IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

ISABEL G. ANDRADE, *et al*.	§	CIVIL ACTION NO. W-96-CA-139
	§	JUDGE WALTER S. SMITH
Plaintiffs,	§	
	§	and consolidated actions:
V.	§	*Holub v. Reno* W-96-CA-140
	§	*Ferguson v. Reno* W-96-CA-141
PHILLIP J. CHOJNACKI, *et al.*	§	*Brown v. U.S.* W-96-CA-142
	§	*Riddle v. Reno* W-96-CA-143
Defendants.	§	*Gyarfas v. U.S.* W-96-CA-144
	§	*Martin v. U.S.* W-96-CA-145
	§	*Holub v. U.S.* W-96-CA-146
	§	*Brown v. U.S.* W-96-CA-147
	§	*Sylvia v. U.S.* W-96-CA-373

ANDRADE **PLAINTIFFS' APPLICATION TO RECONSIDER DISMISSAL OF JEFFREY JAMAR AND RICHARD ROGERS**

- "Well we had known in the past that when we were, had activity around there, the Davidians would run to the windows and hold children up in front of the windows. What happens if you tell them that you are going to, and **we would tell them this before we started destroying part of the building,** look get out of the gymnasium we're gonna take it down. But his reaction would be, fine I'm gonna put all the kids in there. So you don't have those kinds of options and so our . . .

  He said that?

  No, we anticipated that that's what his reaction would be.

  Floyd Clark, Deputy Director FBI,
  Press Briefing, April 21, 1993

- Any negotiator would have told them that dismantling the building would provoke a violent response. Noesner would have told them that and he believes Van Zandt would have too. **He believes that is what triggered the starting of the fires and the shooting of the children.**

  Gary Noesner, Crisis Negotiation
  Team Coordinator at Mt. Carmel
  (from DOJ Internal Interview dated 8/31/93)

- **He told Jamar** that they **could not send in the tanks because if they did so children would die** and the FBI would be blamed even if they were not responsible.

  Peter Smerick, FBI Criminal Profiler
  (from DOJ Internal Interview dated 8/24/93)

- Q: "Did you see the course that was being taken by the tactical personnel and Mr. Jamar at Mt. Carmel as resulting in an almost **inevitable tragic outcome**?

A: "**Yes**, in fact, . . . I said, "I don't want to stay because **those people are going to die and I don't want to be here when it happens**."

Former Hostage Negotiator at Mt. Carmel

- **Everyone agreed** that the Davidians would fight back if they made a **forced entry**.

Fred Lanceley, Former Hostage
Negotiator at Mt. Carmel
(from DOJ Internal Interview dated 8/25/93)

BIVENS CLAIMS AGAINST JAMAR AND ROGERS SHOULD BE REINSTATED

Introduction

1. The Court in its July 1, 1999 Memorandum Opinion and Order ruled as follows:

> One issue that is not so readily dismissed under a Fifth Amendment analysis is the Plaintiffs' assertion that FBI Agents fired into the Compound without provocation during the insertion of the tear gas and after the fire started. Plaintiffs assert that the FBI's actions kept a number of Davidians from leaving the Compound. If Plaintiffs' allegations are true, due process would be implicated as such behavior would rise to a level that would shock the conscience.[1]

2. The Court's analysis on this point supports the reinstatement of *Bivens* claims against Defendants Jamar and Rogers on two bases:

(1) The unauthorized decision made by Rogers and Jamar to deviate from the operations plan approved by Attorney General Reno by ordering tanks to begin punching holes in Mt. Carmel and dismantling/demolishing the building, while at the same time continuing to make announcements to the occupants that "this is not an assault," which both triggered the fire (whoever started it), *and* kept persons from leaving Mt. Carmel.

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[1] July 1, 1999 Order, p. 52.

(2) The decision by at least Rogers, and probably Jamar, to order HRT members to direct gunfire at the occupants of Mt. Carmel on April 19, 1993, as evidenced by the FLIR videotape taken by the FBI's own Nightstalker aircraft from 11:15 a.m. until 12:15 p.m. on April 19, 1993.

In each case, the decisions made by Rogers and Jamar were unauthorized, outside the scope of their authority, unjustified by the circumstances, and caused or contributed to the deaths of countless innocent children and some adults.

Supervisor Liability

3. The Court has stated the standard for supervisor liability for such claims when the supervisor is either (1) personally involved in the acts causing the deprivation of a person's constitutional rights, or (2) "if he implements a policy so deficient that the policy itself acts as a deprivation of constitutional rights."[2] The Court concluded that to prevail against a supervisory official, Plaintiffs must show that such a defendant's actions, or inactions, if any, "caused" or was the "moving force" in causing a Plaintiff harm.[3] Throughout the Mt. Carmel standoff and final assault on April 19, 1993, Defendant Jeffrey Jamar was the Special Agent-in-Charge and Defendant Richard Rogers was Commander of the FBI's

[2] *Cronn v. Buffington*, 150 F.3d at 544. *See also Thompkins v. Belt*, 828 F.2d 298, 304 (5th Cir. 1987).

[3] July 1 Order, p. 54. *See Monell v. Department of Social Services*, 436 U.S. 658, 692, 694, 98 S.Ct. 20018, 56 L.Ed. 2d 611 (1978); *Vela v. White*, 703 F.2d 147, 153 (5th Cir. 1983).

HRT.[4] The command roles of Jamar and Rogers, alone, create a jury issue that they were the "moving force" in ordering the premature demolition of Mt. Carmel and directing gunfire against the Davidians on April 19.

4. However, as will be shown below, Plaintiffs have identified additional, specific evidence that these Defendants directly supervised all aspects of the operations on April 19, including these specific unconstitutional acts.[5]

Additional Fifth and Fourth Amendment Liability

5. Finally, as legal background for this application, Plaintiffs would note that the Court's analysis of Government gunfire in its July 1 Order concluded that such conduct satisfies the "intentional" standard for Fifth Amendment liability. Plaintiffs agree, but note for the record that their July 16, 1999 Motion for Reconsideration (pp. 3-5) points out that the Fifth Amendment is also violated in this case by the Defendants' deliberate indifference and reckless regard, which would apply equally to the claims addressed by this application.

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[4] Plaintiffs' Complaint specifies that Rogers was Commander of the HRT and makes clear that Jamar was operationally in charge at Waco. This Court can also take judicial notice of their roles from the *Branch* record. (July 1 Order, p. 2, n. 1). As will be shown *infra*, discovery has also confirmed their command roles on April 19, 1993.

[5] Notably, the Court, in specifying the individual Defendants who do not have supervisory liability, did not include Jamar or Rogers. (July 1 Order, p. 54-55).

6. Plaintiffs' July 16 Motion for Reconsideration also argued that the excessive force claims against the individual defendants, including Jamar and Rogers, violates the Fourth Amendment. The Court's July 1 Order concluded that (1) there was no Fourth Amendment seizure because the Davidians did not yield to the Government's show of authority and (2) Plaintiffs did not specify the individual Defendants who violated the Fourth Amendment. However, as Plaintiffs' July 16 Motion for Reconsideration (pp. 1-3) points out (1) a seizure also occurs when law enforcement "physically touches" an individual and (2) the Plaintiffs' Complaint did specify the Defendants who committed these unconstitutional acts through a shorthand method of grouping them by a defined category (*i.e.*, "U. S. officials").[6]

7. Finally, the *Bivens* claims against Jamar and Rogers survive even if this Court ultimately dismisses the claim against Lon Horiuchi because, whoever committed the unconstitutional acts of trapping the Davidians with gunfire or through the premature use of tanks to demolish the building (including triggering the fatal fire), they were under Jamar and Rogers' command.

CONCEPT OF THE APRIL 19, 1993 PLAN OF OPERATIONS

[6] As explained in Plaintiffs' July 16 Motion for Reconsideration (pp. 5-6), the Complaint does allege that Jamar and Rogers supervised and ordered all aspects of the April 19 assault. However, because the Complaint also alleges that others acted with Jamar and Rogers, and to make the Complaint less cumbersome to read, Plaintiffs alleged that "U. S. officials" committed these acts and then defined that phrase to include, among others, Jamar and Rogers.

8. The proposed operations plan for April 19, 1993, unequivocally provided that the tear gas operations were to continue for "48 hours," and only then were the CEVs to engage in the "systematic opening up/disassembly" of the building.[7] The contingencies provided in this plan dealt solely with the accelerated injection of tear gas into Mt. Carmel through the use of M-79 grenade launchers. There was no provision in the plan for acceleration of the demolition of the building, since the central premise of the plan was that it might take one or two days for the gas to achieve the desired effect. In the meantime, there were to be periodic announcements by the hostage negotiator that "this is not an assault" and encouraging the occupants of Mt. Carmel to peacefully surrender.

9. A brief examination of a prior proposed operations plan dated March 11, 1993, underscores this point. This plan of operation provided a "one hour" deadline for the occupants of Mt. Carmel to surrender,[8] after which the CEVs could be used to create "entrances/escape routes" (also labeled "escape/exit openings") in Mt. Carmel with the Bradley Fighting Vehicles moving into position to deliver CS gas and "projectible flashbangs".[9] The fact that none of these provisions survived to the plan finally approved by Attorney General Reno for implementation

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[7] Tab 1.

[8] It is perhaps not a coincidence that Richard Rogers later acknowledged in an interview prior to the *Branch* criminal trial that he had expected all of the Davidians to surrender "within one hour." *See* Tab 26.

[9] Tab 2.

on April 19, 1993, makes it clear that the FBI leadership and the Department of Justice preferred a more gradual, less aggressive approach.

10. Even the 1996 Congressional Report[10] gave an overview of the plan which acknowledges that the "final contingency" was "if all subjects fail to surrender after 48 hours of tear gas, then a CEV with a modified blade will commence a systematic opening up/disassembly of the structure until all subjects are located." There was **no** provision in the proposed plan of operations for April 19, 1993, for acceleration of the demolition of Mt. Carmel.

11. Not only was this clear from the plan, but this point was reiterated repeatedly by various Government officials following the tragic events of April 19, 1993:

- "We were prepared to go for **two or three days of doing nothing** but putting gas in by using this jet liquid . . . because we knew that they had gas masks and we expected that a number of them would resist, and we expected that it may take some time but the filters on those masks have a life span . . . ."

  Floyd Clark, Deputy Director FBI,
  April 21, 1993 Press Briefing[11]

- "We believed that by putting gas into segments of the building incrementally and telling him what we were doing, we would demonstrate our intentions. **Our intentions were not to assault the place**, not to hurt them . . . ."

  Floyd Clark, Deputy Director FBI,

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[10] Tab 3.

[11] Tab 4.

- "Neither the Bureau nor I looked at this as a proactive policy . . . **it was not necessarily going to happen that day**. There might be people who went down in the bunkers. It was a day or two; it was increasing the pressure."

  "There were views that if they had gas masks and if they had clothing on that could cover most of their skin, it might be eight hours before they would want to come out, that some might stay a day or two if they could get in a bunker or some place."

[12] Tab 4.

Janet Reno, 1993 Congressional Testimony[13]

- "With respect to the trip to Maryland, the FBI urged that I go ahead and make the trip because they wanted to — they considered that it was going to be a **slow, gradual process**.

Janet Reno, 1995 Congressional Testimony[14]

- "There was agreement that the preferable plan would be one which was **least likely** to provoke a hostile response and which was more in keeping with a **gradual denial of access** to the space in and around the Compound.

  "D. D. Clark stated that eventually, a plan was agreed to whereby CS gas would be introduced into the building over a three day period. **If** people were still inside after that period of time, then the FBI would proceed to systematically dismantle the building."

Floyd Clark, Deputy Director FBI,
July 14, 1993 302[15]

- "We also talked about systematically beginning to dismantle the building, using the CEV vehicles. That didn't have a very good likelihood because on a number of occasions when we were maneuvering around the building, removing the obstacles, the Davidians would appear in the windows and hold the children up, refer to them as the Kevlar kids. So if we were going to tell them what we were going to do, and **we certainly wouldn't start trying to dismantle the building without giving them notice**, they would take, we assumed that they would take and place the children or others into that

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[13] Tab 5.

[14] Tab 6.

[15] Tab 7.

section of the building and prevent us from tearing it down. So we had to dismiss that.

Floyd Clark, Deputy Director FBI,
1993 Congressional Testimony[16]

- "We wanted to be careful [not] to do anything that might be misinterpreted by those inside. [We] didn't do anything that would send a signal that could be interpreted or misinterpreted as any kind of aggressive action on our part or that may cause them to react in a way which might escalate the situation. [As]we developed the plan for using the CS, we wanted to follow that same kind of thinking. We wanted the procedures to be incremental, deliberate, **giving advance notice**, giving ample opportunity **without any unnecessary provocation**, which would bring about a peaceful resolution.

Floyd Clark, Deputy Director FBI,
1995 Congressional Testimony[17]

- "Richard stated he noted that the tanks were projecting tear gas by punching holes in the house, not injecting the tear gas through the windows, **as he understood the original plan to be** . . . Richard stated that he, the Attorney General, and Hubbell left SIOC at sometime that morning due to previous engagements and the anticipation that **the process of ending the siege would take days**."

Mark M. Richard, Deputy Assistant Attorney General,
July 15, 1993 302[18]

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16 Tab 8.

17 Tab 9.

18 Tab 10.

- Hubbell stated the most important part of the matrix was "**this was not viewed as an assault**, it was being used to increase the pressure." Hubbell concluded by saying "it was clear that we were not dealing with a rational person."

Webster L. Hubbell, Associate Attorney General,
August 12, 1993 302[19]

IMPLEMENTATION OF THE PLAN BY ROGERS AND JAMAR

12. Rogers and Jamar (1) knew the limits of the plan approved by the Attorney General, (2) consciously altered that plan without authorization — with full knowledge of the probable consequences, and (3) attempted to cover-up or minimize their wrongful conduct after the fact. Plaintiffs have not yet deposed either Rogers or Jamar,[20] but expect to do so in late February. In the meantime, what follows is some of Plaintiffs' evidence on this issue, even without the benefit of discovery from these individual Defendants.

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[19] Tab 11.

[20] Which is one of the reasons why granting this motion will not prejudice unreasonably either Defendant. Not only will they be represented by the same Justice Department counsel who have represented individual Defendants in this matter from the onset (and have continued to participate in all discovery on behalf of Lon Horiuchi), but they have not yet been subjected to any personal discovery and will have the full benefit of counsel at their upcoming depositions.

13. An HRT supervisor has identified notes dated “4/19/93" as being in Rogers’ handwriting.[21] At the bottom of the first page of these notes is the following statement:

> If no or limited effect, CS continues for 48 hrs. followed by disassembling compound by CEV’s.

Thus, even Richard Rogers understood the restrictions on dismantling Mt. Carmel under the plan of operation for April 19. Ironically, the same notes, on the second page, refer to the planned operation as an “assault.”

14. The plan of operation itself was disseminated to HRT members. However, implementation of the plan — as ordered by Rogers and Jamar — quickly deviated from the prior expectations of HRT members. The commander of the Bradley Fighting Vehicle on the “black” side characterized the function of the CEVs on April 19, 1993 as follows:

[21] Tab 12.

> It was my understanding that they were to be used to introduce the gas and **that was it**.[22]

Moreover, when faced with the demolition of the gym on the April 19 FLIR, the same HRT member acknowledged that what was happening on the back side of Mt. Carmel here at the gym, was **not** necessary to introduce gas.[23]

[22] Tab 13, at p. 72, l. 13-14.

[23] Tab 13, at p. 72, l. 15-19.

15. Joseph Servel, Jr., in his April 20, 1993 302[24] characterized what he saw on the back side of Mt. Carmel as "the CEV began to **dismantle** a portion of the Black side." Servel also noted simultaneous with that event, "more gunfire is heard emanating from the opening he estimated to be Black Alpha 16," which was the window in the kitchen nearest the Green side of the building. In response to that gunfire — apparently prompted by the aggressive actions of CEV-2 in demolishing the building — Sierra 2 sniper post requested that Servel insert more gas into Black Alpha 16, which was done according to Servel's 302. The next passage is particularly striking:

> **At this time**, Servel was advised by Sackett that he saw smoke from Black Alpha 14-16, the kitchen area of the BDC building. Shortly after that, Servel said Sackett advised that he saw flames. Servel confirmed this sighting and then they went to the BR corner.

16. A second occupant of a Bradley on the black side responded as follows when asked his understanding of CEV-2's purpose in going into the gymnasium:

> A. Again, from — best recollection from the planning stuff was to **take down parts of the building**. I believe that's probably what he was doing.
>
> Q. Just disassemble the building and force the Davidians into other parts of the building?
>
> A. I don't know if that was the thought behind it, or **take down parts of the building so they'll come out**.[25]

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[24] Tab 14.

[25] Tab 15, p. 62.

That particular HR member could not recall any instructions concerning placement of tear gas inside the first floor of the tower, the so-called "bunker."[26]

17. Seen from above, it was clear that the building was being systematically demolished by the two modified patent tanks. The pilot of the surveillance aircraft circling overhead testified to the following:

[26] Tab 15, p. 92.

> Ah, I recalled some remarks that were made while — you know, 'people were going to have to get out pretty soon, because it's going to, you know, **the things are being kind of, during the penetrations, being taken away from them**, and there is not, you know, no one is going to be there, so they're going to have to go somewhere else.' It's kind of like, 'ok, watch out for when the people start — are ready to start coming out. Be on the look-out.'[27]

In addition, the pilot could recall one moment when CEV-1, stationed on the front of Mt. Carmel, was "missing" and the pilot "didn't know where it had gone," and then he "saw it backing out from the Compound right in front of the tower area." The pilot commented to the effect "look at that. That thing went all the way in, because it just started backing out."[28]

18. Incredibly, despite ordering actions that clearly exceeded the parameters of the plan approved by the Attorney General, Jamar maintained in his post-action 302 that all "actions taken during the tear gas insertion period were in accordance with the pre-approved operations plan."[29]

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[27] Tab 16, p. 20.

[28] Tab 16, p. 22.

[29] Tab 17.

19. Rogers was similarly disingenuous. In Rogers' 302 dated April 21, 1993, he claimed that the purpose of instructing CEV-1 and CEV-2 to begin demolition of Mt. Carmel was to create "escape openings" on the front and back of the building, despite the fact that the initial penetration of CEV-1 into the front of Mt. Carmel had already created a sufficient opening to allow the crew inside to view stairs and a hallway and penetrate virtually all of the way to the base of the tower.[30]

20. Rogers, however, failed to coordinate his story with the occupants of CEV-2, the tank that systematically demolished the gym. Both the driver and the spotter in CEV-2 testified that the instructions they received from Rogers on April 19, 1993, were to "clear a pathway through the building."[31] In fact, the spotter in CEV-2 denied violation of the plan of operation for April 19, 1993,[32] and disagreed with Rogers' explanation ("escape openings") for his conduct.[33] He made it clear, however, that his orders on April 19, 1993, to begin whatever he was doing

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30 Tab 18.

31 Tab 19, p. 45, l. 4-5.

32 Tab 19, p. 89.

33 Tab 19, p. 141-142.

on the backside of Mt. Carmel after 11:00 came from “Dick Rogers, Richard Rogers.”[34]

[34] Tab 19, p. 108.

21. Special Agent James Walden stated in his after-action 302 dated April 20, 1993, that "another CEV without gas delivery capability was then put in service by SA Walden with a mission to clear a path through the structure from the black to the white side for the remaining CEV with gas delivery capacity."[35] A brief review of Walden's 302 reveals numerous inaccuracies/misrepresentations by Walden, including the clear inference on page 2 that Walden entered and backed out of the gymnasium only once.[36] Finally, one of the occupants of CEV-2 drew a diagram, FBI 35, indicating a "path" along side the gymnasium to the tower, which was supposedly the pathway they were instructed to clear by Dick Rogers on April 19.[37]

22. The other occupant of CEV-2 on April 19, Gary Harris, was equally unsuccessful in justifying his actions on April 19. Rather than clearing a pathway to the tower, Harris characterized the mission of CEV-2 as "probing the black side for places to insert gas."[38]

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35 Tab 20.

36 Tab 20, p. 2, para. 5.

37 Tab 21.

38 Tab 22, p. 2.

23. The obvious falsity of the stories told by the crew of CEV-2 and Dick Rogers concerning their actions on April 19, 1993, becomes glaringly apparent when photographs of the scene are examined (Tab 23). Even a cursory glance at the devastation done to Mt. Carmel puts the lie to claims of making "escape openings" and "pathways." The sharp conflict between the official version and reality was highlighted by the driver of CEV-2 in his deposition testimony, when he acknowledged that in "45 minutes, [he] had destroyed the gym."[39] In fact, the driver acknowledged that, instead of trying to clear a path to the tower, actually CEV-2 was "moving further and further away from the tower as [he] continued demolition of the gym."[40] Once again, however, the driver of CEV-2 acknowledged that he was basically following orders on April 19, 1993, and that his orders came from Dick Rogers.[41]

JAMAR AND ROGERS ORDERED DEVIATIONS FROM THE PLAN

24. In an interview conducted of Steve McGavin, an HRT supervisor and Rogers' Tactical Chief of Staff, McGavin recounted the "tank conference" held on April 19 among Jamar, Rogers, McGavin, and the CEV drivers. The notes of that interview reflect McGavin's characterization of Jamar's instructions at that

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39 Tab 24, p. 69.

40 Tab 24, p. 74-75.

41 Tab 24, p. 49, 75.

conference as "**all out**." Further, McGavin apparently placed the conference in the chronology of events as "when CEV #2 started collapsing gym."[42]

25. Notes of a similar interview with Dick Rogers by the *Branch* prosecution attorneys recorded the following:

- **Rogers expected surrender within one hour and it was not happening**.
- "Don't know if JJ passed [his decision to change plan] to SIOC"

[42] Tab 25, p. 2.

- JJ: no reservation about authority to make this decision; all believed authority to make it part of operation[43]

26. However, the Department of Justice internal review of the Branch Davidian stand-off issued on April 8, 1993 — the redacted version — characterized the actions taken by Jamar and Rogers following that meeting at the "Y" intersection as a "deviation":

> Sometime in mid-morning an apparent **deviation** from the approved plan began. The plan had contemplated that the building would **only** be dismantled if after 48 hours not all the people had come out. However, the CEV's began knocking holes into the Compound the morning of the assault. First, CEV-1 was ordered to enlarge certain openings to provide for an easier escape route for the Davidians. CEV-2 broke down and the team of that vehicle obtained another CEV which was not equipped for tear gas. This CEV was ordered to clear a path through the Compound in order to clear a path to the main tower so that CEV-1 could insert tear gas into that area. In that endeavor the CEV started to knock down a corner of the building and a portion of the roof collapsed.[44]

Therefore, it is clear that Jamar and Rogers acted without authorization, without authority, and deviated from the plan approved by Attorney General Reno. The issue becomes two-fold: what was their intent, and what was the effect of their decision?

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[43] Tab 26.

[44] Tab 27. Of course, it is clear from photographs and the FLIR tape that all of the gymnasium had either been demolished or collapsed prior to the fire.

JAMAR AND ROGERS MOTIVATED BY FRUSTRATION AND ANGER

27. Gary Noesner, Crisis Negotiation Team Coordinator at Mt. Carmel from the inception of the stand-off until March 25, 1993, and currently head of the FBI's Negotiation Team for the Critical Incident Response Group at Quantico, Virginia, dealt extensively with Jamar and Rogers during the month he spent at Mt. Carmel in March 1993. Noesner is one of the FBI's most experienced negotiators and was responsible, with others on his team, for the successful resolution of the Freemen stand-off in Montana in 1996 (utilizing many of the same policies which had been rejected by Jamar and Rogers at Mt. Carmel). In the Form 340 notes of his after-action interview, two words appear repeatedly: "intimidate" and "frustration".[45]

- "Rogers wanted to intimidate Davidians rather than appease them."
- HRT said "these people are not complying with our requests to come out and therefore we'll intimidate until they do."
- "Lot of frustration and anger exhibited by command and tactical element"
- "Decisions made were influenced by frustration"
- "Tactical element wanted to intimidate and create pressure"
- "During this period [there] was frustration and mounting anger between tactical element and crisis negotiators"

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[45] Tab 28.

Even when Noesner's comments were transcribed into a Form 302 dated June 4, 1993,[46] the terminology of "frustration" and "intimidation" remained. Again, Noesner's 302 states, in part, "SSA Noesner felt that subsequent decisions that were made were influenced by these feelings."

JAMAR AND ROGERS KNEW CONSEQUENCES OF TANKS

28. From a variety of sources, Jamar and Rogers were warned of the likely consequences of their actions:

- "**He told Jamar that they could not send in the tanks because if they did so children would die and the FBI would be blamed even if they were not responsible**."[47]

  Pete Smerick, FBI Criminal Profiler

- "He believes Jamar's style demonstrated frustration, anger and was motivated by emotionality."[48]

  Gary Noesner

- "Any negotiator would have told [Jamar and Rogers] that dismantling the building would provoke a violent response." Noesner would have told them

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[46] Tab 29.

[47] Tab 30.

[48] Tab 31.

that and he believes Van Zandt would have too. **He believes that is what triggered the starting of the fires and the shooting of the children**."[49]

Gary Noesner

[49] Tab 31.

- "Anyone would have seen the risk. What was the rush? The plan had been to wait. The agents were safe in the tanks to put in the gas so that even though they were drawing fire that did not justify dismantling the building. Moreover, Noesner thinks it was a bad decision to start knocking down a building containing women and children because people could have been crushed. This was all a manifestation of the action imperative, the sense that we have to do something because it has to end today."[50]

Gary Noesner

- "Everyone agreed that the Davidians would fight back if they made a forced entry."[51]

Fred Lanceley

29. Moreover, both Lanceley and Noesner recounted instances where Jamar apparently lied to the negotiators concerning the motives behind certain actions.[52] This created problems not only with the Davidians, but also within the FBI's management team.[53]

JAMAR/ROGERS' ACTIONS WERE AN ASSAULT AND PROVOCATION

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[50] Tab 31.

[51] Tab 32.

[52] Tabs 31 and 32.

[53] Of course, Plaintiffs believe this evidence goes directly to the credibility of Jamar as he accounts for his actions at Mt. Carmel.

30. Despite the best intent of the FBI leadership and the Attorney General to avoid an "assault" on Mt. Carmel, it is clear that the unauthorized orders of Jamar and Rogers, deviating from the Attorney General's approved plan, precipitated or contributed to the tragic outcome at Mt. Carmel. Clearly the actions of the tanks demolishing the building put the lie to the Byron Sage broadcast that "this is not an assault, you will not be harmed." It is also clear from testimony that at least some of the FBI leadership present at the SIOC in Washington, D.C., on April 19, 1993, were unaware of the demolition of Mt. Carmel by the FBI tanks. In fact, there is testimony from one person present at FBI headquarters on that day that he was "shocked" when he finally learned the extent to which the CEV's had demolished Mt. Carmel before the fire.[54]

31. Testimony from another former FBI negotiator was even stronger:

- The FBI's actions on April 19 were "certainly provocative"
- The image of the tanks driving again and again and again and again into the gymnasium and front of Mt. Carmel was "an assault"
- The course that was being taken by the tactical personnel and Mr. Jamar at Mt. Carmel would result in an almost inevitable tragic outcome
- When this negotiator was leaving Mt. Carmel, one of this co-workers expressed sorrow at his departure and he replied "I don't want to stay

[54] Tab 33.

because those people are going to die and I don't want to be here when it happens"[55]

BIVENS CLAIMS AGAINST JAMAR AND ROGERS SHOULD BE REINSTATED

32. Clearly, based on the foregoing evidence, Plaintiffs have stated claims against Defendants Jeffrey Jamar and Richard Rogers for violation of the Fifth Amendment and, Plaintiffs believe, the Fourth Amendment for their unauthorized deviation from the approved plan of operations on April 19, 1993, and their orders to demolish Mt. Carmel.

33. Moreover, in addition to the extensive evidence concerning the use of tanks to demolish Mt. Carmel without authorization, much of the same evidence extends to the Plaintiffs' claim against Jamar and Rogers in connection with Government gunfire on April 19, 1993.

[55] Tab 34.

34. First, every HRT member questioned so far by Plaintiffs has claimed that he acted in accordance with orders issued by Richard Rogers on April 19, 1993. It is difficult, if not impossible, to believe that HRT members could have directed gunfire at the occupants of Mt. Carmel on that faithful day without the knowledge and orders from Richard Rogers. Indeed, recent evidence suggest that there was a plan in place for just such action.[56]

35. As Plaintiffs complete their preparations for trial and the demonstration of gunfire on the FLIR takes place next month, it is appropriate that both Jamar and Rogers be reinstated as Defendants on possible *Bivens* claims. If it is determined, as a mounting body of evidence suggests, that the flashes on the April 19, 1993 FLIR are indeed gunfire, it is clear that a great deal of responsibility for that Government gunfire must rest on Defendant Rogers and, most likely, Defendant Jamar.

Therefore, based on the foregoing, Plaintiffs ask for the reinstatement of Jeffrey Jamar and Richard Rogers on the *Bivens* claims outlined above.

Respectfully submitted,

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[56] Tab 35. This is a checklist found at HRT headquarters. The author has been identified as an HRT supervisor. On the second page, there is an item listed as "CQB Plan in place — Rick." CQB has been identified as "Close Quarter Battle." The author of the checklist has offered an implausible explanation for this entry.

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CERTIFICATE OF SERVICE

I certify that, on February 1, 2000, I have served a true copy of the foregoing to the following by fax:

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