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.

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

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Proceedings before the HONORABLE RICHARD P. MATSCH, Judge, United States District Court for the District of Colorado, commencing at 1:15 p.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

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PROCEEDINGS

(Reconvened at 1:15 p.m.)

Before calling for Mr. Nigh's argument, Mr. Mackey, we ought to set a time for you to submit those affidavits or whatever you're going to submit in connection with this Exhibit W83. Can you tell me when you'll have those ready?

MR. MACKEY: What I'm anticipating, Judge, is seeking affidavits from telephone company representatives themselves.

If I could have a couple weeks, and I'll do it faster assuming

THE COURT: All right.

MR. MACKEY: I've not made those phone calls yet.

THE COURT: All right. Well, I know you've been here, so -- but the sooner the better, obviously.

MR. MACKEY: Understood.

THE COURT: Okay.

DEFENDANT McVEIGH'S ARGUMENT ON 804(b)(3) MOTION

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

May it please the Court, this is not simply a question where it can be said that the Government indicates that the glass is half empty and on behalf of McVeigh we say that the glass is half full and that both of us are right. It is a factual question that can be resolved by reference to Terry Nichols' statements that are at issue.

The proof is in the statement itself as identified in the FBI 302 and in Agent Smith's notes. And an examination of the statement, in the context of the narrative in which it was given, or, in fact, sentence by sentence proves that each and every part is facially innocent for Terry Nichols. In fact, your Honor, it was not even inculpatory enough to change Terry Nichols' status from that of material witness for a period of 19 days or until May 9 of 1995.

The statement proves that it was designed to shift responsibility to Tim McVeigh for every action that Terry Nichols said that he took. The statement reveals and the circumstances of the statement show that Terry Nichols had a reason for every -- absolutely everything that he wanted to say, or in the words of the Government, he had made a calculated decision to speak to the FBI. In the words of Agent Foley, he had a story to tell.

If light of those facts, your Honor, and in light of the specifics of the statement, it simply cannot be said that Terry Nichols perceived the statement to be against his penal interests.

The Government has characterized portions of the

statement as, quote, core admissions, end quote. But what the Government fails to recognize or refuses to recognize is that Terry Nichols didn't admit anything. Throughout the course of the nine-hour interview, he maintained his innocence and he made sure that if there were any negative inferences to be drawn, they would be drawn only against Tim McVeigh.

During the course of the statement, your Honor, that part of the statement that the Government says is admissible against Mr. McVeigh, Mr. Nichols mentioned Tim McVeigh 68 separate times, or if you calculate it on the basis of time, about once every seven and a half minutes, and that doesn't account for the breaks that were taken during the statement.

Viewed in the context of the narrative or as isolated mini statements, Terry Nichols did not utter one sentence that he thought was against his penal interest.

I think that everyone would agree, your Honor, that the Government has two hurdles that it has to surpass in order to have these hearsay statements admitted against Tim McVeigh. First is that it must fit the statements into an exception to the hearsay rule. And the second, even if they can fit, it must prove that the statements have inherent reliability or indicia of reliability.

The Government cannot even meet the first hurdle and force the statements into the confines of 804(b)(3). The reason is that the statements are not the squarely inculpatory or strongly inculpatory statements that the rule requires and that the Tenth Circuit in such cases as Earnest vs. Dorcy says that the rule requires.

THE COURT: Well, I suppose the strongest statement that goes towards the -- against penal interest exception is to

put him in Oklahoma City in the company of the arrested suspect on Easter Sunday.

MR. NIGH: That is the --

THE COURT: Now, why would that statement be offered if it weren't true?

MR. NIGH: That statement might be offered for several reasons. First of all, at the time the statement was made,

Terry Nichols knew that he had an unshakable alibi for April 19. He had nothing to fear from being in Oklahoma City on April 16.

The second reason is that it could be an attempt to curry favor with law enforcement officials by adopting their theory concerning the case and attempting to place their suspect in Oklahoma City three days before the bombing.

And finally, your Honor, it's quite possible that Terry Nichols wanted law enforcement officers to think that he was in Oklahoma City when he was somewhere else.

Finally, the problem with that, your Honor, is --

THE COURT: I hesitate to ask too many questions about some of these things because of sensitivity of dealing with evidence before trial; but in the discovery materials, are there observations from someone that corroborates that meeting in Oklahoma City as -- on that Sunday as indicated in Mr. Nichols' statement?

MR. NIGH: Not one witness that I'm aware of, your Honor, or not one piece of discovery would indicate that.

THE COURT: All right.

MR. NIGH: The fourth problem with viewing the statement like that as an isolated admission that I was in

Oklahoma City on April 16 with Tim McVeigh is that that's not how the statement was made at all. Consistently the Government has tried to characterize this as some kind of a core admission

with a subsequent explanation, but that simply isn't what happened. And I think the FBI 302 makes this clear that that's not what happened.

Terry Nichols went to the Herington Department of Public Safety with a story to tell, and the story had a beginning, middle, and an end. And it was a narrative. And it flowed chronologically from beginning to end. And he started with events that occurred over two months prior to the time that he was there.

During the course of that narrative, he said that he was in Oklahoma City, but he also explained in great detail in facially innocent terms why he was there. And he did that from the outset. It was not an admission that he subsequently tried to explain away. And I think the context of it is critical in the Court's assessments of the reliability of the evidence.

If I could turn back for a moment, your Honor, to the provisions of 804(b)(3), the hearsay exception itself, I think that the Supreme Court case law and the other case law, the Tenth Circuit case law concerning the point make it clear that

strongly inculpatory; and I think that link-in-the-chain-type evidence -- in other words, the assertion that while it's not facially incriminating, a statement or an admission that "I was in Oklahoma City" might be incriminating when coupled with other evidence -- the courts have consistently ruled that that

is not the kind of against penal interest statement that

804(b)(3) requires. In fact, in United States vs. Shalin at

link-in-the-chain type of evidence is insufficient for

804(b)(3) purposes.

The case law concerning 804(b)(3) also makes clear that in order to be admissible like that, the arguably

inculpatory portion of the statement has to be severable from

the rest of the statement; and what I would cite for that

proposition, your Honor, is a case of United States vs. Lilly,

an Eighth Circuit decision that was cited with approval in

United States vs. Porter. That case is in our brief. But it's

at 881 F.2d 878.

Your Honor, the Government has insurmountable problems

in reference to each aspect of 804(b)(3). First of all, the

Government admits that each of the statements that Terry

Nichols made was facially innocent by itself. For example, in

the motion in limine and in the brief in support of the motion

in limine, the Government argued that thousands of people were

in the vicinity of the Murrah Building on the days before the

bombing for innocent reasons.

If you look at the cases that have addressed

804(b)(3), you find that the kind of squarely inculpatory

statements that are admissible and even some of the ones that

are not admissible are vastly different from the kinds of

statements that Terry Nichols made here.

For example, in Earnest vs. Dorcy, the kind of

statement there was that the declarant admitted to trying to

cut the victim's throat at a time when the declarant knew that

those wounds were the ones that were thought to have caused the

victim's death.

In Williamson vs. United States, the Supreme Court described the declarant's statements and said that some of them would be admissible under 804(b)(3). Those that were admissible would be the ones where the declarant said he was -- he knew that there was cocaine in the suitcase. By virtue of that statement, he would have forfeited his only defense to a charge of cocaine possession.

In United States vs. Elkins, a Tenth Circuit decision, the declarant stated that at the defendant's instruction he took a shotgun and shoved it into the trunk through a stereo speaker. The Tenth Circuit ruled that that was inculpatory,, but the reason was because the declarant was on probation at the time that he made the statement and by admitting that, he admitted possession of an illegal firearm.

Perhaps one of the best cases that illustrates the point is the case of Jennings vs. Mariner. In that case, the declarant stated that he specifically had told the defendant which house to burglarize, had told him what he might find when he burglarized the house, and he had given him instructions to

facilitate the crime's commission. Each of those statements inculpated the declarant as a principal in the crime.

But even those cases, your Honor, that have addressed hearsay statements that were not admissible are much more inculpatory than the statements that Terry Nichols made on April 21 and 22. For example, in Lee vs. Illinois, the declarant's statements concerning premeditation to commit a murder in reference to the defendant and his question to the defendant whether she wanted to go through with the murder and

her response was that she did was inadmissible because it was an attempt to shift responsibility.

In Williamson vs. United States, the declarant via the Supreme Court looked at the other side of the coin and said that although the declarant's statement that he knew there was cocaine in the suitcase might be admissible, his additional statement that he was transporting the cocaine for the defendant would not be admissible because it was an attempt to shift blame.

In United States vs. Sherlin, the Tenth Circuit decision, the defendant -- the declarant's statements that they were present with the defendant and that the defendant was extremely intoxicated, thus making it more likely that they themselves committed the crime, was insufficient for 804(b)(3)

The bottom line from all these cases, your Honor, is

there is not one single case in which statements have been admitted as against penal interest unless the declarant actually admitted the commission of a crime.

Terry Nichols didn't admit anything, let alone the commission of a crime. He didn't admit knowledge of commission of a crime.

facially incriminating, and they were not severable.

If I could now, your Honor, turn to the liability inquiry, assuming they could be forced into the provisions of 804(b)(3). There are general principles that guide the inquiry. And I won't spend a lot of time on them, but statements of this kind are presumptively unreliable; and it is

presumption through indicia of reliability or particularized guarantees of trustworthiness.

Another important factor in the reliability

determination is the consideration that adversarial testing

words, cross-examination wouldn't do any good.

I think in this case it's clear that Timothy McVeigh would have a very critical interest in cross-examining Terry Nichols about these statements which concern McVeigh.

Finally, attempts to shift blame to other people are inherently unreliable, as the court has often found. Lee is

the best example of that.

pleading, the Government argues that Mr. Nichols did not attempt to shift blame to Timothy McVeigh. It is difficult for us to understand how such an assertion can be made in light of the FBI 302 describing the statement. The statement makes clear that Mr. Nichols attempted to blame Timothy McVeigh for absolutely everything that he did.

wife.

He attempted to blame Mr. McVeigh for Nichols' trip that he says he took to Oklahoma City.

He attempted to blame Mr. McVeigh for failing to tell anyone he was going to Oklahoma City.

He attempted to blame McVeigh for knowing how to get around in Oklahoma City.

He attempted to blame McVeigh for his proximity to the Murrah Building on April 16.

He attempted to blame McVeigh for his purchase of diesel fuel for his truck, because McVeigh made him go to Oklahoma City.

He attempted to blame McVeigh for the use of Mr. Nichols' truck on April 18, 1995, and he attempted to blame

McVeigh for Mr. Nichols' stated presence in his storage shed on April 20; and he attempted to blame McVeigh for possessions in

Mr. Nichols' garage.

Now, some of these statements have to be viewed in the context and the timing in which they were made. Mr. Nichols did not say that he had loaned Mr. McVeigh's his pickup truck on April 18 until after he had been made aware that his pickup truck was going to be searched. And by virtue of that statement, if anything was found, Mr. Nichols could blame it on Mr. McVeigh.

In reference to the storage shed and his presence in the storage shed and items that must be found in Mr. Nichols' garage, he did not make those statements until after he had been informed at 4:34 p.m. in the afternoon on April 21 that his garage or his house was going to be searched and he had signed a consent for that search.

In light of that, he knew that he could blame his own presence if he was there in a storage shed on April 20 on Mr. McVeigh and he could blame any item found in his garage on Mr. McVeigh.

Mr. Nichols' attempts to blame Mr. McVeigh did not stop on April 21. The next day he continued to do so; and I would refer the Court to paragraph 8 of the April 22, 1995 FBI 302, where Nichols continued to blame Mr. McVeigh. I won't make a specific reference to it because I don't believe there has been any evidence about it, but it shows the state of mind Mr. Nichols had at the time he was making the statements.

I would like to come back, if I can, for a moment to the Government's assertion that there was some kind of core admissions. The problem or one of the problems presented by the argument in the Government's three identified areas of core admissions is how the statements can be rewritten in order to fit into those descriptions. In the most recent filing, the Government described the first admission in reference to the trip to Oklahoma City as, quote, Nichols' admission that he drove McVeigh from Oklahoma City to Kansas on April 16, 1995.

The obvious question is what are we going to do with that half of the statement where Mr. Nichols describes how he got to Oklahoma City in the first place and his rationale for being there.

We would have to selectively begin in the middle in order to call this a core admission. And the problem -- the context problem that exists by virtue of that is that the Government says it will not oppose Mr. Nichols' attempts to put the statements in context. The Government argues, well, that's all right because we won't be offering them for the truth of the matter asserted.

The critical problem is that Mr. Nichols gets to offer them for the truth of the matter asserted and Mr. McVeigh gets denied his opportunity to cross-examine Mr. Nichols about them. And it would be impossible to instruct the jury that some of the statements are admitted for truth, if they're consistent

with the Government's theory but the rest of the statements are not admitted for truth, if they're consistent with Mr. Nichols'

interests. And it would be a practical impossibility to do that.

The second category the Government describes as Nichols' admission that he met again with McVeigh on April 18. That's not what Mr. Nichols said. What Mr. Nichols said was that he loaned Mr. McVeigh his truck on April 18 and in the process of doing that, your Honor, if anything incriminating was found in it his truck, he could blame it on Mr. McVeigh but, perhaps equally importantly, establish an alibi for himself on April 18 by saying that he was at the auction and he put Mr. McVeigh in his pick up truck alone for a large portion of the day on April 18.

Pardon me.

Finally, the Government's third core admission is, quote, "Nichols' admission that he cleaned out a storage locker for McVeigh on April 20," end quote. And I would submit, your Honor, that that is not an admission at all. That is simply Terry Nichols' blaming Tim McVeigh for something that Terry Nichols did and blaming Tim McVeigh for the presence of particular items in Terry Nichols' home.

Your Honor, there is not one case that can be cited where statements of this kind have be admitted into evidence as substantive evidence against a defendant. The closest the

Government can come is the hypothetical -- the hypothetical posed by the Supreme Court in dicta in Williamson vs. United States, and that is the Sam and Joe hypothetical. "Sam and I went to Joe's house" might be against declarant's penal interest if a reasonable person in the declarant's shoes would realize that being linked to Joe and Sam would implicate the declarant in Joe and Sam's conspiracy.

First of all, I point out, your Honor, that those clearly are not the facts of the Williamson case and is a hypothetical designed to address some of Judge Kennedy's concerns. But furthermore, your Honor, the hypothetical just doesn't fit the facts of Terry Nichols' statements. In order for the hypothetical to fit, we have to rewrite the hypothetical, as well; and we could do it this way: We could say that the declarant knew that Sam and Joe had been charged with conspiracy to commit a crime and that the declarant went to the police station voluntarily and told the police, You know, about three weeks ago, Sam told me to come by his house and pick up my television set. Well, the other day I decided that I'd go do that. I didn't have a ride, so I called Joe. Joe gave me a ride over to Sam's house and I picked up my TV. Now, while I was there, they didn't talk about a crime, I didn't see any evidence of a crime, they didn't tell me they were going to commit a crime and I don't know anything about it.

That is parallel to Terry Nichols' statement, your Honor, and the Supreme Court would not rule that it's against penal interest.

In the most recent filing, your Honor, the Government argues that even if the statements are not strongly inculpatory against Terry Nichols, neither are they strongly inculpatory against Tim McVeigh. Well, whether or not that's true remains to be seen and I think will be seen at the time of trial. But beyond that, it is completely irrelevant for an 804(b)(3) analysis. The Court has never ruled that statements are admissible by virtue of the fact that they implicate the

defendant only a little bit.

It is also an incredible stretch to suggest that the statements inculpated both defendants equally. Nichols' statements always put an innocent spin on the things that he did while leaving open the door for an improper purpose for the things that Mr. McVeigh did.

Finally, your Honor -- or perhaps not finally but almost finally, the Government argues that Terry Nichols tried to exculpate Timothy McVeigh and they say that Mr. Nichols provided innocent explanations for the things that Mr. McVeigh did. A simple reading of statements, your Honor, proves that what Mr. Nichols was trying to do was provide an innocent explanation for everything that he did. He in no way intended to benefit Tim McVeigh; and even if he did, I would submit that

Tim McVeigh did not need that kind of help.

Finally, your Honor, in support of the reliability of the statements, the Government argues that the amount of detail contained within the statements lends credence to their reliability. I would concur that the statements have a great deal of detail; but I would say that it's equally true that the first half of the statement has a great degree of detail and if detail was the question for 804(b)(3) analysis or confrontation clause analysis, that each and every one of Mr. Nichols' statements would be admissible, including the entire first half of the narrative.

Earnest vs. Dorcy simply does not hold that.

Your Honor, I would submit that the proof is in the statements themselves; and the statements prove that not one statement did Terry Nichols perceive to be against his penal interest. The presumption that these statements are unreliable

remains unrebutted, and the Court should rule that not one of them is admissible against Tim McVeigh.

Thank you.

THE COURT: All right. Mr. Thurschwell, you have here, of course, a different situation as far as admissibility of these statements -- I mean apart from the suppression as the statements of Mr. Nichols admissible against him.

DEFENDANT NICHOLS' ARGUMENT ON 085(B)(3) MOTION

MR. THURSCHWELL: We are, your Honor; and there is no

argument that the statements in question here are admissible against Mr. McVeigh under the party opponent exception.

THE COURT: You mean against Mr. Nichols.

MR. THURSCHWELL: Against Mr. Nichols. I'm sorry.

We are, to respond to your comment before the break -- I think Mr. Nichols has classic Article III standing in the sense that he has a direct personal stake insofar as the issue of the controversy concerned here directly impacts his ability to get the severance that he would be seeking shortly. We -- given that our position -- if this case -- if this -- sorry. If Mr. Nichols were taking a position contrary to Mr. McVeigh's, this would be a different case. But given the fact that our position is generally consistent with Mr. McVeigh's, I think that there is ample reason for the Court to hear --

THE COURT: Well, I'll go ahead. I won't quibble about your standing to make the argument.

MR. THURSCHWELL: Thank you, your Honor.

I will -- I want to address the merits in a moment; but initially, there are a couple of considerations that I

think the Court should consider that were not discussed by Mr. Nigh. In a real sense, the motion insofar as it seeks admissibility of these statements, of a ruling admitting these statements against Mr. McVeigh is premature and hypothetical. It is premature in that one of the prerequisites for admission

under 804(b)(3) is the unavailability under 804(a) of the declarant, Mr. Nichols. And Mr. Nichols has not decided at this time whether he will, in fact, be unavailable at time of trial. Therefore, the --

THE COURT: Well, we wouldn't know that even if we were in trial in the Government's case. There may be an indication one way or the another, but he doesn't have to make a decision like that, of course, till the Government has rested.

MR. THURSCHWELL: That is correct, your Honor. While that -- that is correct and in fact, United States vs. Hill stands for the proposition that regardless of the consequences to the Government's case, a defendant may choose even in -- apparently in bad faith to declare that he will be available before trial, change his mind at trial, and the Government finds itself in a situation where the conviction can't established under Bruton.

THE COURT: So how could it be considered premature here since, you know, he doesn't have to tell us until the Government has put on its case?

MR. THURSCHWELL: Your Honor, it is premature only insofar as the Court would rule in favor of the Government. To the extent that the Court makes the finding that the other prerequisites of 804(b)(3) are not met, then the motion can be denied at that time.

But there is -- there is some dicta in Seventh Circuit opinion, United States vs. Meyers, to the effect that the Government, if it can make a sufficient showing during its case in chief that the defendant will be unavailable, it will be allowed to admit statements at that time.

That's --

THE COURT: I mean if I were to exclude it now, exclude these statements and if we had a joint trial and if Mr. Nichols testified obviously we'd have a different posture and they would have rebuttal; so, you know --

MR. THURSCHWELL: That is correct, your Honor.

Let me move on to the hypothetical aspects of this. There is -- admitted in evidence at the suppression hearing was the notes of the statement given by Mr. Nichols and as I understand the Government's position, it is seeking the specific and particularized evaluation of the statements it seeks to admit under Williamson based on those notes of the Agent Smith.

THE COURT: And you know, we're going to have to take that for now, even though the testimony of the agents concerning the statements would be the evidence that we're talking about, not what's in the 302; but I think I have to assume that the testimony would be consistent with the 302 and that 302's are really submitted as an offer of proof that the testimony would be as recited there.

MR. THURSCHWELL: That is correct -- that is the

posture of the case at this time, your Honor. We would just point out that Williamson really requires a nuance evaluation of the statements in question to make the findings that it requires. And I will come back to that in a moment when I discuss the merits. It is far from clear that that nuanced evaluation could be made on the basis of abbreviated notes made by an agent that are not explicated at a minimum by his testimony explaining exactly what it is that Mr. Nichols said and is the way that he said it, because those issues are directly relevant to the Williamson -- the Williamson evaluation.

THE COURT: So what would we do? Make him put on the actual testimony before trial --

MR. THURSCHWELL: I believe you could. Your Honor, what I expected was some development of that -- of those specific statements that the Government would seek to admit which are already in the public record during the suppression hearing. It was my understanding that that was part of the purpose. The burden is on the Government as the proponent of the declaration under hearsay exception to demonstrate that all the requirements of that exception are met. That was not done during the suppression hearing. It could be done in a voir dire at trial, immediately before trial. The point is that on this record, it's far from clear that the record itself is

clear enough to make the very detailed circumstantial and specific findings required by Williamson.

That said, let me move on.

THE COURT: Well, you wouldn't have any problem if I excluded them on the basis of this proffer, would you?

MR. THURSCHWELL: Your Honor, I think you could exclude them on the basis of the circumstances surrounding the making of the statement which Williamson makes directly relevant. Those were adduced at the hearing. There is a sufficient record to find that the circumstances were such that a reasonable person would not have made these statements, believing them to be true.

On that basis, there is a basis for -- for not -- for denying the motion.

So in essence, your Honor, because the Government did not develop the record, the posture of the case is such that they are left without the findings, I think -- the ability for the Court to make the findings necessary to have the exception, have the statement admitted under the exception.

THE COURT: Well, I don't know that the Government should be faulted in some way here. It's my recollection when we discussed procedures here that we were going to proceed just as we did; that the 302's were going to be considered as the offer and that we wouldn't therefore put into the public record the actual testimony about the statements since if they were

going to be suppressed, you know, the public and potentially the jurors would not know of them.

MR. THURSCHWELL: Your Honor, I don't want to be --

THE COURT: And that seemed to me to be a reasonable way for us to proceed to contain and cabin the evidence that may never see the light of day at trial.

MR. THURSCHWELL: Your Honor, I don't want to belabor the point. My understanding was that -- was that agreement

went to the facts of the statement not previously made public by the Government's own filings and the specific facts that they seek to admit are in the public record. And my understanding was that they would be elucidated for purposes of the 804(b)(3) standard.

That said, your Honor, with your permission, I'll move on to the merits.

THE COURT: All right.

MR. THURSCHWELL: With respect to the merits, it's important to keep in mind when evaluating admissibility under the hearsay exception the confrontation clause values that are served by the exception. And I think one way of characterizing the error that the Government makes in its arguments is that it fails sufficiently to read the hearsay exception in terms of those confrontation clause values, those values that are best stated, I think in Idaho vs. Wright, which require sufficient inherent trustworthiness of the declaration such that

adversarial testing would add little to its reliability.

In other words, there would have to be such inherent trustworthiness in the statement itself that the hearsay exception -- under the hearsay exception, the statement carries its own -- own reliability.

The hearsay exceptions serve that value by setting forth in a specific and rule-like manner the general situations in which the general value represented by the confrontation clause is served. 804(b)(3) serves that value, seeks to serve that value by relying on the common sense notion that where statements are sufficiently against the penal interests of the declarant and genuinely against the penal interests, then such

a statement would not lightly be made because people do not make statements that can cause them to suffer serious detrimental consequences.

That is the rationale expressed by Williamson. I think there is no debate that that is the value served by the rule; but what is lost in the Government's understanding is that this basis for admission implies that the declarant have a mental state that is conscious -- sufficiently conscious of the possibility of significant penal consequences that the statement can be relied upon; that it would not be -- that it would not be said unless the person believed it to be true at the time.

And that understanding, as Mr. Nigh points out, was

recently strongly reaffirmed in earnest of the underlying value.

The consequences for Mr. Nichols' alleged statements are significant here because they, as Mr. Nigh pointed out, do not on their face in any way represent the kind of significant inculpation that individuals making those kinds of statements would expect to lead to serious detrimental penal consequences. And that point again has been made by Mr. Nigh.

I would only add -- and I would also add that the facts at the hearing support the finding that I suggested before, that in making these statements, Mr. Nichols was not motivated by a mental state that represents consciousness of guilt. His actions, as we discuss in our most recent brief, were the actions of a person who strongly and genuinely believed in his own innocence. A person who strongly and genuinely believes in their own innocence at the time they are making the statements sought to be admitted is not a person who

meets the qualifications of a declarant under 804(b)(3).

The Government's response to this is that the Supreme Court in Williamson recognized that statements that in fact are facially neutral can suffice under 804(b)(3) for admission if the circumstances are such that they meet the requirement. And the qualification is the critical point with respect to that Government assertion and it's the point that the Government tends to lose sight of.

An individual who makes self -- even strongly self-inculpatory statements may not be motivated by the kind of consciousness of guilt that is -- serves the value of the confrontation clause; i.e. he may not be making the statement out of a sense that he wants to get something off his chest, he wants to be truthful, he is aware of the penal consequences that would come down on him as a result of his making that statement. And there are circumstances in which even strongly self-inculpatory statements do not meet the rule.

And this, in fact, is a part of the test under 804(b)(3). Williamson strongly reaffirms that in the context of the very statements that the Government points to as examples of neutral statements, the "Sam and I went to Joe's house" example. And the clear import of the Supreme Court's decision there is that given the correct circumstances, such neutral statements may be admissible.

What are those circumstances? Let me just give you a couple of hypotheticals to explore the Government's position: The declarant says to a friend, "Sam and I went to Joe's house that morning, but Joe and Sam were the ones who actually robbed the bank." Not entirely clear, but I think there is a

reasonable argument under Williamson that the assertion "Sam and I went to Joe's house that morning" might very well be against the penal interest of the declarant such that the statement could be admitted.

Same statement: "Sam and I went to Joe's house that morning but Joe and Sam were the ones who actually robbed the bank" said to a police officer might be inculpatory under the rule, might not. You'd need to know several things. One of them is the specific context in the sense that was it said to a police officer after a custodial arrest, for example, or even a Terry stop.

THE COURT: And an allegation of conspiracy.

MR. THURSCHWELL: And an allegation of conspiracy. Thank you, your Honor.

An additional point is not just an allegation of conspiracy, but knowledge on the part of the declarant of the law of complicity and the law of conspiracy such that he would be actually aware that these kinds of statements would make him subject to criminal liability because absent those -- that condition, that legal knowledge, if you will, the conditions for the rule aren't met.

Third hypothetical: Statement said -- the same statement: "Sam and I went to Joe's house that morning but Joe and Sam were the ones who actually robbed the bank," said to a police officer where the declarant has some knowledge or strong suspicion that the police are aware of his possible involvement with Sam and Joe in some illegal activity: In that case, I think it's -- the courts -- the cases that have decided these kinds of issues in other contexts -- would strongly hold that

that is not against his penal interest in the sense that one cannot be sure that that statement is made with the required consciousness of guilt and absence of deception for self-serving purposes.

That is exactly the case here, that third hypothetical; and I would emphasize, your Honor, that the Court does not need to find as fact that Mr. Nichols' statements were unreliable; that he was deliberately placing blame on anyone else, as Mr. Nigh has suggested. That is not the rule under both the confrontation clause and the exception for -- against penal interest. The rule is an objective test. What would a reasonable person in the particular circumstances of the declarant be doing. That's the test of reliability.

But here, the Government's claim stated most forthrightly in its initial motion in limine is that Mr. Nichols' statements here inculpate Mr. Nichols by linking him, in quote -- linking him to Mr. McVeigh. The whole reason Mr. Nichols appeared at the station was that he heard reports on the radio and later on television that linked him to Mr. McVeigh. He is in the position of the person in the third hypothetical. He does not have -- the reasonable person in his position would not be -- have -- one cannot be certain that a reasonable person in his position is making the disclosures that he is making out of the truthful impulse and awareness that possible consequences will flow to him because he is

already in the position where those possible consequences could flow to him whether he makes the statement or not. The

Government in its briefs recognizes this analysis but thinks that it's limited to cases in which the declarant is caught red-handed. But that is incorrect. The classic instance of this situation is where a defendant, as the one in Williamson, is caught with cocaine in their possession and then implicates someone else, admitting to involvement with the cocaine that was already in their possession along the way. But it's perfectly clear that the basis for not admitting the additional statements and even under -- according to four justices in Williamson not admitting the statement that admits -- admits possession of the cocaine itself is that those statements do not inculpate the defendant because a reasonable person in the declarant's position would not necessarily be making those statements out of this impulse to truthfulness.

That is the case here; and there is no distinction in this situation, although it occurs at a far, far lower level of inculpation than the cocaine possession cases and, of course, that's an independent ground for dismissing the motion. The statements even as alleged do not amount to the kind of inculpation that the Supreme Court or any of the other courts that have discussed 804(b)(3) have in mind.

But that is the situation here.

Just very quickly, your Honor, I just raise one more

issue that Mr. Nigh didn't discuss. The March 15 letter raises several other bases for admission of the statements against -- it's not entirely clear but against Mr. McVeigh and possibly Mr. Nichols as well; and I just would point out that not only are these generally premature but that the Government is playing fast and loose with a number of the hearsay rules in them. Also, in particular, of primary significance, I'd refer

the Judge, you, to page 5 of the March 15 letter at the bottom of the page in connection with the third statement that the Government seeks to admit against Mr. Nichols.

THE COURT: Page 5, did you say?

MR. THURSCHWELL: Yeah. Of the letter itself. The Government suggests that it would offer a particular statement made by -- allegedly made by Mr. Nichols under Federal Rule of Evidence 801(c), assertedly not for the truth of the matter asserted but to show the state of mind with which he performed that act.

Your Honor, 801(c) does not cover that case. This is a classic instance discussed in the advisory committee note under 803(3) of a presence -- a present mental state representing a memory or past recollection. That evidence tending to show such a thing is evidence of the truth of the matter asserted. There are numerous other instances of that type here.

I would just alert the Court that the Government --

Government's suggestion should not be followed at this time, at least without further chance for us to rebut.

THE COURT: Yes, well, you know, I'm not, in this motion, considering admissibility against Mr. Nichols of his own statements and objections that might be made to particular statements.

MR. THURSCHWELL: I understand that, your Honor, and speaking, I suppose, as a friend of the Court in this -- in this context, the same argument would apply with respect to Mr. McVeigh as to that 801(c) argument against.

THE COURT: All right. Mr. Connelly, is this your

area, also?

PLAINTIFF'S ARGUMENT ON 804(B)(3) MOTION

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

The first question before the Court under Rule 804, the question conceded by Mr. McVeigh but challenged now by Mr. Nichols, who again we would urge does not have standing and who said that I'm just going to make the arguments Mr. McVeigh makes but went beyond it in this respect because Mr. McVeigh conceded it, is that the declarant be unavailable. The declarant is unavailable under Rule 804(a)(1) --

THE COURT: I'm not worrying about that.

MR. CONNELLY: Okay. So we would submit that that's clearly been satisfied.

The real question then becomes whether it satisfies

the prerequisites of 804(b)(3) and in the language of that rule whether it so far tended to be -- to incriminate the declarant that a reasonable person would not have made it were it not true. And I think the Court asked Mr. Nigh at the very outset of his argument why in the world would Terry Nichols have said, I was in Oklahoma City three days before the bombing with the alleged bomber and suspected bomber, the person he knew was becoming in police custody or FBI custody at that very time -- why would he make that up were it not true? And I think there is no answer as -- no credible answer as to why a declarant in Mr. Nichols' shoes on April 21, being interviewed by the FBI, would lie about being in Oklahoma City with the person he knew was being arrested in connection with the bombing.

THE COURT: But you see, here's a big problem, and that is the Government believes some of what he says and strongly disbelieves others. Take this statement about Easter

Sunday. It strongly urges he is telling the truth when he says he was in Oklahoma City, disbelieves why he was there.

MR. CONNELLY: And I think that's --

THE COURT: And that presents a problem about the credibility of the statements which has to be determined, the statement has to be credible and against penal interest; and of course whether he answers to what he might be talking about this is that he has some suspicion that somebody has seen or that the Government has some information that links him and

that's why his name is on television and so forth.

MR. CONNELLY: I agree entirely with that, and that just confirms the truthfulness of it. Why would he say it if it weren't true -- or why would he say it? Because he thinks perhaps the Government has some surveillance cameras or witnesses that see him at the time. I think that --

THE COURT: And he wants to explain it away on innocent grounds.

MR. CONNELLY: And I think to explain it away on innocent grounds is not credible and is not a declaration against interest.

THE COURT: Well, and that's very difficult then to say, well, pieces of this statement are admissible against penal interest and pieces aren't because they're lies and they're exculpatory lies; and I have a lot of trouble with that.

MR. CONNELLY: I don't disagree it's difficult, your Honor. I think that's the task the Supreme Court has assigned this court and others in Williamson. It says you have to look statement by statement. And it says one of the most effective

ways to lie is to mix truth with falsehood, and it's for that reason have you to look statement by statement.

THE COURT: And Justice Ginsburg herself and three others say don't admit any of it.

MR. CONNELLY: Well, I don't know if that's true,

because I think in that --

THE COURT: Well, that's what she said.

MR. CONNELLY: Well, no, I think she joined in part 2(b), your Honor. In Part 2(b) of the opinion where the court said that one of the most effective ways to lie -- and you have to go statement by statement and you have to look and determine whether each statement is against the defendant's interest and specifically the hypothetical that even statements that are neutral on their face may be against a defendant's interest -- it's Part 2(b) of the opinion -- Justice Ginsburg and the other four justices joined in that and formed a majority of six justices. And the dissenting judges thought that that reading was too restrictive. So all nine justices, I think it's fair to say, said that you can look statement by statement -- well, I'm sorry -- six of the justices said you have to look statement by statement. Justice Kennedy in his dissent would have gone further and said if some of it is self-inculpatory, then you can admit it all under the right circumstances.

And so -- but I think the point is Justice Ginsburg -- I don't think what we're saying is inconsistent with Justice Ginsburg. I think the dispute there was on those particular facts, is a particular statement admissible. But even Justice Ginsburg, I think, recognized that even custodial statements implicating another can under appropriate circumstances be admissible; and so I don't think anything we're saying is

inconsistent with Justice Ginsburg. In fact, she joined in the parts the of the opinion that we are urging upon the Court.

THE COURT: Well, you agree that we have more to do here than just look at 804(b)(3); that we do have a Sixth Amendment and a confrontation clause concern?

MR. CONNELLY: I agree. And I think the analysis under both is very close; and I think the Supreme Court in Williamson, taking a more restrictive view of 804(b)(3) than some courts before it had and that Justice Kennedy and the

satisfying that. I think Justice O'Connor in her concurrence -- she was also the majority opinion writer for the court -- said it would go a long way if you apply a careful statement-by-statement analysis.

But I think -- so I think under 804(b)(3) the question is and the only question is did this particular statement so

would not have made it up. And I think there is no good answer, and I appreciate the Court's concern about the gloss he puts on it after having admitted that yes, I'm in Oklahoma City with the suspected bomber three days before the bombing. There is no answer as to why somebody would falsely make that up -- falsely make it up. Why he said it is perhaps he thought that,

with that; but there is no good answer as to why he would

falsely make that up. In no way does that help Mr. Nichols, having put himself there.

Now, having put himself there certainly does help him by saying, well, I was there for an innocent reason. We

weren't there to plan a bombing. We were there for -- because Mr. McVeigh had called me up and said, I'm coming across -- I don't know how much you want to get into this. I think this is not really hurtful to the defendants, but I think it's important to look at the context.

But my point would be that Mr. Nichols' explanation for why he went there also gave an innocent explanation as to why Mr. McVeigh was there and in fact said Mr. McVeigh was heading back East. On his way from west to east, he broke down there, had my TV, and wanted to head back East to visit his relatives. I think in terms of pinning blame -- and I think that's a key part of the analysis under the Sixth Amendment and in Earnest -- is there a reason for this declarant, Mr. Nichols in this case, to try to curry favor with the authorities or shift blame. This is not a case of blame shifting on that statement in any way. It's not that he said, well, Mr. McVeigh, you know, was there to discuss the bombing and I said I didn't want to do it or it's not that he gave --

THE COURT: Well, you're going to argue -- if these

evidence of a consciousness of guilt. Right?

MR. CONNELLY: Well, I don't think -- I think we're going to argue that it's false and whether it's not -- we're going to have to prove it's false; and I think the fact that he made false statements is only helpful if we can prove it's false. I don't think the statements in themselves help prove they're false; although in a sense, I mean, to the extent

that. But yes in terms as to Mr. Nichols. But in terms of they don't incriminate Mr. McVeigh, his explanations for them -- and I think there is -- I understand the Court's problem --

THE COURT: Why would he be seeking to exculpate Mr. McVeigh unless there was some complicity? I mean, I can

MR. CONNELLY: Well -- and that may well be the case. But in terms of an analysis under the Sixth Amendment, was he trying to shift blame -- and I think that's the question. It's not why was he trying to help Mr. McVeigh. It's was he trying way are shifting blame to Mr. McVeigh. And I think that is the proper Sixth Amendment analysis. When you go beyond the 804 argument in terms of these statements are against his interest, then you go broader than that in terms of Sixth Amendment, is there anything about the circumstances of the interview that would render them suspect.

In Earnest, the court said that there was nothing, Well, in Earnest, in fact, there was indication that the defendant, the declarant, hoped for a deal. He said, I was hoping to obtain a deal; and the court said, well, that's not enough because they ruled out a deal.

Well, here it's an even stronger case in that circumstance. There's no suggestion in the record and any fair want to cut a deal and give you up Tim McVeigh. There was no blame shifting, no currying favor; and in fact his statements about Mr. McVeigh are far less prejudicial to McVeigh and far more exculpatory to McVeigh than the statement in Earnest where the declarant Bodlin said, I slit the victim's throat but Earnest shot him. And that by itself is a powerful -- in fact, maybe the only real evidence of guilt in Earnest, because before that statement came in, there was a real question about sufficiency of evidence.

So in terms of the impact and the threat to Sixth

Amendment values, we would submit that it's far greater in the Earnest case than it is here.

The real question, I think, has to be twofold; and first is was this statement so far against his interests that he wouldn't make it up; and the argument that Mr. Nigh has advanced here is that, well, not really, because on its face,

it's not -- it really doesn't prove anything.

The Supreme Court's opinion in Williamson is squarely contrary to that in which they said -- this was Part 2(b), and it was joined in by six justices, and the three dissenters would have gone even further, so I think you can take the word of the nine justices of the Supreme Court -- is that even statements that are neutral on their face may be against the declarant's interest if in the circumstance of the case they would tend to subject him to criminal liability.

And that's where they gave their Joe and Sam hypothetical, and I think we've repeated that enough in our briefs. But I think that is not meaningfully distinguishable from this case; and I think the point is would Nichols have recognized on April 21 that being linked to McVeigh in Oklahoma City three days before the bombing was against his interests such that he would not lie about it were it not true. I think the answer is yes. And then we come to the next question, which I think the Court is having the most trouble with, and that is, well, how can you say that's true, yet say his explanation for it is not.

And I think that's exactly what -- and I think it is a

difficult job, and I think it is something that the Supreme Court in Williamson said that trial courts are best suited to do; that you have to parse through the statement, the overall statement, and go statement by statement and say is there

reason for believing that he was in Oklahoma City with McVeigh. And I would say yes because he wouldn't lie about that.

Now, having admitted that, is there a reason to believe that, you know, I was really there for an innocent purpose? Well, that's not self-inculpatory, and so that does not come in under 804(b)(3). We have made clear to the Court and to the defense that we are not trying to keep that part out. For context, that can certainly be brought out and they can argue that, and Mr. McVeigh would have standing to complain if that somehow prejudiced him. But it doesn't because, No. 1, the Government is not introducing it for its truth and will not argue that that -- those further statements that gloss on the core admission somehow prove McVeigh's guilt and, No. 2, it really doesn't prove McVeigh's guilt. It gives McVeigh an equally innocent explanation for being there.

So we would submit that under Williamson, it is a difficult burden, but it is no longer the rule of law that you can just look at the whole statement and say it all comes in or it all doesn't come in. In fact, even prior to Williamson, the

Tenth Circuit in Porter said you have to look at the statement and put in the disserving parts and throw out the self-serving parts.

Well, we're not trying to keep out the self-serving parts, although we're not affirmatively trying to introduce them. We're saying it can all come in, but what we're asking

the Court to do is put in the disserving aspects of Mr. Nichols' statements because there is no reason for believing that he would have falsely made them up.

There is just one other point on corroboration. The Court asked a question is there anything proving that, and I don't want to get into the evidence; and Mr. Nigh was correct that there is nothing independently proving he was or -- there are no witnesses seeing him there, but there is corroboration there. There's corroboration that we would be prepared to offer, if the Court wanted in a 104 hearing, in terms of other people he made the statements to and --

THE COURT: I'm talking about visual observations.

MR. CONNELLY: That is correct, no visual observation. But the point as a matter of law on that -- and it's recognized in Earnest and Idaho vs. Wright -- is the analysis has to be on the statement itself and not external corroboration, whether it's true or not.

THE COURT: Yes.

MR. CONNELLY: So as a matter of law, it's not necessary. But there is corroboration in the sense of him having made similar statements contemporaneously with some differences. And I don't want to go into all that, but there is in terms of that type of corroboration, although it's not necessary, we would submit, under the law.

Thank you.

THE COURT: Mr. Nigh, do you have any --

MR. JONES: Your Honor, I'm going to close for Mr. McVeigh.

THE COURT: All right.

MR. JONES: With the Court's permission.

May it please the Court.

THE COURT: Mr. Jones.

DEFENDANT MCVEIGH'S REBUTTAL ARGUMENT ON 804(B)(3) MOTION

MR. JONES: I think that it's a fair statement that all of the counsel and parties in this case know that the Court's central inquiry is on the first of the -- first of the three so-called core admissions that the Government wishes to introduce. The statement that "I loaned Mr. McVeigh my pickup truck," a statement made after he knew that the Government was going to search that truck or at least attempting to search that truck certainly belies any idea that that was an inculpating statement. They clearly were self-serving.

And likewise, the statement that "I cleaned out items at the storage unit at the request of Mr. McVeigh" was made only after he knew that the Government was interested in searching this house where those items might be found or at least he might think they would be found.

And the Court has not raised questions about those, so

I'm not going to address them. I am going to address, though -- and I hope show the Court a very good reason,

actually several reasons, why Mr. Nichols would lie about being in Oklahoma City on April 16; and in doing so, I'm not assuming the role of a special prosecutor of Mr. Nichols. It's not my job to prosecute Mr. Nichols; it's my job to represent Mr. McVeigh and to bring before the Court all of the relevant considerations, facts, evidence and case law that I think bear upon an issue that if the Court decides the wrong way against us and the Court is in error, it is not harmless error.

And it goes to the very core of the Sixth Amendment right of confrontation involving an area that our own Tenth Circuit has said is inherently suspect; that is, to use one defendant's statement against another defendant where we cannot cross-examine it.

And the Court knows by now -- and if there is some doubt about it, I think it will become clear when we submit the motions for severance -- that there is a deep abiding consistent permanent and antagonistic approach to this case by Mr. Tigar on behalf of his client -- properly so -- and myself on behalf of Mr. McVeigh. And the Government would like nothing more than one trial in which we point the finger at each other. And we're not going to do that.

But today -- or at least we're going to try to avoid it, and that's the reason we're here today on this motion.

Mr. Connelly said there is no reason why he would make that up. Why would he make up being in Oklahoma City if he

wasn't there? There is no credible answer.

Well, there is. First of all -- and it perhaps may be true that external facts that show that it is not true perhaps don't weigh heavily; but the Court did ask the question is there an eye witness that placed Mr. Nichols and Mr. McVeigh or either one of them in Oklahoma City on Sunday afternoon, April 16; and the Government said there isn't any. And there isn't.

But there is an eyewitness -- actually two -- that place Mr. McVeigh in Junction City, Kansas, an hour and a half after. According to Mr. Nichols, he left Herington to go to Oklahoma City. So unless Mr. McVeigh got a direct flight from Junction City at 4:30 in the afternoon after he left the Dreamland Motel where he was seen by two people and flew to Oklahoma City to be there when Mr. Nichols arrived, which is preposterous on its face, of course the statement is false.

But looking, as if we were literary critics, at the statement itself, there are at least two hints why it is false. The first is -- and I don't want to get into the Court's concern about going too far into this 302. And may I ask the Court if it has the 302 in front of it?

THE COURT: Just a moment. I will.

Yes.

MR. JONES: All right, sir. And I'll try to measure my words carefully in view of the discretion that I know the

Court will want me to exercise; but could I ask the Court if it would turn to page 4 of the 302, which is the 302 --

THE COURT: The four agents.

MR. JONES: By the four agents.

THE COURT: Yes, I have it.

MR. JONES: Are the paragraphs numbered in the Court's copy?

THE COURT: They are. 12, 13 and 14.

MR. JONES: May I ask the Court to go to paragraph 14 and just simply note the second sentence, the one that begins "Nichols stopped."

THE COURT: Yes.

MR. JONES: Now, if the Court would then turn over to page 5 and go to paragraph 18 and look at the fourth sentence, which says, "They also stopped."

THE COURT: Yes.

MR. JONES: Okay. If the Court will just follow me, what Mr. Nichols is saying in that statement is that before he **went to Oklahoma City, he did something. When he returned from** Oklahoma City, he did the same thing, because, presumably, that thing was exhausted. The indictment in this case alleges that that thing is one of the components of the bomb; and a statement that one went to Oklahoma City would explain neatly

So while he in the one sense, according to the

Government, is making an inculpating statement, by the same token, he is also making an explanation for why he has two of those things in so short a period of time.

Secondly, according to the statement -- and I don't know whether Terry Nichols said any of those things. I'm just relying upon what the Government said he said. I've never

it; so in making this argument to the court and conscious there are members of the media here, I don't want it to be said that I'm conceding Mr. Nichols made those statements. Let's just say for purposes of argument that he did. We know from the

statement that when he received this telephone call which allegedly took him to Oklahoma City, he lied to his wife and

Now, to me, it requires no stretch of the imagination that if he would lie to the woman he's married to and loves, he would certainly lie to the FBI as to where he went. Perhaps he went to neither and perhaps the explanation to the FBI is just as much a lie as the explanation was to his wife. Perhaps he was doing something else and needed an alibi, a dangerous alibi, but nevertheless an alibi, for why he had to go and be gone during that period of time.

But I think that the real key is that while we have been talking about this so-called "core admission," it is important to remember precisely what it is that the Government

seeks to introduce. As I understand it, the statement the Government seeks to introduce is Nichols' admission that he drove McVeigh from Oklahoma City to Kansas on April 16, 1995. Now, that, I submit to the Court, is a subtle difference but an important one from the question that Mr. Connelly raises, which is why would he lie about being in Oklahoma City? That must be the truth.

Well, Nichols in Oklahoma City is part of it; but what is the core that is being sought is the admission that he drove McVeigh from Oklahoma City to Kansas on April 16, 1995. Now, to answer the Court's question perhaps, or at least I attempt to do so, perhaps, in fact, Mr. Nichols was in Oklahoma City on April 19. That is not a so-called inculpatory statement that no reasonable man would make unless it's false. The inculpatory statement that is being sought introduced is Nichols' admission that he drove McVeigh from Oklahoma City to

Kansas on April 16, 1995. The difference is this: Mr. Nichols may have had a reason to be in Oklahoma City that is incriminating, very incriminating. He may have been seen, so he explains that by saying that he was there to drive back Mr. McVeigh.

And I would simply ask the Court to consider the following which are in evidence before the Court -- well, perhaps "evidence" is a poor choice of words. They are part of the public pleadings in this file. It is undisputed, at least

in the record up to this point that Tim McVeigh arrived in Junction City on Thursday, April 14. That's 30 miles north of Herington. In fact, to go to Oklahoma City, you'd have to bypass Herington or at least go in the general direction south.

It's undisputed that he registered in a motel under his own name.

Now, if the Court would turn back to the 302 just one moment and turn to page 3 at paragraph 9, the third sentence in the letter --

THE COURT: Yes.

MR. JONES: And then paragraph 10.

THE COURT: All right.

MR. JONES: Beginning "during this," which I believe must be the third --

THE COURT: Yes.

MR. JONES: -- well, that statement is clearly false. The person that he is referring to was not going from one point to another point. The person he is referring to has been north of a certain point for several days; and one has to ask the question if the purpose of going south was to get the thing,

the thing had been available 30 miles north and had been for four days. So of course, the statement is false.

Now, the question is why is it false? Is it false because he incriminated himself and therefore admissible, or is it false for a more sinister reason?

To go back to the points that are undisputed that Mr. McVeigh arrived in Junction City on Thursday, April 14, and registered in his own name at the Dreamland Motel, the room incidentally next to the office -- the material that is in the public record before this court shows that on Saturday morning, April 15, I believe it is -- I'm sorry -- yes, I believe it would be the 15th -- a Robert Kling went to Elliott's Body Shop and paid Mr. Elliott some money, 200-some-odd dollars, to rent a Ryder truck. Mr. Elliott is 5' 10". He described the person identified as Robert Kling as being 5' 10", 5' 11", weighing 180 to 185 pounds, of medium build.

On that same day, that afternoon, a telephone call was placed from Room 25 to the Chinese restaurant to order Chinese food in the name of Robert Kling. The driver went to the motel to Room 25 and delivered the Chinese food to a gentleman that he described as approximately 6' 1" and friendly, but it was not Tim McVeigh.

On Sunday at the time that Mr. Nichols according to the FBI said Mr. McVeigh was in Oklahoma City calling him, two other witnesses say Mr. McVeigh was in Junction City at the Dreamland Motel at 4:30 in the afternoon.

So did the statement serve two purposes, to exculpate Mr. Nichols but to incriminate ever so subtly, ever so slightly, another person? People who use aliases do not bring the alias back to their motel room the same day they use it.

The description of Robert Kling is not the description of my client. That description is also in public record when he was booked into the Noble County Jail. This is a cleverly constructed statement, as presented. I know nothing about it, I wasn't there, I don't know if that's what he said. But to say that this statement bears the indicia of reliability is absurd on its face.

In talking about any statement that the FBI claims that Mr. Nichols made about Tim McVeigh, to borrow Mr. Tigar's statement about Elizabeth Taylor and Kim Novak, I am recalled the statement of Mary McCarthy about Lillian Hellman, that every word Lillian Hellman wrote was a lie, including the words "a," "and," and "the." That's true about Tim McVeigh and this statement. It does not have the indicia of responsibility; it does not have the indicia of credibility. And the Government is asking the Court to do what its own agent said on the stand could not be done.

During the examination of -- if I might just ask Mr. Nigh. Rob, is this Agent Foley?

MR. NIGH: Jablonski.

MR. JONES: Question: And this is one long, continuous interview stretching over a period of what, eight, nine hours?

"Answer: Yes.

"Question: And it's very hard to pick and choose,

isn't it?

"Answer: It can be.

"Question: Events are developed in sequence, chronologically, geographically by identity of a person, are they not?

"Answer: That is correct.

"Question: If you take one part of it out and you don't have the rest of it, you can get a false impression from just reading that part, can't you?

"Answer: That's possible."

We respectfully ask the Court to rule that this statement is not admissible against our client.

THE COURT: Well, I'm taking this motion under advisement. I think I have to consider both the suppression and this together. Obviously, they're connected.

The issue of compliance with the new legislation for closed circuit television transmission of trial proceedings to Oklahoma City is the next issue. The Government filed its motion on this. Defendants filed their respective objections and the Government reply; so we've got extensive briefing on this as well. I indicated that we would give some time for argument here simply on the question of the constitutionality of this provision, recognizing, of course, that the actual application of it requires further consideration and what conditions and what the methodology is and all that has to be

considered; but we're ready to go on the objections that have been raised that include the arguments with respect to separation of powers, bill of attainder, Fifth and Sixth Amendments, and the like.

I'll hear any supplement to the brief by argument if you wish to make it. Mr. Tigar, I see you rising for that

purpose, I presume.

DEFENDANT NICHOLS' ARGUMENT ON CLOSED CIRCUIT TRANSMISSION

MR. TIGAR: Yes, your Honor. I'll not repeat what we said in the brief about statutory interpretation.

This statute caught us by surprise. There are those in New York that Nicholas Pileggi calls "wise guys" who dream of a racetrack in which the numbers are put on the horses after the race is run. We made -- that's how we feel. We made an argument to your Honor at the change of venue hearing that was directed at moving the case to Denver, and in that I consciously made a decision that we would not seek a change of venue to places that we thought might be even better for us in terms of jury selection. I had already spoken to two district judges in the Ninth Circuit who had approached me about trying the case in San Francisco or Seattle -- that was at the Ninth Circuit judicial conference; but if your Honor will recall, I was conscious of the fact that a United States attorney was going to make a presentation about the rights of victims and so we decided to try to head that off by seeking a venue that, as

I said in argument, was a reasonable short air flight from Oklahoma City; that is to say, Denver, where the transportation facilities would accommodate those interests. And the Court will recall that the United States Attorney made a tearful and empassioned speech with respect to victims' rights.

So after we had done that, after we made all our arguments, after we're committed, the Congress goes and passes this statute. Why does this statute violate the Constitution? First, it violates the equal protection clause as that is construed in Romer vs. Evans, 116 Supreme Court 1620. The

wonderful thing about Romer and Justice Kennedy's opinion is that it tells us that equal protection of the laws is not achieved through indiscriminate imposition of inequalities; that the desire to harm an unpopular group cannot constitute a legitimate governmental suppress.

This statute is like the constitutional provision declared invalid in Romer; that is to say, it is impossible to believe that this statute has any purpose other than hostility to the proclaimed desire of these defendants to have a trial free from the diversion of television cameras. This statute, unless that purpose be the other one, of contradicting what your Honor had said; that is to say, a resolute desire to enforce the provisions of Federal Rule 53, which the Tenth Circuit has just this week told us -- just last week told us means exactly what it says and what your Honor says it says.

The statute, in addition to having no legitimate governmental purpose, is utterly irrational. First, it burdens the defendant who seeks an interstate change of venue, although movement from one state to another penalizing that is itself suspect under the equal protection clause. It doesn't burden the defendant who wants a change of venue from Beaumont to El Paso, a distance of 888 miles. It doesn't burden a defendant who wants a change of venue, indeed, within a single district from Austin to El Paso, 683 miles, San Antonio to El Paso, 560 miles. It doesn't burden a defendant who wants a change of venue from Redding, a place for holding court, to Los Angeles, 546; Redding to San Diego, 690.

At the same time, your Honor, by saying that the out of state must be matched with the 350 miles, of course, had I known that the cost -- the cost to my client would have been by

seeking a change more than 350 miles -- would have been we had to have television, well, your Honor, there are some other venues I could have had out of state. The last case Mr. Woods and I tried a verdict was in Tarrant County, your Honor -- that's Fort Worth -- and our client was acquitted. Senator Hutchison. A Terrin County jury would be just fine for us; an Amarillo jury, your Honor, Judge Mary Lou Robinson; a Lubbock jury, Judge, Cummings, less than 350 miles, and that's a choice that we could have made.

But the statute -- see, the statute, first it says out

of state. Now, the out of state part we show is irrational because the fact is that within single states, you can have enormous distances and enormous differences that are based on those as between east and west Texas. By putting in the 350 miles, the statute also makes no sense because 350 miles can be exceeded by an intrastate transfer, and a distance of 350 miles has nothing whatever to do with the relative convenience of air transport; that is to say it is as inconvenient to get from Oklahoma City to Fort Worth as it is to get from Oklahoma City to Denver.

The statute makes no sense. The classification it establishes makes no sense. It denies these defendants, therefore, the equal protection of the laws. And what equal protection means is the protection that Rule 53 was in its inception and in the consistent course of Judicial Conference decision designed to confirm.

It is a protection which we cited in our brief to the Tenth Circuit that was a part of their mandamus decision noting that Rule 53 has been carried into effect in district after

district, including this one, by an express prohibition not only upon cameras in the courtroom, but upon the sort of studied evasion that the press was attempting to do and that your Honor wisely put a stop to.

So that is the point, your Honor. We cited Romer vs. Evans to the court, and we cited Yik Wo; but Justice Kennedy's

opinion, when read, I think makes our argument more eloquently than we could in our papers and, certainly, more fully than we did.

With respect to separation of powers, were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control. That's what Madison wrote in The Federalist No. 47. And he cited Montesquieu's Spirit of the Law, a treatise that was well known to the framers of the Constitution and which as has indeed, if Westlaw is correct, been cited some 13 times since 1945 in Supreme Court opinions dealing with separation of powers.

It is not, however, simply the abstract concern with separation of powers that motivates our argument. The fact is that all defense counsel had said that they did not want to risk a repeat of some media circus in this case no matter what the controls; so our position was clear.

Your Honor -- and I can recall it clearly -- had a shouted question that came at him in the Oklahoma City airport and had said that Rule 53 would be observed. A significant observation. I don't think a controversial ones. All courts that have looked at these matters, even in highly publicized matters, have said that Rule 53 means what it says.

And so this legislation was designed to tell your Honor, Judge Matsch, This is the Article I Congress people.

Hello, Article III Judge; this is how you're supposed to decide

the particular issue that is before you. Oh, and by the way, Judge Matsch, says the Congress, do that after the defendants have taken a position in reliance upon the law as it stood.

That, if the Court please, is directly contrary to the teaching of Plaut, it's directly contrary to the teaching of Klein.

The Government's response is interesting. I made the statutory interpretation argument in part because I believe that having drafted the statute, the Government has to live by it. The thorns which they have reaped are of the tree they planted; however, I also knew that the Government would come back and tell your Honor, as it predictably did, don't read the text of the statute. The text of the statute is only relevant when the legislative history is vague. That's not the way I learned the rule, but let's take the Government at its word.

The legislative history, say they, was designed to tell your Honor, and Article III judge, exactly how to rule on a pending issue in this case. And so the Government, in seeking to avoid the thrust of one of our arguments, has impaled itself upon the other. That, it seems to me, makes inescapable the conclusion that this legislation is invalid for those reasons.

And I turn finally, then, to the due process concern, which is slightly different from the equal protection concern but based on the same idea. All of us in this case have

striven, with a little mutual recrimination, to be sure -- but all of us have striven in the best way that we can to keep from making this case into a media circus. I think that we have been conscious of our professional obligations, although some of us have seen fit to do -- to try to discharge them differently; but the fact is we've all tried to do it.

And what we get for that is a declaration that this courtroom is to be subject to the paraphernalia of cameras, something that helps to turn the courtroom into something that the Supreme Court warned against in Estes vs. Texas and something that will make it much more difficult to have the atmosphere of dispassionate judgment that all of us here at one time or another have at least professed to want.

Moreover, the dangers attendant upon peopling -- or having the courtroom filled with microphones are ones to which I need not avert. They are ones that we averted to in our filing in the Tenth Circuit with respect to mandamus and which I think it is clear that the Tenth Circuit, following your Honor's lead, has already told us are of sufficient weight to have led that court to deny the mandamus last week and uphold your Honor's position.

For all of those reasons -- and since your Honor invited me to talk about the Constitution, I've done it -- but plus my insistence that the text of this statute means what it says, as the Supreme Court has often told us. We ask that the

Government's motion be denied.

THE COURT: Mr. Jones, are you speaking to this?

DEFENDANT MCVEIGH'S ARGUMENT ON CLOSED CIRCUIT TRANSMISSION

MR. JONES: May it please the Court, your Honor, when the Constitutional Convention finished its work in Philadelphia

and it required for its labors to bear fruit that nine of the twelve states must ratify it -- and, of course, we recall that New York was the pivotal state -- three of the members of the convention, James Madison, Alexander Hamilton and John Jay, wrote a series of essays that we have come to know as The Federalist Papers in an attempt to persuade the legislature of the State of New York to ratify the Constitution. And the heart of those Federalist Papers is, of course, No. 10; and in Federalist Paper No. 10, Madison and Hamilton and Jay set forth and addressed the principal concern that must have been in the minds of rural legislators in deciding whether to ratify the Constitution, and that is just how powerful would the new Federal Government be.

And they assured their audience that the new Constitution had within it two basic fundamental principles that would forever guide the new government and serve as a protection. The first of those was the concept of federalism, divided authority between the federal and state governments; but the second one is the one that Mr. Tigar references, and that is the separation of powers. In fact, Mr. Madison in

writing that particular essay went on to say the very heart of the machine to preserve liberty is to be found in the separation of powers.

Now, the issue before the Court cannot be one that the Court would invite. We're all familiar, we learned it in the first week in law school, that courts strive to avoid declaring an act unconstitutional. If there is some way to save the legislation, it is to be saved. If it is unconstitutional but its inapplicability can be determined on other grounds, courts

prefer that. And in some respect, I think that even arguing with this issue today is a vain and useless thing because from the state of the technology, I think it is clear that when we have the hearing -- if, in fact, there is one -- that the requirements that Congress passed on the security of the signal will be found wanting. If hackers can break into computers and signals of missile ranges and city electrical systems and all of the other things that we know occur, they can certainly break into this one.

But that's not the issue before us today. And this

defendants; and it might seem to be a peripheral issue, but it isn't. It goes at the very heart of the type of government that we have.

And we are asking the Court to do something that probably less than 50 federal judges in the entire history of

this country -- that is, below the Supreme Court level -- have done, which is to declare an act of the Congress passed almost

States to be unconstitutional. All the more difficult a challenge and invitation to this court, because this statute is aimed at your Honor. It's not only aimed at your Honor, it's aimed at a specific act that your Honor undertook on February 27 when you announced, as Mr. Tigar said, that there would be no television broadcasting from this courtroom. And in April, Congress decided to overrule your Honor. And if there is any doubt that they had specifically in mind overruling your Honor and talked about your Honor's ruling on the floor of the Congress, it can be found in the daily issues of The Congressional Record, and I'll be glad to give you the citation.

That is why we say -- and I am not going to repeat what's in the brief. We talk about those lofty principles --

and they are lofty -- bill of attainder and ex post facto and separation of powers. But there can be no more clear example of the interference with the judiciary's independence, authority, and authority than to take a decision that your Honor has made and overturn it by legislation. Not that your Honor's decision was wrong. Rule 53 is clear. Your Honor's decision was correct. And we invite the Court to find the gloss on Rule 53 that Justice Frankfurter found in the

Youngstown Sauer case involving the seizure of the steel mills by President Truman in 1952; that the Judicial Conference and the judiciary and Supreme Court have spoken so consistently and so uniformly in an unbroken record of 60 years that there will be no broadcasting of criminal federal -- federal criminal trials; that somewhere along the line that had to pass into an area uniquely controlled by the judiciary.

And as I have elsewhere, and I say it with all friendship for Congressman Lucas, a friend of mine -- and I've contributed to his campaigns and plan to do so again, have entertained him in my house; but he can no more tell you to put a television in this courtroom than you can tell him to put a television in his office.

It surely needs no elaboration. This is a political decision made by politicians who sought to seize the moment, and not even most of the victims asked for it.

So all of those reasons why we don't permit television cameras which are summarized at 381 U.S. 540 through 551 in Estes vs. Texas are applicable to the very issue here. But specifically, there are four points -- and I'll just mention them very briefly -- that trouble us about this act as applied

to this case. I won't go into the one that Mr. Tigar did except to say that, of course, it does discourage and burden change of venue motions that defendants must file. But leaving that aside, there are four others.

First, of course, there is no provision in this statute for the public and no provision for the families of the defendants, who certainly are inconvenienced through no fault of their own and have a compelling interest in attending this trial. But if we read the language of the statute itself, it does not apply to this case for the reasons initially submitted by Mr. Tigar, because it only applies where there is an out of state change in which the case was initially brought -- which clearly that is satisfied -- more than 350 miles from the location in which those proceedings originally would have taken place.

Well, the antecedent for the clause those proceedings originally would have taken place is the trial. This trial was never scheduled for Oklahoma City. It has been scheduled only in Lawton, Oklahoma and moved here. So even if there is a signal to be sent back, it has to be sent back to Lawton. There is no court order, no minute, no determination that this trial would ever be held in Oklahoma City.

Secondly, I adopt the argument Mr. Tigar made in his brief that under the plain wording of this statute, not even the 350-mile requirement is met. This statute requires the Court already burdened with the motions and the trial preparation to do three other things that it ordinarily would not have to do. Actually, four. First, the Court must determine the location. Secondly, it has to determine those

persons who have a compelling interest in doing so and are otherwise unable to do so by reason of inconvenience and expense. So that's the second and third finding the Court has to make.

And the Court has a fourth finding, and that is under paragraph 2, that you must determine for each of those individuals whether the testimony by that person, if they testified at trial, would be materially affected if that person heard other testimony at the trial.

We do not know how many people will seek to avail themselves of these proceedings; but if the public statements are correct that just the core, to use an overworked expression today, victims of 2200 -- let's just say that a fourth of them sought to avail themselves of this statute, the Court would have to determine the status of 550 people and the legislation gives no guidance to the Court whether it's an adversarial process, whether there is a public hearing, whether we have the right to challenge any of those people or whether Mr. Nichols has the right or, for that matter, the Government.

But let us suppose that there are more than 500. Let's suppose there is 5,000. We're going to have a Yankee Stadium setting much like the early days of Fidel Castro's republic with a giant television screen in which there will be several thousand, certainly several hundred people that might want to go there. And we all know that there are a certain

number of people that follow the firetruck to every fire. There are large number of people in this case who have sought to involve themselves in it, inappropriately so.

So how many of them are going to try to take advantage of this and come down and have their 15 minutes of fame or 7 1/2 minutes of fame to show that they're entitled to watch this? Because they have a claim?

And I'm not referring to those people -- I don't call them victims, I call them survivors. I think that's what they are and how they should be addressed who obviously have a very real and personal interest in attending these proceedings. But there is no way to work that to their exclusion -- I mean only to their inclusion.

Finally, there is another provision in this statute that is carefully drawn, which is very troublesome and that is the provision that says nothing in this section shall be construed -- and then it goes down to the second what I call double little (i), to provide any person with a defense in any action in which application of this section is made.

I have read the entire legislative history and could not find a single word in the Congressional debate or the conference committee report that interpreted that section; so I have to take it at its face value. And plainly what they're trying to do is to prevent us from raising an Estes vs. Texas argument on appeal. Having overruled your Honor and having

told you that you have to do it, if our client or Mr. Tigar's client is convicted, we can't raise that on appeal and that is the only issue upon which Mr. Estes got certiorari and got his conviction overturned.

So we respectfully submit to the Court that although this statute was introduced, I think, for blatant political purposes and in this case plays out against those on both sides and although many of the survivors have a legitimate concern and interest in this legislation, that in the final analysis, the truth of the matter is that this bar right here separates us from the mob. This side of the bar is the sanctuary in the jungle that Mr. Tigar talked about at the change of venue hearing; and anyone who doubts that with the slightest encouragement or inattention that that bar would be pushed down and that the vigilante system of justice would pervade this case simply does not understand what is at issue.

And in the final analysis, the only person, as Learned Hand says, that protects us in the spirit of liberty is the trial court. It's your Honor. You either shut the door or you open the door; and in this case, all of us know why this statute was passed. All of us know what is the issue here; and there must be -- and I submit there is in the brief -- adequate reason to declare it either unconstitutional or inapplicable as poorly written to the facts of this case.

THE COURT: Who speaks for the Government on this?

Somebody other than Mr. Connelly.

MS. BEHENNA: We decided to give him a rest for a moment.

THE COURT: All right.

PLAINTIFF'S ARGUMENT ON CLOSED CIRCUIT TRANSMISSION

MS. BEHENNA: Thank you, your Honor.

With the Court's ruling earlier, I will not discuss the implementation problems that Mr. Jones just raised.

THE COURT: That's right.

MS. BEHENNA: I will narrow this to the constitutional challenges raised by the defendants in this case. Mr. Jones made a comment that the victims have a legitimate interest in this case. I submit to the Court that they have a statutory right to view these criminal proceedings. In 1990, Congress enacted the Victims -- let me get the correct name here -- the Victims Compensation and Assistance Act. In that act, Congress recognized certain rights of victims of crime. One of those rights was to declare victims to have the right to view, to be present at all criminal proceedings in matters.

That interest --

THE COURT: Well, they have the right to be notified of them.

MS. BEHENNA: The statute provides they have the right to be present, your Honor.

THE COURT: Well, read that to me.

MS. BEHENNA: It states specifically at Item No. 4, rights of victims: A crime victim has the following rights . . . No. 4, the right to be present at all public court proceedings relating to the offense unless the court determines that the testimony of a victim would be --" and that's the 615 issue that the Court has previously raised.

THE COURT: All right.

MS. BEHENNA: That was provided for in 1990, long before the antiterrorism bill that was the subject of Section 235.

The interest that Congress has in providing for rights of victims was well recognized. Under an equal protection challenge, your Honor, the Court must determine, if in fact, it

finds the defendants are part of a suspect group or that Section 235 of the antiterrorism bill somehow burdens a fundamental right of the defendants -- the Court must find that there was no legitimate state interest in providing for the victims in this case; and I submit to the Court that that is not true.

Congress has a substantial interest in providing for the victims which began, as I mentioned earlier, in the 1990 enactment of the Victims Compensation Assistance Act. That interest in providing for the rights of victims was continued in the 1996 legislation providing for closed circuit TV for victims. It provides nothing more than expanding this

courtroom in situations where venue is changed outside a state to a distance of more than 350 miles from the district where the crime occurred.

As such, your Honor, it no more burdens a fundamental right of the defendant, nor does it -- nor is it irrationally related to some legitimate Congressional end. In fact, as I mentioned before, in fact, it is rationally related in a rationale for the previous enactments that Congress has enacted.

With regard to the separation of powers issue, your Honor, in Plaut vs. Spendthrift -- I can't even talk -- Spendthrift Farms, the Supreme Court specifically identified two types of legislation that is -- by Congress that it is an unlawful intrusion to the judicial branch. One of those types is where Congress attempts to tell the Court how to rule in a case pending before it. Specifically, the Supreme Court said it is unlawful for Congress to try and legislate in an area

that annuls a final judgment in a pending case. I submit to the Court that there is no final judgment in this case with regard to the closed circuit TV issue.

In fact, there is no invasion by the enactment of Section 235. Congress has always reserved the right to be able to manage criminal federal trials. Specifically, they have the right to legislate rules of evidence, they have the right to legislate sentencing provisions, and so forth.

The fact that Congress felt it necessary to provide for closed circuit TV in this situation is no more than managing a criminal trial, which the Congress already has the right to do.

The final argument raised by these defendants has to do with the broadcast and the prohibition under Rule 53. Continuously, the defendants argue that closed circuit television is unlawfully intruding into Rule 53 by telling this court that it has to provide closed circuit TV after -- in violation of Rule 53, which says that cameras in the courtroom.

Your Honor, I submit to the Court that the private broadcasts by closed circuit TV to the victims in Oklahoma City do not come to the level of an Estes vs. Texas public broadcast of criminal proceedings. It is to a very limited group for a very specific purpose. There is no violation in this case. There is no concern that somehow there will be a public broadcast of these proceedings which would interfere with the defendants' right to a fair trial. Such being the case, the analysis under the right to a fair trial, I submit to the Court, is wanting.

Your Honor, having stated this, Congress does have a legitimate interest in providing for the rights of victims to

be present during criminal proceedings; and noting that there is in separation of powers problem because the judicial branch or the Congress did not try to impermissibly invade the

judicial branch, Section 235 does nothing more than extend this courtroom to the victims in Oklahoma City, an audience which Congress has already determined has a right to be present during the criminal proceedings and to view these proceedings.

Such being the case, your Honor, the constitutional challenges raised by the defendants to Section 235 are not real, they're not substantial, and they do not weigh this statute and make it fail on constitutional grounds.

Any problems with the implementation of this statute regarding how many cameras, how many microphones, where they are going to be placed, are all issues that can be decided amongst the parties with the Court at sometime in the future. If the statute is constitutional on its face, which it is, your Honor, the Court must uphold Section 235 and provide closed circuit TV for viewing of the victims in Oklahoma City.

Thank you.

THE COURT: Any rebuttal on this?

MR. TIGAR: Briefly. Very briefly.

THE COURT: All right.

DEFENDANT NICHOLS' REBUTTAL ARGUMENT
ON CLOSED CIRCUIT TRANSMISSION

MR. TIGAR: Very briefly, your Honor. The argument that all the statute does is expand the courtroom is the same argument that Mr. Kelley made on behalf of the press: All he wanted to do was expand the courtroom. The problem is that

this form of expansion is regarded as significant.

With respect to the equal protection challenge, if the statute's purpose is to protect the rights of victims who would have difficulty getting to a trial, then it is seriously under-inclusive for equal protection purposes because the only criminal trial in the United States that it could possibly apply to is this one. It would be hard to name another one that it could actually now or in the future potentially apply to. And it does not apply, which proves its under-inclusiveness to intrastate changes of venue, which, as I told the Court, could be more than several hundred miles.

With respect to the Congress' power, we quoted the language from United States vs. Klein. Klein is a case in which there was not a final judgment. There had been a trial court judgment. It was on appeal. The court said, What is this but to prescribe a rule for the decision of a cause in a particular case; i.e. in which a judgment tentatively entered had not yet become final?

So for all of those reasons, your Honor, we respectfully suggest that the statute fails as a constitutional matter.

RULING ON CLOSED CIRCUIT TRANSMISSION

THE COURT: Well, on this I'm prepared to rule and do so. And of course, my focus at the moment is simply on whether the statute -- Section 235 is invalid on its face. And my

ruling is that it is not.

With respect to the particular challenges and my reasoning in support of this ultimate conclusion, I think it's

an overstatement to say, as the Government has just said, that the Congress has the power to manage criminal trials. It doesn't. It has the power to prescribe rules that the courts must apply in criminal trials as well as to prescribe sentencing and sentencing procedures.

I look at this statute not as requiring television broadcasting. That's not the issue. What it is in my reading is an amendment to Rule 53 and in a sense a proviso or exception to the general prohibition of broadcasting contained in Rule 53.

Now, is it special legislation? As of the moment of its enactment, obviously, this is the criminal proceeding that the Congress had in mind; but it is not, in my judgment, restricted to this case and might have applicability in the future. I don't know.

But Congress does have the power to pass the Rules of Criminal Procedure as it does to pass rules of evidence. Generally speaking, it's done in a cooperative way under the Rules Enabling Act with the participation of the advisory committees of the Judicial Conference, the Supreme Court, and then Congress; but this is not the first time that Congress has exercised its power without going through those other

procedures. It's done so on several occasions with respect to rules of evidence and most recently Rule 43, I believe.

Does it violate the separation of powers? In my judgment, it does not. This does not constitute, as I interpret the statute, an incursion on the judicial power of this court, nor does it interfere with the decisional authority of this court with respect to adjudication issues that are, of course, the responsibility of the trial court.

So this matter is not a part of the adjudicative process.

With respect to whether it constitutes a bill of attainder because it impacts particularly on these defendants, it doesn't fit the definition of bill of attainder that has been made in the Supreme Court and other courts, because this is not punishment. It's referred in the papers here as subjecting the defendants to the perils and penalties of telecasting, but this is not going to be telecasting in the sense of Estes and Chandler.

For the same reason, it's not ex post facto legislation because it is not prescribing punishment. And of course, I intend to see that application of the statute in no way affects the rights of the defendants in fundamental fairness.

That gets us to the fifth and Sixth Amendment arguments, due process under the Fifth, the fundamental fair

trial requirements of the Sixth Amendment; and of course, counsel for the accused have presented this possible parade of horribles about what can happen at a trial with television cameras and microphones and directors and zoom lens and all of those kinds of things.

Well, it's not going to be like that. The statute says very clearly -- and this is also one of the reasons why I think it doesn't violate separation of powers. The statute specifically provides that the signal shall be under the court's control at all times and shall only be transmitted subject to the terms and conditions imposed by the court. And in this case, there will be certainly a number of those restrictions.

With respect to the Court's burden to determine who views or who has the opportunity to view the television transmission, that is, of course, something that has to be decided; and the parties have the right to participate in that process.

Now, the Congressional purpose has the recitation that this is for victims, but the statute doesn't speak to victims. It says such persons the Court determines have a compelling interest in doing so and are otherwise unable to do so by reason of the inconvenience and expense caused by the change of convenience. So compelling purpose is not limited to victims or survivors. That's something that needs interpretation. And

we'll be doing that.

Reception of the signal is to be limited here. And the Government in its motion has suggested that it be to a courtroom configured as a courtroom and subject to monitoring and controls of a courtroom in the receiving place, just as with the transmission place, the place of trial. And that is what I'm suggesting.

What is the effect on the transmitting court, this courtroom? Well, I can tell you that we're -- what I have in

mind. There would be no visible television camera. A camera can be placed in the wall with a port that is not obtrusive; and also, we don't need a director, a program director because what the statute speaks to, in my judgment, is to give the persons at the remote place -- that is, the receiving place -- the same opportunity to see the trial proceedings as the persons who are present in the courtroom where the trial proceedings are taking place. And that, to me, means that they ought to have something that is the equivalent of a person seated here in the courtroom in the public area. So to my mind, that means a fixed focus, a panoramic view, if you will, a view of the well of the court, not the jury, probably, and no -- no movement of the camera, no focusing on speakers or witnesses or anybody else. You see the whole scene. That's what I call panoramic view. I don't know what the people in the business might call it.

With respect to what impact this might have, the awareness that this television signal transmission is taking place and it's being viewed by someone else, of course, with respect to a jury, it would be a subject of voir dire inquiry as to whether persons who are being considered for service on this jury would be influenced by that fact. That can be taken care of in voir dire.

With respect to its influence on the Court, I'll pass on that. I don't believe that's a problem.

With respect to its influence on witnesses and other participants, counsel, as suggested in some of the papers filed here, well, it isn't going to be any surprise to anybody participating in this trial that the proceedings going on here are receiving and will receive public attention; so I don't

think that there is anything in the possibility -- in the awareness that some people over in Oklahoma City might be viewing this that's going to affect in any significant way the conduct of the proceedings and the participants in it.

On the equal protection arguments that have been made, I think there is a legitimate Governmental purpose in providing for an opportunity for those who have compelling reasons to have this very limited opportunity to see the trial proceedings -- see and hear, I presume.

And I don't see here any burden on any fundamental right in the case, particularly in view of the controls that I

intend to exercise.

And I don't see that there is a suspect class or any invidious discriminatory purpose or any of those things that are customary in looking at an equal protection analysis; so we have a rational government purpose being served here.

Other issues that have been suggested here: A conflict with Rule 615. Rule 615 will be applicable in the receiving courtroom in the same fashion as in the trial courtroom itself. I don't intend for persons to view this who are also going to be witnesses in the case; so it will apply there as here.

The argument that it doesn't apply by its own terms because the state line of Colorado is within 300 miles of Oklahoma City -- I'm not persuaded by that argument.

And the argument also that Lawton is the place, not Oklahoma City, because the trial was never scheduled for Oklahoma City -- well, of course, the designation of Lawton was made at one time by Judge Alley, who found that the place of trial should be moved, found sua sponte, I guess, under Rule 18

21 Oklahoma City would be, I think he said, chancy. So the -- the

22 place in which this trial would be conducted, all other things

23 being equal, would have been Oklahoma City; and I believe the

24 statute should be interpreted to mean just that; that the

25 transmission would be to Oklahoma City.

1 Now, there are a lot of problems, given what I've said

2 about the terms and conditions and subject to control. These

4 they are. We have here the affidavit of this Dr. Welch from

5 southern California, University of Southern California, about

6 those problems. Well, we will take a look at that; and I think

7 that's something we have to hold a hearing on.

8 It is suggested that it is not possible technically to

9 make it so that this signal cannot be intercepted. I don't

10 know whether that's true or not true. We'll have to find out;

11 and so we need a hearing really on who is going to view it, how

12 we're going to determine that, what monitoring must take place,

13 what controls must take place. Certainly, there will be limits

14 on the numbers of people. I'm aware, having been there, of

15 some of the courtrooms in Oklahoma City. And of course, we'll

16 be using a courtroom, not an arena; and the seating facility --

17 the seating capacity there will be limited. And who is in the

18 courtroom representing this court is something to be

19 considered, because I guess as it is an extension of the trial

20 proceeding, so it is an extension of my authority.

21 The fact that we start and if in the course of the

22 proceedings trouble arises, I'll know what to do. The one

23 control that certainly is going to be required as a technical

24 control is an off switch within the reach of this arm, or this

25 arm, because I believe that the trial judge has to have the

capacity to stop the transmission at any time. And what we also need on the technology, the way I have understood it, is some monitoring of how this signal is proceeding so that there becomes some immediate awareness if there is a penetration and a pirating, if those are the words, of the signal. You may not be able to prevent that from happening, but you can become aware when it does happen and then exercise the authority to stop it.

So the ruling is that the statute is not unconstitutional on its face. We'll have to work it out.

Now, that leaves us with the need to conduct that type of a hearing at some convenient time. We have other matters that will have to be set as well in addition to what we already have set on the severance and a motion to be filed; and we, of course, have the whole matter of the laboratory and the forensic evidence. I don't know.

I know, Ms. Wilkinson, that you're the one who has previously addressed that, and I presume have been following it.

Have you any update on your report with respect to that?

MS. WILKINSON: I do, your Honor.

THE COURT: Please tell us.

MS. WILKINSON: I believe you asked the Government to check with the Inspector General's office to determine if they

could tell us when they would have the report ready and if they could not give us a date for the entire report, whether it

would be possible to extract certain portions which would be relevant to this case.

THE COURT: That was my request.

MS. WILKINSON: We did that and heard from the Inspector General's Office that they do not have a date certain when they will complete the report.

Their best estimate -- they gave us two different dates in November and December that they would complete the report. I believe that goes to the issue that the Court raised the last time I spoke about this issue, and that is that they have a much broader charter to investigate than this court is considering in this case.

THE COURT: Yes.

MS. WILKINSON: That being said, I thought it might help if I tell the Court briefly about some of the thing that they're looking into that don't involve this case directly. For example, they're investigating lots of other cases, as Mr. Jones brought to your attention, United States vs. Moody, which was the killing of the federal judge down in Georgia. They're looking into that case and other specific cases.

But in addition to those other cases that don't involve United States vs. McVeigh and Jones, they're also looking at the general protocol, procedures -- I'm sorry -- did

I say Mr. Jones?

THE COURT: Yes.

MS. WILKINSON: Freudian slip.

MR. JONES: I take it I'm no longer free to go.

THE COURT: Do you want a lawyer?

MR. TIGAR: Could we have judicial notice of what's

just been said here?

MS. WILKINSON: I apologize, Mr. Jones.

The other thing is the Inspector General is looking into are the procedures, the protocol and the management of the laboratory in general and I believe -- although, again, we are not privy to their final conclusions because they haven't made any -- they're going to make recommendations in the report about management of the FBI laboratory as a whole.

That being said, I believe the best way for us to proceed is to schedule the hearings. And I say that for two reasons. One is because we have provided the underlying data that the Inspector General is using in his conclusions; that is, the investigate -- the investigatory reports. And we are in the process of providing transcripts when they were taken or when they were recorded, when the interviews were recorded, to the defense, that apply in this case.

We also are working with the criminal division, which is the portion of the department that has direct contact with the Inspector General's office in terms of the Whitehurst

investigation; and we are also receiving any expert reports written by the Inspector General's outside panel of experts in connection with this case or in connection with conduct of examiners as it relates to this case.

Based on that information and our continuing obligation that we understand to provide that type of information to the defendants, they will have access to the same raw data that the Inspector General will in attacking our experts.

That is important because we believe that is the

ammunition that the defense will need to challenge the credibility of the experts and challenge the evidence itself that we would like to introduce.

The report, the conclusions that the Inspector General makes, would not, we believe, be admissible in this courtroom, especially in the preliminary 703 hearings where the Court is making a determination whether this -- each specific expert that the defense challenges is admissible for the jury. Again, you're not going to make a determination as to the weight of the evidence. It's just as to whether this expert is truly qualified to make the determination that we ask the Court to introduce.

So for those reasons, we don't believe that the Court should wait for the report nor that the defense needs that report to fairly and thoroughly attack the Government's experts

or challenge their credibility or their expertise.

Another reason, your Honor, why we believe we don't need to wait for the report is over the past year, we have been providing the laboratory reports to the defense counsel. They know in large part who our experts are from the FBI laboratory, to ensure that they know all of the experts that we're going to introduce and all of the conclusions that we currently intend to introduce. And, of course, we would always inform the parties and the Court that we reserve the right to introduce additional expert testimony. Depending on the challenge of the defense and depending on the -- how our experts testify at trial and how the evidence develops, we will provide the Rule 16 material to the defense which would outline each expert's credentials and outline the general findings that we intend to

affirmatively introduce in court. We will reference the laboratory reports that they have so that they'll be able to easily go back and check that they have the reports and they have the underlying facts that the expert will testify to.

We told the Court several weeks ago that we would do that by August 30. We have reevaluated. And if the Court is willing to schedule the hearings at an earlier date, we are willing to provide that material by -- August 2 is the earliest date we think we could possibly do it for the defense. And if the defense needs several weeks to evaluate that to make the challenges, they could do that during the month of August.

We believe again, your Honor, that they have had most of this material for quite some time. It's not as if we have not turned over the lab reports throughout the case. They know what the major findings are that we intend to introduce.

However, for them to properly evaluate it, we would recommend that they would have three weeks in August to review those materials, the Rule 16 material. Then they would give us their challenges. We are not sure at this point whether they're going to challenge every single expert that the Government intends to introduce. As I mentioned before, there is a fingerprint expert. I can't imagine under Daubert that they would challenge the reliability of fingerprint testimony and I can't imagine that they would challenge the fingerprint experts in this case based on the Whitehurst materials because there are no challenges to the fingerprints section in the laboratory.

And there may be reasons, your Honor, that the defense does not want to, for tactical reasons, challenge other experts in a preliminary hearing because they may believe they have

some --

THE COURT: Yes.

MS. WILKINSON: -- advantage.

We would ask that the Court then schedule the hearings, giving us just two weeks once we receive the defense's challenges; and we would present all the experts that

the defense challenges and try and establish their expertise and credibility.

MR. JONES: May I respond?

THE COURT: Yes.

MR. JONES: Ms. Wilkinson's suggestion is unacceptable for the defense, and it represents an attempt to rush to judgment on the weakest part of their case, which is the forensic evidence.

I want to go down each one of those points she's made. The reason they want to rush to this hearing is because the more we investigate, the more we find out, notwithstanding the tremendous obstacles placed in our path, the more we know that the FBI forensic laboratory as it relates to the important point in this case is the emperor's new clothes. First of all, there isn't any reason to wait till August 2 to give us anything. We have asked for this material from the FBI laboratory since November of last year, specific motions served on them, which they have never responded to.

They give us lab reports in which the person that did the work is not known to us until, finally, we insisted that we be given some kind of explanation who this person or persons is. It contains absolutely no quantitative data, which is absolutely essential to determine the credibility. There is

nothing provided to us that relates to the contamination of the laboratory. We have no protocols. We don't know how the

laboratory does this or that. And we will shortly, thanks to the Court's granting certain 848 -- we know a little bit more about what they've been doing than we knew three weeks ago.

And we are preparing a detailed Rule 16 motion to the Court to get it all, because our experts, who include some of the world's most famous, well-recognized law enforcement people, who are familiar with the laboratory, far more familiar than I am, have told us how it operates and what we're entitled to see in order to properly defend our client.

And they will sign affidavits and if necessary come to this court and tell you why we need that material. What they want to give us is the tip of the iceberg.

For example, these transcripts, which they say they can give us August 2, they have now. They've had for months. We have asked for them for months.

What we have received are small snippets which the Court has under seal relating only to this case. And they said, Well, the Moody case doesn't relate to this case. Of course the Moody case relates to this case. If nothing else, it relates on the basis of contamination, because that is one of the central criticisms that has been made under seal with this investigation. They don't want us to get a copy of the report of the five experts or the Inspector General, because the report is going to be devastating to their position. They want to single out that part of it and give it to us.

Now, the Court may say that's all we have to get; but what we want to have the opportunity to do is to tell the Court and in an adversarial proceeding, if necessary, why we are entitled to more than what is being offered. I represent to the Court, having spent two weeks flying various places, that what they're willing to give us isn't going to get the job done and is a carefully controlled selection so that we can't get at the heart of it; that this forensic heart does not inculpate our client.

And that's just one of the discovery problems. We are still negotiating with the Government. Two weeks ago we gave them a 50-page letter -- I say two weeks ago, perhaps two and a half weeks ago -- so that we don't burden the Court with that; but this question of the FBI laboratory is critical to the defense. And in view of the extraordinary investigation, in fact, unprecedented investigation going on in the lab in which you have to bring in outside experts and the Inspector General, it seems to me that that part is exculpatory. We're entitled to it. It's the cornerstone of our defense, your Honor.

And most importantly, Ms. Wilkinson and some FBI agents went not too long ago to interview General Bernard Parton. General Parton is a retired general of the United States Army who has written a rather significant report challenging the basic thesis of the Government's case. He's not our expert. They went to interview him. We haven't been

able to interview a single FBI agent in that lab despite repeated written requests.

I think at the appropriate time we're going to ask the Court -- and in fact, I invite the Court to issue the order

today -- that we be permitted to interview Frederic Whitehurst forthwith, James Colby forthwith, and every one of those other FBI agents that are involved in that investigation to find out what they know about contamination of the lab as it relates to this case and the works of Martz and Thurman. There is no reason why we can't interview those people, and they have prohibited us from doing so; and yet they come before the Court and say we're going to give them everything they need.

Well, fine. We want to interview Special Agent Whitehurst and these other nine agents.

THE COURT: Mr. Tigar?

MR. TIGAR: Your Honor, I don't understand the Government's offer. If the Government has a proffer of expert testimony to make, it should make it. When it has made it, we will be in a position to tell the Court within a very few days how much time we reasonably need to respond to it and to prepare for a hearing.

Ms. Wilkinson's fundamental premise with which she began is completely in error. The report of the Inspector General with respect to the Whitehurst matter under Federal Rule of Evidence 803(8)(c) would be admissible if we offered it

but not if the Government offered it. It is a report prepared under lawful authority, factual findings resulting from an investigation made pursuant to authority granted by law.

The Government can't introduce it, but we can in a criminal case. So I fail to see how that could be irrelevant to us.

We may very well ask the Court when we see this to wait until that report is available; but I can't tell you right now.

Another example: At the last hearing, Ms. Wilkinson said that the Government had retained an entomologist, and I thought the only bugs in the case were ones on people's telephones. But Mr. Nigh wrote and found out that the entomologist is examining crank case drippings at the Geary State Fishing Lake and their impact on insect colonies there, and that will help them to date things. I don't know how long it will take us to find somebody who is equally enthusiastic about insects or even if the Government intends to introduce its entomologist.

I would suggest if the Government has its proffer that it present it; that within a week from that time, we will tell the Court how much time we reasonably need to get ready for a hearing.

I will say to the Court that the American Bar Association meeting is the first week in August. I don't know

if the Court intends to be there. I've been invited to give a talk there, and I intend to do it.

THE COURT: I don't intend to be there, for your talk or any other.

MR. TIGAR: I understand that, your Honor; and I wanted to warn you just in case you were thinking of going there. But it's in Orlando; and my daughter voted that I go there, and so therefore there will be two Mickey Mouse events, my talk and then our visit.

And then if the Court please, unless the Department of Defense decides to enforce the don't-ask/don't-tell policy, I have a general court marshal for Major Deborah Meeks that starts the 12th of August, a pro bono case; and I can't escape

that obligation. But we can get to your Honor promptly some report on when we'd be ready for a hearing, which will be with all the speed we can muster.

But I think the first thing Ms. Wilkinson has to do is to stop describing what they're going to do and then do it, and then we'll see what our response should be.

THE COURT: Well, actually, there are some other things that I want to deal with with counsel on scheduling. Now, I'm going to do that in chambers. It's not, Mr. Kelley, a part of the adjudicative process. It is by way of doing some things with respect to planning and scheduling that I think legitimately are not public at this time.

So what I'm going to do is recess and reconvene at 4:00 in chambers.

Mr. Kelley?

MR. KELLEY: Your Honor, I was not standing to object to the chambers conference. Could I be heard for less than a minute?

THE COURT: Yes.

MR. KELLEY: We would ask your Honor, along with the other rulings that are under advisement, as soon as possible a ruling on our motions to unseal exhibits and in particular for access to the 302, which we believe is Exhibit A1, and Exhibit 72.

THE COURT: Well, you know, that follows upon the ruling with respect to whether it will be suppressed.

MR. KELLEY: Just one thought: Your Honor's comments on what the Court would do if the evidence is suppressed didn't sound good for public access. There is a growing impression, I think, that those documents contain something highly

inculpatory which is not known to the general public, which I think is itself prejudicial misimpression.

THE COURT: Well, we're not trying this case in the interests of your clients.

MR. KELLEY: I understand that. But as I understand, as best I can tell, those exhibits contain information that is central to these hearings but not significantly in excess of

what is already in the public domain.

THE COURT: You'll get a ruling in the fullness of time.

MR. KELLEY: Thank you.

THE COURT: All right.

MR. JONES: Your Honor, did you contemplate the defendants would be present?

THE COURT: Yes, I do.

MR. JONES: Thank you.

THE COURT: We'll recess, reconvene at 4:00.

(Recess at 3:45 p.m.)

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REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Dated at Denver, Colorado, this 15th day of July, 1996.

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Paul A. Zuckerman