

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Richard P. Matsch

Criminal Action No. 96-CR-68-M

UNITED STATES OF AMERICA,

Plaintiff,

v.

TERRY LYNN NICHOLS,

Defendant.

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO
May 31, 2001
JAMES R. MANSPEAKER,
CLERK

DEFENDANT NICHOLS' RESPONSE TO MOTION TO CLARIFY,
AND REQUEST FOR A HEARING

Defendant Terry Lynn Nichols, through undersigned counsel, pursuant to the Court's Order of May 23, 2001 requiring a written response to the government's Motion to Clarify of the same date, responds as follows:

1. Mr. Nichols reasserts his position, accurately reflected by the government in its Motion to Clarify, that disclosure of the late disclosed FBI reports should be made to Oklahoma County authorities so that the defense can be adequately prepared in state court proceedings there. Mr. Nichols also reasserts his request for a hearing in this Court to address the extent of materials to be produced and the process by which they are to be produced.
2. A hearing is necessary because, notwithstanding the government's hasty and repeated

assurances that all discovery has been produced, there is strong reason to believe this is not the case.

In support of this contention, undersigned shows the Court as follows:

a. Counsel first learned of the undisclosed FBI reports in a May 8, 2001 telephone call from AUSA Sean Connelly. In that conversation, Mr. Connelly informed undersigned that the FBI discovered that as many as 500 302 reports from some 44 field offices never were disclosed.

b. In Mr. Connelly's May 9, 2001 letter to counsel (copy to the Court), the number of offices grew to 46. See Exhibit A. Counsel received the reports on May 10, which consisted of approximately 3100 pages.

c. On May 11, 2001, Mr. Connelly called to inform undersigned that an additional field office, Baltimore, also would be sending in previously undisclosed 302's, bringing to 47 the total of field offices holding undisclosed reports. The Baltimore reports consist of 127 pages.

d. On May 17, 2001, Mr. Connelly again called and said there were an additional 327 pages of FBI reports and inserts. When produced on May 18th, it was discovered these reports come from the Denver field office.

e. On May 16, 2001, counsel informed Mr. Connelly that page 0018 was missing from the Dallas production. Mr. Connelly assured undersigned that there was no page 0018, but rather the gap (from 0017 to 0019) was do to a stamping error. However, on May 29, 2001, undersigned received a fax from Mr. Connelly containing page 0018, thus indicating the information provided to Mr. Connelly was erroneous. See Exhibit B, fax cover sheet and explanation.

f. On May 24, 2001, Mr. Connelly published a "Report to the United States Attorney General Regarding Post-Trial Production of FBI Documents," which asserts that "[t]he United

States has today completed production of items that were not made available to defense counsel prior to trial." A copy of the report is attached as Exhibit C.¹ Attorney General John Ashcroft held a press conference that same day making the same assertion.

g. Yet, as of the date of this filing, the government's assertion of complete production is still wrong. On May 29, 2001 CBS aired a segment on "Sixty Minutes II" involving interviews with four former FBI Special Agents, three of whom worked on the OKBOMB investigation. One former agent, Ric Ojeda, stated that he was concerned that reports he prepared in connection with the OKBOMB investigation never got produced. The network gave the FBI a chance to respond prior to airing the segment. In a written response by FBI representative John Collingwood asserted, "[r]ecords of interviews by former Agent Ojeda about the bombing were, in fact turned over to McVeigh's attorneys but none of his investigation was used at trial." See Exhibit D, "RE: Segment on Oklahoma City Bombing Case."

h. Former Agent Ojeda in fact expressed these same concerns to undersigned in a lengthy telephone interview on May 15, 2001. He stated he recalled conducting a lengthy interview with J. D. Cash, which resulted in a 10-page 302. He feared it was never produced. After extensive checking with all members of Terry Nichols' defense team, present and former, and double checking computerized data bases, we concluded Mr. Ojeda was correct.

i. In a May 30, 2001 letter to counsel from AUSA Connelly, the government itself

¹ Counsel strongly disagrees with Mr. Connolly's effort to characterize the entirety of the production by his description of selected reports, see Ex. C, Part III, but saves that dispute for another day.

confirmed the legitimacy of Mr. Ojeda's concerns by finally disclosing the J.D. Cash 302. See Exhibit E, copy of letter.² The explanation given was that the Cash interview was classified as part of a *different* investigation, even though the report clearly deals primarily with the Oklahoma City bombing. Therein lies the problem. We are asked to trust the FBI after disclosure of this colossal blunder that all reports relating to the bombing have now been disclosed. Even Mr. Connelly hedges: "I am not aware of any FBI OKBOMB interview reports, by Ojeda or any other agent, that have not been turned over in pretrial discovery or as part of the recent production." Id. (Emphasis added.)

3. Counsel asserts as an officer of the court that these protestations of completed production cannot be relied upon. Mr. Ojeda, whose concerns about his interview with Cash have been validated, also has informed undersigned that there exist within the FBI secret files, called "0" files, which never are disclosed even to federal prosecutors. He shared this with us because he suspected that the reason his J.D. Cash 302 was never produced is that it may have been classified as such a file. Moreover, since the undisclosed FBI reports have come to light counsel has developed information that leads and reports generated by other federal law enforcement agencies, such as BATF, may not have been produced.

4. Accordingly, Mr. Nichols requests a hearing at which the Court directs the government to report as to what efforts, if any, have been made to locate and produce reports relating to the Oklahoma City bombing but classified under some other investigation (such as Unabomber, Waco, Ruby Ridge, Elohim City, Dennis Mahon, etc.), but which nonetheless should have been produced in

² A copy of the J.D. Cash 302 itself will be submitted as Exhibit F, separately under seal in accordance with this Court's prior orders.

this case. In addition, Mr. Nichols would request at the hearing that the Court direct the government to report on the existence of the so-called "0 " files, and which of such files relating to this case likewise should have been produced. Finally, Mr. Nichols would request at the hearing that the Court direct the government to report what efforts, if any, have been made to locate and produce reports from federal law enforcement agencies other than the FBI, which should have been disclosed in this case.

Respectfully submitted this 31st day of May, 2001.

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of May, 2001, I served a true and correct copy of the foregoing **Defendant Nichols' Response to Motion to Clarify, and Request for a Hearing**, U.S. Mail, postage prepaid and addressed to the following:

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