailer; but clearly they did not do that. So if as a matter of form they're required to serve it on Sheriff Cook, they did not.

We would submit that that is not a basis under the Fourth Amendment for suppressing evidence; that everything the

framers required of the police in this situation was complied with and that Mr. McVeigh's rights were fully protected and that there is no basis for suppressing evidence. Under Edwards, we would submit that a fair reading of the case is

that a warrant was not required; but No. 2, even if it was, everything necessary to protect Mr. McVeigh's rights was done; so there is no basis for suppressing evidence.

THE COURT: All right.

MS. MERRITT: Your Honor, may I respond briefly?

THE COURT: Yes.

Defendant's McVeigh's Rebuttal Argument on Motion to Suppress

MS. MERRITT: Your Honor, Mr. Connelly asked the Court not to consider Brett. However, I would just point out to the Court that Brett has been expressly approved in the Tenth Circuit in the case of Faubion, which is in the brief. And it says, "The language of Brett, supra, coincides with this court's position in Humphrey, supra, which emphasizes the requirement for a warrant."

And I would also ask whether or not this -- or the actual warrant which was not used should be considered to have been used. I think it is more than a form argument. The documents in front of the Court which have been submitted into evidence show that that warrant was returned unexecuted, so I think they can rely on that warrant.

THE COURT: Well, but, you know, still, if you step

back and think about why we have exclusion of evidence, it is so that the police will conform their conduct to the requirements of the law. And the requirements of the law, as you suggest, is -- is that they get a warrant before seizing this -- these effects and exposing them to whatever laboratory tests they were -- that were done.

The only thing that you're saying here, it seems to me, has to be that because this warrant wasn't actually used and returned, that that misconduct requires suppression of this

evidence.

MS. MERRITT: Correct, because that misconduct is a shortcut; and the purpose of the exclusionary rule -- you just set forth the purpose of the Fourth Amendment; but the purpose of the exclusionary rule is to stop police from making their own decisions. And in this case, there may have been a warrant issued, but these police didn't know about it, so they made their own decision to shortcut the Fourth Amendment and do this search. And that's the kind of conduct that the exclusionary rule is designed to prevent; and for that reason, we submit that they shouldn't be allowed to rely on the warrant.

THE COURT: All right. Well, that matter stands submitted.

We'll proceed to the motion to suppress on behalf of Mr. Nichols. Mr. Tigar?

DEFENDANT NICHOLS' ARGUMENT ON MOTION TO SUPPRESS

MR. TIGAR: If your Honor please, we have briefed this matter in exhaustive and I trust not wearisome detail; and I won't tax your Honor's patience by repeating what we wrote there.

I will focus instead on responding to the Government's submission with some reference to what we already filed but I hope in a very minimal way.

I think the principal difference between the Government's statement of facts and ours lies with what I might call a metaphor. I have done a lot of suppression motions in which an individual police officer meets an individual civilian on the street and we file a motion to suppress and we invoke this notion of the individual vs. the massive power of the

state; but we do that metaphorically.

In this case, I think when we look at what happened first with respect to Mr. Nichols' nine-hour interrogation at the Herington police station, it's important to review what was going on outside.

Mr. Nichols had heard his name on the television. The television coverage was massive. The search of the James Nichols farm had already begun.

But let's look at who was on the Government's team. Starting early that day, Jamie Gorelick, the Deputy Attorney General of the United States, had called Randal Rathbun and asked him, and as it happened his assistant, Robin Fowler, to

go to Herington. So they had those lawyers. Merrick Garland, who tried the preliminary hearing, was available. Mr. Howard Shapiro, the FBI SIOC, was there; and John O'Neil was with him. In Oklahoma City, Henry Gibbons was there, who said that he had not had much experience with material witness warrants; but after all, he was assisted by Donna Bucella, the No. 2 person for U.S. Attorneys, Arlene Joplin, Jerome Holmes, and Jim Reynolds from the Department of Justice. That's just the lawyers that were on the scene for the Government.

They had been given their orders the day before by the President of the United States and the Attorney General. Their objective was clear. It was to round up anybody as to whom they had cause to arrest, to charge them, try them, convict them, if possible, and execute them. That was their plan.

The FBI had a command post in Kansas City, a command post in Fort Riley, agents that had scooped up Mrs. Lana Padilla and Josh Nichols in Las Vegas. They had agents in Oklahoma City. And as the Court heard, they had these groups

of agents converging from Wichita, from Kansas City, from Fort Riley. They had all the resources they needed.

Now, Mr. Nichols goes to the police station. What was his state of mind? The Government does not dispute the evidence with respect to this. They draw different inferences from it. But there is no dispute that Mr. Nichols was frightened, he was concerned -- he said he was -- he didn't

want to have another Waco; and that's in both of the sets of findings and conclusions. He was scared.

And the evidence shows that when his house was searched there were things in there that showed what had happened at Waco, showed what had happened at Ruby Ridge. There is some reason for him to be frightened. When told he was free to leave, he said he didn't want to go out there. He didn't want to provoke an incident.

What he did want to do, your Honor, was to ask questions. All of the people that spoke to him, the agents, admitted that what he said was, I've got some questions for you. Did they answer his questions? Were they candid with him? No, your Honor, they were not.

First they told him that he was free to go -- well, free to go in some metaphorical sense. He certainly wasn't free to get in his pickup truck, wasn't free to go to his house, go in his door and sit on his sofa, because those had been secured. They didn't answer his questions. They did tell him at one point that he could have the notes. But what Agent Smith had in his mind about the notes was that he didn't get them until after he was indicted.

When an attorney called, David Phillips, having first

contacted the defender in the United States who is responsible for seeing that counsel is available in capital cases, that message was not relayed.

Now, that, it seems to me, your Honor, is significant. I know the Government is going to rely when they stand and argue, as they have in their brief, on Moran vs. Burbine; but the defendant in that case, which came to the Supreme Court on habeas, was an in-custody suspect. No formal charge, no process of any kind had been started. There weren't any of the due process or Sixth Amendment applications or aspects of the case that brought it within the rule of law for which we contend.

After all, Mr. Phillips was not, as the Government portrays him in their statement of facts, simply a lawyer who called unbidden. He is the public defender with the District of Kansas with as much a statutory responsibility to perform his job for the Sixth Amendment as this platoon, this regiment of lawyers has under the laws and statutes of the United States to execute the game plan the President of the United States and the Attorney General had told them the day before to execute.

Mr. Phillips called the man who was responsible for getting me appointed; that is to say, advised the Administrative Office, he called the Assistant United States Attorney, and yet that message wasn't relayed.

Now, there is another funny thing about the timing. When we look at the lies, your Honor -- and I hesitate to say this, but Mr. Nichols was lied to. Mr. Nichols had information concealed from him. Mr. Nichols was consciously made the pawn

of these people who were executing their prearranged plan.

Let's look at the warrant timing to get a picture of this. When I stood before your Honor and described what I thought I would prove, I was wrong. I thought I could prove, your Honor, that that material witness warrant had been issued sometime around 3:00. I said that to your Honor; and I failed. But in failing, I respectfully submit that we succeeded -- our team succeeded in showing something that was even more significant. A decision had been made to seek a warrant as to Mr. Nichols for arrest and search or arrest or search, depending upon which version, sometime that morning, certainly by noon. That's why Mr. Rathbun was there at the direction of the Deputy Attorney General of the United States, a Deputy Attorney General of the United States, by the way, a person who came out of one of Washington, D.C.'s most prestigious criminal law firms, with extensive experience. She knew what she was talking about.

Mr. Hartzler is smiling. She clerked for me one summer, but then she later learned how to do her job properly.

MR. HARTZLER: I'm accepting the compliment, having worked at the firm with her.

MR. TIGAR: If your Honor please, that decision was then reinforced by the decision to dispatch the S.W.A.T. team to execute that warrant. In the meantime, the warrant is being drafted in Oklahoma City.

Now, what happened in Oklahoma City? Let me put it all together. First, Agent Gibbons, under the supervision of senior Justice Department lawyers, prepares a warrant

application that falsely says Mr. Nichols is attempting to leave the country. That's why the later timing is significant, because since he started at about 4:00, he was aware that Mr. Nichols was already in the police station.

They attributed probable cause simply to Mr. McNichols' friendship with Mr. McVeigh. That warrant application was, in short, your Honor, not probable cause to interfere with anybody's liberty. It was a tissue of falsehoods.

Regardless of that, your Honor, it was an unequivocal judicial command to do something. Indeed, it was such an important judicial command, so important to Chief Judge Russell, that he took time to read it and endorse "of material witness" on the first edition of the warrant and then to suggest, when the error was pointed out to him, that the thing be shredded and a new one substituted.

At 4-something that afternoon, 4:28, 4:30, that warrant is issued. By 4:45, it's in Kansas City.

The team of lawyers, your Honor, had advised what was to be done. Mr. Nichols was to be followed closely, if possible, if he did manage to get out, and they were to wait for the warrant.

Now, your Honor, comes what is the most difficult to believe of all of this, and that is that the only four people in the United States Government establishment concerned with this case who didn't know anything about the warrant were the four agents who just happened to be in there interrogating Mr. Nichols.

Now, the Government has a interesting contradiction, your Honor. Maybe it's the speed with which these findings

were drafted. They tell us that the agents didn't know about the warrant and that it was okay for them not to know about the warrant because nobody wanted to interrupt them. And yet in proposed finding 88, they say that when Agents Smith and Crabtree were out of the room, Smith and Crabtree were bombarded with material and information from many other sources for possible use in later stages of the interview.

In Government's Exhibit 72 at page 12, your Honor, Agent Smith recounts that he had to go out of the room to get okay as to whether or not Mr. Nichols' condition on the consent for Mrs. Nichols was all right. "Went out of room, got okay," it says there.

At page 2 of Government's Exhibit 72, the litany with respect to reading Mr. Nichols the form and trying to get him to sign it on the Miranda waiver goes on for 20 minutes, a lengthy discussion about whether he's going to sign it, is he going to read it and so on. When an agent -- when Chief Kuhn

is concerned about what's going on in the room in the basement where the interrogation is taking place, a room without a door except at the top of the stairs, Chief Kuhn comes in to turn down the radio. The interrogation log shows that the agents repeatedly interrupted the hearing or the interrogation, rather, to go up and get pizza, get water, use the rest room, talk to their superiors.

Your Honor, it simply isn't credible that the agents didn't know; but whether that's so or not, it isn't credible that they couldn't have known. Somebody upstairs, if the Government's version is to be credited, operating a system in which these agents doing the interrogation were informed of

everything they needed to ask questions, including getting tape recordings of Josh Nichols -- somebody upstairs decided they're not going to know about the warrant.

Now, your Honor, to continue that -- by the way, when we get to Wichita the next day, Deputy Ingermanson's testimony about Mr. Nichols' asking to see the agent -- that contradicts the agents' version, by the way, of what happened. They say that they told him if he wanted to talk to him that they would be available for that.

But let me go back now and talk about the legal significance of the evidence. We have made what can be described as four separate arguments with respect to this interrogation of Mr. Nichols. The first is a straight up and

down Miranda argument, your Honor. And that rests on this: When Mr. Nichols read the advice of rights form and said "interrogation" reminds me of the Nazis, I won't sign this, that was a statement that he did not want further interrogation.

Now, the Government says no, that's not quite right because, after all, Mr. Nichols is a sophisticated person. And they put in evidence some transcript of a court proceeding which ended so disastrously for him that his household goods were at risk from his creditors.

But if your Honor looks at Government's Exhibit 72 at page 2, you will see the amount of time that the agents spent to try to get Mr. Nichols to sign that form. And after that amount of time, the only thing that's noted -- and it's on the form itself -- is Agent Smith, who says he said he understood his rights but he wouldn't sign the form.

There is not a line, a word, a syllable in that form

in the 302 that says that Mr. Nichols agreed to further questioning. It's a straight up and down Miranda issue.

The next point --

THE COURT: Well, let's stop with that for a moment.

MR. TIGAR: Yes, your Honor.

THE COURT: Because, you know, there is no doubt that this began as voluntary statements. Correct?

MR. TIGAR: A conditional voluntary statement, yes,

your Honor.

THE COURT: Now, what's the condition?

MR. TIGAR: The condition was Agent Smith walked in the door and said that he -- he was there, Chief Kuhn had said these people are going to answer your questions, and Mr. Nichols is quoted as saying, "It's good that you're here. I've got some questions for you."

THE COURT: All right. So what is your position; that they had to answer his questions before he should proceed with his statement?

MR. TIGAR: No, your Honor. The position is that the -- with respect to Miranda and with respect to voluntariness, the purpose of Mr. Nichols' presence at the police station as indicated by that statement has to do with whether or not he consented to answer the agents' questions. I mean the voluntary -- if he was voluntarily at the police station, why was he there? If I go to a police station and say excuse me, I have a parking ticket notice here and I never got the ticket, I go there for that purpose and instead of the police saying, Oh, well, let us help you, let us answer the question how the parking ticket came, they take me into a

basement room having already decided on orders from on high that they're going to try to convict me and execute me and start interrogating, that's -- that's different from the purpose for which I went there.

1129

THE COURT: Well, that's a little strong with respect to the Government's position at the time of this interview. They -- there is nothing here to suggest that at that time, the Government believed that they had more here than an association between Mr. Nichols and Mr. McVeigh --

MR. TIGAR: I disagree with your Honor.

THE COURT: -- and they were exploring what that relationship was. What is there in this evidence that shows that at that time they really had him, Mr. Nichols, as a suspect?

MR. TIGAR: At 11:30 the previous evening, the FBI in Michigan had contacted the deputy sheriff in Sanilac County and received information about explosions and a so-called fertilizer bomb experience at the James Nichols farm which involved both Terry Nichols and James Nichols. At 8:30 the following morning Eastern Time, 7:30 Central Time the agents met with Kelly Langenburg, who turned out to be the confidential informant, the former wife of James Nichols. She

wife. Kelly Langenburg provided extensive information saying that James and Terry Nichols were members of the Michigan Militia, that there had been bombs out there, and so on. And she also said that Terry Nichols had visited the James Nichols farm perhaps in company with Tim McVeigh earlier in April, so there was more than just that association.

1130

Then the agents had the evidence of -- from Lana

and well before Terry Nichols arrived at the Herington police station. That information was solid enough that Jamie Gorelick, the Deputy Attorney General, called Randal Rathbun and said, Go to Herington to execute an arrest or search warrant. Agent Reightler testified he left at about 1:30 to go execute an arrest or search warrant. Well, "arrest or search

only thing to get probable cause on was Terry Nichols and his house.

THE COURT: Still, though, it's probable cause for what? There is the -- the record shows that it isn't until

cause to file a complaint and arrest Mr. Nichols as a defendant. Right?

MR. TIGAR: That's true. They filed a complaint only on May 9; but if your Honor please, the Government lawyers had to be aware, because the Bacon case was the leading case that in order to even get a material witness warrant, they had to

Moreover, the search warrant that was executed was -- if you read Agent Crabtree's affidavit, Agent Crabtree is swearing as of 11:00 on the morning of the 22nd that a fuel meter of the type found -- that would be found in Mr. Nichols'

home could be used to make the very bomb that detonated in Oklahoma City.

So I think that the May 9 does not seem to us at least Mr. Nichols should be held without bail, which he was, made references to Mr. Nichols' alleged involvement, the guns in his house and so on. But irrespective of that --

THE COURT: Well, you know, but it's still a material

witness arrests, as has been shown here by all the papers filed. We don't have much except this class action case in Texas, which is really quite a different situation. But there is very little law that I'm aware of about using, as you're suggesting, I think, that the Government here was using a material witness warrant as a substitute for an arrest warrant

MR. TIGAR: Yes, we do say that, your Honor. In fact, we do bring to the Court's attention the Drake case in the Tenth Circuit and that language about deliberate tactical delay to get something they wouldn't otherwise be able to get.

Let me focus on that, then, because those facts are also relevant to us and that -- your Honor is right. There is some of the outlines of it, it seems to us, are quite clear.

Agent Jablonski said that he thought a material witness warrant was no different than a warrant to arrest a bank robber, and you go to the bank robber's house with the warrant in your pocket and if the bank robber would talk to you, well, that was just fine.

THE COURT: Incidentally, is there anything wrong with his legal analysis there?

MR. TIGAR: Well, if he tries it in the Tenth Circuit and does it for tactical advantage, your Honor, he's going to find that he's -- that the fruits of that conduct will be suppressed. Other than that, there is nothing wrong with it.

I'm sorry, your Honor. I should not indulge in sarcasm.

Yes, your Honor, the candid answer is he's wrong. He's wrong under the Tenth Circuit law, if he does it for that improper purpose.

THE COURT: Well, except that there is a substantial

difference between delaying and taking -- executing an arrest warrant and taking them before a magistrate judge and simply at the time that you execute the warrant taking the person into custody. You don't tell them about it until you give him an opportunity to make a statement. We don't have a case that says he's wrong in that respect, do we?

MR. TIGAR: Yes, your Honor, we do.

THE COURT: Which one?

MR. TIGAR: The -- well, the Drake case is an example

of a case in which the delay was -- not executing the warrant was for tactical purposes.

THE COURT: What did they do?

MR. TIGAR: The Court held in that case that the evidence could have been come at from -- on another basis, so that, in fact, the --

THE COURT: Well, I don't remember what happened in that case.

MR. TIGAR: The court said that the search was okay because, in fact, the delay there was not for the improper purpose. They recognized the rule. That's all. That was the flamingo case. They wouldn't give the man back his flamingo.

But what the Court is touching on, it seems to me, are two aspects of this that I want to make sure that I've said our argument the best way I can. The first seems to be something about voluntariness. Agent Jablonski is right and the Government is right: There is hardly any privilege or right under our system of government that I possess or Mr. Nichols possessed that I can't waive, and that includes the -- I can go talk to the Government in such a way that I have put myself in a position to be executed by the state. However, in the

calculus of determining whether that can happen, I must intentionally relinquish my known right. That's the waiver standard. Intentional relinquishment of a known right.

And this litany of lies, deceptions, and failures to

answer what the questions Mr. Nichols was legitimately answering, legitimately concerned for the safety of himself and his family, pretermit any legitimate argument that he waived his right not to speak.

THE COURT: Which applies when he's in custody; right?

MR. TIGAR: Yes, your Honor.

THE COURT: Now, when is he first in custody on these facts?

MR. TIGAR: Mr. Nichols is in custody no later than 3:20 p.m. on the 21st of April.

THE COURT: And why do you pick that time?

MR. TIGAR: I pick that time because that's when they -- they have secured his pickup so that he's not going to leave in the vehicle he arrived in and an FBI team is at his house surrounding it and preventing anybody from going in or out.

His liberty is meaningless. It could be earlier than that, your Honor, depending upon how you read Agent Chornyak's notes because Mr. Shapiro in Washington, D.C., said let him loose but follow him.

THE COURT: Right.

MR. TIGAR: Close surveillance.

Your Honor, there is no way that Terry Nichols was going home to his house on the 21st because keep him under surveillance meant keep him under surveillance until we get a

warrant to do something else, a decision that had been made well before he ever went to the Herington police station.

THE COURT: Well, being under surveillance is not the equivalent of being in custody, is it?

MR. TIGAR: Your Honor, the closest analogy -- and it's not in our brief -- is the habeas corpus cases. There is such a thing as house arrest, arrest in the city. The purpose of following him was to keep him within their sight and hearing until such time as they could get a warrant.

THE COURT: Right.

MR. TIGAR: It was like letting him out on a leash.

THE COURT: Okay.

MR. TIGAR: That, again, your Honor -- that's just one independent part. The fact of their having taken his truck and his house as of the time he got in the station is clear.

Now I want to turn to the material witness warrant. Your Honor, you're absolutely right there is not a lot of law about this but what law there is seems to us to make matters clear. A material witness is fundamentally different from a criminal defendant in a way that Agent Jablonski did not seem to appreciate; that is, a criminal defendant is being taken into custody based on probable cause or warrantless arrest or under a warrant in order to start a process, the process of formal charge, and so on.

A material witness has his or her liberty interfered

with for a very different reason. When the material witness warrant is used for legitimate purposes, it is used to obtain

testimony; that is to say, to bring someone before the grand jury.

At footnote 22 of our proposed findings and conclusions, we cite some cases in connection with ω Mrs. Nichols' interrogation that deal with so-called "office subpoenas." There were a lot of U.S. Attorney's offices around the country that used to use grand jury process to get people

ωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωω ωωωωωωω

being confronted with this practice, uniformly held that the use of the office subpoena was improper and simply should not be permitted.

ω I'll get the page, if I may here.

125. As your Honor can see, a lot of people worked on the project, and I'm just the reporter.

ωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωω ωωωωωωωω

office is not a proper substitute for the grand jury room.

Let us be clear, your Honor: Ours is an adversarial system of criminal justice. The grand jury is tolerated as its ω one and only one inquisitorial element. And it is tolerated because it is thought that the rights of person there summoned are hedged about with certain clear protections, such as the

ωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωωω ωωωωωωωωω

place in a courthouse or some place that's like a courthouse;

that is, the dignity of the system attaches to it.

The material witness warrant is a means to get somebody to a grand jury or to a trial. Who? A citizen thought to have evidence.

Now, the fact is, of course, that the Government was using the material witness warrant for these improper purposes. The fact is that they really thought they had had or were about to get probable cause. But our material witness warrant

argument takes them at their word. The piece of paper they had and were so assiduous to get that -- when it was wrong, they had another one issued simply commanded the agents to get Mr. Nichols and bring him before a Federal grand jury.

Under Section 3006(a) of Title 18, at the moment he was brought in on a material witness warrant, the moment it was served, he would have the right to counsel, he would have the public defender represent him.

Had Mr. Nichols been told candidly, Mr. Nichols, you want to know why your name is on the radio? Your name is on the radio because in about an hour, we're going to have a material witness warrant for you and we're going to take you to Oklahoma City and we're going to put you before the grand jury and you'll have the lawyer at that time, maybe you better ask the lawyer the questions -- it is unimaginable that Mr. Nichols

fact that he refused to sign their interrogation form. Had

they been truly candid and said Mr. Nichols, we're intending to execute you just as quickly as we can manage it, it is doubly unimaginable he would have talked to them.

The rights of a material witness person named in the warrant, however, are not Sixth Amendment rights. They partake of the same sets of principles, but they've been identified by

Your Honor, what do you get with due process when you're seized? Well, I think that it's -- as we point out, that's the same in civil and criminal cases. Due process is Matthews vs. Eldridge due process; it's Goldberg vs. Kelly due process. Matthews vs. Eldridge is the Supreme Court's last case in the due process series, a series that begins with the Fuentes case,

stove and stereo without a judicial officer having done

something that would be calculated to notify her that she had the right to keep you from getting her stove and her stereo.

A hearing at a meaningful time and in a meaningful

a material witness warrant is a way to take innocent citizens off the street and get their testimony, the way in which the Government handled this matter, we respectfully suggest, requires the suppression of the statements.

Now, the final point with respect to this is the fruit of --

THE COURT: Let me just test that for a moment. So

warrant for a material witness was issued, it should have been executed and he should have been given a Miranda -- and you're suggesting that that would have resulted in no more statements -- and take him to Wichita, I guess, was the nearest magistrate.

MR. TIGAR: I amend what your Honor suggested. First,

necessary; but that's not the most important part. And yes, I do suggest there would be no more statements; but beyond that, the failure to serve the warrant, the deliberate deception with respect to it, makes the custody unlawful, and the statements

Now, there is also a fruits argument with respect to the legality of the warrant itself.

THE COURT: Well, why is the custody unlawful? They have a warrant for his arrest as a material witness. Now, I understand you have an argument about the validity of the warrant.

THE COURT: Yeah.

MR. TIGAR: -- the custody is unlawful, your Honor --

the custody becomes unlawful because it is based upon deception, based upon the agents' not informing Mr. Nichols of

the rights that he possesses as a material witness and failing from the moment they get that warrant to afford him those rights. Once the agents downstairs got that warrant in their

to do one thing, after they've told him we have it and here it is, and that is to get him before a judicial officer without unnecessary delay. That's the unequivocal command.

And even the Government concedes that. At least they concede that once the warrant is served under Rule 40(a), he had to go before a judicial officer without unnecessary delay.

THE COURT: Well, does that mean they have to stop, if he had after receiving a Miranda and being notified that he's under arrest; that he's a material witness; that that had been issued from Oklahoma City and what it's in connection with and he chose to say, Well, let's -- I want to talk to you? There wouldn't be anything wrong with continuing the discussion there, would there?

MR. TIGAR: If, your Honor, the waiver was free and voluntary and made in full knowledge of his rights, no.

THE COURT: Okay.

MR. TIGAR: But the Government is not given, if the Court please, the luxury of speculating as to what would have been done.

THE COURT: No. I understand that. I just -- when you say "taken immediately," I'm just trying to find out how

immediately you mean.

MR. TIGAR: Well, there is case law about this; and there is a statute that applies to arrest warrants for relevant here.

Another factor here, your Honor, is, of course, that the judicial officer was standing by. I have driven from Herington to Wichita and Wichita to Herington. Judge Belot was a telephone call away; and Mr. Rathbun had been instructed to make sure that Judge Belot was a telephone call away, not to General Gorelick's interest to be sure, but the judicial officer was available.

I turn now, your Honor, unless your Honor has further questions about the Nichols interrogation --

THE COURT: No, go ahead.

MR. TIGAR: We have -- I'm going to turn -- I should speech in the car the next day, which we think the equivalent of the Christian burial speech. And that's our position.

Let's turn to the situation of -- I'm sorry, your Honor. I should put my glasses on.

The Hoffa case that the Government cites, of course, doesn't have anything to do with this. That was a case in which a court held that once you have probable cause to arrest

somebody, you don't have to get a warrant immediately. That's the context in which the court said there is no right to be arrested. The Government quotes it out of context.

Let's turn to Mrs. Nichols, if we may. This is a classic situation: Government claims that Mrs. Nichols consented voluntarily in all of the consents that she was asked and required to sign over the period when she had her assigned companions. They used to have elections in the Soviet union, your Honor, and everybody voted and everybody voted for the

regime; and that was called consent of the governed.

I'd like the Court to imagine for a moment what Mrs. Nichols must have felt. One doesn't have to guess a great deal: She testified about it. There she was in the police station with her breast-feeding daughter, and at some point during the evening she became aware that her husband would not be going home with her; that he was going to stay in the custody of the Government.

Within a few days of her being in these motels, she was surely aware that anyone charged with or regarded as a suspect in or regarded as connected with this event would face the death penalty; that there were serious, serious issues here. Indeed, it is the seriousness of those issues and the concerns that they must have raised in her that led the FBI agents to write her the Mother's Day card, referring to her need to cry, referring to her sense of loneliness, referring to

perhaps her feelings that the Government was -- were the bad people and urging her to think only, only of herself and her own interests.

Mrs. Nichols realized that when she first was taken into Government custody that if she was to act independently, she would have to go home; and she asked whether she could go home.

Now, it's interesting that when the Government spoke to her about that, they told her that she shouldn't go home and couldn't go home because the media would bombard her. Now, one of the things we saw this morning is that there were a number of media telephone calls to the Nichols residence. And the Court will recall that scene described by several witnesses in

the Nichols home in Herington, Kansas, on the afternoon of Sunday, the 23rd, in which Mrs. Nichols evidenced once again her desire to live in her own house with her breast-feeding child. Chief Kuhn said that the media would find her and that he didn't have enough officers to protect her. And the FBI went along with that story.

The Government's whole position in their statement of facts is that they were protecting Mrs. Nichols. Why, they were providing her lodging, food. They were paying her phone bills and collecting the records of all the phone calls so they could use them as evidence and recording some of the telephone calls, the most intimate ones to her husband. Yes, they were

paying her phone bills.

The Government had all the resources that it needed to meet Mrs. Nichols' concerns about security but not resources to permit her to live where she said she wanted to?

The Government's claim that it was interested only in her security and safety stands in stark contrast to what occurred when finally she was given back the money that was hers, the $5,000 less the 200 they kept.

If your Honor please, they left her in Oklahoma City in a hotel she could pay for for herself, let her get on a Greyhound bus and travel alone with her breast-feeding child to California, and they did so having successfully opposed her right to kiss her husband goodbye. That, if the Court please, is the Government's protection of Mrs. Nichols during this period of time.

Their claim is that Mrs. Nichols acted voluntarily; and yet, if your Honor please, looking at page 38 of the Government's brief -- I'm sorry -- page 119.

THE COURT: 119?

MR. TIGAR: No, there is no 119.

THE COURT: There is none.

MR. TIGAR: I've got page 38 -- here it is, page 38, paragraph 119. Yes, your Honor. I'm sorry, your Honor. I've got the pages and paragraphs mixed up. It is page 38, paragraph 119.

Now, your Honor will recall that various government agents testified as to what Mrs. Nichols was told before she signed the consents. And -- but with respect to this, notice after Marife Nichols signed the consent to search form, Agent Dobson explained to her that other agents would be accompanying, so forth and so on. So at least with respect to the most crucial consent, the explanation concededly comes after the consent was extracted.

Now, consent is not difficult, your Honor. Consent to search or consent to do anything is a contractual idea; and thus, the relative level of knowledge of the parties, the ability of a party to say no, the information that's provided, and the total -- totality of the circumstances dictate whether the consent is voluntary or not. Mrs. Nichols testified as to what she was or wasn't told.

Now, Agent Dobson did say that she meticulously explained certain things. And I -- I'm not going to repeat it here, because this is a very sensitive issue and don't need to take time with it. It's in the briefs. We've asked the Court to make a credibility determination, because with all solemnity, I tell the Court that I think there is a lack of candor about what was said here and what was said here about

what happened to Mrs. Nichols.

It is interesting to note that this assertedly assiduous effort to inform Mrs. Nichols of her rights found no

reflection in the 302's. It only was repeated here and it's contrary to the other evidence that your Honor heard.

Moreover, the Government in its brief, page 52 at paragraph 169, tells the Court that as much as three days would go by without the agents seeing Mrs. Nichols. And yet all that -- the citation there to the transcript is that Agent Dobson wouldn't see her for as many as three days at a time.

Well, your Honor will recall that at least one of Mrs. Nichols trips -- that is, the one up to Kansas -- was made over a weekend so that Agents Dobson and Thomeczek would could be with their families for a weekend. There is no evidence that the agents left Mrs. Nichols alone for as much as three days at a time.

The FBI claims that they arranged a meeting with the Philippine embassy for Mrs. Nichols. Well, it is true that they facilitated contact between Mrs. Nichols and the Philippine embassy; but your Honor, my declaration is in evidence with respect to this: Nothing happened. Mrs. Nichols was never permitted by the Government to give out a phone number where she could be reached. The agents say she was told not to, it would be better if she didn't, more of this protective atmosphere. She was never permitted to give out a phone number, your Honor, until, as my declaration recites, I called the ambassador to the United States for the Republic of the Philippines because I had represented the Aquino government

in recovering the Marcos assets and I got through to those people and they said they would do something about it. And they did something about it, and we got her rights respected.

And finally, your Honor, looking at this paragraph 169, it's interesting: Here's another unintentional lapse. Two trips to Oklahoma City, it says, quote "to meet with United States Attorney's office personnel there." Gee, your Honor, I think there are two grand jury subpoenas in evidence. I had thought that it was the federal grand jury, this body sitting indifferent between citizen and sovereign, whose testimony it was sought, Mrs. Nichols -- Mrs. Nichols' testimony might have given some information to. But no, to it was to meet with the United States Attorney's office personnel.

In short, your Honor, there is a concession. Those grand jury subpoenas were shams. The meeting was a sham. They never intended to put her before the grand jury unless they could get something incriminating out of her. They were just shuttling her to conduct further interrogation, politely phrased as to meet with United States Attorney's office personnel, including, by the way, the No. 4 or 5 person in the Justice Department.

In short, your Honor, the captivity of Mrs. Nichols belies any assertion that this -- these consents were voluntary in any accepted sense of the word. Mrs. Nichols was used in order to obtain warrants that Jamie Gorelick had already given

the order were going to be obtained sometime during the day.

Very briefly, your Honor, I would like to turn to the search warrant issues, the Franks issues. This whole business of search of the house begins with what Agent Reightler did. Now, Agent Reightler was there having dismantled the S.W.A.T. team. Although Chief Kuhn did say that he recognized the S.W.A.T. team as having been there, he wouldn't admit it on the stand. We had to put an investigator on to show that he -- that's what he had said before. And your Honor can take the hearsay for the truth of the matter asserted.

Agent Reightler testifies that he went and looked in the window. Now, the interesting thing about the Reightler search is that the Government has now portrayed Agent Reightler as having walked, as they say in their proposed findings, up and down the property line. He walked up and down the property line, on the edge of the curtilage. In other words, they want your Honor to find that nobody trespassed on the house.

Well, if you look at the map of 2nd Street in Herington, Kansas, your Honor, there are no sidewalks between the houses. If the agents were there, they were on somebody's property. And the lots are small there. It's not a ranch. They're little lots in which all of the areas certainly fall within the what the Tenth Circuit has described as the curtilage; that is to say, if in the Tenth Circuit a chicken coop is a curtilage, then all the houses in Herington and their

little yards constitute the home, the core, core Fourth Amendment area.

So the first -- first notion is, your Honor, that yes, the agents were there -- and not just Agent Reightler -- and they were trespassing on the place, even if they say they weren't answering the telephone.

The next thing about Agent Reightler is he goes and looks in the window. This becomes important because various claims have been made: consent, exigent circumstances, and so on. I'll deal simply with exigent circumstances. I think it's important to note what was in that shed in that garage and what Agent Reightler saw there.

Remember, your Honor, we had a dispute about whether I could put some 302's in to try to take the force out of it. Here's what Agent Reightler saw: He looked in through the window and he saw some barrels. And the barrels said Ster-Bak, S-T-E-R dash B-A-K, which is ammonia -- and it had the word "ammonia" on there -- which is something used to clean dairy barns.

Now, it's odd, your Honor, that all of these agents who live in Kansas all these years didn't know how you clean a dairy barn; but okay, their Herculean labors were performed by other means. They didn't use Ster-Bak.

But the barrels didn't seem to be anything other than what they were, and they're barrels that you can get at any

recycling depot after they've been used for the Ster-Bak purpose. But Reightler reports that.

Now, your Honor, here's another contradiction in the evidence, the famous "what kind of smell was there." Reightler says that the lawn was dirt and weeds. You look at the Government's Exhibits, you see that the Nichols lawn is a

lovely lawn; it's not dirt and weeds. Ammonium nitrate fertilizer, if that's what they were concerned about, doesn't have an odor even when you mix it with water. So if you spread it on your lawn and then water it with your garden hose, it doesn't have an odor. It certainly doesn't smell like ammonia.

So whatever it is that Agent Reightler smelled could not have related to any bombing concern. I mean I understand why he wanted to go out there and he got a little impatient and so on; but after all, he had a United States attorney who was in telephone contact with a judge.

The Reightler observation then becomes transmuted; and this is the Franks issue, your Honor. Let's look at the warrant for the house, the warrant that was executed beginning on the 22nd. Remember Agent Crabtree and Attorney -- U.S. Attorney Rathbun and Assistant U.S. Attorney Fowler all go back to Wichita, and they work until the early hours of the morning to get that affidavit done. Well, "strong odor of ammonia," which we say never happened, becomes "odor of fertilizer," because by now it's a fertilizer bomb. And then the rest of

the Franks issues begin to fall into place.

Your Honor, there is only one Government. The Government says that -- they have a long business in their statement of facts that Agent Jablonski was in the room for part of the time and Agent Foley and Agent Smith and Agent Crabtree; and one person heard one thing and one person heard another; and they just went with what they had, and after all, Mr. Nichols, every time he was asked about the fuel meter, he didn't repeat everything he had said before about it. And that's their position.

It is undisputed that Mr. Nichols said that he had a

fuel meter that was inoperative; that it didn't work and the gears were broken. That's undisputed. It's also undisputed that he told that to the agents. It's undisputed that the four agents were back and forth and in and out of that room and comparing notes.

So there is no excuse whatever for saying that Mr. Nichols had a fuel meter, particularly when Agent Crabtree, hearing about the fuel meter, decides that it must be the key to the case, decided it was important. Having decided it was important, he didn't even bother to check his facts. He simply put in the ATF paragraph about "could be used to mix the bomb" that makes it really sinister.

So now we've got the ammonia smell, we've got the fuel meter, and then we have the misrepresentation of Mr. Nichols'

statements.

When you strike those out of the warrant, your Honor, the fruits of the illegal search and the Franks matters, there simply is not probable cause. There is association with Mr. McVeigh.

The Government relies on the doctrine of inevitable discovery; but the problem with inevitable discovery is that the argument is belied by the search inventory that they prepared. This is not an inevitable discovery case, if the Court please. The FBI went in there under that warrant, and they looked at everything that they could conceivably want to look at. There wasn't anything of significance that was left until later.

The doctrine of inevitable discovery simply doesn't apply, unless you want to assume that having once searched the

house and pulled out of it 30 or so pages worth of inventory of goods that sometime in the future they would have thought about getting a valid warrant. And that is not what the doctrine of inevitable discovery is about.

Well, I've -- I hope I haven't taxed your Honor's patience. I've tried to focus on the issues that I think are most relevant.

THE COURT: I have a question about what significance there is to the April 29 warrant search. You're asserting the warrant is invalid because it's tainted; but the Government

indicates in its papers that nothing was seized in that search and it's not relevant to the evidence. But you refer to visual observations; and I don't know whether we're talking about testimony from that, or that that relates to the May 2 warrant and the May 3 search. I'm not sure where we are on the April 29 search.

MR. TIGAR: We included the April 29 search, your Honor, because the Government says it's going to rely on visual observations made during that search.

THE COURT: I don't remember whether in the May 2 affidavit some of those observations are present. I guess that seeing nods from the Government side, that must be the case.

MR. CONNELLY: Your Honor, on the April 29 execution of that warrant, the agents observed the Makita drill that they later went back in for on the May 2 warrant.

THE COURT: That's in the affidavit.

MR. CONNELLY: Yes.

THE COURT: So that's the significance of your argument.

MR. TIGAR: That's the fruit, your Honor. And to the

extent the Government is going to disclaim reliance on a particular search, it may not be necessary to it rule on it now, although if it turns out the fruits are later used, then we may challenge it.

THE COURT: I understand.

MR. TIGAR: In short, your Honor, this is a case in which the Government had -- they had every advantage. They had every resource they could possibly want, and they had it because they wanted to pursue a single objective; that is, the trial, conviction, and execution of anybody found by them that they thought had anything to do with this. Under these circumstances, to tolerate the studied -- and I say studied -- deception that was practiced on Mr. and Mrs. Nichols makes the government, as Justice Brandeis said, "an omnipresent teacher of but of entirely the wrong thing."

I'll reserve now, and maybe I could have a short rebuttal.

THE COURT: We'll take our recess before hearing from the Government. 20 minutes.

(Recess at 10:32 a.m.)

(Reconvened at 10:51 a.m.)

THE COURT: Be seated, please. Who is arguing for the Government? Mr. Connelly? All right.

PLAINTIFF'S ARGUMENT ON MOTION TO SUPPRESS

MR. CONNELLY: Thank you, your Honor. The defendant's suppression motions require this Court to answer four general questions: First, were Nichols' statements to the FBI on April 21 and 22 voluntary and taken in compliance with the Constitution; second, was the warrant-authorized search on

April 22 and 23 valid; third, was a later consent search on

April 23 valid and would, in any event, the evidence received been inevitably discovered pursuant to the later warrant searches; and fourth and finally, was the warrant-authorized search on May 3 valid. I'd like to address these issues in turn.

First, Mr. Nichols' statements to the FBI on April 21 and 22 clearly were voluntary and taken in compliance with the Constitution. Mr. Tigar's complaints about what happened that day are not so much about what the FBI said and did to his client, but rather on what the FBI did not do and say. These complaints reflect a fundamental misunderstanding of the Constitution. The Constitution and the Bill of Rights in particular limit what Government authority can do and do not require affirmative action to advise a defendant and an interviewee of information that may be helpful to that person.

Accordingly, the Supreme Court in cases such as Colorado vs. Springs and Moran vs. Irvine has held that the police and authorities do not have an affirmative duty to tell a suspect or interviewee exactly what they know about that person and provide information that may be helpful to that person.

Before addressing, therefore, what the FBI agents did not say and do to Mr. Nichols on April 21 and 22, I'd like to address what they did do and say. First, minutes into the interview, at 3:26 p.m., the FBI agents went beyond what they

were required to do by fully advising him of his Miranda

rights. There is no question -- no serious question -- I know Mr. Tigar got up here today and said custody established as early as 3:20 p.m. But in our view, there is no serious question that at the time they advised Mr. Nichols of Miranda, they were not required to do so because he was not in custody.

There is no dispute that Mr. Nichols voluntarily turned himself in to the Herington police station on April 21, not at the request of the FBI but solely on his initiative. When he did arrive at the Herington police station, again, there's no dispute that at least three times Herington police officials told him that he was free to go.

Agent Smith also testified, and as did Agent Foley, that when Mr. Nichols -- when they first arrived to question Mr. Nichols, they told him, We have questions we would like to ask you. Mr. Nichols said, That's good because I have questions that I want to ask, too. Clearly Mr. Nichols was advised that the FBI was interested in interviewing him on the subject of the Oklahoma City bombing, and he clearly assented to that. At 3:26 p.m., for 17 minutes, the FBI agents went over the form with him, fully advising him of his rights. Mr. Nichols deliberately reviewed that form and clearly understood it.

Mr. Nichols' only complaint with the form -- his only complaint was it contained a term "interrogation," which in

Mr. Nichols' mind reminded him of Nazi Germany. I don't need to remind the Court, of course, that "interrogation" is an accepted legal term of art. The Supreme Court has used it, and the fact that Mr. Nichols in his own mind was reminded of Nazi Germany has no constitutional significance. The key fact is

that nothing the agents did in the course of those nine hours of interviews had anything to do with Nazi Germany, but rather was consistent with the highest ideals of American justice.

Again, at 4:12 p.m. when new agents joined the interview, Mr. Nichols was again advised of his rights; and in his presence, the agents went over the fact that they had told him that he had -- of his Miranda rights, that he understood them and that he was not willing to sign the form because of his aversion to the term "interrogation" but for no other reason.

Case after case, your Honor, from the Supreme Court in North Carolina versus Butler to the Tenth Circuit in Austin and every other Federal Court of Appeals has rejected the argument that the mere refusal to sign a waiver form precludes a valid waiver of Miranda rights. That is the only basis upon which Mr. Nichols refused to sign the form, the "interrogation" word. And otherwise, he clearly was willing to answer questions, clearly understood his rights far more than, I think, most defendants. I think it's probably a very rare case where 17 minutes are spent advising a defendant of his rights and

discussing the rights in detail with him and having them read aloud the form quietly -- or slowly and deliberately.

Mr. Nichols made a calculated decision to speak with the FBI. And like many other defendants in his situation, he may now wish he did not. But at that time, his choice was voluntary and knowing, and the agents went well beyond what the Constitution required.

The next thing that happened in the course of that interview was that a voluntary period of questioning and answering occurred. I think there is no question that it was

entirely voluntary and that the FBI agents' conduct was perfectly consistent with the Constitution and with professional responsibilities that they have as FBI agents.

FBI Agents Smith and Crabtree, the two principal interviewers, testified before the Court, and the Court was able to evaluate their demean and manner. They testified that the questioning and their manner on that day and in the hours with Mr. Nichols that evening was roughly the same as their demeanor in court. They were two low-key agents. There was no pressure applied. There was just a voluntary period of asking questions and learning information from Mr. Nichols, exactly what we would expect the FBI to be doing two days after the Oklahoma City bombing.

I'd like to turn then if I could from what the agents did say and do to what they did not say and do. The first

thing the defense complains about is that Mr. Nichols was not arrested. As the evidence made clear, a material witness warrant was issued in Oklahoma City at around 4:25 p.m. that

any obligation under the law or under the Constitution to immediately execute that warrant. The answer, we submit, your Honor, to that question is clear, they did not.

The Supreme Court has held there is no constitutional right to be arrested. Every federal circuit who has considered the issue has held there is no right to an immediate execution

you are hereby commanded to arrest Mr. Nichols and to bring him forthwith to a grand jury in Oklahoma City. The forthwith language that we heard so much about, your Honor, from the witness stand and every witness that got up there was questioned about, did you read this and understand you had to

arrest him forthwith? The answer was no, and the answer was

once a defendant is arrested, he be brought forthwith before a magistrate to determine the validity of that arrest.

THE COURT: Now, Mr. Tigar argues really that at that point, this witness warrant was really pretextual, a circumvention of all the things that would follow if the complaint had been filed and he had been made a defendant. And I take it you're in agreement that at that time the Government

didn't have probable cause to arrest him as a defendant.

MR. CONNELLY: That is correct, your Honor. Most of the incriminating information -- the initial incriminating information came from Mr. Nichols' mouth throughout the course of that interview. It was certainly not at the beginning of the interview that they knew he had been in Oklahoma City with Mr. McVeigh three days before the bombing and many other things that he said about bomb making knowledge, and I won't go into the details. It was as the night went on that the -- that the initial incriminating information really started to come out and of course --

THE COURT: And also, there are other things as comparing the affidavit for the complaint with the affidavit for the material witness warrant.

MR. CONNELLY: Oh, clearly. And then in the course of searching the house and other investigation, more information was learned; so certainly, as of May 9, when the complaint issued, there was probable cause -- and that probable cause has been upheld by the courts in Oklahoma -- to arrest Mr. Nichols as a defendant. The question --

THE COURT: There's a strong suggestion here, of course, that he really wasn't free to leave. There had been

this instruction from Mr. Shapiro that if he left, they should keep him under close surveillance.

arrest; that is entirely proper. The Supreme Court has clearly held an arrest occurs once they take custody of a person. You can follow a person or even tell the person stop; and if the person does not stop, the arrest does not come until there is a laying on of hands, as Justice Scalia said in his opinion, to effectuate that arrest.

when a person is arrested as a material witness? Is a Miranda required at that time?

MR. CONNELLY: I think a Miranda is required if he is in custody.

THE COURT: Any kind of custody?

MR. CONNELLY: If he's in custody and if there's interrogation. Certainly, if they wanted to question him after they arrested him, they would have to Mirandize him. I think the key point here, of course, they did Mirandize at 3:26. Nothing more would be required after the arrest. That's what the Supreme Court has held in Patterson. Even after a defendant is indicted, the only thing required is that he be Mirandized.

And so clearly in an indictment when there are Sixth Amendment rights that attach, the only thing the Supreme Court has held necessary to have a valid waiver of his right to counsel and his right to remain silent after indictment is that

you Mirandize him and give him the same warnings that

Mr. Nichols was given. So I would say that yes, after they arrested him and if they wanted to question him, they would have to Mirandize him.

THE COURT: Of course, at that point in making a decision about whether to waive the right to remain silent and proceed to talk, the factor that you know there is this arrest there, and that wasn't true when they Mirandized Mr. Nichols.

MR. CONNELLY: Well, that's a good -- second point. And I think that leads me to the second point that he complains about, not only did they not arrest him, but they did not tell him there is an arrest warrant out. I think the case law again is very clear. Every court of appeals that considered the question after Patterson has held that a defendant need not be told that he was indicted, which I would submit that it's even more significant. There's even a more irreversible changed position postindictment. The Sixth Amendment attaches, for one thing. But also the adversarial lines have been more clearly drawn after indictment versus after arrest.

There's also a case -- the Eighth Circuit has held and it is cited in our brief that a defendant need not even be told that an arrest warrant has been issued; that he's under arrest. The Second Circuit has similarly held in the Valdez case, very closely on point. The defendant there argued -- in that case the defendant was a witness in court. And the judge and the

government had together agreed to delay execution of a warrant for the very reason that they thought the defendant may not be willing to testify if he knew that an arrest warrant was out for him.

The Court of Appeals -- I think it's directly on point -- the Court of Appeals applying the reasoning of Moran

said things that the defendant does not know about are not material to his voluntariness of his waiver; that is, you don't have to provide a defendant with information that may be helpful to him.

THE COURT: I'm not familiar with the case. This person was a witness at a trial?

MR. CONNELLY: Witness at a trial; and there was an arrest warrant issued for him, but he did not know about it. And the judge and the government together -- got together and agreed that they would delay mention -- delay execution of the warrant and delay mentioning the fact of the warrant to him so that -- that he would not be chilled in his testimony. His statements at that trial were later used against him in his own trial, and he claimed that it was involuntary because he was not given critical knowledge of the fact that there was an arrest warrant for him.

THE COURT: What's the name of that case?

MR. CONNELLY: Valdez. 16 F.3d -- I don't have the page, but it is cited in our brief. It's a Second Circuit case

directly on point. It implies -- it really is consistent with the Supreme Court's teaching in cases like Colorado vs. Brady and Moran where the fact is that you have to know your right to remain silent. You have to know the fact that anything you say can be used against you. You have to know you have a right to an attorney if you want.

All those things are implicit in the Miranda warnings, and that's what Mr. Nichols know -- knew. The teaching of the Supreme Court and relied on in the Valdez case is that you need not know information that may bear on the wisdom of whether you

should talk to the authorities or not. All you have to know is the consequences of what you -- if you do talk to them, they can use anything you say against you.

THE COURT: Okay.

MR. CONNELLY: And Colorado vs. Springs, the Supreme Court decision, is a good example of that. In that case, the defendant complained that the authorities had not even told him the subject in which they were interested in questioning him about. He thought it was about some innocuous or smaller offense when they were really interested in a murder case; and he said, If I really knew you were looking at me for a murder, I might not have spoken with you. The Supreme Court in Spring said that's irrelevant. The question is did you know anything you say could be used against you and did you know you had a right to an attorney. And that's all Miranda requires. It

doesn't require anything more.

That I think -- that principle is fatal to the whole notion that Mr. Nichols had some kind of right to be told about an arrest warrant.

The third thing that he complains about that he was not told was that a public defender was trying to contact him.

I think these same cases forestall that claim; particularly Moran vs. Irvine, which is dispositive of it. In that case, the defendant had an even stronger claim because he had a prior

attorney-client relationship with the attorney and the attorney was contacting him on behalf of his family. Nonetheless, the authorities did not tell him that the attorney was calling. He claimed that that violated my -- the knowing -- my knowing waiver of rights. It also violated my Sixth Amendment rights. The Supreme Court rejected that and saying, again, that things that occur outside the interview room and that are unknown to the defendant are irrelevant to the validity of his waiver of constitutional rights.

So for all those reasons, your Honor, and particularly in this case -- in that case, it was a suggestion that there was some kind of misconduct of the authorities in not notifying him of the attorney call. Even though it didn't violate the Constitution, there was still some idea that they didn't -- they weren't exactly square with the defendant.

In this case, there's no suggestion to that even.

Every one of Mr. Phillips' notes reflects that he called and he said I'm available to represent Mr. Nichols if he requests that counsel. The evidence is undisputed that at no time that evening did Mr. Nichols request counsel. So not only was there no constitutional violation, there was certainly no ethical violation or nothing done that they shouldn't have done. The very premise of Mr. Phillips' request is that I just want you to know I'm available if he requests counsel.

Agent Price testified that when he was told you have that, that he said, well, if he requests counsel, let's give him Mr. Phillips' name. That's exactly what Mr. Phillips

requested. That's what the agents did. They didn't have to do it because he never requested counsel. That contingency never

I'd also like to note the factual premise of this claim that somehow he violated my rights by not telling me that counsel was calling on my behalf is misplaced. The factual premise is that had Mr. Nichols known of the arrest warrant, had he known that counsel was trying to call him, he would have stopped talking. He would have just shut up and said I'm not

case.

Agent Foley testified that he thought Mr. Nichols had a story to tell that night, and that is confirmed by the actions on April 22. On April 22, after Mr. Nichols had been

arrested, after he had been told of his Miranda rights and after he had been told at the outset of the trip to Abilene where the jail was to Wichita where the federal court was, that

appointed for him, he initiated discussions with the agents.

Clearly, the fact that he had been arrested as a material witness was not something that caused him automatically not to want to talk to the authorities. I think

a difference between being arrested as a material witness and being arrested as a defendant, as counsel pointed out. A material witness is somebody who is being held because he may have information relevant to the case. That's -- and Mr. Nichols did have information relevant to the case and was happy to share it with the authorities, in fact was very

authorities. He knew his rights. He knew his situation, certainly knew everything there was to know on April 22 and, nonetheless, still spoke.

So we would submit that as a matter of law, the agents

did everything entirely properly and, as a matter of fact, there's no basis to the suggestion that Mr. Nichols would not they now complain about.

I turn then to the three searches that are in question. The first search is the April 22 to 23 warranted search. The first challenge to that search is that it was based largely on Mr. Nichols' own statements. That's correct. They were a key part of the search warrant. What Mr. Nichols had said to the authorities on April 21 and 22, into the early morning of the 22nd, was a key part of what that search warrant was about. We would submit that because those statements were voluntary, because they were taken in compliance with Miranda, there is no basis for suppressing or excising those statements from the warrant.

The second challenge to the warrant that included a paragraph describing the observations of Agent Reightler who on the evening of April 21 looked through an opening in the garage window of Mr. Nichols' home and saw plastic barrels, we submit, your Honor, that that -- it happened on two occasions. There were two separate peeks through the windows. We would submit, your Honor, that those peeks are valid based on exigent circumstances.

THE COURT: What about the consent? We have during the time of the interview a consent to search.

MR. CONNELLY: In fact, there were two consents to search. One was of Terry Nichols.

THE COURT: I'm talking about Terry Nichols.

MR. CONNELLY: That --

THE COURT: You're not emphasizing that in your papers

here, but you're relying on that.

MR. CONNELLY: Well, we do emphasize that for other searches. We do not emphasize it, though, for Agent Reightler's look through the window because Mr. Nichols said, Would it be possible for my wife or I to be present when you did the search of my house? The agent said it would be possible, so we are -- we are accepting the argument that that was a condition of the consent, that before they can rely on that consent, they have to ensure or allow either Mr. Nichols or Mrs. Nichols to be present at the home. They were not present at that home on April 21 when Agent Reightler looked through the garage, and therefore we do not rely on that Terry Nichols' consent for that search. We rely for that search on --

THE COURT: I thought your position was that earlier, that that wasn't really a condition. That was a request but not a -- an actual condition on the consent. Now, which is it?

MR. CONNELLY: I don't think we've ever argued it was not a condition. I think we could have made the argument. I'm confident that none of our papers have ever made that argument, your Honor. I think we could have said that. I think we have given it the status of a condition. I think maybe we have bent over backwards in doing that. We have consistently said that that's a condition. We're not going to rely on his consent unless either he or his wife were present at the time. And so

I don't think we've ever sought to justify Agent Reightler's peek through the garage window based on his consent.

THE COURT: Agent Reightler thought he had consent.

MR. CONNELLY: He thought he had consent and --

THE COURT: But that's subjective and not the standard.

MR. CONNELLY: Well, he thought he had the consent of the occupants of the home. He didn't differentiate whether -- Mr. Nichols or Mrs. Nichols. He thought he had consent and, in fact, he did have consent of both of them, although we're saying now we're not allowing the consent of Terry, but he did have the consent of Mrs. Nichols. By that time, I think the testimony is fairly clear -- very clear that by at least 6 p.m., Mrs. Nichols had signed written consents to the search of her home.

THE COURT: If we're dealing with exigent circumstances and I understand that argument, why is it limited? Why does he only go peek in with his flashlight to this one window in the garage that has a broken blind and is the only one that -- we don't know anything about the house and whether the windows were covered or not in the house. I don't remember anything about that. If these circumstances warrant this early peek, why is it so limited?

MR. CONNELLY: Well, perhaps it could have gone further than that. I think he did -- he took a limited step

that, in his judgment, was appropriate to determine whether there was any demonstrable safety hazard to people or danger inside that garage because harm to him. There, I think there's no question that he in good faith believed that there were exigent circumstances. There has been a lot of testimony about the Government's actions that day in terms of securing the truck, in terms of sending a S.W.A.T. team to Herington. And I

think that is largely overstated; that a lot of the statements that were made here in the papers and also here this morning of Mr. Tigar overstated with respect to the S.W.A.T. team. All that was done was members of the S.W.A.T. team who were also criminal investigators, as well, were sent to Herington and were available were -- were it needed to call them out. They never sprang into action. But clearly, the Government had a good faith concern on that day that there were possible safety hazards.

I think it's easy, looking back a year and some several months after the bombing, to forget what happened. But on April 21, two days after the bombing, there was indications that Kansas had been a staging ground for the bombing at that point, and there were concerns at that point. I think this Court can remember -- and certainly throughout the country, there were evacuations in federal buildings and all kinds of buildings in the days after the bombing. There were clearly safety concerns at that time. I don't think there was any

suggestion that Agent Reightler, as in many exigent circumstances cases -- there is a suggestion that somehow really what was going on, he wanted to get a sneak peek at what was happening.

I think really, his legitimate interest was two-fold. One, he had a consent; and two, he had valid concerns that he wanted to make sure there was no safety hazards. It was not an exploratory search. He just wanted to satisfy himself that there were no safety hazards. And I think that was a reasonable judgment under the circumstances, and it did not violate the Fourth Amendment.

I would also point out, however, that even if you

struck that part of the paragraph -- and that's what the Tenth Circuit has taught us in several cases, most recently en banc case in Cusamano, is that the remedy is if there was -- one part of the warrant contained information illegally obtained, the remedy is just to strike it out. And even if the Court were to strike it out, it would have no effect on the probable cause.

The barrels were in no sense critical to the probable cause showing. The probable cause showing, as I've argued, is largely on Terry Nichols' own mouth and the things he said that evening. But the barrels were not an important part of that -- of that calculus. They were clearly included in there; but our submission is if you take it out, the warrants would be no

different. It would be unaffected.

The second challenge -- or the third challenge -- there are three challenges, as I understand it, to the April 22 warrant, the first one being Nichols' statements were involuntary and they shouldn't have been included, the second being that Agent Reightler's observations were illegal and should not be included. The third one is a Franks challenge.

And the first challenge under Franks is that the agents did not include everything that Terry Nichols had said about the fuel meter. What the affidavit did say -- and which was true and was exactly what Agent Crabtree had been told during the interview -- was that Nichols admitted possessing a fuel meter, and he claimed that he bought it for resale purposes. The agent included both those facts.

And I think the second fact is particularly critical because if it were accepted, it would be reason for finding

that Nichols had an innocent purpose for that fuel meter. He claimed an innocent purpose, and Agent Crabtree told the issuing judge, Judge Bligh in Kansas, what that claim was. It was not a case where Agent Crabtree was trying to hide the ball from the judge and trying to hide from the judge the fact that Nichols had claimed there was an innocent purpose for the fuel meter. The fuel meter, however, was relevant to this investigation because it could have been used. It could have been used or -- could have not just been used. It could have

been purchased for use in constructing an ammonium nitrate fertilizer fuel oil bomb.

The key point, I think, your Honor, is that -- what was Defendant Nichols' intent in purchasing that item. If he purchased it for use in constructing an ammonium nitrate fuel oil bomb, then it certainly would have been relevant evidence whether or not it ultimately served that purpose.

So it is true, your Honor, that the affidavit did not describe the additional statement of Mr. Nichols made earlier in the interview to two other agents that -- that the fuel meter did not work and was not in working condition and was now disassembled.

THE COURT: So as I look at the affidavit now, I should include that?

MR. CONNELLY: You -- well, there are two -- I think there are two elements that must be found in a Franks claim. First is that the defendant acted with scienter.

THE COURT: I understand that.

MR. CONNELLY: So if you concluded that Agent Crabtree recklessly omitted that with intent or omitted that with

reckless or deliberate intent to mislead the issuing judge, then yes, the remedy would be to include it; and you say is it material in the sense would it defeat probable cause if you added that. We would submit on both those grounds that defendants failed to carry the burden by a preponderance of the

evidence that there was a Franks violation. One, because there was no scienter. Agent Crabtree candidly admitted that had he to do it over again and were he not acting under the time constraints, he would have included that and explained credibly, we submit, why he did not include it.

Mr. Nichols had first mentioned the fuel meter, and the only time he mentioned that it was not working and was disassembled was at a break of Agents Jablonski and Foley. When Agents Crabtree and Smith came back in the room, Jablonski and Foley briefed them on what he said and did tell him he claimed it was not in working order. That statement did not make its way into Agent Smith's notes because he was only writing down what he had heard from Mr. Nichols. It made its way into Agent Jablonski's notes.

The affidavit in the wee hours of the morning of April 22 after Agent Crabtree had just gotten through several hours of questioning Mr. Nichols, was writing it up -- I believe the testimony is from 2:30 a.m. to 7 a.m. in the U.S. Attorney office in Wichita, just forgot about it and he -- so I

would submit, your Honor, that there's no basis for any scienter, any intent or reckless disregard to mislead Judge Block.

Second of all, your Honor is correct that the remedy in that case, if the Court were to conclude that there were any scienter, would be to just add it to the affidavit and ask

whether that addition would defeat probable cause. Clearly, your Honor, it would not. Even with that addition, it was still a relevant piece of evidence that the agents were entitled to go into and look for. And beyond that, even if the Court were to strike the fuel meter allegation entirely, there would still be probable cause to go in and search that house for relevant evidence related to the bombing.

Mr. Nichols, for example -- I don't want to go into all of Mr. Nichols' statements in this proceeding, but Mr. Nichols made several statements in which it was suggested that there was relevant evidence to be found, including evidence that belonged to Mr. McVeigh in his house. But clearly with or without the fuel meter, there was probable cause to the agents to conduct that search on April 22nd to 23rd.

So for all those reasons, we would represent the Franks claim as to the fuel meter should be denied.

The Franks claim is also made as to the statements of Mr. Nichols admitted he knew how to make a bomb. We have submitted under seal the entire statement relevant to that. We would submit that is a fair summary of what Mr. Nichols told the agents. The fair reading of the entire 302 and the entire interview including the notes of Agent Smith is that Mr. Nichols admitted he had the knowledge of how to build the

bomb.

But even if you were to disregard that paragraph, there was a separate paragraph in the affidavit, paragraph 20, which reports that a co-worker of Mr. Nichols talked about Mr. Nichols bragging about his ability to make fertilizer bombs. Clearly, Mr. Nichols' own words are not the only part of the affidavit that go to his bomb making knowledge and ability, but, also, there's a separate paragraph that is not the subject of any Franks challenge that confirms his ability -- his own acknowledged ability anyway.

The third and I think final Franks challenge to the affidavit is that it included Agent Reightler's additional statement that he smelled the smell of fertilizer when he went up to the house.

There was testimony introduced -- Agent Reightler testified that he has a degree in biology and training in the DEA lab that allows him to recognize the smell of certain bombs and chemicals. And he testified that ammonium nitrate does have the distinct smell of ammonia.

There was testimony by a defense investigator with no background or experience that says I bought a bag of fertilizer. Didn't smell to me. Well, it was totally different conditions; his bag of fertilizer versus what Mr. Nichols may have had to put on his lawn the day before.

But we would urge the Court to take judicial notice of the case we cited, the Standard Oil case that was a commercial

dispute in the Ninth Circuit about 30 years ago, in which the dispute was there had been contamination, that a truck that contained ammonium nitrate should not have contained that and the result was that there was a strong ammonia smell resulting from that -- from that improper use of a truck to carry ammonium nitrate. And that is how they proved that the truck had, in fact, carried ammonium nitrate, is that there was a strong ammonia smell. I think that the Court should take notice of the fact that other cases have involved ammonium nitrate and have an ammonia smell.

I would point out for the Court that this Franks claim was never raised in any papers beforehand. It was never the basis of any hearing in this case. The first time we heard it was on the very last day of testimony when a defense investigator got up and said I think that statement must be false because I bought a bag of ammonium nitrate and it didn't smell to me.

THE COURT: Well, the affidavit doesn't say ammonium nitrate. It just says fertilizer.

MR. CONNELLY: Then I think there are two links in the chain. I think Agent Reightler testified that he reported that he had smelled ammonia which suggested to him the presence of ammonium nitrate, which is a fertilizer. And then Agent Crabtree went on and said that he smelled fertilizer, which I think is an entirely accurate statement. He didn't

differentiate the type of fertilizer smell. In fact, if he had been more specific, I think there would even be stronger probable cause because there was indications that this may have been an ammonium nitrate fuel oil bomb.

So the fact that he just said more generically

fertilizer certainly is in no way prejudicial to the defense rights. It's a fair statement of exactly what Agent Reightler -- again, it's a fair summary which was -- the entire affidavit was a summary of statements.

THE COURT: Your position is the smell of fertilizer is not very significant to the probable cause determination?

MR. CONNELLY: That's our -- that's our other position, and I think you can strike that entirely just like you can strike the barrels, and it makes no difference to the affidavit.

The third search in question is the April 23 search of Nichols' residence. After the agents had finished executing the search warrant on April 22 and into the early morning hours of April 23, they went back and reviewed the inventory lot.

And Mary Jasnowski -- the lead search agent's testimony in this is very clear and very credible, we submit -- realized they had left behind some items of significance. Foremost among them was the fuel meter. They also recognized that they had left behind a sleeping bag that Nichols had said in his interview he had taken and belonged to McVeigh.

They went back on April 23 in the afternoon -- now after they had executed the warrant, they had left the house and locked the doors, and they made no argument that this was some kind of continuing search under the warrant, even though I think possibly they could have, because it was all within a matter of hours. They had left the house. They had left the inventory there, and they made no argument that the search was anything but over.

So at that point, they approached Mrs. Nichols and

they said, Would you be willing to consent to a search of the house? And she gave a written consent; and those are all in the record, like all her consents. The question --

THE COURT: I can't recall on April 23. She wanted something out of house at that time; right?

MR. CONNELLY: Yes. She was going to get some of her clothes and other items of personal property.

THE COURT: Which she did, indeed, do.

MR. CONNELLY: She did. And so our argument on the validity of the April 23 search is three-fold. I think there are three alternative grounds upon which it is stated. First is that Terry Nichols' consent was at that point an independent justification for the search. His consent was voluntary. Just as his statements were voluntary, we would submit his consent was voluntary.

The question was whether his condition was satisfied.

And there's also another question as to whether his consent on April 21, which he refreshed again on April 22 when he asked the agents, Have you been in my house to start the search -- whether that April 21 or April 22 consent can still apply on April 23. The defense argues that it can't. Their argument, as I understand it, is that there was an intervening illegality; that in between his consent on the night of the 21st -- after that, he was illegally arrested pursuant, they say, to the illegal material arrest warrant in Oklahoma City.

We would submit, your Honor, first of all, that that material arrest warrant was entirely legal. It was issued by Chief Judge Russell. It was upheld by Judge Belot against defense challenges later in Kansas, and we submit there's no basis for finding anything but legal and valid.

But second of all, even after he was allegedly illegally arrested, he refreshed his consent. On April 22, he said, have you started searching yet, and they said no; and they asked about booby traps, and he specifically gave them advice that would facilitate them conducting that search safely and without hazard to themselves.

And then again on April 22 and April 26, his counsel in his presence and before Judge Belot said he voluntarily consented to a search of his house and his car, so we would submit that there's no basis for holding that as of April 2 his consent somehow had expired.

So given that it's voluntary and given that it's still extant and in force, the question for the Court is whether its condition was satisfied. Again, we have conceded that it was conditional. No argument can be made on that. I think we at all times have conceded it was the conditional. The question is was Marife Nichols present during that search.

THE COURT: Incidentally, on the car search, I didn't see any discussion in here about the searches of the truck. There were in the motions before we held the hearing. I take it that the reason I'm not seeing that is there's nothing obtained from there that is admissible evidence here or leads to admissible evidence? Is that --

MR. CONNELLY: That's right. That's always been our position, your Honor. And at the June 18 hearing when we argued that the Court need not consider all these other searches and need not consider even Marife Nichols' consent because it was not a necessary basis for any of the five searches we did rely on, Mr. Tigar got up and said I'm going to

prove -- I'm going to prove that there was taint. I'm going to prove you have to decide these other searches because they tainted the five searches upon which the Government relies on.

That claim has disappeared because today and -- in his papers and today, they said you only have to consider these five searches. So there's no taint claim; and it was raised, your Honor, and we submitted to the --

THE COURT: I'm just asking you now so it's clear in my mind that it is the Government's position, as it was in the prehearing papers, that nothing was obtained in -- in, you know, going into the car. There was an address book or telephone book or something in there.

MR. CONNELLY: Our position has always remained the same. We don't intend to introduce any of that evidence, and none of that evidence in any way affected any of the other searches; and I think the testimony from the witness stand was very clear on that. I guess we would ask the Court to make a finding if it's still disputed in that way. I think there's only one possible finding, and I think it may even be conceded at this point, that there has been no showing of any taint from any of the car searches or indeed from any of the consent searches pursuant to the Marife Nichols' consent other than the April 23 searches which we're now discussing.

So first justification of that April 23 search is that Terry Nichols consented, it was valid and its condition was satisfied because Mr. Nichols was present there.

The second argument is Mrs. Nichols' consent was valid and properly served as a basis for that search. And I'd like to discuss the whole Mrs. Nichols issue separately if I could at the end. That's our -- that's our second position on that.

And our third position is that even if they improperly entered the house that day and improperly seized the items

about which they already knew, the fuel meter and sleeping bag and other items that are material in that search, that they inevitably would have been discovered anyway during the later April 29 warranted search and during the May 3 warranted search.

I think there rarely would be a stronger case than this one for inevitable discovery. The agents knew going in what they wanted. It's not like they found something they didn't know about. And they clearly -- it's not that they just could have gone in later and got it. It's that they did, in fact, go in pursuant to valid warrants on April 29 and May 3.

So for that reason, we would submit even if the search somehow were not -- or the entries somehow were not valid, that second entry on April 23, there would still be no basis for the exclusionary rule in this case.

The fourth and final issue in the third search issue is the May 3 warranted search. That search, as the testimony made clear, the agents went in and seized some drills and other materials that they had known about and that they had first observed during the April 29 warranted search; and that's the reason, your Honor, why the April 29 search is at all relevant. Nothing relevant came out of that except the observation that later was one of the foundations for the May 3 warranted search.

There is no colorable challenge, we would submit, to

that May 3 warrant. The same challenges that were made in the April 22 and 23 warrant are made; that is that Mr. Nichols' statements were involuntary and therefore should not have been included; that there were Franks violations and basically a repetition of the same challenges were made on the April 22 and 23 search. And for the same reasons, they don't have merit with respect to that search. They have even less merit with this search because at that time there was additional information that the agents knew and included in the affidavit that had nothing to do or -- on top of what Mr. Nichols had told them and the other information they learned as of April 23.

I'd like to turn then, if I could, to the issue of Marife Nichols. We argued to this Court on June 18 that that issue didn't have to be determined. We argue today there is an independent ground for each of the three searches upon which we rely on, having nothing do with anything Marife Nichols said or did.

Mr. Tigar, as I pointed out, stood up and said no, you have to decide that issue because all those other entries and everything that they did with Marife Nichols, including bringing her to the grand jury on -- in mid-May and including not giving her back her money on April 23 and including allegedly keeping her in captivity and incommunicado for 37 days, all of that tainted the three searches upon which you

rely.

Again, your Honor, that taint claim has disappeared and if it hasn't disappeared, should disappear because it's been conclusively refuted by unrebutted testimony in this case.

Nonetheless, having heard Mrs. Nichols' testimony and having spent hundreds of pages in terms of FBI agents testifying about their treatment and dealings with Mrs. Nichols, we would urge the Court to make a finding that her consents were valid. And that finding would have to relate only to three searches because there are three independent grounds for three of the searches; that is, first, Agent Reightler's warrantless peeks through the window on April 21, the garage window; second, the April 22nd and 23rd warrant. There would be an alternative ground for that. I don't think it's necessary, but it would be an alternative. Third, it would be an alternative ground for the April 23 consent search that Mrs. Nichols provided consent for that. We would submit the record is clear that Mrs. Nichols' consents were voluntary.

THE COURT: Just so I have this, your position is that her participation on the 22nd and the 23rd simply was satisfying Mr. Nichols' condition?

MR. CONNELLY: Well, that was originally -- your Honor -- yes, there are two --

THE COURT: That's why her consent doesn't mean anything from one look at it?

MR. CONNELLY: That's why it's not necessary to decide that, and also because there's inevitable discovery. There are two grounds upon which that April -- well, really, it's the April 23. The second -- the return on April 23 when they seized the fuel meter after the warrant has been executed. There are two bases on which to uphold that search. One is that Nichols --

THE COURT: She's not in there on the 22nd?

MR. CONNELLY: No. No. But she consented to -- by then, she had consented to a home search. So her consent can provide backup, if you will, to the search warrant. There were two possible authorities for the 22nd and 23rd. One, the search warrant. And we submit that's all you need. That's why you don't have to determine the validity for her consent. Her consent is another ground upon which they could have entered that day. And it would be backup to that; it would be a backup to Agent Reightler.

It would also be an alternative to the April 23, as we have two arguments to that consent search on April 23 regarding the fuel meter. One is the Terry Nichols consent, that she was there, and that satisfied his condition. The second one is that she independently consented. She signed a consent form that day again, that second consent form that authorized them to go in and search the house that day.

I'd like to talk generally about this Marife Nichols

issue. The defense said in the papers and again today Mr. Tigar has argued that it's really a credibility choice between Marife Nichols and FBI Agent Sheila Dobson. Agent Dobson testified here credibly, consistently and professionally; and we would urge the Court to credit her testimony. I'm happy and, indeed, proud to defend the credibility of her testimony. But in some ways, the issue is not so much Marife Nichols versus Sheila Dobson, but it's Marife Nichols versus Marife Nichols.

The defense in their papers have portrayed Marife Nichols as an unsophisticated woman. We think this gives her far too little credit. We think the testimony on the stand and her background and it has been made clear in the evidence that

she is an intelligent and strong woman capable of standing up to Government authority. Most telling perhaps was Mr. Woods got up and asked her a hypothetical question, a hypothetical question of if the authorities in the Philippines had come to you and said can we get in your house, what would you have done. Now, this question arguably was objectionable and under Tenth Circuit law in Little and Zapata arguably irrelevant because a person's general attitude to foreign law enforcement is entitled to little or no weight as a matter of law. I think her answer is telling. She said, I don't know. It would depend on if they were being nice.

It also came out that Mrs. Nichols' first entry into

this country, her first dealing with Government authorities in this country, she lied about her age and her birthdate. Clearly, she is not someone who is timid and unsophisticated. I don't think there are very many lay witnesses that have come before this Court and testified that they have read Black's Law Dictionary. I think that their argument that she is naive and unsophisticated gives her too little credit.

And it is important to know that she has taken sophisticated courses in English, college courses in anatomy and psychology in English; that she is not the naive and unsophisticated person they would put her out to be.

I think the question in the end comes down to do you believe what Marife Nichols said at one point in her testimony or another point. Give you an example. She testified on page 725 of the transcript that Agent Dobson had told her she had a right to refuse consent. Page 726, she testified, I didn't know I had a right to refuse consent. She testified I think on

page 732 of the transcript that Agent Thomeczek told her, We want to go in the house to search for items. Later on in that transcript -- I don't have the exact page, but later on in the transcript she said, I didn't know they were going to search the house on April 23. Then she later amended it to say, All I knew is that they were going to search for a little receipt. I didn't know they were going to do any more than that.

Agent Dobson's testimony is that she was free anywhere

in that house, to go wherever she wanted; in fact, went out in the garage for a short period of time and were aware the agents were conducting the fuel meter search.

So we would submit, your Honor, that the Court should, in fact, credit Agent Dobson's testimony and the testimony of the other FBI agents and not credit Mrs. Nichols in those points where she is inconsistent or -- or -- or not entirely free from memory in terms of exactly what happened. She said, for example, it's possible I may have been in the garage. I think it's -- it's -- the Court should clearly credit Agent Dobson's testimony that, in fact, she went out to the garage. That testimony is uncontradicted even by Mrs. Nichols.

But the key point on -- and there are other inconsistencies in her testimony and other places where we ask the Court to make a credibility finding; for example, what the agent said. It's undisputed that Mrs. Nichols read and signed the forms. She admitted that. And it's also undisputed -- by the way, the fact that she read and signed the forms under the case law is sufficient by itself in Tenth Circuit cases to uphold the finding of consent. She clearly read the forms. She -- she was, in those forms, told she had a right to refuse to consent, and that's -- goes beyond what the Supreme Court

has required in Schneckloff and other cases. The defendant -- or a person does not have to be told they have a right to refuse consent.

But she was clearly told by her own admission she had a right to refuse consent. She testified, as well, that the agents went beyond the form and told her orally, yes, Mrs. Nichols, you do have a right to refuse consent.

There is some dispute that comes up in the record between her and Agent White and Agent Dobson to a lesser extent as to what were you told in the event you refused consent. Mrs. Nichols claimed -- admitted they would have to get a warrant from a judge. Mrs. Nichols said that they made very clear to the -- Mrs. Nichols that the judge would issue the warrant. The agents testified, on the other hand, that it was very carefully explained to her that there was no guarantee the judge would issue a warrant and it was up to the judge.

Again, this is an example of a case we would have to credit the agent's testimony over Mrs. Nichols. But in the end, I don't think it comes down to credibility findings as much as the bottom-line fact of Mrs. Nichols' own words when asked on direct examination, Why did you consent to the search of your home and the search of the truck -- which is not at issue in this case, but why did you consent to the search of the home. She said, I consented because I thought I had nothing to hide and I thought it was the right thing to do. Later on in her testimony, she said, I thought Terry was innocent also.

This case in some respects is far easier than many

consent cases. A case comes before this Court and a defendant -- it's argued the defendant gave consent to a search of his trunk when you know there are kilos upon kilos of cocaine in that trunk. And the question is why would any defendant voluntarily agree to a search of his trunk when he knew the agent -- the agent was going to go right in there and find all the drugs. That's a little difficult in some cases. And quite candidly, it's difficult to square as to why is that really voluntary and why was he not just submitting to authority in that case.

In this case, your Honor, I think from Mrs. Nichols' own mouth came the reason she was not submitting to authority and why she was doing it voluntarily and not just submitting to authority. And that's precisely because she thought it was the right thing to do and she had nothing to hide.

And for all those reasons, your Honor, we would urge the Court to uphold each of the searches, to admit Terry Nichols' statements and to make a specific finding now that we've litigated the issue that Mrs. Nichols' consent provided justification for three of the challenged searches.

I'd be happy to answer any questions.

THE COURT: Thank you. Mr. Tigar, do you have some rejoinder?

DEFENDANT NICHOLS' REBUTTAL ARGUMENT ON MOTION TO SUPPRESS

MR. TIGAR: Very briefly, your Honor.

Question one, what does the Valdez case hold at 16 F.3d 1324? There was a witness in Judge Mary Johnson-Lowe's court who -- for whom a warrant had been issued. He was not

told that the warrant was issued and he went ahead and testified.

It is true that the Second Circuit held that the -- his testimony given under those circumstances was admissible. However, we are troubled by the district court's choice to deliberately delay the execution of an arrest warrant to ensure a witness' testimony at trial. There is something vaguely inappropriate about the district judge arranging matters so that Mock's testimony on behalf of the defendants would not be jeopardized by execution of the arrest warrant. Even though Mock did not have a Fifth Amendment right to the information, the district court's determination to withhold the information itself implicates concerns of fundamental fairness of the courtroom.

Hardly a ringing endorsement of the tactics employed by Government counsel with the connivance, the cooperation of a district judge. And when one considers that the warrant here was an unequivocal judicial command to bring the person before the court and the Tenth Circuit language about tactical delay, we submit the case has to come out the other way.

Now, the -- Mr. Connelly, Government counsel, has suggested that the Government does not have an obligation of

candor in dealing with citizens. The Ninth Circuit in a case we cited at page 80 has discussed the use of misinformation material in a decision to speak to agents. And -- excuse me -- that is the Tenth Circuit in Erickson. It says that simple failure to inform the defendant he was a subject of the investigation or that the investigation was criminal does not amount to affirmative deceit until defendant inquired about the

nature of the investigation and the agent's failure to respond was intended to mislead. Pages 80 and 81 of our brief.

Years ago, before my hair was gray and my posture was stooped, I represented Selective Service registrants whose lives were in some sense in question, in jeopardy if they were drafted. Justice Clark said in a Supreme Court case called Simmons vs. United States, Registrants are not to be treated as though they were engaged in formal litigation assisted by counsel, at 348 U.S. 397. I submit that the same due-process-based concerns that led the Court to say that in Simmons are at work in a material witness situation. After all, one can't lie to a court about the purpose of a search warrant one is obtaining. And we submit the same principle should be applied here.

With respect to the -- whether Mr. Nichols initiated discussions with the agent, our brief at page 32 deals with that question. That is the -- the car ride on the way to Wichita and the Christian burial speech.

The Reightler search, he returned -- Mrs. Nichols' consent does say no searches were conducted pursuant to it.

Ammonium nitrate, the Government could have put in some evidence that ammonium nitrate has this odor that's been referred to here instead of asking the Court to take judicial notice, which we submit is improper. The ammonium nitrate or ammonia or fertilizer allegation is important to the warrant, particularly when taken together with the attribution to Mr. Nichols of bomb-building knowledge to which he had admitted -- to which they said he had admitted. After all, what really happened was Mr. Nichols said that a farmer told him about ammonium nitrate bombs. Now, that's an entirely

innocent ammonium nitrate statement because as is clear in this case, the use of ammonium nitrate fuel oil bombs for farming purposes, as the Government will not deny, is quite routine.

Turning to the 23rd, Mr. Nichols' consent was conditional. Mrs. Nichols was told she had 45 minutes to go in there and get her clothes. The most she did was not to go in the garage. All the agents would give us is that she saw agents in the garage because she stood at the door. There is no evidence that she was affirmatively told she was there to satisfy this condition on the consent.

Pickup truck. I did stand in front of the Court and say that we would attack the pickup truck search, and we did. The totality of circumstances make it important that we talk

about that truck being unavailable to Mr. Nichols and that Ms. Dobson was unable to get into it. More important, your Honor, when they went in there the first time, they found an address book that had Tim McVeigh's name in it. That's Mrs. Nichols' address book that had Mr. McVeigh's name in it.

The Government says we're not going to use that. We have ample other evidence that under the Longson test means that we don't have to litigate the question of taint; but if that pickup truck search is invalid, your Honor, and the Court so holds, not only does it go to totality of circumstances, but if at trial it turns out that the Government's bland assurances about not relying on what they found in that pickup truck aren't so, we'll be able to litigate it.

THE COURT: Well, there isn't any observation from that or reference to that in the subsequent affidavits, is there?

MR. TIGAR: That is correct, your Honor. It does not go to the invalidity of those affidavits to which I now turn.

Inevitable discovery. The later searches, your Honor, are worse than the earlier searches because those later searches happen after the fuel meter has been seized. The fuel meter which -- to which such cosmic importance was attached in the initial affidavit is put in a box, if the evidence is to be credited, and sent on to Washington, D.C., without anybody

Moreover, in going for the search warrants for those later searches, the agents used the information that they obtained during the search on the 22nd and especially the 23rd. Government Exhibit 46D, Mr. Hartzler's letter, recites that the Government is still relying upon the search conducted on the 23rd at which they saw the guns and the video case and that

Therefore, that search on the 23rd absolutely knocks out any claim of inevitable discovery because you simply can't purge those searches of the taint.

I will not spend any time -- appreciable time dealing with the question of Ms. Nichols' credibility. Yes, she did once say on a Government document that she was older than she was so that she could get married and get out of the living circumstances that she described in her direct examination. Once she said that in order to get married, that birthdate followed her. So it isn't a lie that she made in order to get into the country. That's just complete nonsense.

And for the Government to say that these consents that were obtained are voluntary in a contractual sense, knowing the circumstances under which Mrs. Nichols was then having to live, strikes us as simply incredible. Yes, she said over and over, I just wanted to cooperate, I just wanted to cooperate. And

she coupled that at every turn with the assertion that if I did

so, maybe they would let me do what I told them I wanted, which was to go home with my child, and if I couldn't go home to Kansas, to go find my relatives, in conversations with whom -- and the Government knew this because they were tape recording a lot of them -- she described herself as being shaken and scared and alone and not knowing what to do.

Unless the Court has questions, that's all the rebuttal that we have to offer. We briefed this about as well as we could.

THE COURT: Rather thoroughly, yes. Thank you. All right. Well, the motion stands submitted.

Now, the -- next is to proceed on the 804(b)(3) issue, and I guess we have this weighty decision about whether to go forward with that now or take the break.

Mr. Jones, are you going -- who is going to argue that? Mr. Nigh?

MR. NIGH: I'm going to argue it, your Honor.

THE COURT: Do you have some estimate of what you need? I'm not trying to restrict it, but I'm thinking in terms of this break.

MR. NIGH: I think it might be appropriate to go ahead and take the break now. I would say 20 minutes. It could take a little bit longer.

THE COURT: Yes. And I'd rather go right from the defense to the Government's rejoinder on that so -- and

Mr. Tigar, I don't -- you --

MR. THURSCHWELL: Judge, we'll have maybe 10 minutes, 15 minutes.

THE COURT: Yeah. You don't -- I don't know quite where your standing is on it, but I'll hear from you on it.

Okay. Well, let's -- shall we say 1:15 or is that -- okay. 1:15.

(Court was in recess at 11:48 a.m.)

* * * * *

INDEX

DEFENDANT'S EXHIBITS

Exhibit	Offered	Received	Refused	Reserved	Withdrawn
W83		1103			

* * * * *

REPORTERS' CERTIFICATE

We certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated at Denver, Colorado, this 15th day of July, 1996.

_____
Paul Zuckerman

_____
Bonnie Carpenter