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.

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REPORTER'S TRANSCRIPT
(Hearing on Motions)

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Proceedings before the HONORABLE RICHARD P. MATSCH, Judge, United States District Court for the District of Colorado, commencing at 1:30 p.m., on the 25th day of March, 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, JANE TIGAR, SUSAN FOREMAN, and TY GEE, Attorneys at Law, 1120 Lincoln Street, Suite 1308, Denver, Colorado, 80203, appearing for Defendant Nichols.

REGINALD J. BROWN and ROBERT F. HOYT, 2445 M Street, N.W., Washington, D.C. 20037, appearing for Marsha Kight and Martin Cash.

PAUL G. CASSELL, University of Utah, College of Law, Salt Lake City, Utah, 84112, appearing for Marsha Kight and Martin Cash.

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PROCEEDINGS

(In open court at 1:30 p.m.)

THE COURT: Be seated, please.

We're convened in 96-CR-68, United States against Terry Lynn Nichols for consideration of several matters. And we'll ask for the appearances. Mr. Mackey . . .

MR. MACKEY: Good afternoon, your Honor. For the United States, in addition to myself, Mr. Sean Connelly is

here, Beth Wilkinson, Pat Ryan, Geoff Mearns, Jamie Orenstein, and Aitan Goelman.

THE COURT: For Mr. Nichols, Mr. Tigar?

MR. TIGAR: Good afternoon, your Honor. Mr. Nichols is here and Ron Woods and I are here. With us are Adam Thurschwell, Reid Neureiter, Jane Tigar, and Susan Foreman, who has been added to the defense team under the conditions that your Honor had mentioned before. Also in court, your Honor, is Mr. Ty Gee, who your Honor authorized to help us on some of these sentencing guidelines intricacies that are going to be argued today.

THE COURT: All right.

MR. CASSELL: Your Honor, Paul Cassell, along with Bob Hoyt and Reg Brown for Marsha Kight and Martin Cash.

THE COURT: I proposed the sequence here of matters to
be heard would be this: That we'd start with the defendant's motion for judgment of acquittal under Rule 29, for new trial under Rule 33 and arrest of judgment under Rule 34, then the motion for compliance with the mandatory victims' rights under Rule 32 and under the statute, then consider the objections to the draft of the presentence report and then guidelines, sentencing issues as far as the application of the guidelines.

That seems to me to be the logical sequence.

So given that, we'll turn to the motions, Mr. Tigar, under 29, 33, and 34.

MR. TIGAR: If your Honor please, I don't intend to tax the Court's patience by discussing anything other than the new trial aspect of the motion.

THE COURT: I think the other matters are fully briefed.

DEFENDANT'S ARGUMENT ON MOTION FOR NEW TRIAL

MR. TIGAR: Yes, your Honor. The issue as tendered by
the parties is this: As the Court will recall, after the direct testimony of FBI Agent Budke, we learned for the first time that the Government had a large storehouse of memoranda, handwritten, that reflected interviews with witnesses. Of course, as to Agent Budke, the document that was eventually produced and marked as an exhibit was Jencks material and ought to have been produced earlier.

It was produced. We cross-examined.

Then when Mr. Dilly appeared during the penalty phase, we got another insight into that bunch of material and found that, once again, what we got was exculpatory in character. That led to the Government's agreement to review the material in question, it being uncontested that none of it had been reviewed theretofore in connection with the Government's discovery and Brady obligations.

The report the Government filed with the Court has

been filed and we have commented upon it.

Let me make the most expeditious and simple proposal

first with respect to this, your Honor, because there is a procedural history here.

Back in 1995, if the Court please, the parties began to discuss reciprocal discovery; and we reached an agreement that was, indeed, unprecedented, although not unprecedented in the way that the Government says. The Government points to the fact that they delivered to us some 28,000 or so FBI 302's and inserts. We did something that I have never done in a criminal case; that is to say, we agreed to open file reciprocal discovery of all memoranda done by our investigators with limited exceptions, such as members of the family.

Therefore, there was a quid pro quo and not simply the Government as a matter of grace giving us something.

This agreement was never reduced to writing; however, it was an agreement and there was a meeting of the minds.

The definition, your Honor, of a statement included -- and I'm putting this up on the ELMO, this No. 4: "A memorandum of interview, FBI 302 or other document, made by a representative of a party to this action that purports to summarize any statement given to the recording agent by the person being interviewed."

That language was in all of the drafts beginning with the first of these proposed agreements that were exchanged. And the Government regarded this paragraph as defining the nature of our agreement. That is made clear by this filing of January 26, 1966 (sic), in which Mr. Hartzler represented to the Court that the United States has voluntarily produced all these reports -- referring to the FBI reports of interview -- pursuant to an oral agreement with defense counsel that they would reciprocate within 30 days.

So that January 26, 1996 filing made clear that the parties had reached a meeting of the minds; that they knew what a statement was, and that statements included all of these -- anything, whether it's an FBI 302 or otherwise that was a summary of what somebody said to an agent.

Just to nail the point, Mr. Woods wrote to Mr. Hartzler on January 10, 1996 -- that's Exhibit H to our motion -- and noted that Mr. Hartzler had agreed that there would be produced a breakdown by various categories that would list all witnesses in those categories that would be Brady material to us; i.e., those witnesses who have given different versions on the whereabouts of the Ryder truck on various dates, John Doe No. 2, etc. That is not purporting to describe all of the categories.

Well, clearly, what Agent Budke had from Sergeant Wahl was Brady material within the meaning of that letter. Here is Mr. Woods making a specific request, and he's confirming that Mr. Hartzler has agreed not only to make the production under the agreement but that Mr. Hartzler has agreed that he's going to comb that material to identify material that could be regarded as exculpatory.

I don't have to tell the Court that we made good use of what was produced to us; that is, your Honor saw the cross-examinations, your Honor saw us using the witness notebooks. And I would ask the Court to recognize that when we got material from the Government that were these FBI reports of

got material from the Government that were these FBI reports of interview and inserts, we knew what to do with them. We had them organized. Every time a witness got on the stand, we had not only that witness' but what other witnesses had said about the same subject and our cross-examination reflected thorough preparation on our part. At least from my perspective and Mr. Woods' as lead counsel, I was proud of what our team did with that.

So what does the Government say about why these materials were not produced? And I haven't yet got to this effort that they've made to go through them and tell us what's in them. They say, no, no, no, these are notes and thus, they were not subject to any agreement to produce.

Well, if the Court please, we know what notes are. Notes are what Mr. Smith did. Mr. Smith made notes when he talked to Mr. Nichols. They are illegible, in no particular order, not on a form, on any size any paper at all; that is, whatever the agent wanted, made in pen or pencil and above all contemporaneous. Notes do not have a place at the bottom of a form where notes are taken such as all of these lead sheets do to take further action that's reflected. And by the way, some of what has been produced to us, the action taken has been whited out.

So our first contention, your Honor, is that the Court can't decide a new trial motion at this procedural hour; that what needs to happen here is that the Government needs to make production of these materials. They're not very long. There is 40,000 of them, but most of them are just one page. We'll do the same thing with them that we did with our -- with the FBI 302's and inserts. We'll go over them, have a team do it, do it in as short order as we can, we'll get back to the Court, and we will make a report to the Court whether we, in good faith, as advocates, believe that the withholding of any of it is so significant that we're entitled to relief under Rule 33.

This course -- that is to say, turning it over -- I respectfully suggest is not only required by the terms of the agreement that the Government violated, but, also, your Honor, as a matter of prudence. All of us have been involved in litigation in which a matter has wound its way up to the court of appeals, there has been an order that now -- that somebody has to come back and look at it or not an order that somebody has to come back and look at it; but if there is one, then it has to be done at that point or else the court of appeals finishes and certiorari is denied and there is Rule 2255 and then a district judge who, you know, wants to be the third guesser in the -- in connection with it says, well, no, we better look at this because the withholding of this kind of information is the very sort of thing that undoes otherwise valid judgments more quickly, thoroughly, and, I would say, justly than almost any other form of alleged government misconduct.

So that would be our first proposal. We just cut the knot here, and because there are contentions being made today that are going to make it difficult to get this case to judgment within the next couple of weeks or three weeks, as the parties had hoped, that we just do that process. After, all as the Supreme Court reminded us in United States against Dennis,

you know, only advocates or Dennis against United States -- excuse me -- I guess it is, the one in 384 U.S., probably about page 873. We have the court saying that it's advocates that

can tell what's in there, and we cite Alderman for the same proposition.

Alternatively, your Honor, the Government has represented to the Court that they have gone through this material and with the exception of the 11 or so documents they produced, the alleged Jencks material, there is just nothing in there. There is no Brady, there is some civilian Jencks, noncivilian Jencks they don't talk about -- and we've discussed the inadequacies of that -- but that's it.

Well, if that's true, your Honor, then I'm going to start buying lottery tickets and everybody can stand behind me and see what numbers I'm getting, because I'm going to win. There are 40,000 statements. We had two trips into that cache of material -- one from Mr. Budke and one for Mr. Dilly -- and in both instances, we found exculpatory material. The Government's representation to the Court is that the other 39,998 things contain nothing; that it was just a lucky hit on our part to get those.

Well, I -- I don't want to be unduly ironic or more than the situation demands or seem to be sarcastic or criticize counsel, but whatever review process was engaged in here, it clearly had to be inadequate. It's clearly inadequate as to the Jencks Act production, and it certainly doesn't meet the standards that the parties developed during the process of earlier discovery.

Your Honor, when the Government would send us lists based on the inserts of what Brady material was, they had every sighting of somebody that could be John Doe No. 2, they have all the Ryder truck sightings, they would have interviews from people who couldn't possibly see what they said they saw. In other words, the Government took its discovery obligation perhaps more seriously than the situation warranted; but at any rate, they took it seriously.

Here, at this procedural hour, they've chosen to do something entirely different, which is to withhold from us information that the record undisputably shows we could make effective use of.

So for that reason, your Honor, I respectfully suggest that the motion for new trial is not ripe for decision; that the Government has not met the obligation of production that it had under the agreement, and it has not met the obligation that it had conscientiously to review these materials.

THE COURT: All right. Mr. Mackey, you're going to address the motion?

PLAINTIFF'S ARGUMENT ON MOTION FOR NEW TRIAL

MR. MACKEY: I will, your Honor. Thank you so much.

Judge, the defendants in this case received all the discovery that they were entitled to. And before I begin to respond to the precise arguments made by Mr. Tigar, let me make a final report to the Court as to the scope of the discovery.

More than 28,000 witness statements totaling more than 52,000 pages were produced; transcripts of every witness before

the grand jury totaling some 2,100 pages; 16,000 pages of lab notes and lab reports; more than 2,300 government trial exhibits derived from some 14,000 items of physical evidence, and millions and millions of phone records and multiple records of every sort.

We're down to at this hour, your Honor, the question of whether handwritten notes taken by agents as they took phone calls from private citizens is discoverable; and our position is, as we've reported to the Court, it is not.

There is a couple preliminary matters if I could advise the Court. First of all, thousands upon thousands of the lead sheets generated, 302's or inserts that were produced to the defense, so there is a great body of the material that turned itself in in the normal flow of the investigation into materials that were, in fact, produced to the defense.

The second preliminary matter, Judge, is there was absolutely never at any point in time an agreement that handwritten notes of this nature would be produced. It was not the subject of any reciprocal agreement. Indeed, I was party to and familiar with and recall various conversations, all of which netted out to nothing. We had lots of exchanges of paper, lots of phone calls, contemplating at that time a tri-party agreement between Mr. McVeigh's counsel and Mr. Nichols. We reached no agreement.

On January 12 of 1996, we forwarded a letter to counsel, telling them exactly what we were going to provide in the way of our initiative through discovery. And at that time, we provided thousands and thousands of 302's and inserts and made clear in my fair reading of the letter, Judge, that's what we understood our obligation to be, statements of the witnesses as reduced to 302's or inserts, and later in grand jury transcripts.

If, indeed, it was contemplated, as Mr. Tigar suggests, that every handwritten note of an investigator who took a call from a citizen offering information, regardless of whether it was relevant or not, then we should have gotten some as well, Judge. We received no handwritten notes from defense investigators or other defense teams saying, I got a phone call from a private citizen and this is what they reported. What we did receive and what I believe the defense did in the way of honoring this gentleman's agreement was provide us with scores of typewritten reports, much like the same typewritten reports that were being produced to the defense from the FBI files.

We have understood, your Honor, from the beginning of this case our duty to look for and find and produce any Brady or Jencks material. And that was the task that we went about in December of this past year, to identify any materials that might be within handwritten notes that we're describing.

The first step that we took, Judge -- and I'd like to make a record as to the process -- is we simply gathered them here in Denver. The Court recalls that there were a number of FBI offices around the country that beginning on April 19 and continuing for many weeks thereafter received phone calls from citizens who wanted to help, offer advice, information, whatever. There was a form that was used -- we call it the lead sheet. It can be called a phone message pad, for that matter, Judge, that served the limited purpose at that point in

matter, Judge, that served the limited purpose at that point in time of simply taking down skeletal information from that caller. It was never the intent nor was it ever contemplated or carried out in such a way that phone calls would become the means to conduct an investigation into the bombing. It was leads. Leads only.

And so the FBI would, in fact, take those names, phone numbers, contact those people, and in traditional fashion do a full interview, question and answer, reduce those statements to written form; and those are the statements that became the 52,000 pages of discovery that the defense received.

Once we had those lead sheets here physically in Denver, your Honor, myself and Mr. Orenstein conducted a personal briefing of the FBI agents that I had asked to perform an initial screening task.

THE COURT: Now, let me just interrupt a moment. The timing of that is that my recollection is this came up during Agent Budke's testimony.

MR. MACKEY: Yes. Came up twice. December 11 and later with Mr. Dilly on December 31.

THE COURT: But the first time --

MR. MACKEY: Yes, your Honor.

THE COURT: -- was with Agent Budke; and at that time, my recollection is -- I haven't gone back and reviewed it -- that you reported that you were not aware of these lead sheets and the procedures that were being followed on the 1-800 number.

MR. MACKEY: That's correct.

THE COURT: So that you did not see these or have these produced to counsel for the Government up to that time.

MR. MACKEY: That's exactly right.

THE COURT: Okay.

MR. MACKEY: The extension of that thought, of course, is it was never part of the Government attorneys' files that could be used in any form or fashion in shaping our evidence or in cross-examining the defense.

THE COURT: Now, we'll take it from there.

MR. MACKEY: Once they're in hand, Judge -- and I think the number gets bumped up close to 42,000 -- I did a briefing of the agents and I said: This is what I want you to do. I want you to sort through the materials. I don't want you to analyze anything. I'm not asking for legal judgments or opinions. I want you to sort through these materials with the idea of sorting it into three stacks, your Honor, stacks that are nothing more than agent-to-agent communications, a form that was used to send a request or a lead to another field office, saying we've identified this information, would you check it out, would you please interview this person, find this document. Those kinds of things that you would expect the FBI would do. So we sorted those out, Judge.

The other thing we sorted out was -- second category, were opinions of citizens who called in to offer nothing more than I think I know who John Doe 1 or 2 is based on the composites. And that is some 18,000 citizens called in and

offered essentially the nature of that information.

The third category is everything else. Everything else. Without being precise into categories, everything else. And that netted out to almost 12,000 lead sheets. And those are the lead sheets, your Honor, that myself and members of the prosecution team reviewed, read, page by page, to look to see whether, in fact, there is any Jencks, any Brady, any material that should be disclosed under the law to the defense.

I will say, because Mr. Tigar has taken an opportunity to compliment the defense, and I can do as well. Let me compliment the prosecution team for this part of the project. It wasn't fun work, Judge. I will tell you. Not fun work at all. But there was no cavalier attitude about it. Everybody understood how important it was. We had recalled and reviewed the definition of Brady that your Honor had described for all of us many, many months ago. There was no confusion about what our task was or how important it was.

What we did was reviewed every one of those 12,000 lead sheets page by page and our conclusion, my representation to you, your Honor, is there is no Jencks or Brady within them. And it's not a laughable proposition if we think about the process and what was going on in the way of flow of information, early leads to the FBI in April of 1995. I can't give you a figure, but I would estimate it would be in the hundreds, where somebody called in and said: I have a Middle Eastern neighbor that I've always wondered about. The examples go on and on and on. And as I said in the brief, many of them track what's being publicized about the investigation. A fact that is reported in the newspaper, the next day, there are 200 phone calls about that fact.

So when we think about it, in terms of the flow of the information and the stage of the investigation, it is not laughable for us, after 12,000 pages of review, to say to this court there is no Jencks or Brady as it comes to the issues that were tried in this courtroom.

We did find some occasions where citizens, witnesses that we called during the prosecution of Terry Nichols, had, in fact, called into the FBI and there were, in fact, those handwritten notes written down by the agent essentially summarizing what it was that the caller said. One of them -- and we've given all of these to the defense and your Honor has seen them in the way of attachment to the defense pleading -- there is, I think, 12 additional lead sheets. They -- for example, Florence Rogers, your Honor recalls her testimony, was a representative from the credit union. She called in in March of 1996 to say, I just got a bomb threat. Someone called me and said, We're going to blow up the federal credit union. This is a year to the day after the bombing in Oklahoma City.

Janey Coverdale called in and said I have two friends who keep talking to me about all the information they have. She gave the information as she learned it from those two people, the names of those two people, and the defense in this case received detailed multipage interviews of those individuals.

That's the kind of information -- I won't go through all of them, Judge -- that led us to the conclusion that even with respect to the witnesses who were on this witness stand and took the oath and testified in this case, there was no Jencks or Brady.

I think I won't belabor any other additional points that have been raised either in the brief or in my response, your Honor, other than to say that as I have at the outset, we understood the task, it has been performed, and I report to the Court the results of that review.

THE COURT: So you accepted the -- the separation out that was done by FBI agents and the lawyers looked at the 12,000 odd --

MR. MACKEY: Exactly. The separation was by my design, in consultation, obviously, with other members of the prosecution team. We're aware of the nature of the project and how many lead sheets there might be.

THE COURT: What are you willing to let the defense look at, apart from the question of delaying further proceedings, because Rule 33 provides, of course, that even when there is an appeal pending, the Court can hear a motion for new trial based on newly discovered evidence. You can't grant it, of course, while it's pending on appeal in the absence of a remand; but, procedurally, the inquiry or the investigation about newly discovered evidence can go even after a judgment. Are you willing to --

MR. MACKEY: I'll respond in twofold, your Honor. As a matter of law, it's our position that nothing of the lead sheets are discoverable.

THE COURT: I understand.

MR. MACKEY: As a matter of practicality, it is the policy or the nature of the policy that marked our discovery position throughout this prosecution, we produced unprecedented discovery, unprecedented, categories of information that had never been produced.

THE COURT: I'm not talking about that. I'm talking -- what I'm talking about is are you willing to let them look at it?

MR. MACKEY: Without jeopardizing the timely imposition of final judgment?

THE COURT: Yes. I'm saying what Mr. Tigar has suggested -- and I understand his reasons for doing so and the appropriate objection -- or suggestion for the defense is that we wait; but I don't think you need to wait under Rule 33, because they've got two years to file a motion based on newly discovered evidence, and it can be heard by the Court even where the case is on appeal.

MR. MACKEY: Your Honor, my instincts teach me that it
is more than appropriate to agree to disclosure under that understanding; that indeed, that we can advance this case to final disposition.

There is one mechanical matter that, of course, will have to be taken up; and Mr. Tigar alluded to it and your Honor knows. This lead sheet was a form designed to communicate information about the action on that lead, and I don't think under any scenario there ought to be disclosure where there is

under any scenario there ought to be disclosure where there is a result recorded on that same lead sheet of what the FBI did in response to that lead.

THE COURT: This is for what information was communicated to the extent that it was recorded.

MR. MACKEY: Correct. The source information, your Honor.

THE COURT: Yes.

MR. MACKEY: With that understanding . . .

THE COURT: Well, Mr. Tigar?

DEFENDANT'S REBUTTAL ARGUMENT ON MOTION FOR NEW TRIAL

MR. TIGAR: If your Honor please, I appreciate the Court's suggestion. I think there is a difference between the standard that would be applied to a new trial motion made on the grounds of newly discovered evidence post judgment, and that that would be applied to a new trial motion made and decided before judgment is entered.

THE COURT: Well, but this would be post judgment because you wouldn't have these -- you know, what I'm saying is we'll let you -- we'll let you -- I'll -- the Government is willing to produce this source information, and you can review it after we've entered final judgment. And if there is anything in there that supports a motion for new trial, it would be in the nature of newly discovered evidence.

MR. TIGAR: Except, your Honor, as I understand the Rule 33 standard, the Court on a prejudgment Rule 33 motion sits essentially as the 13th juror; and the Court, within its discretion, because such a ruling is reviewed for abuse of discretion should the Court grant a new trial, could grant a new trial whether or not we had met the Berry standard of -- for newly discovered evidence based upon the withholding.

THE COURT: Yes. I'm separating out the motion based upon what you know as you stand here today vs. what you discover as the result of the providing of this information post judgment.

MR. TIGAR: Well, so for that reason, your Honor, I don't wish to reject what the Court is offering us. I simply note that it is our decided preference that we would have the opportunity to review it before judgment.

THE COURT: I understand.

MR. TIGAR: I will make these further observations, your Honor, just so that the record is clear.

As I understand it, Government counsel did not review the 18,000 lead sheets that purported to say that John Doe No. 2 is, you know, X or Y, or Z or my neighbor; and yet if we look at the lead sheets that were produced because they were Jencks -- for example, here's Mr. Dilly and he says that he believes Un. Sub. 2 is Robert somebody who served in C Company and so on.

Now, that is not "My neighbor is Middle Eastern and I've always been suspicious." This is a man who served with Tim McVeigh who tells us not only who John Doe No. 2 is but also gives a description and says that he was a friend of McVeigh and McVeigh used to watch his house.

THE COURT: Yeah. And it's been produced for that very reason.

MR. TIGAR: Well, your Honor, no. I think, your

Honor, this has been produced because Mr. Dilly was a witness and it's Jencks material. What the Government is telling us is that 18,000 statements that reflect John Doe No. 2 sightings were never reviewed by Government counsel. I just wanted the record to be clear about that. I believe that is the case.

Finally, your Honor, with respect to what parts of these lead sheets are going to be produced to us, there may be, in some cases, a governmental privilege; however, let's look at this lead sheet, No. 14267, that was provided to us. The Government would want to white out the lead information and the disposition information. The Court will note that a lead sheet is not notes. There is an original, a rapid start, and a lead copy that's made. It's got an actual official number, and there is a control number. But the information as to what was done with the lead -- that is to say, a further interview was conducted of the witness -- would in this instance be relevant to what goes before. It's not simply some internal administrative designation.

So we would -- we'd respectfully suggest that the appropriate procedure would be to turn over the sheets to us, to turn them over unredacted, to turn them over under a protective order.

Your Honor, our defense has never had a problem with these protective orders in this case. We've observed them, they've been entered for information far more sensitive than what we're talking about here and that we review them under those conditions.

And I would respectfully ask, maybe, Mr. Mackey through the Court whether the Government would agree to that simply to avoid the difficulties of redaction of these some 40,000 documents.

THE COURT: All right. Mr. Mackey?

PLAINTIFF'S SURREBUTTAL ARGUMENT ON MOTION FOR NEW TRIAL

MR. MACKEY: It's a rare occasion I may not have been listening to Mr. Tigar, but I think I heard what he said.

THE COURT: About the 18,000?

MR. MACKEY: Yes, yes. And my understanding of the earlier suggestion from the Court would be that it would be limited to the 12,000 that the lawyers reviewed. I mean, I think, as a matter of law -- and we can argue this now or later -- that those lead sheets that fall into that common category of opinions about who John Doe 1 or 2 are simply by -- under no circumstances, by their nature, are the Jencks or Brady; so my understanding of the process is we would go about redacting only those 12,000 that fall outside of those two other categories and were the ones reviewed by the prosecution.

THE COURT: Tell me again what the criterion was that was given to the investigators who review these others and separate out the 18,000 when it comes to unsubstantiated John Doe 2 or whatever they used?

MR. MACKEY: Essentially, two questions: 1) Is this lead sheet an internal communication between agents, FBI to FBI? That's one question. If it is, that's one category. And they total some 12,000 or so.

The second category is the information, an opinion about the identity of John Doe 1 or 2; that is, someone saying

I think I saw the person in the composite.

THE COURT: Opinion, rather than an expression of some fact?

MR. MACKEY: Yes. Yes.

THE COURT: "It looks like my brother-in-law."

MR. MACKEY: "And I saw him at the laundry, or I saw him on the bus this afternoon. Here's the route. You can find him."

THE COURT: And that was the standard given.

MR. MACKEY: Yes. And the additional instructions, Judge, was don't make any close calls. If you have any doubt about whether lawyers should look at that, put it in the lawyers' stack. And that's part of the reason it got to 12,000. I'll tell you from my own experience there were a number of those lead sheets that I reviewed that, by and large, that are essentially nothing more than someone saying I saw John Doe 1 or 2; so I feel very comfortable in making that initial sort, but it was inclusive to the group that prosecutors eventually reviewed.

THE COURT: Okay.

MR. MACKEY: As to Mr. Tigar's suggestion, I do think it is so important and must stand on the principle that whatever we would make subject to disclosure would be nothing below the line that ends the block for narrative.

THE COURT: I understand.

DEFENDANT'S FURTHER ARGUMENT ON MOTION FOR NEW TRIAL

MR. TIGAR: With that clarification, your Honor, I'm afraid I need to restate our view here. The John Doe No. 2 sightings, which the prosecutor in summation ridiculed as Elvis sightings, turned out in this case to be important; that is, we were led to witnesses who identified people that were associated with Mr. McVeigh in various ways. We presented that evidence to the jury. I respectfully submit that it had some impact on the way the case was presented. Certainly, it did from our perspective. So to take 18,000 of those things, characterize two or three of them and say, Well, you can't look at those or shouldn't look at those does not seem to us adequate; that -- and what we're being told here is that the prosecutors didn't even look at those; that is, they set up a category and didn't even look at them and they let FBI agents do it. That's not compliance with the Government's Brady obligation.

With respect to the first category, FBI agents to FBI agents: Well, FBI agent to FBI agent can contain exculpatory information such as a laboratory note, for example, that might have been reached. I don't know if it was on a lead sheet that a drill belonging to Mr. Nichols might have been submerged in water for a period of time.

THE COURT: Well, that type of thing is not -- we're not dealing with that, as I understand it. These are all -- those were things the Government had before. We're dealing with the calls in under the 800 number.

MR. TIGAR: Except, your Honor, I'm told that the lead sheets that are being talked about here include FBI agent to FBI agent. I don't know how the 800 number generated FBI-

agent-to-FBI-agent material. Maybe what they mean is the thing that Mr. Budke did. Now, that's an FBI-agent-to-FBI-agent. It says, Go out and interview, you know, to Agent Schaefer -- go out and interview Master Sergeant Wahl. And that which is in evidence, your Honor, is very significant, because the first part contains what Agent Budke heard, which was gray Chevy pickup. Then at the bottom in the part the Government proposes to hide from us as privileged, there is further information about what Mr. Wahl said as a follow-up on the lead.

Now, eventually, 302's get made, but the 302's and grand jury don't have the same information as on the lead sheet.

So if the Court please, I don't think there is any substitute for disclosure here. The Government's procedure for reviewing these things is, in our respectful submission, manifestly inadequate; and we believe that the entire group of 40-some-thousand should be turned over to the defense. The claim that the Government never in its wildest imaginings thought of handwritten things as being part of the agreement is -- seems to us irrelevant. They didn't even know they existed. The fact is that the definition was broad enough. Had our investigators not been able to type and had written out things in that form, those would have been turned over; and the statement here today that there never was an agreement or that there was just a gentleman's agreement, I emphatically reject, your Honor. We produced, we relied; and on the 26th of January, Mr. Hartzler told the Court there was an agreement, and he even attempted to hold Mr. Jones to it by doing a little reciprocal withholding. Your Honor will recall the grand jury testimony dispute.

So Alternative 1, your Honor: We would request an evidentiary hearing at which the agents who did the initial review would testify so that we can be clearer about these categories. We would request the opportunity following up on the agents' testifying to ask the Court to put -- let us put prosecutors on the stand, although we wouldn't do that unless we thought it was necessary; and in the alternative, your Honor, to exploring this further because of what we say is the inadequate production, we ask that the 40,000 be disclosed to us under a protective order. We'll review them under -- as expeditiously as possible and make our report to the Court.

THE COURT: Mr. Mackey?

PLAINTIFF'S FURTHER ARGUMENT ON MOTION FOR NEW TRIAL

MR. MACKEY: Judge, very briefly, your Honor, as I listened to the arguments, it came back to me that problems upon problems will develop even in a scenario that your Honor is thinking about. And that's why I return to our initial position and ask the Court to order -- rather, to deny the motion and any relief as it relates to discovery of lead sheets and the record stand as it is.

RULINGS

THE COURT: All right.

Well, I'm denying the motions for judgment of

Well, I'm denying the motions for judgment of acquittal and for new trial and arrest of judgment as they are made on the papers here, separating out this matter of whether there has been a failure to comply with Brady or Jencks and a breach of any discovery agreement.

Now, as to that, as I've already indicated, the way I read Rule 33 based -- new trial motion based on newly discovered evidence, that's available to the defense after the entry of final judgment for another two years. I'm not going to hold up disposition of the case and the entry of final judgment for further exploration of these lead sheet papers because it's my interpretation that that would be newly discovered evidence within the meaning of the rule.

I'm going to direct the Government to provide the 12,000 roughly that have been mentioned here as the material that has been reviewed by Government counsel with the redaction with respect to directions with respect to following up on the leads. I am granting that redaction because I would assume that the Government still has an interest in investigation. Not all of the questions have been answered by the evidence presented at the trial, and so I assume that this is still a matter of inquiry by the appropriate law enforcement agencies of the Government. And it's consistent with that that I will authorize the redaction.

With respect to the request for an evidentiary hearing to inquire further of the agents or whoever conducted the screening in accordance with the directions Mr. Mackey has identified here as having been given as criteria for the sorting or separation, I'm denying that and I'm denying the production of the material that wasn't given to counsel consistent with the directions. I'm assuming that whoever did it did it according to the directions; and I have no reason to go behind that. You know, there are some reasonable limitations on what we can do. And I believe this order is reasonable; so that's how we'll do it.

MR. TIGAR: May we have a date, your Honor, by which the production is to take place?

MR. MACKEY: I propose, if your Honor would accept, no sooner than 30 days after imposition of judgment.

THE COURT: Well, it's going to be after final judgment, so that there can be no argument that it's newly discovered. That's why I'm suggesting that, but I don't know why it has to be 30 days.

MR. MACKEY: It's incredibly time-consuming, your Honor, and the reality is while there is ongoing investigation, a limited staff, it is limited and those in Denver --

THE COURT: Well, it's to do the redactions.

MR. MACKEY: Yes, yes. We're going to have to pull out and do the redaction page by page; so I'll be happy to shoot for 30 days, your Honor, and pledge we'll do better if we can. If it gets worse, I'll certainly let the Court know.

MR. TIGAR: Well, if that's the order, your Honor, may I clarify, then, that when we get in material, we're going to have to review it, your Honor, and it would be our intention to

have investigators who had done some of the earlier reviewing work with us. Will Mr. Nichols be entitled to the services of appointed counsel and investigators under the Act --

THE COURT: I think so.

MR. TIGAR: -- for that purpose?

THE COURT: Yeah. I read 848 as authorizing that, even though I can assume for this purpose that there would be a notice of appeal filed in that 30 days' time.

MR. TIGAR: Yes, your Honor.

THE COURT: But I believe that under the unusual circumstances here, that that's a legitimate expenditure, to be sure; so, you know, I'm going to authorize it.

MR. TIGAR: Thank you, your Honor.

THE COURT: It may come back to my statement some day,
but I'm authorizing it. All right.

The next matter is the motion that was filed here on behalf of Marsha Kight and Martin Cash identified as a motion for compliance with mandatory provisions of Rule 32 and that was filed the -- the brief was filed in support of it. The Government filed a brief to the same effect, saying that victims have a right of allocution. The defense filed a response on February 23, the essence of which is that -- that part of Rule 32 is not applicable because this court had a sentencing hearing with the jury because of the applicable provisions of the death penalty statute.

We have counsel here for the movants. I think, again,
to expedite the matter, I'll ask the defense whether you have any change of position. There was a reply filed to the defense objection, so --

MR. TIGAR: No, your Honor, our position is as stated in our papers.

THE COURT: And I do characterize it correctly, do I, that you're saying that that part of Rule 32, at least, is not applicable because the Court, along with the jury, heard the sentencing phase information?

MR. TIGAR: Yes, your Honor. That's the practical effect of the interpretation of the rule, is that the Court heard it. Our position rests upon an analysis of the statute. I can do that now --

THE COURT: Go ahead.

MR. TIGAR: -- or wait to reply to what Professor Cassell and others would say.

THE COURT: All right. Well --

MR. TIGAR: Whatever your Honor wishes.

THE COURT: I think I understand the position of the movants, which is that Rule 32 says what it says and that it was enacted -- the amendment to Rule 32 was enacted by the Congress, didn't really come through the Rule's enabling act normal procedure; it came in as a result of these amendments to the victim act legislation. I can't remember what they call the statute, but it's amendment to the Victims and Witnesses Protection Act, I think is what it is. So that's your position, isn't it, Mr. Cassell?

MR. CASSELL: Yes, your Honor. We'd be glad to

elaborate or respond to Mr. Tigar's argument.

THE COURT: Well, let's hear from the defense, because I understand what you wrote.

DEFENDANT'S ARGUMENT ON MOTION FOR VICTIM ALLOCUTION

MR. TIGAR: If your Honor please, early in -- earlier, really, than the sentencing or penalty phase hearing, at the innocence phase of the trial, the Court took the position that the Death Penalty Act of 1994 superseded Federal Rule of Criminal Procedure 24; and to that end, your Honor held the alternate jurors available to substitute for the nonalternate jurors in the event that somebody became disabled or whatever.

THE COURT: Right.

MR. TIGAR: Now, thus, the law of the case is that there are ways in which the Death Penalty Act supersedes provisions of the Rules of Criminal Procedure. Of course, a Rule of Criminal Procedure is of no greater or lesser dignity for having been enacted by Congress as opposed to having been gone through the Supreme Court process and simply not vetoed or not amended by the Congress.

Our position on this issue is consistent with the position that we have taken with respect to the guidelines. I begin by noting that the Tenth Circuit has already held that it is -- would be a very unusual case in which victims would have standing to come into court and compel your Honor to do anything; that is to say, in which they would have standing as parties. Rather, the structure of the -- of these provisions has not derogated from the very fundamental principle that it is the sovereign and not the victims who control the course of a criminal prosecution.

Indeed, with respect to the statute that went to the Tenth Circuit on the previous occasion, it said expressly that the Government was to use best efforts.

But in this case, what we're being told is that, well, Rule 32 speaks of a crime of violence. It says the sentencing court must, and therefore, the sentencing court must.

However, under this statute, the statute that we're operating under, it's clear that there is no presentence report. The normal function of the normal process of sentencing is different. And let me try to describe to the Court how we got here, because I think that's -- that's basic to our position on a lot of these issues. We went to Mr. Ryan and we said it's inappropriate for you to sign a notice of intent to seek the death penalty. We then went to Washington, D.C., to review his decision he was going to do it and had the rudest reception I've ever had by any bureaucrat ever in my 30 years. But we had a reception, anyway; and they approved through the attorney general Mr. Ryan's signing a notice which was word-for-word identical to that filed against Mr. McVeigh. We litigated that issue in front of your Honor. We litigated it in the Tenth Circuit, and yet the Government persisted. So thrice did they say that they wanted this statute and nothing else.

Then we litigated the Death Penalty Act issues as a substantive matter, and your Honor made some changes in the list and -- in the notice, and I kept insisting Mr. Ryan had to

first and -- in the notice, and I kept insisting Mr. Ryan had to sign it. And your Honor got a little impatient with me, perhaps; but it was deemed to be signed.

THE COURT: Well, he stood up here --

MR. TIGAR: Stood up and said he signed it.

THE COURT: Yes.

MR. TIGAR: Then, your Honor, after the innocence phase of the trial, the jury returns 18 not guilty verdicts and we have an argument about Bullington against Missouri and we say to the Government, could you now desist? Could we stop this now? Could we quit? And they won't do it, because they have what the Tenth Circuit has held to be the unreviewable discretion to force your Honor to hear and us to defend a proceeding under this statute. And under Payne vs. Tennessee, your Honor having rejected our view that Payne did not apply to this statute because it didn't expressly permit, in a certain way, victim impact evidence, 54 witnesses took the stand and testified.

Now, that, your Honor, is a process by which people, in the way that the Supreme Court of the United States has decreed -- people who feel themselves victimized make their views known to the jury and to the court. After all, the Death Penalty Act does contemplate that the court may wind up doing the sentencing and as interpreted by your Honor that the jury, if it fails to make certain threshold findings, does turn it over to the court.

Under those circumstances, we respectfully suggest that the purposes, if purposes there be, of victim participation in the sentencing process, have been amply satisfied; and since the statute says that, you know, no presentence report, the statute authorizes or the statute suggests that the otherwise mandatory provisions of Rule 32 simply don't apply.

That, your Honor, is our position, is that we are -- the Government has chosen a procedure which as parens patriae binds all citizens; and having chosen that procedure, the statute itself says that Rule 33 doesn't apply under these circumstances.

THE COURT: Rule 32.

MR. TIGAR: Rule 32. Excuse me, your Honor. Wrong rule.

THE COURT: Well, are you saying that part of Rule 32 doesn't apply, or the whole rule doesn't apply? Here we have the situation where we proceeded under the Death Penalty Act. The jury returned a verdict in which it did not find either of the necessary intents being relied upon for the death sentence. And that was a decision, as the Court has interpreted it, that there can be no death sentence in the case; therefore, the sentencing must be done by the Court.

Now, to my mind, that means that the court proceeds in
the same fashion as if there had been no death penalty, not that there had been no death penalty possible because, you know, I've heard a lot and participated with the jury at that hearing; but we still, I think, are called upon to proceed under the statute, 3553, and to consideration of the guidelines as the statute commands. And I would think that as the statute

commands, we would also be looking at Rule 32 and using procedures under Rule 32. And indeed, I instructed the chief probation officer of the Court to do a presentence report and to provide counsel with copies of the draft, which he's done and to which you've replied, but -- so I have assumed that because the Court must impose sentence in this case and because the Court must function within the normal sentencing constraints procedurally, that Rule 32 in all of its provisions is now applicable.

MR. TIGAR: Well, I'm grateful for your Honor's explication of the position here. I had doubted that the Court had the power to say that Rule 24 didn't apply, but the Court did because it regarded it as superseded by the Act.

THE COURT: Well, the Court is entitled to be selective on the rules.

MR. TIGAR: I've never doubted that, your Honor, for a moment. If I have seemed to doubt it, your Honor, I recede from all such positions, renounce all such errors, and repent of them heartily.

But let's look at Rule 32 and see which of these provisions might apply. First, time for sentencing. Well, that's -- might or might not.

(b) presentence investigation. It's true that your Honor did order a presentence report, but not as mandated by the statute, because the death penalty statute says no presentence report. And your Honor reserved to yourself portions of the presentence report determination that you ordinarily would have had Mr. Miklic and his capable staff do, so that I did not interpret your Honor's order to have a presentence report prepared in part as law of the case for the position that the other provisions of Rule 32(c) applied. In fact, quite the contrary. I interpreted that as a holding by your Honor that you were not mandated to follow all of the provisions of Rule 32(b).

Next we get to Rule 32(c). At the time that your Honor sentenced Mr. McVeigh, you noted that you were obliged by statute to impose the sentence recommended, quote unquote, "by the jury."

THE COURT: Right.

MR. TIGAR: But that you would nonetheless grant a right of allocution. I interpreted your Honor's view there, although it's not binding on the Court here in this later proceeding, as simply saying that the right of allocution being so firmly founded perhaps on constitutional grounds --

THE COURT: I think it is.

MR. TIGAR: -- that -- that your Honor would not, even though the statute seemed to say that the allocution would be a futile act -- that is, you couldn't do anything with what you were being told -- that your Honor would permit it. And so I didn't interpret that as saying that you thought that Rule 32 applied under that situation, although, as we say, that case is different.

So now we get down to the imposition of sentence provisions here. That's where if sentence is to be imposed,

etc., etc., "the court must . . . Now, that's 32(c)(3).

The presentence report provisions are expressly referred to here under 32(c)(3) big (A). And yet those are the very provisions of law -- that is to say, the presentence report provisions -- that the statute says are not to be applied here and that the Court has already interpreted to give the Court the power and not Mr. Miklic to make certain of the determinations.

THE COURT: Well, the Court has that power always. I mean, if they -- under normal sentencing, all they do is do a computation, but they, you know -- I don't sign off on somebody else's work usually and make my own determinations in an ordinary sentence hearing, so --

MR. TIGAR: Again, I don't -- your Honor is the only person who can interpret the meaning of your Honor's orders with respect to how this has been -- the presentence report has been prepared. I'm simply noting that textually, it does not appear that a portion of 32(c) is mandatory upon the court. Indeed, quite the contrary.

THE COURT: Okay.

MR. TIGAR: So then we get down to (e), which is what the -- Professor Cassell and others are talking about here. Under this statute, there is a provision for victims to testify and to present evidence. Now, one of the things that this statute gives us, your Honor, is the right to present evidence in rebuttal; that is to say, if victim impact evidence under the statute is presented and your Honor is going to hold -- we have, if it's presented under the statute as it was -- we have the right to call witnesses. We would have the right to cross-examine the witnesses, the victim impact witnesses that they brought, as we had the right to do during the penalty phase in this trial.

32(c)(3)(E) simply says that the victim gets to make a statement and present information; thus, it speaks to a completely different procedure than under the statute. The two procedures cannot live together. They are flatly inconsistent with one another.

Under the statutory procedure, the Government makes the selection of which witnesses are to appear. The defense has the opportunity to cross-examine, and certain rules of evidence, although not the Federal Rules, but certain rules of evidence apply with respect to the balancing, prejudicial vs.

probative.

Then the defense has the right under the statute, as under Payne vs. Tennessee, to present witnesses, live witnesses of its own after it has been notified and had the -- of who is going to appear for the Government or as pro-severity witnesses, let's put it that way, and then to put those witnesses on and they can be cross-examined and we can get exhibits together and so on. The statute gives us those rights.

Now, why did we get the rights? I would have been happy to dispense with them. I would on the day this indictment was returned been happy to walk into Mr. Ryan's office and say to him, Give us 32(c), Mr. Ryan. Give us 32(c).

But he chose not to. He chose to give us something else. He chose to give us a chance to be death eligible. Well, of course, all of us are death eligible, but he wanted to make Mr. Nichols death eligible in a quite particular way; and having made that choice, we were entitled to those rights and we exercised them.

That shows that there is an inconsistency between the statute and the rule and supports our argument that the rule doesn't apply and puts us, therefore, right back to where the Tenth Circuit said we were; that is to say, there are so many instances, given the Government's sovereign duty, power, and obligation to control the course of criminal justice in which the Government, having acted, does so as parens patriae and may deprive citizens of what would otherwise be their right of autonomy to participate in proceedings.

That's our position.

THE COURT: Does the Government wish to be heard on this? Mr. Connelly?

PLAINTIFF'S ARGUMENT ON MOTION FOR VICTIM ALLOCUTION

MR. CONNELLY: Thank you, your Honor. We'll let Mr. Cassell do the bulk of the argument in terms of representing the victims that he does. Just a couple of points.

I think your Honor has stated the plain language of Rule 32 clearly allows victim allocution, so the question really is -- I think the only question is does Rule 32 apply. I think the defense --

THE COURT: Well, it does say more than simply the right of allocution.

MR. CONNELLY: To make a statement and present information.

THE COURT: Yeah.

MR. CONNELLY: And I think the legislative history and intent of Congress in 1994 when it directly enacted that provision was to provide a right to victims equivalent to the right of allocution that the defendant has, and the right of defense allocution is one that has evolved over time first, I think, recognized by the Supreme Court as one that just allows a defendant to argue any legal impediment to imposing sentence, and then I think codified back in 1966 by the -- by the framers of the Federal Rules, and then later on, the Rules were amended to allow the government and the defense counsel a right to make a statement relating to sentence. So I think the history of the Rules shows that there has been equivalency at this point that the victims, according to the intent of Congress, is supposed to have a right equivalent to that of the defendant.

In terms of whether the right applies, whether Rule 32 applies, I think it's clear that Section 3593, the -- the provision relied on by Mr. Tigar, says that for a defendant who pleads guilty or is sentenced pursuant to an offense under Section 3591, no presentence report shall be prepared.

This defendant is not being sentenced pursuant to 3591, which is a death penalty sentencing provision. That would apply to Mr. McVeigh, for example, who the jury recommended be sentenced to death. It would also apply if the

recommended be sentenced to death. It would also apply if the jury had unanimously recommended that the defendant be sentenced to life imprisonment. In those cases, the Court's discretion would be limited; and under the statute, the Court would have to impose a sentence recommended by the jury.

This defendant is being sentenced pursuant to 18 U.S.C. Section 3553, as the Court pointed out, the Sentencing Reform Act, so I think the first point is that that Section 3593 doesn't even apply because this defendant is not being sentenced pursuant to that statute. Second, even if it did apply, all it says is that no presentence report shall be prepared. It doesn't say that there is no right of allocution, it doesn't say that none of the other Rule 32 rights apply. It simply, according to the plain language, says that no presentence report shall be prepared. And I think that's far too slender a read, even if the statute applied to this case, which it doesn't, to say that there's no Rule 32 right of allocution either to the defendant or to the victims, so I think all the Rule 32 rights apply with full force in this case, first of all, because that statute doesn't apply and second of all, even if it did apply, it would only be the presentence report aspect that would be excluded out of the statute.

So for those reasons, we support the motion of the victims for allocution.

THE COURT: All right. Mr. Cassell?

MR. CASSELL: Thank you, your Honor.

THE COURT: I think it would be helpful if we defined exactly what is being asked for here, because the way I understood the motion, these two people, as victims, would like to speak at the sentencing hearing, not call witnesses or offer information in the same sense as we would suggest that that's like evidence at a penalty phase hearing under the death penalty, but simply to speak. Do I read it right?

MR. CASSELL: Absolutely, your Honor. They seek the opportunity to make a statement to the Court. That's traditionally known as allocution.

THE COURT: Right.

MR. CASSELL: Defendants conventionally do that, prosecutors conventionally do that, and victims have done that at least since 1994, when Congress passed this statute requiring this. They don't want to intrude and call witnesses or cross-examine witnesses. They simply want to make a brief statement. My clients estimate it would take in the neighborhood of 10 minutes each to make a statement about the effect of the crime on them and on their families.

And so I think much of the confusion that has been created by the defense motion disappears when we recognize that this is not a motion for victim testimony; this is a motion for victim allocution, quite a separate thing.

Now, Mr. Tigar suggested the purposes of victim allocution have already been satisfied. They have not. My clients are seated here today. They have had no opportunity to make a statement. We submit that that statement would be useful for the Court in imposing an appropriate sentence; but even if it were not, that statement will certainly be useful

for them, for their own purposes, and Congress has given them a right in Rule 32.

Now, this statute is quite different than the statute we had the opportunity to brief with your Honor and with the Tenth Circuit several months ago that Mr. Tigar referred to.

That statute said that the Government shall make its best efforts -- and we appreciate it very much -- the Government's efforts in that case and throughout the trial. But that statute was quite limited.

THE COURT: Yes.

MR. CASSELL: Rule 32 is different. It says that the Court must address each victim personally.

THE COURT: Now, actually, it says if the victim is present at the hearing, the Court must address them personally and determine if they wish to make a statement.

Well, you know, it is one thing, your clients have come forward through you and have identified exactly who they are and what they want to do; and that, we can deal with, it seems to me. What I am concerned about is given what have we got, potentially 2,500, something like that, persons who could qualify as victims, there would be no reasonable limits on who would be heard and how long they would take.

The Government has procedurally attempted to assist with that by communicating with the victims other than the two you represent -- two persons you represent and identified who may wish to be here, but, procedurally, it becomes a bit awkward if we just have an open meeting and say, Anybody else want to speak?

MR. CASSELL: Well, your Honor, this would not be an open meeting. First of all, we represent two clients who --

THE COURT: But I mean, literally, that's what it says. Rule 32 says that.

MR. CASSELL: Yes. Your Honor, but the open meeting scenario is a parade of horribles that one could envision happening in some case, but it's not the situation that's going to happen in this case. The Government has asked all of the witnesses: How many of you are planning to come and make a statement? As I understand it, they received a response from 12, and they estimate the total amount of court time your Honor would expend would be approximately 2 hours to hear from all these victims.

THE COURT: Are you in agreement that the Court can put that kind of a limitation on it; that it must -- these people must identify who they are and that it's going to be limited to allocution?

MR. CASSELL: I think there would be no problem with the Court establishing reasonable procedures and reasonable time limits. Certainly, if Mr. Nichols wanted to speak for three days, your Honor could say we don't have that much time.

We are simply asking for equality here. The defendant
has an opportunity to make a reasonable statement, so should the victims, and the same sorts of time limits and those kinds of things can be applied.

Now, in terms of the number of people that would be involved, again, the Government has precise information. We

need not speculate here. They have sent a letter to 2,000 victims and said there is a motion pending, if it is granted, how many of you will travel to Denver and make a statement? We know the answer to that question. The answer is 12. Maybe we're off. Let's assume they were off by a factor of 50 percent and we'd be talking about roughly 20 people, an expenditure of court time of roughly 3 hours. Given the magnitude of this case, given the congressional directive that victims are to play a role in the process, I think it's entirely appropriate for the Court to apply the provisions of Rule 32. And in any event, Congress has directed that the provisions of Rule 32 must apply here.

The only argument we have heard from the defense is that well, this was once a death penalty case and therefore, the victims' provisions of Rule 32 no longer apply.

Apparently, the rules here in the District of Colorado are somewhat freewheeling, perhaps, and perhaps the defense get to pick out which parts of the rules apply, because I would note that the defense has submitted a stack of letters, essentially a defendant's allocution, pursuant to the provisions of Rule 32 that allow them to provide information to your Honor supporting their position at sentencing.

Again, we are not asking for any special treatment. We are simply asking for equal treatment. The opportunity to provide the same sort of information to your Honor. And this is precisely what Rule 32 envisions. The statute sets out in virtually identical terms a right of the defendant, a right of the Government, and a right of the victim to make a statement.

And the only conceivable reason for your Honor to depart from that is the fact that this was once a death penalty case. That was back in January. This is now in March, and it is no longer a death penalty case.

As the Government has pointed out -- and we agree with everything they say -- we are now operating under the statutory provisions for the situation in which the jury does not agree on a death penalty recommendation. And that particular statute is 3594. 3594 provides that otherwise -- that is, when the jury does not agree on a death penalty -- the Court shall impose any lesser sentence that is authorized by law.

To be authorized by law, the Court should follow the relevant statutes and the relevant rules, Rule 32. And there is some law on this. It's not a question of selectively choosing which provisions to apply and which ones to ignore. The question is are there any provisions that are positively repugnant to the provisions in the death penalty statute? The defense argument that there is a -- some sort of repeal by implication.

Well, the standard for establishing that the provisions of Rule 32 have been repealed by implication is a very, very high one. The Tenth Circuit and the Supreme Court have commanded that the Court should try to construe the statutes consistently if possible. Here, there is very clearly a consistent -- consistent construction.

The death penalty procedures were followed in January and at sentencing procedures in March and April. We are now

and at sentencing procedures in March and April. We are now reverting back to the provisions of Rule 32.

So we would urge the Court to apply the whole rule here. There is no practical reason for ignoring it, and the victims are certainly entitled to exercise their rights under Rule 32.

I'd be happy to answer any questions that the Court might have.

THE COURT: I understand your position. Thank you.

Did you have anything else, Mr. Tigar, on this point?

DEFENDANT'S REBUTTAL ARGUMENT ON MOTION FOR VICTIM ALLOCUTION

MR. TIGAR: Yes, your Honor. I -- we take exception, of course, to the assertion that this was once a, quote, death penalty case. What happened here -- I don't want to repeat what I said before -- the Government made a procedural decision how they wanted to try this case. And now what's being said is that they can at will decide that they want to do it some other way and that there aren't any consequences attached to procedural choices that the Government makes.

Nowhere in Mr. Cassell's argument did I hear a response to our concern that there is a quid pro quo here; that when the Government seeks the death penalty, all evidence that is to be taken into consideration for the defendant's sentence is subject to certain procedural rights that we have to challenge and to confronting, to know what's going to be presented, to cross-examine, if necessary, and to present evidence of our own.

That, it seems to me, is not implied repeal but the same thing your Honor said about Rule 24. You -- Congress has given us two alternative procedures here. You've got to choose one or the other.

RULING

THE COURT: Okay. Well, the motion on behalf of Marsha Kight and Martin Cash is granted, and I do so on the construction made of the law that -- that is to say that we had the hearing under 3593 and it wasn't the Government's choice as to what happened then; it was the jury's choice of their decision that they could not unanimously find beyond a reasonable doubt the requisite intent to proceed with a jury sentence. And accordingly, the effect of that is to return the sentencing responsibility to the Court.

The Court has to proceed under 3553, the Sentencing Reform Act, and under Rule 32; and I am of the view that (c)(3)(E) is a part of the rule that is now applicable. As I said in colloquy with Mr. Cassell, I think there is some

reasonable limitations that the Court can impose on this, what I'm now calling the victims' right of allocution, and that it be a statement; that the statement be a reasonable length and that no witnesses will be called.

And with respect to others who are not movants here, other than -- persons other than Ms. Kight and Mr. Cash, I think that the Court should enter an order that any additional persons who wish to address the Court at the time of the

sentence hearing notify the Court no later than 10 days prior to the hearing of their intention to appear and make a statement and that, again, the right would be limited to allocution and by which I mean the making of a statement without testimony or other witnesses called by the victims.

MR. MACKEY: Your Honor, do you contemplate the United States would relay that information to the Court, or do you want direct contact from interested victims?

THE COURT: Well, they can do it through the Government's lawyers, yes.

MR. MACKEY: Be happy to, sir.

MR. CASSELL: Your Honor, two additional points of clarification. One is my clients were concerned about the possibility of cross-examination that Mr. Tigar raised. Our understanding --

THE COURT: No, I am limiting this to a statement; and that's not subject to cross-examination. It's subject to argument about its significance or lack thereof but not cross-examination.

KIGHT'S AND CASH'S ARGUMENT ON RESTITUTION

MR. CASSELL: The second question, your Honor, is that there may be certain restitution issues that might arise in the course of that sentencing. Our clients would like to be involved in briefing on those issues, not to seek personal gain for themselves but to provide suggestions to the Court as to how best to proceed on those issues.

THE COURT: Well, I don't know wherein the obligation of the Court to consider restitution provides for other than contact through the probation officer or the Government's counsel; and of course, it can be addressed in the statement. But independently to be submitting evidence about that or that sort of thing, I don't think that comes within the Rule.

MR. CASSELL: There is a provision that does seem to contemplate independent victims' action recently passed by Congress. It's 3664(k), if memory serves me correctly.

It refers to the fact that the court may, on its motion or on motion of any party, including the victim, adjust a payment schedule or require immediate payment in full. That statute would seem to envision Congress' direction that victims be involved in crafting restitution.

Our only role, your Honor, is to insure that Mr. Nichols does not profit from his crime. And we have some suggestions along those lines that we think would be useful for the Court in crafting an appropriate restitution order. We would note that there was no restitution order entered in some other cases related to this, we think that a very large restitution order should be entered in this case.

THE COURT: You know, when it comes to restitution, I'm not in the habit of entering orders I don't think can be complied with.

MR. CASSELL: The concern, your Honor, is that there may be income potential for Mr. Nichols down the road and it would be desirable to have in place a restitution order now so that if he were to receive, for example, an exclusive

interview --

THE COURT: That can be the subject of a separate form of order.

MR. CASSELL: All right. We're simply requesting the opportunity to be involved in that process, your Honor.

THE COURT: Well, you can file whatever motions you want to. What I do with them, I'll do after I see the motion.

MR. CASSELL: Thank you, your Honor.

DEFENDANT'S ARGUMENT ON RESTITUTION

MR. TIGAR: Your Honor, this issue, I was told for the first time today at 11:00 this morning, might come up today. It is an effort that has impeded our efforts to resolve the question of return of property to Mr. and Mrs. Nichols, because the Government is rightly concerned that this whole restitution issue could get in the way of that process, and so these negotiations we spoke of in chambers on February 18 are just stalled.

I would respectfully request that if this issue is to come up that we do set a briefing schedule so that we could get it resolved.

The statement made here, Mr. Nichols profiting from his crime -- I mean, I don't need to respond to that. I just think that's an outrageous thing to say in this context. But if this is to be an issue, we have a due process right to brief it. I won't respond to the allegations, the innuendo here; but I do think a schedule should be set and should be resolved before judgment is entered if the Government and the people with whom it works want to make an issue out of it.

PLAINTIFF'S ARGUMENT ON RESTITUTION

MS. WILKINSON: Your Honor, we have a proposal, if we could.

THE COURT: All right. Let's hear your proposal.

MS. WILKINSON: As Mr. Tigar said, we have been trying to negotiate a return of certain property; and as you know, there is several complications. One is property that we have no dispute is Mr. Nichols'. For example, his GMC truck and the bulk of the property seized in this case which we believe belongs to Roger Moore. And --

THE COURT: Well, there is also property that belongs to Marife Nichols.

MS. WILKINSON: Correct. And this morning I sent a letter to Mrs. Cain, who represents Mrs. Nichols, in response to our promise to you to try and work out that motion; and we said that we did not feel we were in the position to return her property to her unless we could prove that it was her property alone and not a joint marital asset and we would need additional information from her. And that is because of your power to enter an order of restitution. And we don't want to return any property to Mr. Nichols if there is going to be an order of restitution.

We also learned from the Bureau of Prisons that if Mr. Nichols is eventually sent to a high-security facility at the Bureau of Prisons, he will have the ability to work at one of these government institutions and make money and that that money can be set aside through a program at the Bureau of

money can be set aside through a program at the Bureau of Prisons where half of that money goes to fulfill an order of restitution.

So as Mr. Tigar suggests, I think we need to have a pretty quick briefing schedule on restitution, and we were thinking if we could submit simultaneous briefs to the Court a week from this Monday, which would be April 6, and the defense and the Government could submit them and perhaps you could authorize the probation department to work on the -- that portion of the report to discuss restitution and because normally, under Rule 32, the probation department would make any initial recommendations to you about procedures for restitution.

We also would keep it simple if the Court did authorize or order restitution, try and work out something where you wouldn't have lots of claims from different people but where the Government, who may be entitled to restitution for the loss of the building, could merge or assign its claims with victims and there would be some central repository where any restitution would be distributed so the Court would not have to deal with those issues, but we would like some time to work that out over this next week, if you set a briefing schedule as we've suggested.

THE COURT: Mr. Tigar?

DEFENDANT'S FURTHER ARGUMENT ON RESTITUTION

MR. TIGAR: At the time I agreed to an April 17 sentencing date, your Honor, not a whisper had been spoken about any such issue, not until, as I say, 11:00 this morning. Mr. Nichols can't afford to pay $32 million to put the Murrah Building back up. And I think it's an outrageous suggestion that any offense of which the jury found him guilty could ever trigger such an obligation. But I pass that now.

I respectfully suggest that the Government file its brief whenever it wants to file it; that we be given two weeks to respond so that we can look at these issues. This is not a matter that needs a hurry-up. The Government proposes that the idea that Mr. Nichols is going to be put in prison and where he could work and whatever he gets -- I don't know what federal prisoners make; certainly not minimum wage -- that rather than it going to his family that that is going to be taken away from him in a certain amount in perpetuity, because the amount of dollars we're talking about here is beyond the power of any individual to earn in a lifetime.

In addition to that, it is now apparent the Government
is talking about marital assets, and so on, which we submit is simply a device to keep assets that really ought to be in the hands of Mrs. Nichols and those kids out of their hands. So whatever position the Government wants to take, we respectfully submit they ought to take it, let us know what kind of a bite they want, and then let us respond to it. I don't see that simultaneous briefs do any good here. Every time I think I have reached the end of a list of the things the Government wants to impose on us, I find that I am mistaken.

I think they ought to tell us what the list is.

THE COURT: Well, I didn't anticipate that we were going to have a quarrel about restitution; but if that's the

going to have a quarrel about restitution, but if that's the case, we won't set a sentencing hearing. We'll deal with restitution and all of that separate. I can't have "and who owns what property." If we're going to have to deal with that, that will have to be done before any sentence hearing as well. And I don't even know what choice of law to apply, whether it's going to be the law of Kansas with respect to marital property or what law. I suppose it is Kansas. That was the last place of residence.

So if you want to have a big fight about restitution, we'll do it; but it's going to hold things up.

Now, with respect to the presentence report, I did direct that probation -- chief probation officer prepare a presentence investigation report without dealing with the relevant offense conduct and the other guideline-determinative issues. And one was done and was submitted to counsel in draft form. And of course, under the Rule, that's not a public document.

Defense counsel has, by letter to Mr. Miklic, which is
the appropriate procedure, identified objections to the report. I take it the Government has a copy of these objections.

MR. MACKEY: Yes, we do, your Honor.

THE COURT: And I don't know if the Government has a position with respect to the objections. Frankly, nothing that's being objected to has any bearing on the Court's computation of the guideline range for sentencing, so I don't have any -- I don't see any reason why we should not grant the objections, amend the report accordingly, and -- there are two objections, and then there is a request for additional material to be attached. I don't have any problem with that, either. Does the Government?

MR. MACKEY: Your Honor, I wonder if I'd have permission to review it and submit a letter to Mr. Miklic by Friday.

THE COURT: All right. Well, if we can't set a sentencing date today, I guess we can do that.

MR. TIGAR: Yes, your Honor. With respect to the matter that now remains on the Court's list, Mr. Thurschwell's will take the lion's share of the argument and I would like the "tiger's" share at the end of his, but very briefly.

THE COURT: All right. Well, I'll tell you, I have reviewed all that has been filed on the papers with respect to guideline interpretation and application and have a viewpoint of it that again may move things along, but we'll take a 20-minute recess beforehand and see -- I don't think we need to argue the same things that are already there in the briefs. I have the briefs, and that's the purpose of filing them, so that I can read them.

MR. TIGAR: Would your Honor -- if your Honor could share a tentative view with us, I know that that would certainly shorten our presentation.

THE COURT: I'll take a 20-minute recess first.

MR. TIGAR: Thank you, your Honor.

(Recess at 2:55 p.m.)

(Reconvened at 3:15 p.m.)

THE COURT: Be seated, please. As I indicated before

the recess, I've reviewed the positions taken in the papers filed concerning the guidelines here, the defendant's guideline sentencing memorandum of February 9, the brief of the Government also filed February 9, then the additional briefing filed by both sides on February 23, which are responses, and also looked at the law myself. And I think it would expedite matters and assist counsel if I outlined for you my view; and then to the extent that you wish to disagree with it, you have the opportunity to do so before making any ruling.

The analysis that I suggest is that the offense of conviction here, of course, under Count One is the 2332(a) conspiracy to use a weapon of mass destruction against persons within the United States and against property of the United States, as well as the eight counts of involuntary manslaughter.

With respect to the first count, the conspiracy count,
that statute provides for punishment by imprisonment for a term of years or for life and, if death results, by death or imprisoned for any term of years or for life.

We had special interrogatories to the jury with respect to death results and the foreseeability of the deaths, and those were answered yes. It is for that reason that we went to a sentence hearing with the jury under the Death Penalty Act as required by the fact that we had a notice of death penalty and proceeded under 3591 of Title 18 with the hearing prescribed by 3593.

After submission of the issues to the jury, the jury returned a verdict in which they found that -- or could not find unanimously and beyond a reasonable doubt that the necessary intention under 3591(2)(C) or (D), which were the two submitted to the jury existed. The effect of that was to eliminate the death penalty. And by my interpretation, at least, present the matter for sentencing to the Court.

As I've already indicated earlier this afternoon, that, to me, means that the Court must proceed under the Sentencing Reform Act, 3553 of Title 18, consider under sub (a) of that statute the factors to be considered in the imposition of a sentence, and, of course, under sub (b) require consideration of the guidelines. And the parties have submitted their views about the applicability of the guidelines, and it has been agreed that the 1994 guidelines manual is the applicable guidelines for this case.

1B1.1(a) directs that the first step is to determine the applicable offense guideline from Chapter 2. You go to the index to determine what portion of Chapter 2 is to be followed; and, of course, the statutory index in Appendix A did not include this offense 2332(a) as a listed offense; therefore, there is no Chapter 2 guideline to apply.

Now, the Sentencing Commission then refers -- asks the court to refer to the most analogous offense guideline. That's the provision in 2X5.1, which says a felony for which no guideline expressly has been promulgated, apply the most analogous offense guideline and further provides if there is not a sufficiently analogous guideline, the provisions of 18 United States Code 3553(b) shall control except that any

guidelines and policy statements that can be applied meaningfully in the absence of a Chapter 2 offense guideline shall remain applicable.

The Government suggested that 2A1.1, first-degree murder, be the analogous guideline; and the defense thinks that 2K1.4, the arson and explosives offense, be used.

And the Government's position is that 2A1.1 is applicable because of the application notes dealing with felony murder doctrine and that while the case, of course, was not tried on felony murder theory or approach and felony murder was, of course, not submitted to the jury, the situation now is different because we're not looking at the liability; we're looking at the punishment that is appropriate.

I am inclined to agree with the Government on the 2A1.1 as being the most analogous offense because of the deaths resulting and the foreseeability of them and the fact that deaths resulted in the course of the commission of a felony.

So that would give us a base offense level of 43. But I also, independently of looking at the most analogous guideline in following the directions under 2X5.1 -- if we say there is not a sufficiently analogous guideline, then we simply go to 3553(b). And 3553(b) says in the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence having due regard for the purposes set forth in subsection (a)(2). In absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to the sentence prescribed by guidelines applicability to similar offenses and offenders and to the applicable policy statements of the Sentencing Commission.

3553(a)(2) instructs that if we weren't sentencing under the guidelines, the court should consider the need for the sentence imposed (a) to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment for the offense and (b) to afford adequate deterrence to criminal conduct. Then (c) and (d) relate to protect the public from further crimes of the defendant and (d) to provide the defendant with needed educational or vocational training. In this case, (a) and (b) would be the factors to be considered primarily. And it's my preliminary view that a life sentence is the appropriate sentence under (a) and (b).

Now, the guidelines that we have and the sentencing statute, I think, require consideration of the adjustments, because the adjustments part of the sentencing guideline system applies regardless of what the base offense level is. And it's agreed here, as I read the papers, that the three-level increase under 3A1.2 is required because of the official victims; that is to say, that the victims were government employees and law enforcement officers, but principally, the official relationship of the victims to the government.

Also, with respect to the involuntary manslaughter counts, because the base offense level there is more than 10 levels away from the rule -- or from the 43 level, there is no grouping adjustment applicable in this case; so we deal with the Count One base offense level.

the count one base offense level.

There is no dispute about the criminal history category. There is no prior record here. The criminal history category is I.

The Government has suggested additional adjustments, the 3A1.1, vulnerable victims based both with respect -- on the fact of the children and the nature of the building, its glass structure and so forth -- I'm not inclined to add that adjustment -- and the obstruction or impeding the administration of justice. And the defense has outlined the limitations of that.

It's difficult to sort out what there is there as far as when it becomes applicable. You have to know that there is an investigation, you have to obstruct it; and it seems to me those things that are being asked to be -- to form a basis for that adjustment are really part of the offense conduct in the case, so that I would not be inclined to add that two levels.

Therefore, by my view, the adjusted offense level is the 43 and 3, for a total of 46.

Now, the Government also suggested in its submission that the Court could arrive at a life sentence or a greater base offense level than 43, even, by considering making findings, specific findings with respect to the relevant offense conduct and as set out here, some specifics, purchases of ammonium nitrate, quarry burglary, and the like. It seems to me to be unnecessary for the Court to go through the evidence and make findings with respect to those factors. We have, you know -- 43 itself calls for a life sentence, so I see no purpose in us going -- sifting through all of the evidence now again and arguing about whether by a preponderance of the evidence -- and I recognize what the Government is saying -- the court is not bound by a jury verdict with respect to that because the standard of proof is different. But I see no value to it.

Now, the issues of whether there should be upward or downward departures is a separate thing entirely, and it's not an appropriate thing to address now. That is a part of the sentencing hearing. But what I asked be done here -- and this briefing was submitted at my request, so that we could establish the presumption -- presumptive sentence in terms of the application of the guidelines for the factors under 3553 in advance of the sentence hearing and not burden that hearing with this kind of a dispute.

So that's where I come out. And I'm ready to hear from counsel about that. And I guess the Government goes first, as it usually does.

Mr. Connelly.

PLAINTIFF'S ARGUMENT ON SENTENCING GUIDELINES

MR. CONNELLY: Thank you, your Honor.

We agree with the Court that the most analogous guideline in this case is Section 2A1.1, the first-degree murder guideline; and we agree that the Court -- with the Court's procedure that it went directly to that guideline. I think there are other ways to get there; and certainly, there are alternatives that can be argued as a matter of law to get there; but we agree with the Court that that is the appropriate beginning point, and we certainly agree with the Court that the

beginning point under that guideline is a base offense level of 43 and even at that unadjusted level would require a sentence of life imprisonment.

I think before even you get to adjustments -- and I'm not going to reargue our obstruction or our vulnerable victim adjustments. I think those positions are preserved on the record.

THE COURT: Yes.

MR. CONNELLY: Even before you get to adjustments such as the official victim adjustment, I think there is, under the application notes to that section, a discretionary authority to depart downward, and I'm not going to argue with the Court at this juncture whether the Court should or should not.

I think there is one finding that can be made that should not be made in this case; and that is under the application note, the only basis for downward departure, or the most recommended basis is if the defendant should show there was a lack of intent to kill. And I think under the Tenth Circuit case law, the party seeking a downward departure has the burden of proof on that, just as the party seeking an upward departure -- typically, the Government -- would have the burden of proof by a preponderance of evidence as to that.

The only reason we argued specific facts to the Court and asked for findings on them -- for example, what Mr. Nichols' role in the conspiracy was and what he did or did not do -- was insofar as it bore on the issue of intent to kill. And I think that is a finding, that is a guideline finding that should be made by the Court; that by a preponderance of the evidence, Mr. Nichols had the intent to kill and that would therefore preclude a departure on that basis under the application note to Section 2A1.1. And I'm not sure --

THE COURT: Well, I'm not going to really address departures now.

MR. CONNELLY: Is that a subject the Court would want to hear at sentencing in terms --

THE COURT: I'll hear that at sentencing.

MR. CONNELLY: Okay. I --

THE COURT: I don't consider that there be an evidentiary hearing on that. The evidence is in upon which we'd make that finding.

MR. CONNELLY: And I don't think either side is asking for an evidentiary hearing. I think both sides agree with your Honor that the evidence is in on that, and that finding can be made or not made based on the evidence there.

And we've also cited case law that that basis for departure is not a mandatory one, even if the Court were to make a finding; so with that, your Honor, we agree that a life sentence is the appropriate beginning point; we would say ending point, as well, but we can discuss the departure issues at a later date.

THE COURT: Right. That will be for the sentencing hearing.

Well, Mr. Thurschwell, I'm not suggesting that you should agree with this, because I know you don't from the

position taken in the papers filed. And as I've already indicated, the argument made or the suggestion made is that the arson, 2K1.4, is the most analogous guideline.

DEFENDANT'S ARGUMENT ON SENTENCING GUIDELINES

MR. THURSCHWELL: That is correct, your Honor. And let me try to expand on our reasons for disagreement with specific reference to the route that your Honor is taking to Section 2A1.1.

THE COURT: Okay.

MR. THURSCHWELL: The Government suggested various routes to that first-degree murder guideline which results in a level 43 result. And your Honor, as I understand it, has -- is basing your decision that this is the applicable -- most applicable guideline on the fact that the deaths were (1) foreseeable as found by the jury and (2) that it was committed during another felony, which would place it apparently in the felony murder category, which is covered by the 2A1.1 guideline.

THE COURT: Right.

MR. THURSCHWELL: Your Honor, we would submit --

THE COURT: And also, that this was one of the objectives of the conspiracy.

MR. THURSCHWELL: Your Honor, we would strongly disagree with --

THE COURT: Well, that's what the jury found, isn't it?

MR. THURSCHWELL: Well, your Honor, I think I would hesitate to make the kinds of findings that the Government is suggesting to you with respect to Mr. Nichols' intent to kill, at least --

THE COURT: I'm not talking about the intent to kill. I'm talking about that killing resulted in the -- and was one of the objectives of the conspiracy which Mr. Nichols participated in. What his individual intent was is a separate item.

MR. THURSCHWELL: All right. Well, your Honor, I would still add that the instructions on the conspiracy count were ambiguous --

THE COURT: Well, I don't think they were.

MR. THURSCHWELL: But to the extent that, apparently, one of the objectives of the conspiracy was the use of a bomb against the building and the people, while, at the same time, the jury was being told that it specifically did not have to find an intent to kill to convict on Count One --

THE COURT: Yeah. Well, you can argue that to the Court of the appeals.

MR. THURSCHWELL: Okay. I understand that.

But let me address your Honor's route to 2A1.1.

THE COURT: Right.

MR. THURSCHWELL: The problem with approaching it in this way is that what the Court is doing, following the Government's suggestion, is looking to the underlying offense conduct, rather than as required by Section 1 -- 1B1.2, the offense of conviction as the starting point for any guidelines analysis. Section 1.1B2(a) (sic) says determine the offense guideline section in Chapter 2 offense conduct most applicable to the offense -- excuse me -- most applicable to the offense

to the offense -- excuse me -- most applicable to the offense of conviction; i.e., the offense conduct charged in the count of the indictment or information of which the defendant was convicted.

Now, that language on its face looks to the specific statutory charge that was leveled in the indictment or information against the defendant as the basis for looking for the most analogous applicable guideline.

We can be sure that that's what the commission had in mind, because in subchapter 1, the introduction and general application principles, subchapter 4 of that, there is a discussion of the choices made by the commissioners in formulating the guidelines; and one of the most significant was whether or not to look to the charge or look to the underlying actual real -- quote, "real conduct "of the defendant in establishing the basis for selecting the applicable guideline.

Given that language, given the requirement of Section 1.1 -- 1B1.2 that you look to the offense of conviction, what we are required to do is look to the -- the guideline that addresses the offense -- the offense, statutory offense most analogous to the offense of conviction; in this case, conspiracy to commit Section 2332(a), that violation.

And I would add, your Honor, there would be no point in including in the guidelines the statutory index which relates statutory sections, not conduct, to specific guidelines, if the preferred method was to look at the underlying conduct. So I think that really, the only -- the place that one has to start is at the arson by means of explosive guideline, 1 -- 1K1.4, because that is -- I don't think there would be dispute from the Government -- is the most analogous statutory provision, criminalizing the kind of conduct criminalized by Section --

THE COURT: Well, this conspiracy stands alone. This is not the conspiracy to commit arson. It's not a 371 conspiracy. This conspiracy is a separate crime under 2332(a).

MR. THURSCHWELL: That's correct, your Honor.

THE COURT: And 2332(a) was not addressed at all by the Sentencing Commission.

MR. THURSCHWELL: It was not, but conspiracy was. And --

THE COURT: But there is a difference between the conspiracy to commit another offense and this type of conspiracy.

MR. THURSCHWELL: Your Honor, I'll --

THE COURT: That's my point.

MR. THURSCHWELL: Okay. I understand that, your Honor. Our position would be that by the route taken, 2K1.4 is that you look first to the conspiracy guideline which then takes you to the underlying substantive objective --

THE COURT: I thought that was your position.

MR. THURSCHWELL: -- and that's the route.

Let me just add, your Honor, we obviously don't dispute many of the Court's rulings. There is no criminal history. Category I is appropriate. There is no grouping adjustment under any guidelines calculation, including the ones that we suggest. We agree that vulnerable victims and obstruction or impeding of the investigation are not

appropriate upward adjustments.

We -- I hesitate -- I want to respond to the Government's suggestion that the Court find an intent to kill as the basis ultimately for departing upward or for not departing downward.

THE COURT: Yes, but you know I'm deferring that to the sentence hearing.

MR. THURSCHWELL: I understand that, your Honor. And I will not address that at length. I will simply note for the record (1) -- I mean in the alternative, should the Court abide by its preliminary decision that 2A1.1 is the appropriate guideline, we do believe that the downward -- maximum downward departure would be appropriate and for the reasons stated in the brief, specifically the findings by the sentencing jury or the failure to find by the sentencing jury of an intent to kill on the part of Mr. Nichols is binding both as a matter of constitutional double jeopardy right and as a matter of statutory right, since the -- collateral estoppel statutory right -- since the Government has had one chance to establish that specific fact in a prior proceeding and failed to do so and that therefore, a finding of intent to kill is therefore not available to the Court at this stage of the proceeding.

THE COURT: All right. Mr. Tigar, yes.

MR. TIGAR: May I address the Court briefly with another approach on this, your Honor?

We appreciate the effort that the Court has made to parse these difficult issues. I wanted to look at this from a somewhat different point of view and pick up on what Mr. Thurschwell said. We appreciate, also, that the Court is attempting with all of us to understand what the jury did here and to give effect to what the jury did and what declaration it made about what happened and the severity of what happened and Mr. Nichols' role in it.

I would note to begin with that the question about the foreseeability of death resulting might have been better phrased by all of us; that is to say, the question was phrased in the passive voice. Of course, death was foreseeable to somebody; that is, if Mr. McVeigh went down there with a Ryder truck, as the jury found that he did, and looked up at that building and set the bomb off in company with his accomplice, then that was foreseeable.

But the question the jury answered was in the passive voice. They didn't answer a question that Terry Nichols had any foreseeability. Now, of course, the foreseeability question was with respect to Count Three, really, because of the proximate cause requirement but that had the jury found him guilty under Count Three, then, of course, the question -- that foreseeability question would have hooked up with that guilty finding and permitted the Court to say that the proximate cause requirement was satisfied. So we don't have a jury finding with respect to proximate cause.

Now, the next thing we have here is that the jury was asked only in one set of counts to make a determination concerning intent with respect to resulting death. That's the other counts.

Your Honor quite rightly responds to that: No, I'm going to look at this as first-degree felony murder.

Let me discuss that. And your Honor says also this is not a 371 conspiracy; it's a standalone conspiracy statute and therefore, the Court is entitled to take a somewhat different approach.

Let me suggest historically that that's not so; that is, we're not without a rudder here. Section 1111, since the dawn of the republic, has provided in compliance with what the Pennsylvania law had done about common-law murder that first-degree murder consists of murder by premeditation, poison, or lying in wait, or murder in the course of any of the enumerated felonies. And therefore, one would assume that murder that is not one of those enumerated kinds is second-degree murder. And at common law, that was the case; that is to say, murder in the course of any other felony or a homicide in the course of any other felony was felony murder.

The trouble, of course, is that conspiracy was a misdemeanor at common law; so if we look at the very backdrop of substantive criminal law procedures here, it simply defies reason, logic, history, and precedent to say that a standalone conspiracy -- let's start with that -- could ever be a felony murder predicate. So -- and therefore, it doesn't make any sense to attribute either to Congress in the sentencing guideline statutes or to the writers of the guidelines any intention that guilt of conspiracy could be a predicate for jumping to an analogy because, of course, it's all analogy. There is no specific guideline. We've acknowledged that -- that says that this is the same as first-degree felony murder. Yes, we would say; no, Congress has now made conspiracy a felony.

But, I defy anyone to come up with a precedent that says that a conviction of a conspiracy without a finding of intent to kill as a part of the conspiracy, which we don't have here -- and yes, we can tell the Tenth Circuit about it, but now we're talking about the guideline -- is a predicate for a felony murder determination. I just don't know of any case that holds that. I don't know of any law review commentator that has ever talked about it. I don't know of a basis on which you could say it.

THE COURT: Well, there is a distinction, of course, between the death penalty jurisprudence dealing with the felony murder doctrine and what we're doing here.

MR. TIGAR: Yes, your Honor. Of course, your Honor and I'm deliberately not relying on that. The Supreme Court granted certiorari in Middlebrook vs. Tennessee, then dismissed the writ as improvidently granted, so we really don't have any suggestions except the suggestions in Cabana vs. Bullock. I'm suggesting as a matter of criminal law -- I'm trying to say gently I think your Honor is mistaken, and I think your Honor is mistaken as a result of the analysis of the history of substantive criminal law.

Then we could ask ourselves the question: Isn't it different here because Congress has passed a special conspiracy statute with respect to particular intent?

statute with respect to particular intent?

But let's look at the kinds of statutes that this looks like. For instance, the 844 offense; you know, arson against a federal building. There is an offense in which if you use a kind of a weapon against a federal building, it could be arson. The "weapon of mass destruction" language has always been frightening to me to read. It's like calling somebody a racketeer. But a weapon of mass destruction could be something as small as a pipe bomb.

A person convicted of this conspiracy -- that is to say, under the law and under the instructions as given -- have agreed only to use a weapon of relatively small dimension against people and property. And that weapon of relatively small dimension need not therefore have necessarily, under the jury's verdict, raised a risk of death.

So therefore, whether we look at it as 2332(a) and what it looks like most under the underlying statute, or whether we look at it as a matter of history, it really doesn't make sense.

And then, your Honor, I respectfully suggest that in putting this together, in choosing, your Honor said that if you weren't going to go with the guideline, you were going to look at the statute and you were going to look at the provisions that talked about affording adequate deterrence, reflecting the seriousness of offense, promoting respect for law.

THE COURT: Right.

MR. TIGAR: And those, of course, are legitimate concerns. And here is where our statement, our argument to your Honor, that respect for the jury's verdict requires consideration of what else it did other than Count One, becomes important, because the jury twice addressed the question of what this defendant's intent was with respect to resulting deaths. Why did they do it twice? Well, I won't repeat what I said earlier. We had asked that we stop at the end of the innocence phase and do something else, but we went ahead. The Government had told the Court that all of the consideration with respect to any culpable intent concerning resulting death was going to take place in the second phase. And your Honor agreed with that position, saying, in effect, that this is a weighing statute, the death penalty statute, and because it's a weighing statute, that blows back, as it were, to interpretation of the offense charged in the indictment and says that the Government can defer consideration of culpable intent with respect to resulting death.

So the jury addressed it twice. Now, the first time it did, it found only an involuntary-manslaughter intent with respect to resulting death. That's the only thing we have.

And second, your Honor, it did what it did when your Honor determined that they were unable to agree unanimously and beyond a reasonable doubt with respect even to the relatively minor, in contrast with the (a) and (b) ones, levels of intent concerning resulting death that were submitted to them, so that under the jury's verdict, your Honor, whether you look to an analogous guideline or whether you look to the statute, it's simply inappropriate to choose a statutory benchmark that assumes a high degree at least of indifference to the prospect of resulting death, because the felony murder doctrine, to

of resulting death, because the felony murder doctrine, to begin with, is much criticized. No wonder the Government didn't try to press it on the Court at the guilt phase; but at the very least, all the commentators say the better rule is that you don't impose felony murder-type punishment on someone unless they're proven to have had this high degree of awareness of a risk that death could result and a degree, indeed, that at common law would have been equivalent to malice aforethought.

So I -- I don't want to belabor the point, your Honor;
but I respectfully suggest that the Court is starting from a premise that disrespects the history of the felony murder doctrine, disrespects what we regard as the seriousness of legitimate felony murder cases, of which we would submit this is not one, and risks disrespecting the findings that the jury made in the innocence phase and the finding that the jury made over our objection in the second phase.

THE COURT: Well, but what we're -- are you suggesting
that before a life sentence can be imposed, there has to be an intent to kill?

MR. TIGAR: No, your Honor, I am not suggesting that there has to be an intent to kill; that is -- and for these purposes. I don't want to waive my contention about your Honor's instructions on Count One.

THE COURT: No, I understand.

MR. TIGAR: But, at the very least to choose a felony murder guideline, you would have to satisfy yourself of offense conduct that at common law would have been regarded as equivalent to implied malice. I mean, the rationale -- the common-law rationale for the felony murder doctrine was that participation in the dangerous felony created such a risk of death to others that you were justified in saying that that took the place of malice aforethought.

THE COURT: But suppose we look at the alternative, rather than the felony murder doctrine, and go the 3553 factors.

MR. TIGAR: Yes, your Honor.

THE COURT: Now, Congress could -- you know, I learned
recently of a state that imposes a life sentence for possession of 938 grams of cocaine. It can do that, can't it? It can impose a life sentence for crimes so long as it doesn't come under the restriction of the Constitution; that this --

MR. TIGAR: There is some --

THE COURT: -- you know, doesn't correlate.

MR. TIGAR: There is some minimal proportionality review here, your Honor.

THE COURT: Yeah.

MR. TIGAR: I'm not stepping away from the guideline simply on the matter of proportionality. Suppose your Honor believed based upon a review of the evidence that the conduct here was severe enough that you ought to be up in that territory, and that's the question your Honor is asking.

THE COURT: That's right. Is there any reason that can't be done?

MR. TIGAR: Yes. Yes, your Honor, there is. And I

would say that when the jury has found, has evaluated the conduct -- and if we try to make sense of the jury's verdict, we would argue that in making sense of the jury's verdict, you can't be in that territory. But suppose your Honor says no, I don't, counsel for the defense, accept your view of what Judge Matsch can do about the jury's verdict. If your Honor chooses -- and in the past, in the Allen Berg case, your Honor, where Allen Berg was killed, your Honor said that's serious conduct and you imposed sentences that reflected your Honor's view of that. The guidelines let you get there. The guidelines let your Honor express those views about the seriousness of this conduct by means of departures. That would be the upward departure route.

All I'm arguing -- but I'm not going to talk about upward departure --

THE COURT: Well, that case, was, of course, in those good days before guidelines.

MR. TIGAR: Yes, I know, your Honor. And that's one of those difficulties.

With respect to your Honor's example about the 938 grams of cocaine, just because it's constitutional to do a foolish thing -- and I think that is a foolish sentence, your Honor, and I think a lot of judges in states like the state where I happen to live now agree with that. It's filling up the jails unnecessarily. But your Honor can get there if you regard the conduct as serious by saying I take a base level that reflects a decent respect for the history of these offenses. Now I look at these other factors, and then we can argue; but what I suggest your Honor has done by starting at the top is dramatically to shift the burden to us to try to argue it back down.

Well, that's the procedural consequence of it; and if that's where we are, then, by golly, we'll be here and we will argue it back down. And we've got a lot of arguments and a lot of evidence to make about it; but I suggest to --

THE COURT: You mean within the evidence that we already have.

MR. TIGAR: Within the evidence we already have. Believe me, your Honor, we're not going to show up and do what we've already said others should not be able to.

THE COURT: Okay.

MR. TIGAR: But what we do say is that we ought to start with a base level that reflects -- that respects what the jury does and also reflects what we -- what we say is the structure of criminal law. That's what I wanted to add to what Mr. Thurschwell said.

RULING

THE COURT: All right. Thank you.

Well, I'm not persuaded to the contrary of my presumptive analysis; and therefore, we are, at the sentencing hearing, going to start with the base Offense Level 46 and the Criminal History Category I.

Now, the law of departures is a bit changed, I think, by Koon against the United States from what some circuits thought it was before then. And I think that the Supreme Court in that case recognized that there is more substance to the

Court's power to depart than simply these numbering -- the numbers under the guidelines. And while 5K1.1 and the rest of that chapter -- I guess it goes to 2.16 -- provides the Sentencing Commission's views of encouraged and discouraged factors for the court to consider in departures either up or down, the Supreme Court in the language that I think particularly deserves attention gave the four questions that a court should ask before making a departure, which is to consider what the Sentencing Commission has said but then also recognizes that there are unusual cases that simply do not come within the contemplation of the Commission, both with respect to setting offense levels upward and downward adjustment levels and also departure levels.

Now, I don't think that the Sentencing Commission could possibly have in mind the facts of this case when they did their work. So I think we have, by definition, an unusual case and that I would expect to hear from counsel at the sentencing hearing about departures, either upward or downward; and that will certainly be one of the prime subjects of that hearing as I foresee it.

And the Government has already indicated its intent to argue about the intent to kill and the defense the obverse of that; but one of the things that I think is always a possibility, sentencing guidelines or not, for a court to consider is the defendant's position with respect to the crime.

Here, you know, acceptance of responsibility and the guideline about that, two- or three-level, is not of particular value, given the high level we start with. But it has been mentioned here that -- and certainly was mentioned at the trial that there are, as a result of the investigation and the presentation of the evidence in this case, a number of questions unanswered. And it was indicated, talking about the discovery matters this afternoon, that I expect the Government is continuing its investigation to attempt to answer some of those unanswered questions. And I don't, you know -- if the defendant in this case, Mr. Nichols, comes forward with answers or information leading to answers to some of these questions, it would be something that the Court can consider in imposing the final sentence.

Now, we have this problem of setting a date for the sentencing hearing. And I had anticipated the date of April 17 and Mr. Tigar indicated, as -- that I talked with counsel about that as a possible date if we were to proceed with sentencing. Now we have this issue of restitution which clouds that; so I don't know that we can do more except set the time for the briefing on the restitution issues and see what kind of a hearing we're going to have to have on that before we can proceed to the final sentencing.

So I'll set April 6 -- you said you could be ready by April 6 for the Government.

MS. WILKINSON: Yes, we can, your Honor.

THE COURT: I don't know if Mr. Cassell is coming in on that with you or not, but I'll set April 6 for whatever is to be filed in terms of restitution and then give the defense -- two weeks, you asked for.

MR. TIGAR: Yes, your Honor. We'd ask for two weeks.

THE COURT: Which is then, I guess, the 20th.

THE COURT: Which is then, I guess, the 20th.
MR. TIGAR: Yes, your Honor.
THE COURT: And we'll have to see where we go from there.
MR. TIGAR: Your Honor, may I make a statement in light of what your Honor just said?
THE COURT: Yes.
MR. TIGAR: Because what your Honor just said about the defendant coming forward may attract some media attention.
THE COURT: Well, I didn't say it for that purpose.
MR. TIGAR: I understand that, your Honor; but I want -- and it's not our practice to go talk to the media about things like this. Let me make our view clear of this. It is as yet undecided whether Mr. Nichols faces proceedings in Oklahoma. From the beginning of this case down to this day, that prospect and the prospect that whatever words he utters then fall into hands that do not have his best intentions at heart has constrained us. And we will address this matter more at the time of sentencing and we will consider your Honor's words carefully, but I hope it's understood that we don't labor here, you know, without those constraints.
THE COURT: Yes. I understand what you're saying, Mr. Tigar. And of course, that's a matter beyond my control, as well. But I would think those who do have the discretion in the matter would consider as applicable to any decision they make the forthcoming -- providing information that's helpful in answering the additional questions.
MR. TIGAR: Yes, your Honor.
THE COURT: That's not a matter that neither you nor I
can control.
MR. TIGAR: I understand that.
And the second, your Honor, is I had understood from the United States that their investigation is now concluded once judgment is entered in this case, so I don't know that there is an ongoing federal investigation. And if the Government can provide us with any information about whether there is, we will gratefully receive it.
THE COURT: Well, I'm not going to call on counsel to answer that; but it would be disappointing to me if the law enforcement agencies of the United States Government have quit looking for answers in this Oklahoma bombing tragedy.
MR. MACKEY: We continue to work, Judge.
THE COURT: All right.
Well, we'll proceed on the briefing schedule and see what follows from that.
Thank you.
(Recess at 4:03 p.m.)
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REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Dated at Denver, Colorado, this 25th day of March, 1998.

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Paul A. Zuckerman