14756

1 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
2
Criminal Action No. 96-CR-68
3
UNITED STATES OF AMERICA,
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Plaintiff,
5
vs.
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TERRY LYNN NICHOLS,
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Defendant.
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REPORTER'S TRANSCRIPT
10 (Trial to Jury: Volume 142)

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12 Proceedings before the HONORABLE RICHARD P.
MATSCH,

13 Judge, United States District Court for the District of

14 Colorado, commencing at 9:00 a.m., on the 24th day of
December,

15 1997, in Courtroom C-204, United States Courthouse,
Denver,

16 Colorado.

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24 Proceeding Recorded by Mechanical Stenography, Transcription
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1 APPEARANCES

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4 City, Oklahoma, 73102, appearing for the plaintiff.

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6 MEARNS, JAMIE ORENSTEIN, and AITAN GOELMAN, Special Attorneys

7 to the U.S. Attorney General, 1961 Stout Street, Suite 1200,

8 Denver, Colorado, 80294, appearing for the plaintiff.

9 MICHAEL TIGAR, RONALD WOODS, ADAM THURSCHWELL, REID

10 NEUREITER, and JANE TIGAR, Attorneys at Law, 1120 Lincoln

11 Street, Suite 1308, Denver, Colorado, 80203, appearing for

12 Defendant Nichols.

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14 PROCEEDINGS

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

16 THE COURT: Be seated, please.

17 Good morning.

18 MR. TIGAR: Good morning.

19 THE COURT: There was filed earlier this morning a

20 motion of the defendant to preclude a sentencing hearing

21 pursuant to 18 United States Code Section 3591 on grounds of

22 collateral estoppel.

23 Also filed earlier this morning is a report of the

24 United States regarding sentencing allegations.

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

1 December 22 -- renewed motion of Terry Lynn Nichols to strike

2 the notice of intention to seek the death penalty.

3 So I believe those go together. But I assume that

4 you've exchanged these new pleadings that were filed.

5 MR. TIGAR: Yes, your Honor.

6 THE COURT: All right. And I've reviewed them, so

7 we're ready to proceed.

8 The Government's report regarding sentencing

9 allegation, I guess, in a sense, is an amendment to the notice

10 of intention to seek the death penalty and eliminates some of

11 the -- well, it eliminates 3591(a)(2)(A) and (B) as intent

12 factors and then also modifies the aggravating -- statutory

13 aggravating factor.

14 So Mr. Tigar, we'll proceed on your motion to preclude

15 a sentencing hearing. And if you want to also address the same

16 matters that are in the renewed motion to strike, you may, of

17 course, do so.

18 ARGUMENTS RE SENTENCING HEARING

19 DEFENDANT'S ARGUMENT

20 MR. TIGAR: Well, if your Honor please, the Court on

21 September 25, 1996, described the procedure that would be

22 followed in the event of convictions in this case. And at page

23 15 of your Honor's opinion, you said that the jury will proceed

24 in a sequential manner, first determining whether the

25   Government proved one of the four intentions described in

1   Section 3591(a)(2)(A) through (D). And then the Court said --

2   and followed this up with instructions in the McVeigh case --

3   that if the jurors are not unanimous in finding that one of

4   these intentions existed, their task is complete and the Court

5   will sentence according to the sentencing guidelines.

6   Thus, the threshold issue is whether or not the

7   Government is precluded at this procedural hour from going to

8   the four intentions that are described in 3591(a)(2)(A) through

9   (D).

10   This morning, in a notice of intention -- excuse me --

11   in a report to the Court, the United States has withdrawn from

12   (A) and (B), leaving (C) and (D).

13   THE COURT: Right.

14   MR. TIGAR: Now, it is well settled that different

15   stages of a bifurcated proceeding require the Court and

the

16   parties and a jury, if there is one, to give full respect to

17   and effect to findings made by the jury in the first part.

18   That is a rule that applies both in civil and criminal cases.

19   For example, in the case of Butler vs. Pollard, in 800

20   F.2d 223, Judge Lee West down in Oklahoma had tried a case that

21   involved both legal and equitable issues.

22   Under Beacon Theaters vs. Westover, Judge West tried

23   the legal issues first to a jury, resulting in a defense

24   verdict and findings. He then said that despite that, he

25   thought the plaintiff was entitled to an injunction and went

1   ahead and issued findings and issued an injunction. And the

2   Tenth Circuit in the case cited said that preclusion applies to

3   prevent that.

4   In criminal cases, of course, the doctrine has a

5   constitutional dimension. In Ashe vs. Swenson, the

case that

6 we cite, the Court told us how this is supposed to work.

7 You'll recall that the defendant there was charged with the

8 robbery of six different people and the theft of a car as a

9 result of a card game. He was acquitted of the first count

10 with respect -- on the first trial with respect to the first

11 victim, and the state sought to retry him with respect to the

12 second victim. The Supreme Court said no; that using the

13 analysis, that is not just the jury's verdict but looking at

14 the whole record, it was clear that the jury's acquittal with

15 respect to the first victim established facts that were

16 inconsistent with the Government's theory in the second case.

17 That was followed up by the Supreme Court's decision

18 in Simpson vs. Florida. In Simpson, which is at 403 U.S. 384,

19 Simpson was convicted of robbing a manager of a store and a

20 customer in the store. His conviction for robbing the manager

21 was overturned. He goes back, he's tried again for robbing the

22 customer, and then the state wants to prosecute him

again for

23 robbing the manager; held no, you can't do it; that is to say

24 that the jury's finding necessarily implicates the finding that

25 he didn't commit a robbery while he was in the store.

1 This doctrine, which is -- starts in Ashe, has special

2 application to capital cases as the Supreme Court held in

3 Bullington vs. Missouri. These are cases that are cited in our

4 memorandum.

5 But the point here is that the jury in this case has

6 found guilt on Count 1, in which there was no requirement that

7 they find an intent to kill and in which the Court specifically

8 instructed the jury that even minor participation would be

9 sufficient.

10 Then the jury found that the defendant had only that

11 mental state described as sufficient for voluntary -- or

12 involuntary manslaughter at page 20 of the Court's

13   instructions, which is a lawful act done without due caution

14   which might produce death and the defendant knew that such

15   conduct was a threat to the lives of others, essentially a

16   negligent or gross negligence standard.

17   In addition to that, the jury, having convicted on

18   Count 1, acquitted on Count 2 and 3. The significance of the

19   acquittal on Count 2 is that Count 2 is under the identical

20   statute, 2332a, except that it proceeds on an aiding and

21   abetting theory and not on a conspiracy theory. And when we

22   examine the jury's work, we can also examine the notes that the

23   jury sent on this. But the Court affirmed at page 20 of the

24   instructions that the defendant had to participate in the

25   conduct and seek by his actions to make it succeed. Those are

1   two of the four elements of aiding and abetting at page 20. So

2   the jury acquitted on that.

3 Now, using that as a backdrop, let's turn to the

4 question of how in the world the Government is going to have

5 a -- a trial here about 3591(a)(2). "Intentionally

6 participated in an act contemplating that the life of a person

7 would be taken or intending that --" legal "-- lethal force

8 would be used in connection with a person." That standard is

9 inconsistent with the jury's acquittal on Count -- on

10 first-degree murder and second-degree murder.

11 There are cases, like Schiro vs. Farley, in which the

12 jury doesn't fill out the verdict form -- and it might have

13 happened here. The jury would simply leave blank the first-

14 degree and second-degree and they'd go right to involuntary

15 manslaughter. Here, they didn't. They acquitted the defendant

16 of all forms of intent-to-kill homicide, including implied-

17 malice homicide under second-degree murder, the common-law

18 doctrine that intent to kill can be shown by a certain kind of

19 wanton disregard.

20 That, by the way, we take not only as a statutory

21   guideline, but we've cited again Enmund and Tison; that is, the

22   Court is making a decision here at the juncture of two

23   important constitutional provisions. There cannot be a death

24   sentence without proof of major participation and an intent

25   that rises at least to the level of second-degree murder,

1   depraved-heart murder, which is the Model Penal Code equivalent

2   of old-fashioned second-degree murder or malice aforethought.

3   Turning then to (D) -- The second of those

4   constitutional provisions, of course, is this double jeopardy

5   notion, which while the contours of the right are clear, what

6   we're talking about is not something that can be corrected

7   afterwards: go through a trial, hear 120 witnesses, many of

8   whom have already given press conferences saying that they

9   despise this jury's verdict and they don't like it and so on,

10   putting the families through the trial, both the families, to

11 testify for the prosecution and Mr. Nichols' family and

12 afterwards say, well, let's take a look at it.

13 The double jeopardy issue says that Mr. Nichols now

14 has a right not to face this prospect at all because the jury's

15 verdict in the first phase is preclusive.

16 So now we come to (D), intentionally and specifically

17 engaged in an act of violence, knowing that the act created a

18 grave risk of death to a person.

19 Now, the Government's difficulty with attempting to

20 rely on this is twofold: First, the defendant has to engage in

21 an act of violence, not contemplate it, not agree to it. He

22 must engage in it. And the jury has acquitted the defendant of

23 engaging in every act of violence that was charged in Counts 2

24 and 3 of the indictment.

25 The jury has also acquitted the defendant of the

1 mental element that's covered under (D).

2 So what we have here, your Honor, is a

situation in

3 which the threshold finding simply cannot be made.

4 Now, when your Honor wrote the opinion back in

5 September of 1996, I don't know that any of us contemplated

6 exactly what procedural situation we would face. But the Court

7 in that process -- that opinion and its earlier one -- did hold

8 that intent to kill was not going to be required for proof in

9 Counts 1, 2 and 3. It would, of course, be required in Counts

10 4 through 11, and that the Court also recognized that

11 essentially the process of capital sentencing is a three-phase

12 process in the second half. The first phase is that if any one

13 juror -- if you put it to the jury -- says, well, we just don't

14 find beyond a reasonable doubt one of these four things, the

15 process is over, the jury goes home, which is why we have the

16 alternative proposal, since there doesn't appear to be new

17 evidence here with the exception of something we'll get to, if

18 we need to, about Brady issues.

19 We ask the jurors: Does any one of you think that

20 they haven't proved that beyond a reasonable doubt? If

so,

21 we're done; that is to say, do as Judge Berrigan did and

22 bifurcate the bifurcation so as to avoid the spectacle. But

23 that's only alternative relief. The fact is these are

24 threshold findings. The Government repeatedly referred to them

25 as "gateway findings." If the Constitution and the finding of

1 the jury, which the Government says it fully accepts, prevents

2 that gateway from being crossed, then that's the end of the

3 matter.

4 Interestingly, your Honor, the Government has conceded

5 that this is so; that is, I thought I was going to have to come

6 in here and argue to the Court that your Honor has a power that

7 the Government would say your Honor does not possess to stop

8 this thing right now. But I don't have to, because the

9 Government -- albeit in a procedurally defective report which

10 I'll get to if we need to -- has withdrawn any reliance on (A)

11   and (B), no doubt in some interpretation of the jury's verdict.

12   Thus, your Honor's power to intervene here has been conceded by

13   the Government; that is to say, the Government recognizes that

14   it cannot put itself in the position of walking up to that jury

15   rail there or standing here and saying: Well, members of the

16   jury, it was all very nice these three months, but we think you

17   did a bad job here and now we want you to find something that

18   you didn't find. Nobody in the process is free to do that.

19   And so if the Court please, we respectfully submit

20   that the jury's verdict is binding and it is conclusive; that

21   is to say that it fails as a matter of the Eighth Amendment to

22   establish a Tison/Enmund threshold and fails as a matter of

23   statutory interpretation to give the Government any comfort and

24   indeed amounts to a finding of reasonable doubt that precludes

25   the Government as to every single one of these elements.

1 Now, that is our argument, your Honor, with respect to

2 the first phase.

3 We also have an argument with respect to the second

4 phase. I can withhold that, or I can go on now.

5 THE COURT: Meaning the aggravating factors?

6 MR. TIGAR: Yes, your Honor. With respect to these --

7 the adequacy of the Government's notice and the aggravating

8 factors.

9 THE COURT: Well, let's withhold that and talk about

10 3591(a)(2)(C) and (D). Then we'll come to that if necessary.

11 Mr. Connelly, are you going to address this?

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

13 THE COURT: All right.

14 PLAINTIFF'S ARGUMENT

15 MR. CONNELLY: The jury found in Count 1 of the

16 indictment beyond a reasonable doubt that Terry Nichols had

17 conspired to bomb the Murrah Building and the persons inside.

18 They further found that that crime of conspiracy resulted in

19 the deaths or at least one death of another person, and

they

20 further found that those deaths were foreseeable.

21 The jury found in Counts 4 through 11 -- or failed to

22 find that he had acted with intent -- premeditated intent to

23 kill or malice aforethought for second-degree murder.

24 Tison and Enmund -- the Supreme Court's decisions in

25 Tison and Enmund cases hold that a felony murderer -- which, in

1 effect, this is a felony murder; it's a felony that resulted in

2 deaths of others, foreseeable deaths of others -- may be

3 sentenced to death even though he personally did not commit the

4 act and even though he personally did not intend to kill. And

5 that, we would submit, is a fair reading of what the jury found

6 in Counts 4 through 11.

7 The question therefore is where in this spectrum of

8 intent would the jury find that Terry Nichols acted. And there

9 is no finding on that. They found on the one hand that he

10 foreseeably caused the deaths of others. They found on the
11 other that he personally did not intend to kill. Tison and
12 Enmund says there is an in-between area in which the death
13 sentence can constitutionally be imposed; and those, we submit,
14 are, in effect, the intent elements in Section (C) and (D) of
15 3591(a)(2).
16 We are entitled, your Honor, to ask the jury to make
17 those findings. Those findings have not been made. We agree
18 that under the doctrine of collateral estoppel applied in
19 criminal cases that if the defendant proves or carries the
20 burden -- and it is his burden of trying to preclude the
21 Government from going forward in the case -- if he shows that
22 the jury necessarily decided an issue adversely to the
23 Government that we would not seek to relitigate that. And we
24 accept that even on intent to kill. So we are not seeking to
25 relitigate did he intend to kill the persons inside the Murrah

1 Building. We are entitled, however, to ask the jury to find
2 that the deaths that they found were foreseeable, were the
3 result of a callous and wanton action taken with reckless
4 disregard for life. And that finding has not been made
5 adversely to the Government by any of the jury verdicts.
6 And again, I think it's hard it to read these verdicts
7 in some ways. The Supreme Court has made clear that the jury
8 has the right to return inconsistent verdicts and that -- that
9 fact may be the result of compromise, may be the result of a
10 lot of other reasons, and it's not for any of us to speculate
11 as to why the jury returned the verdicts they did. The
12 question is did the jury necessarily find that the Government
13 did not prove the intent elements set forth in Section
14 3591(a)(2)(C) and (D), and we submit they clearly did not
15 because that question was not submitted to them.
16 THE COURT: What's the definition of an act of
17 violence under (D)?
18 MR. CONNELLY: I think 18 U.S.C. Section 16

talks

19 about "crime of violence"; and the Tenth Circuit just a couple

20 of months ago in the Lampley case said that a conspiracy to

21 build an explosive device was a crime of violence. And that's

22 a case out of eastern Oklahoma and decided in October of '97.

23 So the Tenth Circuit did say that a conspiracy -- the same type

24 of conspiracy that this defendant is charged with -- I think in

25 that case was to blow up a building in Houston that never

1 proceeded to fruition, but there was a conspiracy to use and

2 build an explosive device. The Tenth Circuit said that is a

3 crime of violence within the meaning of the statute.

4 I don't think "act of violence" is specifically

5 defined; but 18 U.S.C. Section 16 does define "crime of

6 violence." And I think that the case law is clear in this

7 circuit and elsewhere that this type of conspiracy is an act of

8 violence.

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

10 to the jury?

11 MR. CONNELLY: That the -- well, there are different

12 stages of argument, obviously --

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

14 MR. CONNELLY: As to the intent, that he engaged in a

15 conspiracy to bomb the Murrah Building and the persons inside;

16 that that was an act of violence and that it was undertaken

17 with wanton and reckless disregard for human life such that the

18 death penalty is appropriate; that the jury need not find

19 intent to kill; that they can find this in-between element.

20 They found, as I said, on the spectrum that the crime

21 foreseeably resulted in death. They have found, on the other

22 hand, that he did not premeditate and intend the death of these

23 persons, so there is that -- that in-between area, that Tison/

24 Enmund area that still remains open and a matter to be

25 litigated.

1 THE COURT: Let's assume -- because it does seem to me

2 fair reading here -- that the jury may have believed in

3 determining the elements of the offenses here as they did that

4 Mr. Nichols participated with Mr. McVeigh in a conspiracy; that

5 the objectives were as described but that -- in the indictment

6 but that the objectives were not so specific as would be

7 specifically to the Murrah Building.

8 MR. CONNELLY: I guess we could all speculate as to

9 what they found. The indictment --

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

11 MR. CONNELLY: Okay.

12 THE COURT: And therefore that Mr. Nichols' intent was

13 to participate in the construction of a weapon of mass

14 destruction, expecting that Mr. McVeigh and/or others would use

15 it but did not have the specific intent that it be used against

16 the Murrah Building but that it be used as an act of terrorism

17 as we have defined it, and that is to intimidate or coerce a

18 government.

19 Now, if that be the approach, does that meet
20 subsection (C) and (D), intent?
21 MR. CONNELLY: I think it does. And I will, of
22 course, accept the Court's premise. I don't think that's a
23 necessary reading. I think the burden is on the defendant to
24 show that they necessarily decided that way. I agree that
25 could be a reading.

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

9 that here again it doesn't have to be a specific target.

10 MR. CONNELLY: We know from the jury finding that they

11 found that the crime that they did convict him on foreseeably

12 resulted in death. So it was foreseeable. So the question is

13 on top of foreseeing that death resulted, could he have

14 contemplated -- or not could he have: Did he contemplate that

15 death would result? And I would submit that that is not a

16 finding that's necessarily been made by the jury.

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

18 MR. CONNELLY: It does not have to be; and then,

19 certainly, when you get down to (D), you talk about "such that

20 it created grave risk of death."

21 THE COURT: "Grave risk of death."

22 MR. CONNELLY: And I think that anybody that

23 participated in that kind of explosive device that the jury

24 found he conspired to build, foreseeing that death resulted, I

25 think it's a fair inference to ask the jury to find that he

1 knew that there was a grave risk of death presented by that

2 conduct. So I think that, certainly, what we're asking to go

3 to the jury on in the sentencing phase is consistent, fully

4 consistent with what they've already found and certainly is not

5 precluded by anything that they have found adversely to the

6 Government. So I think as a matter of Ashe vs. Swenson or

7 collateral estoppel that we are entitled to go forward.

8 I would point out -- I've accepted the Court's

9 premise, obviously, of what they might have found; but the

10 instructions on page 8 of the instructions say what the

11 Government must prove is that the defendant, Terry Lynn

12 Nichols, and at least one other person did knowingly and

13 deliberately arrive at some type of agreement that they and

14 perhaps others would use a weapon of mass destruction against

15 the Alfred P. Murrah Building in Oklahoma City and the persons

16 in it. So I think assuming the jury followed the instructions,

17 as I think the case law requires us to do -- I think the jury

18   found more than what the Court is postulating they may have

19   found. But even assuming they only found what the Court says

20   they may have found, I think that's sufficient under Section

21   (C) and (D) to go forward.

22   THE COURT: Okay. Mr. Tigar?

23   DEFENDANT'S REBUTTAL ARGUMENT

24   MR. TIGAR: The Government invokes the felony murder

25   doctrine. Five times in this court, the Government has

1   deliberately disavowed felony murder as a basis for proceeding

2   here. And now they want to revive felony murder as a basis for

3   going forward into a penalty phase.

4   The Government is precluded. They've never alleged

5   felony murder. They've affirmatively led us to believe that

6   this is not a felony murder case; and therefore, any such

7   theory has got to be set aside.

8   And to claim that involuntary manslaughter can be

9   somehow assimilated to felony murder, of course,

completes

10 the -- what we'd submit is the absurdity of Government's

11 position.

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

13 In Ashe, there were six victims. In Simpson, there

14 were two victims. The fact that this jury found no intent to

15 kill with respect to any of the eight victims in Counts 4

16 through 11 necessarily implicates a finding that Mr. Nichols

17 did not possess the intent to kill with respect to anybody else

18 that was killed in the Murrah Building or near it or by that

19 device. That is the rationale of Ashe vs. Swenson. There is

20 only one transaction here. The transaction is the alleged

21 construction of a bomb. We know a bomb was constructed. The

22 question is what is Mr. Nichols' role.

23 Given the fact that there is a single transaction just

24 as in Ashe, you can't divide up the intent into geographical or

25 temporal phases and get away from the proposition that this

1 jury acquitted Mr. Nichols of first-degree and second-degree
2 murder.
3 THE COURT: Well, by your interpretation of the jury's
4 findings, though, they couldn't have found him guilty of the
5 conspiracy, either.
6 MR. TIGAR: No, your Honor, that is not true.
7 THE COURT: Well, why isn't it?
8 MR. TIGAR: Because, your Honor -- if I can get the
9 instructions -- the elements of the offense, your Honor, to
10 which the jury looked are that two or more persons, including
11 the defendant, agreed to use an explosive bomb in a truck as a
12 weapon of mass destruction against the Murrah Building and the
13 persons inside it; then that the defendant knowingly and
14 voluntarily became a member with the intent to advance or
15 further it; that the achievement would have affected interstate
16 commerce. Then what the Government quotes is that the
17 defendant did reach an agreement at some point in time that

18 they would use such a device.

19 Under conspiracy law, there is no concept of locus

20 poenitentiae; that is to say, a defendant, even if he

21 affirmatively proves withdrawal, has a great problem once the

22 unlawful agreement is formed. And thus if we're looking for

23 ways to make the jury's verdict consistent, what we see here is

24 that when the jury actually talks about agreement, they

25 conclude that at some time, an agreement is formed, but they

1 also conclude when they get to Count 2 and the Government has

2 to prove beyond a reasonable doubt that the defendant took some

3 action beyond mere agreement, they acquit him. So it isn't

4 just the 4 through 11; he's acquitted on Count 2, your Honor.

5 And the only way to make the verdict of acquittal on Count 2

6 consistent with the verdict of conviction on Count 1 is to

7 recognize that as your Honor said at page 20 of the

8 instructions, you know, they had to prove all four of

those

9 things there, which includes an act.

10 That, of course, is crucial to our argument with

11 respect to the term "act of violence" in (D). Act of violence

12 is not the same thing as crime of violence, if you read the

13 statutory provision. An act -- the law knows the difference

14 between a crime and an act. The term "act" explains itself and

15 is indeed "sought by his actions . . ." The Court has talked

16 about acts in Count 2, and that's what we were acquitted on.

17 So the jury's verdict, if we are to regard it as

18 consistent, says essentially that at some point, Mr. Nichols

19 participated in an unlawful agreement that had a certain

20 objective but that when it came time to do actions, he lacked

21 the intent to kill.

22 Now, that is significant in two senses. And now the

23 Government -- and the Government wants to overlook that. First

24 is, of course, the Tison standard of some depraved-heart

25 murder, being the baseline. Second is the Enmund standard;

1 that is, if we're to read these verdicts as consistent, we have
2 to look at a time when an agreement was formed, but the jury in
3 1, 2, 3, 4 -- in Counts 2, 3, 4, 5, all the way through 11,
4 saying we acquit Mr. Nichols with respect to actions, which, of
5 course, implicates the so-called "major participation" element.
6 At least in Tison and Enmund, you know, the state was told, you
7 know, you can't convict somebody, you can't subject them to a
8 death penalty unless you get them close enough to the -- to the
9 action that they can actually have the intent to kill and
10 fulfill that requirement of major participation.
11 Your Honor --
12 THE COURT: Well, let me take that -- I want to make
13 it clear because I think it may be confusing to the public that
14 the law is clear that the validity of the jury's verdict does
15 not depend upon its internal consistency. The jury is entitled

16   in a criminal case to have an inconsistent verdict.
I'm not

17   saying this verdict is inconsistent. I don't want to
be

18   misunderstood about that. But now we're talking about

19   something different.

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

21   that position.

22   THE COURT: If we read Section (C), subsection
(C) of

23   3591(a)(2) to say this: The defendant intentionally

24   participated in an act and the act becomes agreement in
an

25   agreement contemplating that the life of a person would
be

1   taken or intending lethal force would be used and the
victim

2   die, doesn't that fit what you've just been talking
about?

3   MR. TIGAR: Well, your Honor, if you change
the word

4   "acts" to "agreement" --

5   THE COURT: Yes.

6   MR. TIGAR: -- then you get closer. So let me
first

7 begin by suggesting that "act" is a word chosen by the Congress

8 and the reason the Congress chose the word "act" and not

9 "agreement" is that there has never been a case since Furman

10 was decided in which any Federal Court has upheld a death

11 penalty based upon mere agreement; that is to say, the

12 conspiracy. There has never been one. It flunks the Coker

13 test.

14 As your Honor repeatedly told the jury in voir dire,

15 you know, basically, when we talk about the death penalty, we

16 are talking about murder; that is, homicide committed with some

17 kind of intention with respect to resulting death. And I can

18 prove it to your Honor.

19 You cannot rewrite this statute, your Honor, by

20 substituting the word "agreement" for "act," I respectfully

21 submit. After all, if you look at 3592, which the Government

22 relies on, you look at (C), aggravating factors for homicide --

23 that is to say the Congress, in defining aggravating factors

24 that would apply to this situation, speaks of "homicide." And

25   that so -- if there is any doubt as to whether the word "act"

1   has to be read to be act and not agreement, that should dispel

2   it. The Congress, by using the word "homicide," doesn't refer

3   to some agreement to do homicide.

4   THE COURT: Well, the statute says, 3591(a)(2), "Any

5   other offense for which a sentence of death is provided," and a

6   sentence of death is provided for the crime of conspiracy under

7   2332a(a).

8   MR. TIGAR: Yes, your Honor, provided that the

9   Government is not precluded from going forward by jury findings

10   of no intent to kill; that is to say, the constitutionality of

11   2332a depends upon satisfying Enmund and Tison. A minor

12   participant in the conspiracy -- and your Honor permitted this

13   jury to convict based on minor participation. You told them

14   they could.

15   THE COURT: Well, but, you know, you're

talking about

16   two different things now. You're talking about the

17   Constitution, which of course, we have to be concerned about,

18   and also the statutory interpretation. But if we deal first

19   with the statutory interpretation here, isn't it true that the

20   plain language of the statute provides under 3591 for a penalty

21   of death where the underlying statute -- that is, this

22   conspiracy statute -- specifies a penalty of death. "If death

23   results as" is the language of the act in 2332a(a); and then

24   obviously, we must come back to these intentional forms of

25   intent. But one of the forms of intent is participated here in

1   an act contemplating the life of a person would be taking --

2   taken or lethal force used.

3   Now, you know, the jury says that there was an

4   agreement to bomb the Murrah Building.

5   MR. TIGAR: Your Honor, let me take those a step at a

6   time. First let us suppose that the jury had not

returned 16

7 not guilty verdicts on Counts 4 through 11, which they did.

8 But let's assume they didn't. Then it would be open to the

9 Government to prove beyond a reasonable doubt if it had

10 obtained a conviction only on Count 1 and that was the sole

11 count charged -- they could prove that the defendant did

12 intentionally participate in an act contemplating that the life

13 of a person would be taken or intending that lethal force would

14 be used.

15 Now, they'd be free to try to prove that. That's not

16 the question here.

17 The question is: Are they precluded?

18 Now, the first point is if your Honor is going to read

19 the term "act" to include agreement, then, quite frankly, we

20 disagree with the Court. The act requirement is an additional

21 requirement over and above the agreement requirement for the

22 conspiracy charge. If the Congress had intended to say

23 "agreement," they would have said agreement. In the next

24 sentence, they say "act of violence."

25   Then "contemplating that the life of a person would be

1   taken or intending that lethal force would be used against a

2   person": If the Government were free to argue -- that is to

3   say without the verdicts on 4 through 11 -- they might present

4   evidence with respect to that. But a contemplation that the

5   life of a person would be taken or intending that lethal force

6   would be used is flatly contrary to what the jury found by

7   acquitting Mr. Nichols on first-degree and second-degree murder

8   on Counts 4 through 11; so whatever else there may be, in the

9   abstract, your Honor, that decision, that verdict stands and is

10   entitled to the respect of all the parties here.

11   THE COURT: Why isn't the entry into an agreement an

12   act? It is the act of entry into an agreement, isn't it?

13   MR. TIGAR: Your Honor, that is a possible reading;

14   however, it is foreclosed by the language of the statute, which

15   uses "act" and "act of violence"; and it's also foreclosed,

16   your Honor, by your Honor's own instructions to this jury and

17   by the jury's questions asking what had to be shown for a

18   conviction under Counts 2 and 3. The Court's instructions

19   could not have made clearer the distinction between "agreement"

20   and "act" with respect to Count 1 and Count 2, because after

21   all, Count 1 is a single object conspiracy. Having made the

22   distinction clear to the jurors, the jurors having responded by

23   saying we find agreement but not action to go through with it,

24   the Government is foreclosed from the argument that it wished

25   to make even if one wanted to say that the statute shouldn't be

1   read literally.

2   THE COURT: Well, it's your position that it's a

3   violation of the principle of Tison for a death penalty to

4   result from a conspiracy where the -- where the

conspirator on

5 trial did not participate in a killing?

6 MR. TIGAR: Major participation and depraved-heart

7 intent with respect to resulting death are Tison/Enmund

8 ingredients. In addition, your Honor, with respect to making

9 conspiracy without these additional gateway findings, not

10 waiving our earlier position that they had to be instructed on

11 earlier, by making a conspiracy, a criminal conspiracy of any

12 description, having a person death-eligible raises Coker vs.

13 Georgia problems; that is to say, there has got to be some form

14 of an offense called "homicide" and those elements that are

15 like homicide have to be proved at some point or another.

16 THE COURT: All right.

17 Mr. Connelly, do you want to -- this -- procedurally,

18 of course, it's a -- the defendant's motion; but I'll permit

19 you to address it further.

20 PLAINTIFF'S SURREBUTTAL ARGUMENT

21 MR. CONNELLY: Thank you, your Honor.

22 I think the Court has framed the analysis well. I

23 think there are two issues here. One is a matter of statutory

24 construction, one is a matter of constitutional interpretation.

25 The matter of statutory construction, the statute could not be

1 clearer, we submit: Section 2332a, the offense of conviction

2 in Count 1, could not be clearer that a conspiracy may give

3 rise to the death penalty if death results. And I think in

4 light of 2332a, the Court's interpretation of 3591 that an act

5 of violence may be an agreement to commit a crime of

6 violence -- that, in other words, the agreement may be the

7 act -- is clearly the correct interpretation. I think that's

8 consistent with general conspiracy law that the agreement is

9 the act, entering into the agreement is an act, and I think

10 that's made -- confirmed by the fact that 2332a contemplates

11 that a conspiracy itself that results in death may give rise to

12 the death penalty.

13 So I think the question then for -- and secondarily to
14 that, I think it can't be assumed in any way that the jury
15 found that all Mr. Nichols did is agree and performed no acts
16 in furtherance of that agreement. The only way to infer the
17 agreement is to examine the acts; so I think we have to assume
18 that the jury at least found that Mr. Nichols engaged in some,
19 if not all, of the overt acts in order to support the
20 conspiracy conviction.
21 So I think for two reasons, (1) that the agreement is
22 the act, the statute is satisfied and second of all, because
23 there are acts in addition to the agreement that we have to
24 assume that the jury found.
25 Now, we don't have to debate did they find that he

1 bought ammonium nitrate but not this or that. But certainly, I
2 think it's fair to assume that the jury found that Mr. Nichols
3 engaged in some acts in furtherance of the conspiracy

so that

4 the conspiracy itself is the act and that he also engaged in

5 acts.

6 The question then becomes is the statute

7 constitutional as applied to this case? And we submit that

8 there is no basis for holding that the Eighth Amendment bars

9 the Government from going forward in this case. The defense

10 certainly has cited no case that would say the Eighth Amendment

11 bars it.

12 We have proceeded on the felony murder doctrine on

13 Counts 1, 2, and 3, and I'd like -- if we just go back and talk

14 about what our position has been throughout the case. We

15 originally charged all 11 crimes as capital crimes. The

16 defense -- I think it was the McVeigh defense joined in by the

17 Nichols defense said that the murder crimes are duplicitous;

18 that is that, in effect, the counts 1, 2, and 3 are felony

19 murder crimes; that is a felony that resulted in death.

20 Therefore, they're felony murder and therefore, it's

21 duplicitous with the first-degree murder charges in Counts 4

22   through 11.

23   In that context, we said we will not be proceeding in

24   Counts 4 through 11 as felony murder counts. We are seeking to

25   prove premeditation. We could, under the statute, arguably

1   have said we don't have to prove premeditation on the murder

2   counts. All you have to find is that death resulted from his

3   commission of a felony, and we have consistently said -- and

4   the jury instructions that went back to the jury reflected

5   this -- that we did not ask the Court to instruct on felony

6   murder, which is a subset of first-degree murder. So the

7   jury's finding of first-degree murder was simply that there was

8   not a premeditated intent to kill, and we did not seek to go on

9   the alternative to the jury that even if you don't find that,

10   you can find the scienter necessary for first-degree murder if

11   you find that he engaged in a felony knowingly and

willfully

12 and that death resulted as a result of that. So that is the

13 context in which we said this isn't a felony murder case.

14 I think it's certainly clear that Counts 1, 2, and 3

15 as applied to the death penalty are, in effect, felony murder

16 crimes. They are felonies where death resulted as a

17 foreseeable result of the crime. So I think for counsel now to

18 say we have changed our position is just not true. We have

19 said murder counts are not felony murder. We've always said

20 that, and that's the theory that the jury decided on; that they

21 were not presented with a choice of felony murder. But these,

22 in effect, are felony murder. And I think that is the context

23 in which Tison applies. If a defendant participated in a

24 felony and death resulted and the felony was committed with

25 wanton disregard for life such that he knew there was a grave

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

2 Now, there is an issue that's been raised -- and we

3 argued it earlier as well -- in terms of Tison -- in addition

4 to requiring the scienter requires that there be major

5 participation, and that is true as a matter of Eighth Amendment

6 law. It is not true under the statute. The jury does not have

7 to make that finding and the Supreme Court has held in several

8 cases -- Cabana vs. Bullock and other cases -- that this major-

9 participation finding, like the scienter finding, is not

10 constitutionally required to be decided by the jury. Most

11 recently, the Tenth Circuit in the Hatch vs. Oklahoma case said

12 that the state trial judge properly found major participation

13 even though it was not submitted to the jury. So that's not a

14 jury element. It's an element that this court, assuming there

15 is a death sentence, would have to determine as a matter of

16 Eighth Amendment law is the sentence proportional to the crime.

17 THE COURT: On a post-sentencing verdict motion? Is

18 that what you're saying?

19 MR. CONNELLY: That's correct. That's correct. I

20 think -- first of all, you have to apply the statute as written

21 unless the statute is unconstitutional, and it's not

22 unconstitutional for failing to require a jury finding on that.

23 That much is clear.

24 The only constitutional requirement is that some point

25 in the process -- and it can be done at trial level or

1 appellate level or anywhere else -- we would submit that

2 obviously, this court should make the finding in the first

3 instance, but in a post-verdict finding would have to satisfy

4 itself that the sentence of death, assuming one is returned by

5 the jury, is proportional to the crime; that is, Mr. Nichols'

6 acts; that the Court would find what acts they were in

7 connection with the conspiracy were sufficient that it is not

8 disproportionate to hold him responsible for his life when his

9 acts knowingly brought about the deaths of 168 people.

That is

10 a judgment the Court would have to make as a matter of Eighth

11 Amendment law; but that is not a finding that any case suggests

12 the jury needs to find, and it's not a finding in the statute.

13 In fact, minor participation is a mitigating factor in the

14 statute, but the defendant bears the burden of proving; and

15 that, again, is constitutional.

16 I think McKoy, a Maryland case -- McKoy, a Supreme

17 Court case out of Maryland, held as much. It might have been

18 North Carolina. But in any event, that finding, the Supreme

19 Court has made clear in Cabana vs. Bullock, is one that need

20 only be made by a court at some point; and since it's not, as a

21 matter of statutory law, a matter the jury is asked to pass

22 upon, we submit it is premature at this point. But we submit

23 when it is appropriate to make it that the Court could amply

24 find that the death penalty is not disproportionate to the

25 crime of conviction.

1 THE COURT: Okay. Mr. Tigar, I'll give you the last
2 argument on the point.
3 DEFENDANT'S FURTHER ARGUMENT
4 MR. TIGAR: Your Honor, at the Government's
5 insistence, your Honor did not charge that any overt act was
6 required to be proved. So they didn't have to find any overt
7 acts for this conspiracy.
8 THE COURT: Right.
9 MR. TIGAR: And you also did not charge that any
10 intent to kill was required even under Count 1, conspiracy. So
11 now the Government interprets the conspiracy convictions as
12 necessarily implying (a) that overt acts were committed, which
13 is ridiculous, because the Court doesn't instruct on that and
14 (b) that intent to kill can be inferred. Counsel just said:
15 well, knowingly caused death.
16 They can't live with these involuntary manslaughter
17 verdicts, your Honor. That's the problem. And to ask this

18 jury to speculate now is an insult to the jury's deliberative

19 process that they went through to come to all of those not

20 guilty verdicts on first- and second-degree murder as well as,

21 of course, subjecting all of the parties here to something

22 that, given that it's unnecessary and forbidden by the statute,

23 would be unnecessarily cruel.

24 THE COURT: Well, do you have a response to the

25 suggestion made here that the constitutional question can be

1 resolved in the event of a death sentence by the Court making

2 findings post-verdict?

3 MR. TIGAR: Yes, your Honor. I have -- we've already

4 briefed that issue. And the first is that to say that we have

5 the burden of proving minor participation essentially --

6 THE COURT: No, I don't believe that was the point. I

7 believe that what is said here is that the fact-finding with

8 respect to the role, the major vs. minor participation, is

9 not -- does not have to be made by a jury.

10 MR. TIGAR: Your Honor, the Congress has chosen to

11 have jury sentencing.

12 The fact that in particular state systems, these

13 findings are made in different ways or that there is a

14 matter -- there is a way to repair the record doesn't answer

15 it. The Congress has said that minor participation is a

16 mitigator.

17 Now, we've attacked that on constitutional grounds;

18 and I respectfully submit that is relevant. If the jury -- if

19 the jurors find minor participation or if a substantial number

20 of them do, then -- and we got to that phase, then we

21 respectfully submit your Honor's hands would be tied; that is

22 to say that that would be a dispositive mitigator; that your

23 Honor couldn't go ahead and say well, now I'll look at the

24 evidence and make some sort of a decision. That would be

25 forbidden by the principles of Bullington vs. Missouri and the

1 other cases about looking at what the jury does.

2 THE COURT: Well, of course, we could anticipate that

3 such a jury finding would also result in a sentence other than

4 death.

5 MR. TIGAR: Well, and if it does, of course, that's

6 moot; right? But right now, what we're arguing about is what

7 can -- you know, is the Government fully accepting what the

8 jury did. And it's clear to us that they are not. All I have

9 to do is look at the transcript of the chambers conference

10 where your Honor decided to give lesser includeds. Then the

11 Government was telling the Court that it was ridiculous. I'm

12 not going to quote it. It's a chambers conference. That to do

13 this -- after all, it's only a six-year felony.

14 Well, the jury came in with it, and that's the reality

15 that the Government now wants to relitigate in the face of the

16 acquittals on Counts 2 and 3 as well as on 4 through 11 on the

17 top two parts.

18 RULING

19 THE COURT: Okay. Well, on the defendant's motion to

20 preclude a sentencing hearing that 3591 now (a)(2)(C) and (D)

21 could not be submitted to the jury here -- I'm denying the

22 motion.

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

24 to bifurcate.

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

1 address that as yet.

2 Mr. Connelly, are you going to talk about that? I

3 mean, are you prepared to talk about it?

4 PLAINTIFF'S FURTHER ARGUMENT

5 MR. CONNELLY: Sure, your Honor.

6 We ask the Court to follow the statute that is written

7 by Congress and follow it the way it did in the McVeigh case

8 and follow it the way that every other court to have considered

9 it has done it. There are levels of findings that need to be

10 made, and the instructions very clearly inform the jury of

11 that. The first level is the intent element. After that, the

12 instructions inform the jury that they must find at least one

13 statutory aggravating factor; and from there, it tells them how

14 to consider non-statutory aggravators, how to consider

15 mitigating factors, and how to govern their deliberations.

16 The statute is clear. It's bifurcated in two

17 sections, not three. There is no basis, we submit, for

18 rewriting the law that Congress passed in this case and

19 applying it any differently than this court has already applied

20 it and that other courts have applied it in similar cases.

21 THE COURT: Well, Mr. Tigar, do you want to address

22 it? I just have trouble seeing that bifurcation is a practical

23 approach because I don't know how you separate out the -- what

24 we now call "information."

25 DEFENDANT'S FURTHER ARGUMENT

1 MR. TIGAR: Well, your Honor, the -- Judge Berrigan

2 had bifurcated in that case in Louisiana, the name of which

3 escapes me at the moment; so it's been done by a federal judge.

4 Let's look at the practicalities of it. Neither party

5 suggests that with respect to this so-called "gateway finding"

6 there is going to be evidence; right? That is to say, maybe

7 there will be an exhibit or two -- and we're going to argue

8 about that -- but neither party suggests that that really gets

9 into what the Government is about.

10 The Government's witness list, your Honor, is victim

11 impact evidence. That's what they're going to present. And

12 it's exactly like a situation, your Honor, in which there is a

13 real dispute about liability and there is very heart-wrenching

14 testimony on damages. The risk of an improper jury

15 determination given the dubiety of proceeding this way at all

16 is really significant here.

17 And to put the parties to the expense and difficulty

18   and emotional trauma and all of these witnesses and families to

19   the expense and difficulty and emotional trauma of 60 people

20   getting on this witness stand on one side and 60 people getting

21   on this witness stand on the other side and telling what

22   everybody knows, the disastrous effect that this had, when that

23   may be unnecessary if we simply ask these jurors, well, what do

24   you think about this -- and you can do it with an opening

25   statement, an exhibit or two, and a short closing argument; you

1   can do it in a day -- seems to us, your Honor, to be

2   irresponsible. I'm not -- I'm -- asking for a ruling that

3   irresponsible. I'm not trying to argue with the Court or

4   characterize the Court's actions at all.

5   It seems to us, your Honor, that to put folks through

6   that when it may very well turn out to be unnecessary and when

7   by doing this alternative procedure, we really do save time is

8 nothing more than the exercise of the discretion that the Court

9 customarily exercises with respect to the consideration of

10 questions in cases civil as well as criminal.

11 THE COURT: All right. Well, I've assumed here that

12 the Government is going to offer more than victim impact

13 testimony. Now, is that an incorrect assumption?

14 PLAINTIFF'S FURTHER ARGUMENT

15 MR. CONNELLY: Yes. We're going -- no, it is not an

16 incorrect assumption. We're going to offer --

17 THE COURT: Intent testimony.

18 MR. CONNELLY: -- testimony -- well, testimony that

19 shows the effects of the crime in terms of physical effects,

20 not just victim impact testimony; and obviously, the jury can

21 infer intent from the effects of the crime as well.

22 We have a couple of matters that we've asked to be

23 allowed to present, but it will be similar to the type of

24 sentencing case presented in the McVeigh case.

25

1 RULING

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

3 Now, there are other issues --

4 MR. TIGAR: Yes, your Honor.

5 THE COURT: -- one of which relates to your argument

6 regarding the procedural approach of the Government.

7 DEFENDANT'S FURTHER ARGUMENT

8 MR. TIGAR: Yes, your Honor. We have the report of

9 the United States regarding sentencing allegations which fails

10 to comply with the statute. We're entitled to a notice, your

11 Honor. And the notice we're entitled to is one that can be

12 amended on leave of court. A report to the Court of a

13 unilateral decision by the United States is not a notice.

14 THE COURT: Well, is it -- isn't this the functional

15 equivalent of an amended notice of intention?

16 MR. TIGAR: If the Court wishes to so construe it,

17 then the Court could. It would be our submission that we're

18 entitled to certain procedural protections, such as review by

19 the Attorney General with respect to the notice. If the Court

20 rejects that, we are at the very least entitled to the courtesy

21 of a signature by the United States Attorney and not by some

22 special assistant.

23 The Court has already dealt with Roman Numeral I --

24 THE COURT: But there is no disadvantage to you here

25 by the treating this as an amendment, because it's a reduction,

1 an elimination of some of -- well, both the intent allegations,

2 statutory, and the aggravating factors. So it's a reduction in

3 the Government's approach.

4 MR. TIGAR: It is, your Honor. And it fails to comply

5 with the statute. If the Court -- if the Court decides to the

6 contrary, then I have a substantive objection to it as well.

7 THE COURT: Well, we'll deal with these things one at

8 a time.

9 The statute does contemplate that the notice be given

10 by the United States Attorney. The United States Attorney is

11 here. The United States Attorney for the Western District of

12 Oklahoma. This report is signed by Mr. Connelly.

13 Mr. Ryan, what is your -- do you take the position as

14 the United States Attorney for the Western District of Oklahoma

15 that Mr. Connelly's signed report constitutes an amended notice

16 of intention to seek the death penalty?

17 MR. RYAN: Yes, your Honor. I mean, I spoke to

18 Mr. Connelly about it. We worked on it in concert and it

19 certainly is -- expresses my views.

20 If the Court feels that it's necessary for me to send

21 a revised notice to Mr. Tigar, I will do so today.

22 THE COURT: Well, I'm -- you know, you're speaking

23 here in open court. You're speaking as the United States

24 Attorney from the relevant district. It is you who issued the

25 notice of intent to seek the death penalty in this case

1 originally.

2 MR. RYAN: Yes, your Honor.

3 THE COURT: And do you now in your official role

4 accept this report as an amendment to that notice?

5 MR. RYAN: Yes, your Honor.

6 THE COURT: Then I believe that complies with the

7 statute.

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

9 THE COURT: Yes, please.

10 MR. TIGAR: Roman II, your Honor.

11 THE COURT: Yes.

12 MR. TIGAR: "The deaths or injuries occurred during

13 the commission of an offense . . . Transportation of

14 explosives in interstate commerce." Your Honor, the acquittal

15 on Count 2 bars that factor. There is simply no way that a

16 transportation of explosives in interstate commerce -- that is

17 to say, the exploded bomb -- can be consistent with the jury's

18 acquittal of use of the weapon of mass destruction; i.e., a

19 truck bomb in Count 2.

20 Also, it's inconsistent with the jury's acquittal on

21 Count 3; that is, you can't have -- you know, the bomb had to

22 get there somehow, and the indictment alleges it got there in a

23 truck. So the jury's finding is necessarily inconsistent with

24 844(d). And 844(d) is nothing more than another subsection of

25 the sub -- of the statutory section involved in Count 3.

1 Next: "Knowingly created a grave risk of death to one

2 or more persons in addition to the victims of the offense."

3 This is subject to the same objection; that is to say, the

4 acquittals on Count 4 through 11 preclude that element because

5 the defendant did not knowingly create a grave risk of death;

6 that is to say, he -- the most intent he had was that provided

7 by the involuntary manslaughter statute.

8 Third, the Government has -- you notice the ellipses,

9 your Honor, in (3)? What the Government has done is to state

10 a -- words written by the Congress that are in the conjunctive

11 and simply eliminate them. And so now that we know what the

12 Government has eliminated, let's turn to the statute.

13 "The defendant committed the offense after substantial

14 planning and premeditation to cause the death of a person or

15 commit an act of terrorism." Now, an act of terrorism is not

16 simply any act of -- that is to say, you know, some act of

17 protest protected by the First Amendment. An act of terrorism

18 is an act that presumably involves some harm to individuals.

19 That's what we understand by "terrorism." And the statute, if

20 you read this in pari materia, planning and premeditation to

21 cause the death of a person or commit an act of terrorism

22 involves this kind of substantial risk and premeditation, the

23 jury has expressly found did not exist.

24 So that elimination of that -- of that language omits

25 the fact that the statutory provision read as a whole deals

1 with acts that have to do with risk of -- to human life and

2 that there is premeditation.

3 Well, a jury has determined that there was no

4 premeditation; that the defendant did not premeditate.

5 And planning -- and "substantial planning and

6 premeditation" are in the conjunctive. The jury's verdict says

7 no premeditation.

8 Then (4): "The defendant committed the offense

9 against one or more federal law enforcement officers because of

10 their "status as federal law enforcement officers." Well,

11 that, your Honor, essentially relitigates. What it says is

12 that it's an aggravating circumstance that the defendant

13 committed involuntary manslaughter against law enforcement

14 officers. That is a constitutionally insufficient aggravating

15 circumstance, your Honor. And the offense against one or more

16 because of such victims' status -- that implicates the

17 acquittals that we -- the acquittals that we have spoken about

18 earlier.

19 When we get down to non-statutory aggravating

20 factors -- that's also Roman Numeral II, your Honor, so there

21 are two Roman Numeral IIs here -- "the offense committed

22 resulted in the deaths of 168 persons." That one, your Honor,

23 is permissible under the standards established by the Supreme

24 Court.

25 "In committing the offense caused serious physical and

1 emotional injury including maiming, disfigurement to numerous

2 individuals." Your Honor, we've already -- we've already

3 challenged that. Your Honor has rejected our challenge, and

4 your Honor has also rejected our challenge to the victim impact

5 evidence as a statutory and constitutional matter.

6 THE COURT: All right. Well, final ruling here will

7 await the conclusion of the Government's case in the penalty

8 phase, but I am -- I would like you to address No. 4 here on

9 page 2; that is, one or more federal law enforcement officers

10 because of the victims' status as federal law enforcement

11 officers. Now, I recognize that that is different from "while

12 they were performing their duties."

13 PLAINTIFF'S FURTHER ARGUMENT

14 MR. CONNELLY: I think the major difference we'd rely

15 on is the offense is different. The offense is the conspiracy

16 offense. That's the only capital offense left for this jury.

17 The jury, in 4 through 11, found that he did not premeditate

18 the murders of those law enforcement officers. But I think

19 it's certainly fair to say that he committed the offense of

20 conspiracy against those law enforcement officers, and we'd be

21 prepared to prove that it was because of their status as public

22 servants.

23 So I think we're not trying to relitigate that he

24 intentionally killed and premeditatedly killed those eight law

25 enforcement factors, but I think it's an aggravating factor,

1 since the offense is not the murders but the conspiracy. Was a
2 conspiracy committed against them as well as against the
3 building and the persons inside? In fact, they were the
4 persons inside; so I think, in a sense, the jury has already --
5 you know, may well have found this already: that the conspiracy
6 was committed against the Murrah Building and the persons
7 inside. Assuming they find that the federal public servants
8 were persons inside, this is not at all inconsistent with their
9 verdict.
10 The others, I have a similar response to. I point out
11 that Mr. --
12 RULING (RESERVED)
13 THE COURT: Well, I'm going to reserve ruling on
14 whether these aggravators go to the jury or not until the
15 evidence, information, is in; and then it's a question of how I
16 instruct the jury on it.
17 MR. CONNELLY: If I could -- do you want me to

just

18 address the one that we've made a change on? Mr. Tigar said

19 that the --

20 THE COURT: Yes. The ellipses.

21 PLAINTIFF'S FURTHER ARGUMENT

22 MR. CONNELLY: Yes. Mr. Tigar interestingly said the

23 statute is written conjunctively; and then he read it, and he

24 went on to say "or." And in my lexicon, "or" is disjunctive.

25 We have simply charged conjunctively as you normally do, but

1 you can prove it disjunctively. That's a well accepted rule of

2 law, and we are not required to prove both the elements that

3 are written disjunctively. We can prove one or the other.

4 We've simply dropped one of them and are proceeding on the

5 other one, which by itself is sufficient under the statute to

6 establish that aggravating factor.

7 An act of terrorism, we don't have to guess what

8 Congress meant. It's defined in Section 3077 of Title 18; and

9 the Court instructed on that in the McVeigh case, and I think

10 this case fits well within that. So I think all of these are

11 valid on their face, and we can talk in terms, as the Court

12 said at the time of submitting them to the jury, you know, what

13 gets submitted. But I think all of them certainly are valid on

14 their face and are supported by evidence.

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

16 these factors.

17 Now, there are some other matters dealing with

18 evidence, and I'd like counsel to approach the bench on that

19 with respect to scheduling.

20 (At the bench:)

21 (Bench Conference 142B1 is not herein transcribed by court

22 order. It is transcribed as a separate sealed transcript.)

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1 (In open court:)

2 THE COURT: I just was discussing with counsel the

3 timing with respect to my reviewing some of the exhibits and

4 discussing some of the evidence which is intended to be offered

5 and as to which there is an objection and because -- or there

6 are objections; and because, of course, these matters relate to

7 things that may never be in evidence, it is consistent with my

8 original sealing order, as it's sometimes called, to do that in

9 chambers. And that's what I intend to do, and I will be

10 meeting with Counsel later this morning to discuss the

11 evidentiary issues.

12 With that, then, as far as the open court proceedings,

13 we're going to recess until 8:45 Monday morning.

14 (Recess at 10:08 a.m.)

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19 REPORTER'S CERTIFICATE

20 I certify that the foregoing is a correct transcript from

21 the record of proceedings in the above-entitled matter. Dated

22 at Denver, Colorado, this 24th day of December, 1997.

23

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____

Paul Zuckerman

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