

Judge Allows Nichols To Face Death Sentence Bomb Conspirator Might Testify in Penalty Phase Starting Monday

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DENVER - Terry Nichols will face a possible death sentence despite the jury's mixed verdict in the second Oklahoma City bombing trial, a federal judge decided Wednesday.

U.S. District Judge Richard Matsch, denying defense motions, ruled that a second, penalty phase of Mr. Nichols' trial will begin Monday. In that phase, the same jury of seven woman and five men that found Mr. Nichols guilty of conspiracy and involuntary manslaughter Tuesday will return to decide whether he should die.

As many as 120 witnesses - including possibly Mr. Nichols - could be called to testify, defense attorneys said Wednesday.

In a verdict that many legal scholars regarded as confusing at best, the jurors Tuesday found Mr. Nichols guilty of conspiring with his co-defendant, Timothy McVeigh, to use a weapon of mass destruction - a truck bomb - to destroy the Alfred P. Murrah Federal Building on April 19, 1995. But they acquitted him of murdering eight federal law enforcement agents who died in the explosion, convicting him instead him of the lesser, involuntary manslaughter charges. The conspiracy charge carries a possible death sentence while the manslaughter charges carry a maximum sentence of six years each.

The jury also acquitted Mr. Nichols of two other bombing counts.

On Wednesday, in an hourlong hearing before Judge Matsch, Mr. Nichols' lead defense attorney unsuccessfully argued that the mixed verdict precludes the government from seeking the death penalty.

Michael Tigar, the celebrated University of Texas law professor, said the jurors' finding that Mr. Nichols committed involuntary manslaughter - and not murder - means they concluded he didn't intend to kill those in the building.

"They can't live with these involuntary manslaughter verdicts," Mr. Tigar said, referring to the prosecutors. "That's the problem. " Federal law requires a "threshold finding of intent to kill" before jurors can even consider a death verdict, he said. He further noted that Mr. Nichols could have been convicted of conspiracy even as a minor participant in the bombing plot.

"There cannot be a death sentence without proof of major participation and intent," he said.

Prosecutor Sean Connelly responded that the conspiracy conviction alone warrants a death hearing. As part of its guilty verdict on that count, the jury found that the deaths of people in the building were "a foreseeable result" of Mr. Nichols' actions.

He said a jury finding of intent to kill is not necessary.

"The statute could not be clearer that a conspiracy may give rise to a death penalty if death results" from a defendant's actions, he said.

In any case, Mr. Connelly argued, the jurors should decide.

"We are entitled, your honor," he said, "to ask the jury to make these findings." Judge Matsch agreed. And, alluding to the controversy swirling around the jury's verdict, he noted the courts have consistently ruled that a jury's verdict need not be entirely logical; the verdict is what the jury says it is.

"The law is clear," the judge said, "that the validity of the jury's verdict is not dependent on its internal consistency." He said he might revisit some of Mr. Tigar's arguments after the jury hears testimony in the penalty phase.

That testimony will include painful recollections from bombing survivors and from relatives of some victims. In all, 168 people were killed, including 19 children in the Murrah building's second-floor day care center. Hundreds more were injured in the worst act of terrorism ever on American soil.

Mr. Nichols will have the chance to present "mitigating" evidence that argues against a death sentence, including testimony from family and friends who might plead for his life.

Mr. Tigar said in court that each side could call as many as 60 witnesses in the penalty phase.

Mr. McVeigh was convicted last June on all the conspiracy and murder counts against him and was condemned to death after 35 government witnesses and 27 defense witnesses testified over six days in the penalty phase.

Mr. Tigar argued that it's "unnecessarily cruel" to make Mr. Nichols and his family endure a penalty phase - in essence, a second trial. In a brief submitted to the court, he suggested his client might testify or give a statement to the jury.

"The embarrassment, ordeal and anxiety of a death sentencing hearing are very real, and the unnecessary disclosure of mitigating evidence - some in the form of previously undisclosed statements by Mr. Nichols - is another harm that should be weighed," Mr. Tigar wrote in his brief.

Neither defense attorneys nor prosecutors commented as they left the hearing in a light Christmas Eve snow.

In court, the entire defense team, including five lawyers and a half-dozen aides, rose when U.S. marshals escorted Mr. Nichols into court.

And prosecutors Beth Wilkinson and Patrick Ryan, the U.S. attorney for Oklahoma City, consoled bombing victims as they walked through the spectator section of Judge Matsch's courtroom.

Mr. Nichols' mother, sister, brother and father were in court for Wednesday's hearing, but declined to comment.

Some bombing victims said they remain embittered at the jury's verdict.

Jannie Coverdale, who lost her two young grandsons in the bombing, said she looked forward to testifying in the penalty phase.

"I'm going to introduce Aaron and Elijah to the jurors," she said. "I'm going to tell them what sweet little boys they were and how they enriched my life and how much I need them.

"I needed them then," she said, "and I need them now. " In the end, though, she said she expected the same jury that returned the mixed verdict against Mr. Nichols to spare his life - a view shared by many legal observers.

"I don't think Terry Nichols is going to get the death penalty in Denver," Mrs. Coverdale said.

But noted that both Mr. Nichols and Mr. McVeigh still could face state murder charges in Oklahoma.