IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Criminal Action No. 96-CR-68
UNITED STATES OF AMERICA,
Plaintiff,
vs.
TERRY LYNN NICHOLS,
Defendant.

REPORTER'S TRANSCRIPT
(Trial to Jury: Volume 160)

Proceedings before the HONORABLE RICHARD P. MATSCH, Judge, United States District Court for the District of Colorado, commencing at 8:35 a.m., on the 7th day of January, 1998, in Courtroom C-204, United States Courthouse, Denver, Colorado.

Proceeding Recorded by Mechanical Stenography, Transcription Produced via Computer by Paul Zuckerman, 1929 Stout Street, P.O. Box 3563, Denver, Colorado, 80294, (303) 629-9285

APPEARANCES

PATRICK RYAN, United States Attorney for the Western District of Oklahoma, 210 West Park Avenue, Suite 400, Oklahoma City, Oklahoma, 73102, appearing for the plaintiff.

LARRY MACKEY, SEAN CONNELLY, BETH WILKINSON, GEOFFREY MEARNS, JAMIE ORENSTEIN, and AITAN GOELMAN, Special Attorneys to the U.S. Attorney General, 1961 Stout Street, Suite 1200, Denver, Colorado, 80294, appearing for the plaintiff.

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

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PROCEEDINGS

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

THE COURT: Be seated, please.

May I have counsel at the bench.

(At the bench:)

(Bench Conference 160B1 is not herein transcribed by court order. It is transcribed as a separate sealed transcript.)

(In open court:)

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

THE COURT: Members of the jury, good morning.

JURORS: Good morning.

THE COURT: As I indicated to you yesterday afternoon when I recessed your deliberations for the day, I would today answer the question which you gave me late yesterday about a quarter to five.

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

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

Now, because the offense of conspiracy to use a weapon of mass destruction under Count One does by statute provide that a person found guilty of that crime could be sentenced to death, it was required of you that you proceed to the hearing of additional information, because you also found in your verdict that deaths did result and that these deaths were foreseeable. And that was what under the statute made possible the imposition of the death sentence.

So the information that you heard primarily dealt with consequences of the bombing of the Alfred P. Murrah Building; and in addition, of course, you heard things about the defendant, Mr. Nichols, and things regarding his character, background, and so forth.

And then I instructed you with respect to how you must approach the sentencing decision with instructions that outline for you how you should analyze these questions and told you that you had three choices, a choice among three options. Those include death, a sentence to life imprisonment without the possibility of ever being released, and any lesser sentence provided by law to be decided by the Court. And I told you also that before considering the aggravating and mitigating factors that were presented to you, information about them, you must -- and before weighing them, you must focus on the question of intention and told you that there were two criminal intents to be considered. And those were defined in the instructions; and also, the verdict form directed that you first go to Section I and first decide on intent.

Now, this focus on intention is required by first of all the -- what is the federal death penalty statute. There is a statute that deals specifically with the procedures to be followed before a death sentence can be imposed in federal court under federal law, regardless of the underlying crime for which a death sentence is possible, so that in this case, the underlying crime is this conspiracy to use a weapon of mass destruction. But then we turn to another statute, the federal death penalty statute, that prescribes the procedures that must be followed before such a sentence can be imposed. And it is that statute that says that there must first be a finding of a requisite intent, which essentially is different forms of an

requisite intent, which essentially is different forms of an intention to kill.

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

Well, due process of law also requires that the Government has the burden of proof on these questions of intent and that the standard is beyond a reasonable doubt.

So putting those things together, what the law requires and what I instructed you on is that before you even proceed with this matter of weighing the aggravating and mitigating factors, or finding them and then weighing them, you must focus on this issue of intention: Was there proved to you beyond a reasonable doubt, all of you, that Terry Nichols intended to kill, using one of these two intentions as described in some detail?

And, of course, due process of law means also that all 12 jurors must be convinced beyond a reasonable doubt that the proof was there. Each individual must decide that based on the evidence that was presented, but all must agree upon it; and the unanimity on that issue is, of course, a fundamental requirement of the law.

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

I answered that question here in court when I excused you for the day, recessed your deliberations for the day, by explaining that I couldn't give a direct answer to that. That's not one of those questions where I could just say yes or no. It's sort of a "not necessarily" or "it all depends" type of answer, because as I attempted to explain to you, it depends somewhat on the jury's view of the evidence that supported the verdict.

And of course, you were not required to explain in detail the way in which you decided that. And you're still not required to; never will be. But I did not want to in my answer in some way assume anything about the view that each one of you had with respect to the evidence and what it did or did not show with respect to intention.

Now, that answer, I'm sure, is not very satisfactory to you, because, of course, it would be more comforting for you to -- me to tell you something more specific.

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

deliberated more yesterday. And what I did ask you to do is to take a close look at the original instructions that I gave you with respect to the elements of the offense of the conspiracy, so that you could focus on just what was required for your decision there and that also take a close look, on the instructions that I gave you, with respect to these particular specific intentions that must first be proven to your satisfaction. And I'm satisfied that you did that and carried on your deliberations.

And, of course, I'm sure that when you did that, you saw by comparing them that there was a difference and that the instructions with respect to what must be proved beyond a reasonable doubt to find the defendant guilty of conspiracy did not include the specific intentions that are required for a finding of what you may say is the possibility of a sentence of death.

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

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

You did then late yesterday afternoon send to me a communication that says that you are not, after all of these deliberations, unanimous in your view as to whether all that you have heard satisfied you beyond a reasonable doubt that the Government met its burden of proof with respect to these necessary specific intentions. And, you know, that was shortly before the ordinary time for recess. And I told you then when I recessed, I'd talk to you some more about it this morning. And that's where we are.

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

Now, this is, you know, different from a hung jury in the sense that it is used, which means a jury that is not able to decide whether the evidence proves the charges. You weren't a hung jury there. You did decide that, and you returned a verdict. And a hung jury in that sense results in what is called a "mistrial" and requires another trial, the selection of another jury, presentation of the evidence with respect to the charges, and so forth. So it sort of wipes away the trial and requires a new trial.

Well, it's different when a jury is in this position,

as you are, and that is a sentencing jury. You have disposed of the charges. You have made a final decision with respect to the charges. That was what your verdict was on December 23.

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

Now, when that happens, the question then becomes: Well, should we take that as a final decision from the jury? And the answer to that depends upon assessing the jury's deliberations: Has the jury had an adequate, reasonable amount of time to talk it over and to make the decision after exchanging views; and, of course, an assessment of has the jury used that time and worked at it.

Well, I've discussed that aspect of the case with the lawyers in the case, and Mr. Nichols had an opportunity to participate in that as well. And we have decided -- I have decided after discussion with them but without real disagreement here that in assessing your work that you have had an adequate opportunity to discuss it, to deliberate, and to decide. And we know that you've worked at it. There is no question about that in anybody's mind.

So having determined that there has been what is a reasonable and adequate opportunity to decide, I am not going to require you to go further. I am, in short, going to discharge you.

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

Now, what I want to say to all 12 of you and to everybody in this courtroom and to the public as a whole: You have done your job in this case. I do not want you to feel that you have in any way failed to meet your responsibilities, because you have. And you know, the result here will be subject to comment by many, as indeed your verdict of December 23 will be and has been. There will be some who will criticize it and this outcome. There will be some who will praise it. There will be some who understand it, and there will be some who do not understand it; and there will be others who even though they do understand it will mischaracterize it.

You know that you are answerable to no one for your decisions. You have no obligation to explain your decisions to anyone -- not to me, not to the lawyers, or not -- nor to anyone else.

You may not impeach your verdict; that is, none of you can walk away from what you've decided. And it can't be exchanged. This is a final decision, both with respect to your

verdict on the charges and with respect to the -- what amounts to the decision that the specific intent has not been proved to the satisfaction of all 12 of you beyond a reasonable doubt. Therefore, there can be no death sentence.

You came together here. You were selected through a very careful selection process to be the jury to decide in this case. You were called away from your personal lives, from your work. You made financial sacrifices in addition to the time that you have spent with us on this case. You were in this courtroom at a difficult time, because there was during that time, as normally, a holiday spirit in the air, a lot of people off from work enjoying family and friends and traditional holiday activities. And you were called away from that. You met your obligations every day in sometimes difficult weather, always were here on time. You paid careful attention throughout the trial. You served.

You know, during the jury selection process where -- and, of course, that was individual with each of you -- there were times when I referred to this as somewhat analogous to military service, a call to your country's need; come and serve. And each one of you did that. Each one of you answered the call.

And I believe now that you're entitled to know that your service is recognized as that. And you have served honorably and you have served well, and you should take pride in your service. And as I have said before, you should not consider that this end result is in any way a dereliction of your duty or failure of your answering the call.

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

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

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

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

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

Mr. Tigar . . .

MR. TIGAR: Yes, your Honor. In that regard, we do move -- renew our motion under Federal Rule of Criminal Procedure 29, we move under Rule 33, and we move under Rule 37. And we would ask for February 9, 1988 (sic) for the filing of the written version of those motions, it being clear that the motions are made within the time set by the Federal Rules of Criminal Procedure and the Court having the authority to extend the time, provided the motions are timely made.

THE COURT: What date did you suggest?

MR. TIGAR: I asked for February 9, 1998, your Honor

MR. TIGAR: I asked for February 9, 1996, your Honor, which is a Monday.

THE COURT: Any objection to that extension of time?

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

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

I do intend, however, to proceed under Rule 32 and to proceed as I told the jury with court sentencing, utilizing the sentencing guidelines provided by the sentencing commission. And, of course, that requires the preparation of a presentence report. And I've asked our chief probation officer for the court, who is present, Richard Miklic, to himself prepare the presentence report for this case.

Now, there has been a procedure followed in this district for presentence reports, but I'm going to modify it with respect to it as to that part of the report that deals with victim impact statements, and so forth. I believe that that's been satisfied. I've been in the courtroom during the testimony here. But, of course, all of this is subject to interpretation by counsel and their views of it.

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

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

MR. TIGAR: Yes, your Honor. May I consult with my colleagues for a moment?

THE COURT: Well, of course.

(Discussion off the record among counsel.)

MR. TIGAR: Your Honor, in discussing with Mr. Thurschwell, we intend to present in addition to the legal analysis some other materials. I don't know what schedule the Court has in mind for that. If it's all to be done simultaneously, your Honor, we would ask for the 23d of February.

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

MR. TIGAR: Yes, your Honor.

THE COURT: And the sentence hearing will undoubtedly consist of the legal issues that are involved, perhaps some factual questions that may be involved in the application of the guideline, will also involve the right of allocution, the opportunity for exercising the right of allocution by the defendant personally, and, of course, statements from counsel. So it can be, you know, a hearing that could be in multiple parts. I don't know. It may be something where we want to do did it in segments, even, and consider the legal issues separate than from whatever may be necessary for the other aspects of it.

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

the filing of your views, respective views on how the guidelines may be applied.

MR. TIGAR: If that's the -- if it's limited to that, your Honor, we could do that on the 9th.

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

THE COURT: Yes. Well, let's call, then, for the simultaneous filing, February 9. And then I will not set a date for a sentencing hearing today, because I think that all of us need to sort of take time to think about that; and the nature of the hearing may depend upon what you submit and my reaction to it on these statements of your positions on application.

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

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

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

THE COURT: All right.

Counsel have anything else --

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

THE COURT: -- to be taken up now?

(Discussion off the record among counsel.)

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

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

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

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

And the Court will now be in recess.

(Recess at 9:12 a.m.)

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Dated at Denver, Colorado, this 7th day of January, 1998.

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Paul Zuckerman