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Transcription  
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16048

1 APPEARANCES  
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3 District of Oklahoma, 210 West Park Avenue, Suite 400,  
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4 City, Oklahoma, 73102, appearing for the plaintiff.  
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8 Denver, Colorado, 80294, appearing for the plaintiff.  
9 MICHAEL TIGAR, RONALD WOODS, ADAM THURSCHELL,  
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11 Street, Suite 1308, Denver, Colorado, 80203, appearing  
for

12 Defendant Nichols.

13 \* \* \* \* \*

14 PROCEEDINGS

15 (In open court at 8:35 a.m.)

16 THE COURT: Be seated, please.

17 May I have counsel at the bench.

18 (At the bench:)

19 (Bench Conference 160B1 is not herein transcribed  
by court

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

21

22

23

24

25

16055

1 (In open court:)

2 (Jury in at 8:40 a.m.)

3 THE COURT: Members of the jury, good morning.

4 JURORS: Good morning.

5 THE COURT: As I indicated to you yesterday  
afternoon

6 when I recessed your deliberations for the day, I would  
today

about a 7 answer the question which you gave me late yesterday  
8 quarter to five.

sort of 9 Before addressing that directly, I want to  
10 review where we are in the case. You, of course, heard  
the 11 trial in this case, heard the evidence at the trial,  
and on 12 December 23, returned your verdict. And your verdict  
was 13 guilty on Count One, charging the conspiracy to use a  
weapon of 14 mass destruction; not guilty on the Count Two, use --  
actual 15 use of a weapon of mass destruction by Mr. Nichols, and  
not 16 guilty on Count Three, the destruction by explosive  
count.

charging 17 You also on the Counts Four through Eleven,  
18 first-degree murder, returned verdicts of not guilty of  
19 first-degree murder, not guilty of second-degree  
murder, and 20 guilty of involuntary manslaughter.

a weapon 21 Now, because the offense of conspiracy to use  
22 of mass destruction under Count One does by statute  
provide 23 that a person found guilty of that crime could be  
sentenced to 24 death, it was required of you that you proceed to the

hearing

your 25 of additional information, because you also found in

16056

were 1 verdict that deaths did result and that these deaths

possible 2 foreseeable. And that was what under the statute made

3 the imposition of the death sentence.

dealt with 4 So the information that you heard primarily

Building; 5 consequences of the bombing of the Alfred P. Murrah

6 and in addition, of course, you heard things about the  
7 defendant, Mr. Nichols, and things regarding his  
character,

8 background, and so forth.

you must 9 And then I instructed you with respect to how

outline 10 approach the sentencing decision with instructions that

you 11 for you how you should analyze these questions and told

options. 12 that you had three choices, a choice among three

without 13 Those include death, a sentence to life imprisonment

sentence 14 the possibility of ever being released, and any lesser

15 provided by law to be decided by the Court. And I told  
you  
16 also that before considering the aggravating and  
mitigating  
17 factors that were presented to you, information about  
them, you  
18 must -- and before weighing them, you must focus on the  
19 question of intention and told you that there were two  
criminal  
20 intents to be considered. And those were defined in  
the  
21 instructions; and also, the verdict form directed that  
you  
22 first go to Section I and first decide on intent.

23 Now, this focus on intention is required by  
first of  
24 all the -- what is the federal death penalty statute.  
There is  
25 a statute that deals specifically with the procedures  
to be

16057

1 followed before a death sentence can be imposed in  
federal  
2 court under federal law, regardless of the underlying  
crime for  
3 which a death sentence is possible, so that in this  
case, the  
4 underlying crime is this conspiracy to use a weapon of  
mass

5 destruction. But then we turn to another statute, the  
federal  
6 death penalty statute, that prescribes the procedures  
that must  
7 be followed before such a sentence can be imposed. And  
it is  
8 that statute that says that there must first be a  
finding of a  
9 requisite intent, which essentially is different forms  
of an  
10 intention to kill.

11 Now, that's required not only by statute but  
by the  
12 Constitution of the United States, because there are  
really two  
13 provisions in the Constitution of the United States  
that come  
14 into focus when we're talking about the ultimate  
penalty of  
15 death. One is the Eighth Amendment, prohibiting cruel  
and  
16 unusual punishments, and in these terms, when we're  
considering  
17 sentencing, that has been interpreted by the Supreme  
Court to  
18 preclude the possibility that someone would be  
sentenced  
19 arbitrarily or capriciously or without a reasoned,  
rational,  
20 moral response; and also the Fifth Amendment, providing  
that,  
21 of course, no person can be deprived of life without  
due

the 22 process of law. And the due process of law involves  
23 procedures that are necessary.

the 24 Well, due process of law also requires that  
of intent 25 Government has the burden of proof on these questions

16058

1 and that the standard is beyond a reasonable doubt.

2 So putting those things together, what the law  
you even 3 requires and what I instructed you on is that before  
and 4 proceed with this matter of weighing the aggravating  
them, you 5 mitigating factors, or finding them and then weighing

6 must focus on this issue of intention: Was there  
proved to you

7 beyond a reasonable doubt, all of you, that Terry  
Nichols

8 intended to kill, using one of these two intentions as  
9 described in some detail?

10 And, of course, due process of law means also  
that all

11 12 jurors must be convinced beyond a reasonable doubt  
that the

12 proof was there. Each individual must decide that  
based on the



13 evidence that was presented, but all must agree upon  
it; and  
14 the unanimity on that issue is, of course, a  
fundamental  
15 requirement of the law.

16 You then on Monday undertook your task of  
deliberation  
17 and discussed this matter all afternoon. You then sent  
to me a  
18 communication. And this was fairly late in the  
afternoon. In  
19 substance, the communication was that some of you  
questioned  
20 whether you'd already decided intention and what  
difference was  
21 there.

22 I answered that question here in court when I  
excused  
23 you for the day, recessed your deliberations for the  
day, by  
24 explaining that I couldn't give a direct answer to  
that.  
25 That's not one of those questions where I could just  
say yes or

16059

1 no. It's sort of a "not necessarily" or "it all  
depends" type  
2 of answer, because as I attempted to explain to you, it  
depends

3 somewhat on the jury's view of the evidence that  
supported the

4 verdict.

5 And of course, you were not required to  
explain in

6 detail the way in which you decided that. And you're  
still not

7 required to; never will be. But I did not want to in  
my answer

8 in some way assume anything about the view that each  
one of you

9 had with respect to the evidence and what it did or did  
not

10 show with respect to intention.

11 Now, that answer, I'm sure, is not very  
satisfactory

12 to you, because, of course, it would be more comforting  
for you

13 to -- me to tell you something more specific.

14 But, as good citizens, you went to work and  
15 deliberated more yesterday. And what I did ask you to  
do is to

16 take a close look at the original instructions that I  
gave you

17 with respect to the elements of the offense of the  
conspiracy,

18 so that you could focus on just what was required for  
your

19 decision there and that also take a close look, on the

20 instructions that I gave you, with respect to these  
particular

21 specific intentions that must first be proven to your  
22 satisfaction. And I'm satisfied that you did that and  
carried  
23 on your deliberations.

24 And, of course, I'm sure that when you did  
that, you  
25 saw by comparing them that there was a difference and  
that the

16060

1 instructions with respect to what must be proved beyond  
a  
2 reasonable doubt to find the defendant guilty of  
conspiracy did  
3 not include the specific intentions that are required  
for a  
4 finding of what you may say is the possibility of a  
sentence of  
5 death.

6 You then sent to me a second communication  
yesterday;  
7 and in substance, again, without reading it now, it  
amounted to  
8 telling me that there was -- well, that you were at a  
stage of  
9 something of an impasse with respect to answering on  
these  
10 intent questions.

11 And I gave you a written response to that  
question.

12 In that, I attempted to go a bit beyond what I told you  
in  
13 court Monday afternoon and explained to you that your  
verdict  
14 on Count One did not require you to answer these two  
questions  
15 in any particular way. And I said that this might be  
helpful  
16 to you again to have a little more definite answer;  
that you're  
17 not really required of what you decided in your verdict  
to make  
18 a decision on these two questions in any certain way  
and that  
19 you should consider your answers to these questions  
based upon  
20 everything that you have heard, including the  
information that  
21 was provided since the return of the verdict.

22 You did then late yesterday afternoon send to  
me a  
23 communication that says that you are not, after all of  
these  
24 deliberations, unanimous in your view as to whether all  
that  
25 you have heard satisfied you beyond a reasonable doubt  
that the

16061

1 Government met its burden of proof with respect to

these

2       necessary specific intentions. And, you know, that was  
shortly  
3       before the ordinary time for recess. And I told you  
then when  
4       I recessed, I'd talk to you some more about it this  
morning.  
5       And that's where we are.

6               Now, you used a phrase through your foreperson  
that if  
7       you are required to be unanimous, yes or no, on the two  
8       questions that are these really principal questions  
that have  
9       to be decided by intention that you are "hung." And,  
of  
10      course, I'm sure you've heard of a hung jury; and  
that's the  
11      phraseology, which means a jury that can't decide.

12             Now, this is, you know, different from a hung  
jury in  
13      the sense that it is used, which means a jury that is  
not able  
14      to decide whether the evidence proves the charges. You  
weren't  
15      a hung jury there. You did decide that, and you  
returned a  
16      verdict. And a hung jury in that sense results in what  
is  
17      called a "mistrial" and requires another trial, the  
selection  
18      of another jury, presentation of the evidence with  
respect to

19 the charges, and so forth. So it sort of wipes away  
the trial  
20 and requires a new trial.

21 Well, it's different when a jury is in this  
position,  
22 as you are, and that is a sentencing jury. You have  
disposed  
23 of the charges. You have made a final decision with  
respect to  
24 the charges. That was what your verdict was on  
December 23.

25 Here, now, when these questions are put to  
you, well,

16062

1 what sentence should be imposed, using these three  
options,  
2 when you are not all convinced and all in agreement  
that the  
3 information and evidence presented to you satisfies you  
beyond  
4 a reasonable doubt that Terry Nichols acted with either  
or both  
5 of these two intentions, that, itself, a decision. It  
is  
6 really the jury's choice of the third option, which is  
7 sentencing by the Court.

8 Now, when that happens, the question then  
becomes:

9 Well, should we take that as a final decision from the

jury?

jury's 10 And the answer to that depends upon assessing the

reasonable amount 11 deliberations: Has the jury had an adequate,

the jury 12 of time to talk it over and to make the decision after  
13 exchanging views; and, of course, an assessment of has

14 used that time and worked at it.

with the 15 Well, I've discussed that aspect of the case

to 16 lawyers in the case, and Mr. Nichols had an opportunity

have 17 participate in that as well. And we have decided -- I

18 decided after discussion with them but without real

have had 19 disagreement here that in assessing your work that you

and to 20 an adequate opportunity to discuss it, to deliberate,

is no 21 decide. And we know that you've worked at it. There

22 question about that in anybody's mind.

is a 23 So having determined that there has been what

going 24 reasonable and adequate opportunity to decide, I am not

25 to require you to go further. I am, in short, going to

1 discharge you.

I'm  
has  
there is  
that the  
under  
what I

2 But I want to reemphasize that in doing so,  
3 accepting that being unable to get unanimity that there  
4 been proof beyond a reasonable doubt on these necessary  
5 specific intentions that amounts to your decision that  
6 no unanimity on that; and therefore, you've decided  
7 sentencing in this case should be done by the Court  
8 sentencing guidelines and applicable law. And that is  
9 will do.

to  
whole: You  
feel  
responsibilities,  
be  
who will  
will

10 Now, what I want to say to all 12 of you and  
11 everybody in this courtroom and to the public as a  
12 have done your job in this case. I do not want you to  
13 that you have in any way failed to meet your  
14 because you have. And you know, the result here will  
15 subject to comment by many, as indeed your verdict of  
16 December 23 will be and has been. There will be some  
17 criticize it and this outcome. There will be some who  
18 praise it. There will be some who understand it, and



there

19 will be some who do not understand it; and there will  
be others

20 who even though they do understand it will  
mischaracterize it.

21 You know that you are answerable to no one for  
your

22 decisions. You have no obligation to explain your  
decisions to

23 anyone -- not to me, not to the lawyers, or not -- nor  
to

24 anyone else.

25 You may not impeach your verdict; that is,  
none of you

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1 can walk away from what you've decided. And it can't  
be

2 exchanged. This is a final decision, both with respect  
to your

3 verdict on the charges and with respect to the -- what  
amounts

4 to the decision that the specific intent has not been  
proved to

5 the satisfaction of all 12 of you beyond a reasonable  
doubt.

6 Therefore, there can be no death sentence.

7 You came together here. You were selected  
through a

8 very careful selection process to be the jury to decide

in this

9 case. You were called away from your personal lives,  
from your

10 work. You made financial sacrifices in addition to the  
time

11 that you have spent with us on this case. You were in  
this

12 courtroom at a difficult time, because there was during  
that

13 time, as normally, a holiday spirit in the air, a lot  
of people

14 off from work enjoying family and friends and  
traditional

15 holiday activities. And you were called away from  
that. You

16 met your obligations every day in sometimes difficult  
weather,

17 always were here on time. You paid careful attention

18 throughout the trial. You served.

19 You know, during the jury selection process  
where --

20 and, of course, that was individual with each of you --  
there

21 were times when I referred to this as somewhat  
analogous to

22 military service, a call to your country's need; come  
and

23 serve. And each one of you did that. Each one of you  
answered

24 the call.

25 And I believe now that you're entitled to know  
that

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served 1 your service is recognized as that. And you have  
pride 2 honorably and you have served well, and you should take  
not 3 in your service. And as I have said before, you should  
dereliction of 4 consider that this end result is in any way a  
5 your duty or failure of your answering the call.

discharge you 6 Members of the jury, I am now going to  
are no 7 from this service. And of course, that means that you  
matter. You 8 longer subject to the orders of the Court in this  
sure 9 return to your lives as they were before, although I'm  
your lives, 10 they will never -- you will never forget this. And  
have seen 11 I'm sure, have been affected by the things that you  
jurors. 12 here, heard here, and your participation with the other

after the 13 I will ask you to remain just a few minutes  
on a 14 Court recesses, because I want to talk briefly with you  
15 more personal level and more private level.

16 But with this ruling that I have made, you are  
now  
17 discharged as the jury in this case. You're excused  
from the  
18 courtroom.

19 (Jury out at 9:05 a.m.)

20 THE COURT: Well, this results in the jury's  
verdict  
21 now becoming a final verdict for purposes of the  
application of  
22 the Federal Rules of Criminal Procedure dealing with  
post-  
23 verdict motions.

24 Mr. Tigar . . .

25 MR. TIGAR: Yes, your Honor. In that regard,  
we do

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1 move -- renew our motion under Federal Rule of Criminal  
2 Procedure 29, we move under Rule 33, and we move under  
Rule 37.  
3 And we would ask for February 9, 1988 (sic) for the  
filing of  
4 the written version of those motions, it being clear  
that the  
5 motions are made within the time set by the Federal  
Rules of  
6 Criminal Procedure and the Court having the authority  
to extend

7 the time, provided the motions are timely made.

8 THE COURT: What date did you suggest?

9 MR. TIGAR: I asked for February 9, 1998, your  
Honor,  
10 which is a Monday.

11 THE COURT: Any objection to that extension of  
time?

12 MR. MACKEY: That's agreeable, your Honor.

13 THE COURT: All right. That order is entered.  
The  
14 time is granted to February 9.

15 I do intend, however, to proceed under Rule 32  
and to

16 proceed as I told the jury with court sentencing,  
utilizing the

17 sentencing guidelines provided by the sentencing  
commission.

18 And, of course, that requires the preparation of a  
presentence

19 report. And I've asked our chief probation officer for  
the

20 court, who is present, Richard Miklic, to himself  
prepare the

21 presentence report for this case.

22 Now, there has been a procedure followed in  
this

23 district for presentence reports, but I'm going to  
modify it

24 with respect to it as to that part of the report that  
deals

25 with victim impact statements, and so forth. I believe  
that

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during the 1 that's been satisfied. I've been in the courtroom  
to 2 testimony here. But, of course, all of this is subject  
3 interpretation by counsel and their views of it.

that we 4 I think that rather than the usual procedure  
5 followed here, which I think is probably common to most  
6 districts, where the probation officer prepares an  
the 7 interpretation of the guidelines and the application to  
here, 8 facts of the case -- of course, the probation officer  
have the 9 Chief Miklic, was not present during the trial. We  
it seems 10 transcripts. But rather than approach it in that way,  
amounts to 11 to me more appropriate for counsel to submit what  
12 statements concerning the application of the  
guidelines. And 13 there may well be, I suspect, disagreements about it.

those 14 Perhaps we should set times for the filing of  
15 applications. What do you think?

with my 16 MR. TIGAR: Yes, your Honor. May I consult

17 colleagues for a moment?

18 THE COURT: Well, of course.

19 (Discussion off the record among counsel.)

20 MR. TIGAR: Your Honor, in discussing with  
21 Mr. Thurschwell, we intend to present in addition to  
the legal

22 analysis some other materials. I don't know what  
schedule the

23 Court has in mind for that. If it's all to be done

24 simultaneously, your Honor, we would ask for the 23d of

25 February.

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1 THE COURT: Okay. Well, I'm not sure. You  
know,  
2 ultimately, there will be a sentence hearing, of  
course.

3 MR. TIGAR: Yes, your Honor.

4 THE COURT: And the sentence hearing will  
undoubtedly

5 consist of the legal issues that are involved, perhaps  
some

6 factual questions that may be involved in the  
application of

7 the guideline, will also involve the right of  
allocution, the

8 opportunity for exercising the right of allocution by  
the

counsel. 9 defendant personally, and, of course, statements from

multiple 10 So it can be, you know, a hearing that could be in

want to do 11 parts. I don't know. It may be something where we

12 did it in segments, even, and consider the legal issues

other 13 separate than from whatever may be necessary for the

14 aspects of it.

I think, 15 But certainly the first part of it should be,

16 the filing of your views, respective views on how the

17 guidelines may be applied.

to that, 18 MR. TIGAR: If that's the -- if it's limited

19 your Honor, we could do that on the 9th.

Honor. 20 MR. MACKEY: As could the United States, your

the 21 THE COURT: Yes. Well, let's call, then, for

set a 22 simultaneous filing, February 9. And then I will not

that all 23 date for a sentencing hearing today, because I think

and the 24 of us need to sort of take time to think about that;

and my 25 nature of the hearing may depend upon what you submit



1 reaction to it on these statements of your positions on  
2 application.

3 MR. TIGAR: Yes. In addition, your Honor,  
there are  
4 some other matters as to which there may be evidentiary  
5 hearings necessary that have been the subject of  
motions.

6 THE COURT: Well, I think the best we can do  
is to say  
7 the next step is these filings on February 9.

8 MR. TIGAR: Yes, your Honor. We thank you,  
your  
9 Honor.

10 THE COURT: All right.  
11 Counsel have anything else --

12 MR. RYAN: Can we have just a moment, your  
Honor?

13 THE COURT: -- to be taken up now?

14 (Discussion off the record among counsel.)

15 MR. MACKEY: Your Honor, for purposes of the  
record,  
16 we'd like to incorporate the position we took earlier  
at the  
17 bench conference.

18 THE COURT: Oh, yes. That's preserved.

19 MR. MACKEY: Beyond that, we have nothing  
else. Thank

20 you, Judge.

21 THE COURT: So in this matter, we'll proceed  
and  
22 without setting a new date for open court until I have  
a chance  
23 to review what you file.

24 And the Court will now be in recess.

25 (Recess at 9:12 a.m.)

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1 REPORTER'S CERTIFICATE

2 I certify that the foregoing is a correct  
transcript from

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

4 at Denver, Colorado, this 7th day of January, 1998.

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Paul Zuckerman

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