VII. THE USE OF THE SATCHEL CHARGE

The most critical area of our inquiry has been the City's decision to drop an explosive device on the MOVE compound and its subsequent decision to let the resultant fire burn. That fire started when, at Sambor's suggestion and with Goode's approval, police dropped an explosive device on the roof of the MOVE compound, intending to destroy the bunker and to create a hole through which police could then pump tear gas into the house. This plan failed, however, with disastrous results. When the device (which missed the bunker entirely) exploded, it set in motion a chain of events which resulted in the ignition of vapors from cans of gasoline near the bunker. A small roof fire ensued. The City did not extinguish the fire promptly, and later could not extinguish it before at least ten people had died and sixty-one homes had burned to the ground.

We questioned the Mayor, the Managing Director, the Police and Fire Commissioners and all other persons intimately involved in these events. We extensively considered whether anyone acted criminally in making the decisions which led to this disaster. Our inquiry into these extraordinary events disclosed significant factual questions and problematic legal issues. After painstaking consideration and lengthy discussion, we have determined not to bring criminal charges: We have concluded that, factually and legally, no prosecution is sustainable. To bring charges simply because our visceral reaction is that, given a disaster of this

magnitude, someone must have acted criminally would be cathartic but improper.

Although the evidence adduced before us does not support criminal charges, it does reveal incredible incompetence by the City officials involved in making these crucial decisions. The motifs apparent in preparing for the confrontation -- an absence of thoughtful consideration of the plan, unwarranted haste, and poor communication among crucial persons on crucial issues -- were all apparent first in the decision to drop the charge and then in the decision to let the ensuing fire progress. Once again, the testimony revealed a lack of particularized inquiry by City officials and, instead, a willingness to accept general answers to general questions ("Will it work?" "Is it safe?"). Perhaps this disaster could have been averted had officials asked even the most minimally probing questions (e.g., "How is it that no risk of fire is posed by an explosive device designed to destroy a steel-reinforced bunker and simultaneously blow a hole through the roof into a house believed to contain explosives and gasoline?").

This chapter examines the decision to use the satchel device; the next examines the decision to let the fire burn. In each, we first review the testimony concerning how these two critical decisions were made. That testimony illustrates the grievously flawed decision-making process and provides the essential framework for our subsequent discussions regarding possible criminality. These discussions include a review of the applicable law, after which

we apply that law to the facts, more specifically explaining why the evidence does not warrant the return of indictments.

We first review the evidence concerning how the decision was made to use the satchel charge. Although there is some disagreement among the principal actors regarding critical events preceding this decision, the overall facts are not disputed.

At noon on May 13, 1985, Powell informed Sambor that the original plan had to be abandoned. Sambor then asked Powell to "talk to his people" [the Bomb Disposal officers] to see whether anyone had any ideas, and specifically suggested that they consider using an explosive device to create a hole in the roof through which tear gas could be pumped into the house.

After this conversation, Sambor took Brooks, Richmond and others inside Post One to view the impressive MOVE fortifications which had been exposed in the police assault. Brooks testified that he, Sambor, Richmond, Licenses and Inspections Commissioner James White and Health Commissioner Stuart Shapiro then discussed how to remove the bunker. White left to investigate using a crane, and the others discussed using an armored vehicle with a battering ram. As with the crane option, Brooks testified that Sambor did not indicate to him that these ideas already had been explored and rejected.

At approximately 4:00 p.m., Sambor, Brooks, Richmond and several others met at the Geriatric Center. Sambor recalled that they discussed various options for proceeding against MOVE, such

as using an armored vehicle or crane to remove the bunker, attacking over the roof, or conducting an assault on the front or back of the building. Richmond recalled that Hawthorne was present and said that a crane could be used to dislodge the bunker, but that its operator would be within MOVE's firing range; thus, this option was again rejected. They discussed having an officer put an explosive into the bunker, but dismissed that idea as too risky. Sambor then suggested using a helicopter to drop a "satchel charge" on the bunker to dislodge it and to create a hole in the roof through which an officer could put tear gas. After Brooks and Sambor agreed that the idea was feasible, Sambor summoned Powell.

Powell arrived within a few minutes accompanied by Klein. Sambor asked Powell whether he could devise a charge that would destroy the bunker and create a hole in the roof and, if so, whether he could deliver such a charge. Powell spoke with Klein briefly and then replied affirmatively to both questions.

Sambor testified that Brooks and Richmond asked questions and that he and Powell offered answers. Richmond asked Powell whether the device would start a fire. Richmond, Sambor and Brooks each recalled that Powell assured them that there was virtually no risk of fire. Powell and Klein both testified, however, that there was no discussion concerning the risk of fire, with Powell adding that, had they discussed it, he would have told them there <u>was</u> a potential for fire. Klein's testimony, however, suggests that he would not have disagreed with Powell's alleged response that there was no risk of fire. Klein

told us that C-4 is non-incendiary ("if you light it and burn it, it doesn't explode"), and also said that he was never worried about a fire occurring and was puzzled when one did result. We have found the testimony of Brooks, Sambor and Richmond concerning this conversation to be credible.

Powell was also asked whether the satchel charge posed any risks to the occupants. Sambor recalled that Powell responded that it would be a minimal charge designed specifically for what they had in mind, and that it would present little or no danger to the occupants of the house, even if they were on the second floor. Klein recalled, however, that when Brooks asked Powell what the explosives would do, he (Klein) answered that it would knock the bunker -- and anyone inside -- to the sidewalk:

> I think I told him it would stand the bunker up, drop it down on the sidewalk. If [any MOVE members in the bunker] survived the crash on the sidewalk, they wouldn't be able to hear for a week, but they would probably live, because the blast itself would not kill them. If they could survive that fall from the second floor to the ground, they would live, but they would have a problem with hearing for awhile.

Powell remembered telling them that although he did not know whether the satchel charge would remove the bunker, it would at least disable it.

Finally, the manner in which the device would be delivered was discussed. It was agreed that they would drop the device from a helicopter onto the bunker. Brooks then called the Mayor, to whom he previously had explained the alternatives being explored. Brooks testified that he told Goode by phone:

> Sambor doesn't have any other way that he can find to get that thing down from there. He plans to take a helicopter and drop an explosive device right on the bunker and then, go up to it and put water and tear gas in the hole.

Sambor testified that he could not hear Brooks' every word, but recalled that Brooks outlined the plan for Goode, using words like "explosives" and "helicopter." Similarly, Klein testified that Brooks made a phone call and said:

> ... "We're going to use the helicopter," and again, he said, "We're going to use two and a half pounds of plastic explosives," or "two and a half pounds of C-4, and we're going to drop it from the helicopter in a satchel." He did say satchel.

Goode, however, denied knowing that the device was going to be dropped from a helicopter and testified that he thought police officers were going to crawl across the roof and place the device against the bunker:

> Q. And whether [using police officers to place the charge against the bunker] was, in fact a possibility, given the limitations of that day; that is, in fact, what you believed was going to occur, correct?
>
> A. Without question.
>
> Q. Now, am I correct that you do not remember Mr. Brooks telling you that they were going to drop the device from a helicopter; is that right?
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> A. I do not recall the word helicopter.
>
> Q. Do you recall the word drop?
>
> A. I do not recall the word drop.
>
> Q. Do you recall having any idea how this device was going to be placed on the roof in order to knock the bunker onto the street?

A. What I did think?

Q. Yes.

A. I thought it was going to be placed there by one of the police officers on the roof crawling over there and placing it there and then moving away from it. That is what I thought in my mind.

Q. You certainly cannot think of any reason why Mr. Brooks would intentionally deceive you as to the mechanism by which this device --

A. He is a very honorable man. I'm sure he would always tell the truth as he understood. I'm sure if he says he told me he was going to use a helicopter, he believes deep down inside he told me.

* * *

I was surprised that it was dropped from a helicopter. I recall being very surprised that the helicopter was used to drop this device.

Goode so testified even though previously he had told us that he "understood that [the police] felt they could not safely go onto the roof and into the house from the rooftop with that bunker being there." Further, Lieutenant Fred Ragsdale, a police officer assigned as Goode's bodyguard, told us that as Goode and members of his staff watched television just before the explosion, Goode said "Watch this" and, moreover, registered no surprise at the scene displayed.

Goode's recollection of his decision to approve the use of an explosive device was that he paused thirty seconds, asked whether Sambor knew of the idea, whether Brooks thought it would

work, and when the police planned to do it. After this briefest of inquiries, Goode approved the plan:

> My recollection is that, "You know the crane will not work. We have concluded that we will blow off the bunker by using some type of plastic explosive charge." And I paused for a half a minute, perhaps or some seconds. And I said does Commissioner Sambor know about this? And he said, "Yes, it was his idea or his plan." And I said, "Do you think it will work?" And he said, "Yes, I think it will work."
>
> And I said "Okay." That is the extent of the conversation as I understood it.
>
> * * *
>
> So I did not go into detail, [had he] thought about A, B, C or D. I asked him will the plan work.
>
> * * *
>
> ... I had two very experienced operations people out there.... I did not go through each time I talked with them a checklist and say "Have you thought about this, this and that?" I did not do that, sir.

At the conclusion of his conversation with Goode, Brooks turned to the others, telling them that the Mayor understood and they should proceed.

Other testimony which we heard regarding this conversation between Goode and Brooks has caused us to consider whether the decision-makers acted pursuant to an artificially imposed deadline for completing the operation. Klein testified that, after Brooks spoke with Goode, "He hung up and he said, 'He wants it done before dark.' He said 'He wants everything done before darkness. He wants them out of there before it gets dark.'"

Goode denied having a deadline. He said that he was concerned that the police would be subject to greater risks after dark, but added:

> I was not in charge of the operation. I did not have a deadline. I was at my office receiving reports from the field operations people and responded to what their concerns were. If they had said to me, "Mr. Mayor, we can safely go three or four days," I would have said if that is your professional opinion, fine. If they said nightfall poses a problem, they are at the scene. They know what their limitations and their problems are, and they know what they have to do to maintain security at the scene there.

Brooks similarly testified that he did not recall Goode saying at any point that he wanted the operation to be completed that day.

Although there is no corroboration for Klein's testimony as to this point, we previously have noted that the City began the entire operation pursuant to an artificial deadline; to attempt to conclude the operation by an artificial deadline would have been consistent, and not unlikely, given that sixty-one families were waiting to go home and massive police resources were gathered at the scene. Whether or not immediate completion of the operation was a subconscious motive, no one testified to any discussion of calling off the operation. Rather, the meeting simply ended and the participants began preparations to drop the satchel.

Powell testified that before he left the meeting, Sambor specifically instructed him not to inform the police in the posts about the planned use of the satchel charge. Powell told Marandola nonetheless. Powell was concerned that, although MOVE was sheltered by the structure of the house, the police across the

street were exposed because the force of the explosion would travel laterally across the roof when the charge detonated. Furthermore, Powell was concerned about the other risks to the police: "We might get shot down, I might miss the roof.... Even if it landed directly behind the bunker, you know, if I blew up the bunker, I didn't know what was going to happen. I might throw the bunker right into Post Two or Post One. Distance-wise, we were not that great. I didn't know what was going to happen."

Sambor admitted that he may have told Powell not to tell Marandola or the other officers about the plan. Because Powell had said that the satchel charge posed no danger to the occupants, Sambor reasoned that there could not be any danger to anyone else. Moreover, he felt that "[t]here was no need to get people all worked up and excited and possibly do something that was not calculated that would jeopardize what was to be done."

This is yet another instance where a lack of discussion and particularized inquiry may have caused unnecessary risk. The satchel charge was not considered dangerous to MOVE members because it was believed that they were in the basement. Two of the police posts were located on rooftop positions, however, and officers assigned to the other posts were at upper windows in the surrounding houses. The charge would detonate at right angles, potentially driving debris across the roof. Clearly, an explosion sufficient to destroy the bunker might propel the debris toward these officers. Powell was aware of all of these risks (and of the additional risk that, in dropping the charge, he might miss the roof of the

house completely), yet he evidently did not discuss his concerns with Sambor. He did countermand Sambor's order, telling Marandola to evacuate the posts. However, the safety of the police officers should be protected through the discussion of risks and worst-case scenarios by decision-makers, not by the countermanding of orders.

After the meeting, Klein and Powell left the Geriatric Center. Klein constructed the bomb by himself, using two sixteen-inch tubes of Tovex and one block (1-1/4 pounds) of C-4. The C-4 was included as a "blasting cap" to detonate the Tovex. Klein said he could have used HDP boosters to detonate the Tovex instead of C-4 (because HDP boosters detonate at almost the same rate at C-4) but instead chose C-4, an explosive he described as "safe."

Powell then dropped the satchel on the roof from a State Police helicopter. The mechanics of the explosion and fire on the roof are discussed in Part VIII. For analysis of the issue here, it is sufficient to note that detonation of the charge caused wood on the roof to splinter. These wood splinters were driven through the gasoline vapors by the force of the explosion. The gasoline vapors, when exposed to the heat of the explosion, ignited.

Before examining this evidence under the law relevant to our decisions whether to indict Goode, Brooks and Sambor, we will address Klein's inclusion of C-4 in the satchel charge and whether that was a criminal act. There has been much public discussion concerning Klein's use of C-4. Shortly after the device was

detonated, Sambor stated publicly that it contained only Tovex. Three months later, however, Klein gave a statement to Homicide Captain Eugene Dooley in which he said he used C-4 as well as Tovex. Although this "admission" precipitated speculation that the unintended fire was caused by the C-4, we have concluded that Klein's use of C-4 was neither unknown to City officials nor particularly material to the disaster which ensued. The use of plastic explosives (a category of explosives which includes C-4) was discussed by the Mayor, the Managing Director and the Police Commissioner and, if not specifically approved, was not prohibited. Moreover, although C-4 is more likely to cause a fire than is Tovex, in this instance it made no difference: it was the explosion itself -- not the type of explosive used -- which caused the ignition of gas vapors and the subsequent fire. The fire which resulted did not emanate from point of detonation. (Similarly, no fire resulted from the earlier use of C-4 during the morning.)

Klein told us that Brooks and Sambor had authorized the use of C-4, and both Brooks and Goode testified that they anticipated the use of plastic explosives. Klein testified that, in discussing the satchel charge proposed at the afternoon meeting, Brooks asked Powell what two pounds of "C-4" or "plastic" would do to the bunker. Klein then interjected that C-4 came in 1-1/4 pound blocks, and Brooks asked Powell what 2-1/2 pounds would do. Klein could not remember which of the two terms -- "C-4" or "plastic" -- Brooks used. He explained that the terms are interchangeable: C-4 is one type of plastic explosive. (Tovex, however, is not a plastic

explosive.) Powell also testified to a similar recollection of this conversation.

Brooks admitted that the word "plastic" was used during the discussions, although he said he was not the first person at the meeting to use the term. Brooks also said that he did not specifically recall anyone using the words "C-4" or "Tovex," and did not think he used a specific term when he relayed Sambor's proposal to Goode. (Brooks said that despite his military background he had only a minimal knowledge of explosives and did not know the difference between Tovex and C-4 on May 13, 1985.) Goode testified that Brooks told him "[w]e have concluded that we will blow off the bunker by using some type of plastic explosive charge." Sambor -- who, at the time of the meeting, had a general familiarity with C-4 as a plastic military explosive which came in bricks -- said C-4 may have been mentioned in a very general sense at the meeting, but did not "recall at all anybody mentioning C-4 as C-4 itself being used, No, sir." Sambor further said that, at the conclusion of the meeting, he thought that they were going to use "this new kind of explosive ... I knew specifically that its name was Tovex." Finally, Richmond said that he only recalled Sambor using the phrase "satchel charge" and did not recall any mention of C-4 or Tovex, terms which meant nothing to him. (Richmond may have left the meeting before the content of the satchel charge was discussed.)

We have concluded that Klein's use of C-4 was not prompted by any insidious motive. He testified credibly to his belief

that there are no major differences between C-4 and Tovex and his understanding that, although C-4 is more powerful than Tovex, it poses no greater danger of fire and is actually safer than Tovex. (In fact, Klein testified that he was puzzled by the ensuing fire because he knew C-4 to be non-incendiary.) Klein said that, for these reasons, he would have preferred to use only C-4 and no Tovex. Finally, Klein told us that every Bomb Disposal Unit in the country except Philadelphia's uses C-4.

Although Klein's testimony was sincere, his information was erroneous. Explosives expert James Phelan testified that C-4 does pose a greater risk of fire than does Tovex. Moreover, Angelucci testified that Tovex takes on the properties of other explosives with which it is used; thus, detonating C-4 and Tovex together would have a synergistic effect. Similarly, Phelan said that detonating Tovex and C-4 together increases the heat produced and thus increases the risk of fire.

Nonetheless, however wrong Klein was about the characteristics of C-4, his error in no way affected the explosion which caused the roof fire. Since Tovex alone also would have caused the fire, inclusion of C-4 had no impact on the ensuing events and will not be considered further in the discussion of potential criminality.

Having briefly reviewed the evidence of how the decision to use a satchel charge was made, we will now review the law which has governed our discussions of whether anyone acted criminally in making this decision. We have been instructed that there are

four basic elements common to all crimes: (1) an act (for example, the act of dropping an explosive device on the roof of 6221 Osage Avenue); (2) a result (e.g., the deaths of MOVE members and children inside the house); (3) a criminal state of mind associated with the act (e.g., "recklessness"); and (4) a direct causal relationship between the act and the result. Each of these elements must be present before a crime may be found or charges brought. Additionally, individual crimes also have additional specific elements which must be present, together with the four elements listed above, before a crime may be found or charges brought.

Our inquiry regarding the decision to drop the satchel focused on three persons: Sambor, Brooks and Goode. The evidence shows that Sambor suggested using an explosive device against the bunker, Brooks relayed the suggestion (which he endorsed) to Goode, and Goode approved it. Thus, the first element -- that of an act -- exists as to all those involved in the decision. As noted earlier, Richmond was not really involved in the decision and it was not his to make. He asked the one question which was relevant from his perspective: Would this device cause a fire? He was assured that it would not. Apparently, he then left the meeting. Because of his minimal role, we will not further consider whether he acted criminally in connection with the decision to drop the satchel charge. Similarly, we will not further consider whether Powell and Klein acted criminally concerning this decision which, again, was not theirs to make. They answered factual questions to the

best of their knowledge and took no actions other than those pursuant to orders.

It is clear from the evidence that the first element -- that of an act -- is present as to Goode, Brooks and Sambor. It is also clear that the second element -- a result -- is also present in the death, injury and destruction which occurred. It is not clear, however, that the death, injury and destruction which resulted were directly caused by the acts of Goode, Brooks and Sambor. Neither is the evidence clear with respect to the state of mind of those principally involved in making this decision.

We will first discuss the element of causation under the law. We have been instructed that, in order to be considered a cause of any result, whether it be death or some other result, a person's conduct must be a direct and substantial factor in bringing about that result. There can be more than one direct cause. But a person's conduct is not a direct cause of the resulting harm if the intervening acts of others break the chain of events. We, therefore, have considered whether the acts of other persons, including the MOVE members themselves, played such an independent, important and overriding role in bringing about the resulting harm, compared with the first act (the decision to use an explosive device), that the first act does not amount to a direct and substantial factor in bringing about the resulting harm. A person's conduct may be the direct cause of the harm even if his conduct was not the last or immediate cause of the harm. It need only start an unbroken chain of events. However, whether the

conduct of others relieves the original actor of liability for his first act also depends on whether the intervening conduct was foreseeable to the original actor.

Thus, the question here as to each decision-maker (Goode, Brooks and Sambor) is whether the decision to drop an explosive device directly caused the death of the MOVE people and the destruction of the neighborhood, or whether the fire which resulted, the initial failure to fight the fire, the decision of Fire Commissioner Richmond and Police Commissioner Sambor to let that fire burn, the subsequent inability of the Fire Department to fight the fire, and/or MOVE's decision to remain inside a burning building and/or to keep their children inside a burning building, were intervening, superceding events which the decision-maker could not foresee.

In addition to considering whether the decision to use the satchel charge was the cause of the harm under the law, we have also considered whether the decision-makers here acted with a criminally culpable state of mind ("mens rea") in agreeing to use a satchel charge. A person cannot be criminally charged for his conduct unless he acted with a particular state of mind or level of culpability. The definition of each crime requires that a person commit the act with a minimum level of culpability. Generally, there are four levels of culpability: a person may commit an act intentionally, knowingly, recklessly or negligently. By contrast, if a person commits an act merely as the result of his

ignorance or mistake or bad judgment, he may be civilly liable or morally responsible, but he cannot be charged criminally.

In deciding whether any charges should be brought against those involved in the decision to drop an explosive device, we were instructed as to the legal definition of conduct which is intentional, knowing, reckless and negligent. We have been told that someone acts "intentionally" if it is his "conscious" objective to do a particular act or cause a particular result, and, where there are related attendant circumstances, he is aware of those circumstances or believes or hopes that they exist. (We understand that "conscious" means to be aware of and consider something.) We have also been instructed that a person acts "knowingly" if he is aware that it is practically certain that his conduct will cause a particular result.

Additionally, we have been given the legal definition of recklessness. We have been told that "recklessness" has four elements: (1) the actor was aware of a risk that a particular occurrence would result from his conduct; (2) the risk was substantial and unjustifiable; (3) the actor nevertheless consciously disregarded the risk; and (4) considering the nature and intent of his conduct and the circumstances known to him, his disregard of the risk involves a gross departure from the standard of care that a reasonable person would observe in the actor's situation.

Finally, in considering whether any of the decision-makers acted recklessly in approving the use of an explosive device, we have been careful not to confuse legal "recklessness" with legal

"negligence," which is a lesser level of culpability. We have been instructed that a person acts negligently when he should be aware of a substantial and unjustifiable risk that a material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and intent of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

To further guide our deliberations in determining whether anyone acted "recklessly" or "negligently," we identified four specific risks which attended the decision to drop an explosive charge:

> 1. The explosive charge, or debris propelled by its explosion, would cause gas cans on the roof to explode, igniting a fire which could not be controlled;
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> 2. the charge would propel debris into the house and kill or injure people on the second floor;
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> 3. the charge, or debris propelled by it, would drop into the house and touch off explosives or gas in the house, killing or injuring anyone on the second floor and anyone on the first floor or in the basement who did not (or could not) flee; and
>
> 4. the charge would kill or injure people in the bunker itself, either immediately upon explosion or in dislodging the bunker into the street.

Several factors must be considered in weighing the substantiality of all of these risks. In discussing the nature of the

first risk listed above, three facts became important. First, we heard expert testimony that the fire which resulted was not caused by the satchel charge itself, but by the ignition of vapors from gas cans on the roof. Thus, had the gas not been on the roof, no fire would have occurred on May 13, 1985. Second, this fire could have been extinguished by the squirts at any time from its inception at approximately 5:30 p.m. until 6:15 p.m. Thus, had the decision-makers actually considered this particular risk posed by the use of the satchel charge, they might reasonably have concluded that it was not substantial and proceeded with the plan. Third, the thousands of gallons of water directed at the roof that day did not prevent a fire from occurring because the water evaporated almost instantly in the 7,000° heat created by the explosion of the charge. (However, there is no evidence that Goode, Brooks, Sambor or Richmond thought that that water diminished the risk of fire.)

In assessing the nature of the second risk, we recall that the stated purpose of the satchel charge was to create a hole in the roof through which police could pump tear gas. Obviously, then, the satchel charge, at a minimum, posed a danger of falling roofing material and plaster to anyone on the second floor.

Finally, in assessing the nature of the fourth risk, we are aware that the use of force against anyone in the bunker was arguably justified under the statutory provisions permitting the use of force in law enforcement, briefly referenced in Part IV and more fully discussed below.

With this basic legal framework in mind, we will now discuss the evidence and specific charges which we considered bringing against specific individuals.

The charges which we considered bringing against Goode for his decision to drop the bomb were: conspiracy, murder, involuntary manslaughter, aggravated assault, reckless endangerment, arson, causing or risking a catastrophe, failure to prevent catastrophe and criminal mischief. The initial question in assessing Goode's liability for these crimes is whether his conduct in approving the dropping of the charge was "reckless," the minimum mens rea required for all but two of these charges. (Gross negligence is the minimum mens rea required for involuntary manslaughter (causing the death of another as a direct result of doing a lawful or unlawful act in a reckless or grossly negligent manner). Negligence is the minimum mens rea required for criminal mischief (intentionally, recklessly or negligently damaging the property of another in the employment of explosives). Although these two crimes can be proven where the actor's conduct was negligent, we do not discuss whether Goode's conduct was legally negligent because prosecution for manslaughter is precluded by problems in proving causation, as we discuss below, and prosecution for criminal mischief is precluded because dropping the charge was an arguably justified act as to the bunker on the 6221 Osage Avenue property and was not the direct cause of damage to the other properties.)

The evidence we heard suggests that Goode's conduct was not reckless under the law; that is, that he did not consciously disregard a substantial and unjustifiable risk that people would be placed in danger of death or serious bodily injury as a result of his approval of the device's use. Goode did have knowledge of some risks. He testified that he knew that there might be gasoline on the roof and explosives in the house. He further testified that he knew that MOVE had claimed it would blow up the block, that the children were still in the house, and that MOVE was likely to use the children as shields. Other evidence suggests, however, that Goode believed that these risks had been neutralized and that he did not realize that these risks were "substantial." Moreover, there is no evidence that he "consciously disregarded" these risks.

Goode testified that, in making his decision, he assumed that the gasoline cans had been washed off the roof, if he thought about it at all:

> [I]f I thought about gasoline, I'm sure I thought about all the water up there washing the gasoline away, not believing there was any danger to any of us. If I had any thought process at all, it was the fact that for hours thousands of gallons of water had gone onto the roof....

Further, Goode told us that he did not query Brooks about the explosives -- or any other specific concerns, for that matter. Instead, he explained, he relied on Sambor's assurances that the plan would "work" (i.e., that the occupants of the house would be safely removed), and on the fact that he had "two very experienced

operations people [Brooks and Sambor] out there in the field," who understood his instructions that the operation must be safe. Additionally, he testified that he thought that the bomb would blow the bunker into the street without risk to the people in the house. He explained that he had seen explosives demonstrated which could blow doors off the frame without damaging the frame. Moreover, Brooks testified that, when presented with the proposal, Goode asked him whether there was a possibility of fire, and was told by Brooks that there was little to no possibility of fire. (Goode's testimony about this conversation with Brooks, however, makes no reference to any inquiry about the possibility of fire; indeed, Goode specifically told us that he did not go through a checklist, asking "Have you thought about this, this and that?" each time he spoke with Brooks.) Clearly, Goode, who had little appreciation for the nature of the risks involved to begin with, did not "consciously disregard" those risks.

Moreover, the remainder of the statutory definition of "reckless" further buttresses a conclusion that Goode lacked this mens rea. The statutory definition continues:

> The risk must be of such a nature and degree that, considering the nature and intent of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

The nature and intent of Goode's conduct are evidenced by his actions concerning MOVE in the preceding year: he wanted to avoid confrontation, and when confrontation was inevitable, he

wanted to minimize it. He took no action until the neighbors were threatening violence, he was adamant that whatever plan was drawn up provide for the safety of all concerned, and he wanted Sambor to be careful in choosing police officers for the operation. From the evidence it appears that his intent in approving the charge was not to burn down the neighborhood or even the house. He wanted only to destroy the bunker.

Similarly, examining Goode's conduct in light of the "circumstances known to him" also supports a conclusion that he did not consciously disregard a substantial and unjustifiable risk. As noted above, Goode testified that he had seen explosives demonstrated which could blow doors off the frame without damaging the frame. Further, according to Brooks, Goode asked whether there was any danger of a fire. Obviously, the bomb would be constructed and detonated by the Bomb Disposal Unit, who supposedly knew what they were doing. And finally, Goode asked Brooks -- a former Army general and now the top City official on the scene -- his opinion of the plan. The idea was to destroy the bunker and nothing more, and supposedly his advisors knew the circumstances, and supposedly the police knew what they were putting together, and his advisors thought it was a good idea. Given these facts, we cannot conclude that Goode acted recklessly.

As mentioned above, recklessness is the minimum mens rea for most of the crimes under consideration. The "knowing" and "intentional" mental states have even more elements and requirements which must be satisfied. As Goode's behavior does not reach the

standard of "recklessness" as defined by law, his conduct also does not meet the more stringent "knowing" or "intentional" standards.

Goode's conduct is perhaps more accurately described by the statutory definition of criminally negligent behavior:

> A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and intent of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

As we noted above, however, negligence will not support a prosecution for any of the relevant possible charges except involuntary manslaughter (gross negligence) and criminal mischief (negligence). Prosecution on these charges is precluded because Goode's decision to drop the explosive device was not the direct cause of the ensuing deaths and destruction.

Many of the relevant possible charges (murder, involuntary manslaughter, aggravated assault and causing a catastrophe) require proof not only of recklessness but also of causation. Here, the harm relevant to involuntary manslaughter and criminal mischief charges -- i.e., death and unwarranted destruction -- was not the direct result of Goode's decision to drop the charge, but of Sambor and Richmond's subsequent decision to let the fire burn, and MOVE's concomitant decision to remain inside a burning house. Thus, the relevant issues are whether Sambor and Richmond's decision to let

the fire burn, and MOVE's refusal to exit a burning house, were foreseeable or whether they were superceding causes relieving Goode of criminal liability.

We have concluded that MOVE's refusal to exit a burning building may have been foreseeable to Goode, who knew that MOVE members would sacrifice their own children for their cause. We also have concluded, however, that Sambor and Richmond's decision to let the bunker burn was not foreseeable. Goode stressed to Sambor that he was concerned for the safety of all involved; he repeatedly claimed to have been relying on his Commissioners to effectuate a plan which would safeguard lives and he relied on his Commissioners to act as professionals. Goode did not even anticipate a fire, and had he anticipated one, he doubtlessly would have relied on his Fire Commissioner, who was present at the scene, to extinguish it immediately.

We have also been instructed that, even if Goode's conduct was otherwise criminal, it may have been legally justified under statutes permitting the use of deadly force in law enforcement under certain circumstances. (These statutes are considered in detail elsewhere in this report.) Because we did not conclude that Goode acted criminally, however, we found it unnecessary to determine whether his conduct was further justified by statute.

In sum, indictment of Goode for his approval of the use of the satchel charge would be warranted only if we could conclude that Goode acted with the requisite mens rea to establish criminal liability, and also that he could foresee (1) that a fire might

result, (2) that his Commissioners would let it burn even though they had equipment on the scene with which to extinguish it, and even though they knew there were children inside, and (3) that MOVE would remain inside and would keep their children inside. Additionally, we have been instructed that, even if these mens rea and causation issues did not preclude indictment, Goode's conduct nevertheless might be statutorily justified. Having considered all of the testimony we heard and having analyzed it according to the law outlined above, we concluded that Goode should not be indicted for the decision to drop the satchel charge.

In deciding whether indictments could be returned against Brooks for any of the relevant crimes listed above, we encountered all of the same difficulties presented with Goode: There is simply no evidence that he consciously disregarded substantial and unjustifiable risks. He did not foresee that a fire would result, and could not foresee the Police and Fire Commissioners agreeing to let a fire burn. Further, he, too, may be able to assert statutory justifications for his actions. Moreover, Brooks' criminal responsibility is even further attenuated than is Goode's: Brooks merely offered Goode his opinion of the plan (although it seems quite foreseeable that Goode would rely upon -- indeed, defer to -- his advice); he did not give the final approval.

Brooks had a lesser knowledge of the risks involved than Goode. He was not present at the planning meetings when the

gasoline cans were discussed, and testified credibly that he did not recall any discussion of the possible presence of gas on the roof. Although he knew that MOVE might have gasoline in the house, and although he probably knew that MOVE might also have explosives, he was assured that the satchel charge posed little or no danger of fire. Similarly, although he knew that there were children in the house, Powell assured the decision-makers (according to Sambor) that the charge would not harm the occupants, even if they were on the second floor. (Klein testified, however, that he thinks he told Sambor that "[the satchel charge] would stand the bunker up, drop it down on the sidewalk. If they survived the crash, they wouldn't be able to hear for a week, but they would probably live." If this testimony is credited, the satchel charge clearly posed a danger to anyone in the bunker. Indeed, regardless of what Klein actually said, it is only common sense that any charge capable of destroying or disabling the bunker would necessarily endanger anyone in the bunker. However, the use of force against MOVE members in the bunker -- felons using deadly force to resist arrest -- is arguably justified under the relevant statutes.)

From this evidence, and the absence of any evidence from which we could find that Brooks could have foreseen the decision to let burn any fire which did occur, we have concluded that no indictments against Brooks are warranted.

The decision whether to indict Sambor for his role in the decision to drop a satchel charge has been a difficult one. We have carefully considered several specific charges. We will discuss these charges and will also review additional factual allegations and additional legal principles relevant to the decision whether to indict for these crimes.

We have considered whether to indict Sambor for the crimes of arson, murder, involuntary manslaughter, causing or risking a catastrophe, conspiracy, criminal mischief, recklessly endangering another person, and solicitation or attempt to commit assault or murder, in connection with his participation in the decision to use the satchel charge. We have concluded that, as to each of these crimes, indictment is precluded by one or more evidentiary or legal impediments. Either the evidence does not establish that Sambor acted with the requisite mens rea, and/or Sambor's advocacy of the satchel charge proposal was not the legal cause of the harm which resulted, and/or his conduct, if on a prima facie level criminal, was nonetheless subject to one or more valid statutory defenses.

First we discuss whether Sambor's actions demonstrate a criminally culpable state of mind. As we noted before, the minimum mens rea (state of mind) required for proof of all but two of the above-listed crimes is recklessness. The evidence does not establish that Sambor acted recklessly, i.e., that he consciously disregarded a substantial and unjustifiable risk. Furthermore, as is described below, the assurances given to Sambor about the

limited effects of the satchel charge bar a finding that he "knowingly" or "intentionally" used the charge to cause harm.

Sambor attempted to disclaim any awareness of the risk posed by gasoline cans on the roof. He denied any knowledge of the cans, telling us that up through May 13, 1985, he had no information that there might be gasoline on the roof. However, Tursi, Benner, McLaughlin, Revel, Marandola, Teti, Tiers, Scipione and Powell all testified that, at the May 11, 1985 meeting with Sambor, the presence of a gasoline can or cans on the roof of the MOVE compound was discussed. (Police were concerned that the gasoline could be dangerous if an armored personnel carrier were used, or if shape charges were used on the roof.) Sambor did, however, tell us that he thought that the presence of gasoline would pose a significant risk. He testified that he did not think anyone knew the cans were on the roof because "If [we] had, I think that would have certainly changed our concepts of the operation."

We do not credit Sambor's claim that he was unaware of the gasoline cans and we do not credit his further statement that such knowledge would have changed his concept of the operation. When the risk he implicitly acknowledged actually materialized -- i.e., when the gasoline ignited -- Sambor did not immediately order that the fire be extinguished, but instead adopted a calculated strategy to let it burn. Clearly, far from regarding the ignition of a fire as a risk which must be avoided, Sambor regarded it as an asset which could be used to accomplish what the charge had not. From this we can draw four possible

conclusions: (1) Sambor regarded the fire as an insubstantial risk, his later testimony notwithstanding (because the Fire Department could extinguish any roof fire which occurred), (2) he regarded it as a substantial but justifiable risk, (3) he regarded it as a substantial, unjustifiable risk (in which case his conduct was criminal), or (4) he was not aware (conscious) of the risk and so made no assessments of whether it was substantial or justifiable (that is, the possibility that a fire might ensue simply did not occur to him).

Of these four possible conclusions, the evidence as we find it most clearly supports the first or second conclusion. We simply find no evidence to support the third conclusion (the only conclusion which implicates criminal conduct). As for the fourth conclusion, we find that the evidence, while not inconsistent with this conclusion, does not affirmatively support it. For these reasons, we find that Sambor did not consciously disregard the risks posed by the gas cans on the roof, and did not know or intend that the eventual harm would result.

We further find that Sambor did not consciously disregard any of the three remaining risks we noted initially. Although Sambor had a knowledge of the facts from which he could have formulated an awareness of the risks, the evidence suggests that he had no such conscious thought processes. Sambor admitted knowing that there was gasoline in the house. Additionally, Sambor believed that there might be explosives in the house: The arrest and search warrants which Sambor executed alleged that MOVE

possessed unlawful explosives and Sambor stated at the May 11, 1985 meeting that MOVE might blow up its own house. Finally, we have concluded that Sambor knew that the satchel charge might propel debris into the house, because a stated objective of the charge was to create a hole through the roof. Nonetheless, Sambor's testimony, neither corroborated nor contradicted by Brooks, Richmond, Powell or Klein, negates a conclusion that he acted recklessly with respect to risks posed by the possibility that the charge would fall into the house or propel debris into the house, touching off an explosion or otherwise killing or injuring people.

Sambor testified that Powell assured him that the device would be a minimal charge designed specifically to achieve the objectives of dislodging the bunker and creating a hole in the roof. Sambor said that Powell predicted that the charge would present little or no danger to the occupants of the house, even if they were on the second floor. Sambor also testified (as did Brooks and Richmond) that Powell told them that the possibility of fire "was virtually non-existent, because this stuff had such a low potential for creating fire." Lastly, Sambor claimed that he thought that any gasoline in the house would have been kept near the generator, which he assumed was in the basement. This testimony is corroborated by Sambor's instruction that the police posts were not to be notified; had Sambor intended or realized that explosives inside might detonate, he would have evacuated the nearby police. Thus, there is no substantial, reliable

evidence from which we could conclude that Sambor acted intentionally, knowingly or recklessly.

In assessing whether Sambor acted with a criminally culpable state of mind, we have carefully considered certain additional evidence: allegations by Klein that Sambor told him to put shrapnel in the bomb. Klein testified that as he, Powell and Sambor were walking towards the helicopter, Sambor pulled him aside and told him to "use frag and shrapnel [in the satchel charge] if you have to, to get them mother fuckers." (Klein explained to us that the addition of "frag" would make the charge anti-personnel but, because the target was the bunker, adding frag or shrapnel actually would only cut down on the charge's effectiveness.) Klein said he repeated Sambor's comment to Powell. According to Klein, Powell asked what frag would do. Klein answered "Nothing to a bunker," and Powell said "Don't do it then.... Don't worry about it. What he don't know won't hurt him."

Powell testified to a similar recollection of this conversation. He said that after the decision was made to use the satchel charge, he approached Sambor and told him that they did not have any C-4 and so would use Tovex. Sambor replied "Billy Klein knows what I want." Powell went over to Klein:

> ... I said [to Klein] "What do you mean, you know what he wants?" He said, "He told me not to tell nobody." I said, "What the hell are you talking about?" He said, "He said he wants plenty of frag." And I said "No frag." My thinking is that I'm dropping this thing on the roof. The people in the MOVE house are protected, but the guys in Post Two and Three and Four and Five, they're exposed, these guys.

Sambor categorically denied instructing Klein or anyone else to include "frag" or shrapnel in the charge and further said that he would not use the word "frag." Moreover, Sambor said that he did not know Klein and did not even meet him until after Klein already had composed the satchel charges. In his account of the afternoon meeting at which the satchel charge was discussed, Sambor said that Powell came to the meeting by himself and that he (Sambor) and Powell answered all of the questions about the satchel charge. Finally, he told us that, as far as he knew, Powell gave the instructions they had agreed upon to Klein. However, Brooks, Deputy City Solicitor Ralph Teti, and Brooks' body guard, Police Officer Louis Mount, all recalled Klein's presence at and participation in this meeting. (Indeed, Klein evidently was somewhat unforgettable: Teti described Klein as the police officer wearing Bermuda shorts and a baseball cap, smoking a cigar.)

We do not credit Sambor's claim that he did not even meet Klein until after Klein had constructed the charge. However, having observed Klein's demeanor as he testified and having considered his testimony, we have likewise rejected as uncorroborated and insufficient to come to a conclusion of fact his allegations that Sambor instructed him to put frag in the charge.

Because one of the specific crimes which we considered -- involuntary manslaughter -- may be established on proof of a lesser mens rea than recklessness, that of gross negligence, we have also considered whether the evidence reviewed above

establishes that Sambor's conduct in suggesting and pursuing the use of a satchel charge was grossly negligent. We have been instructed that the Crimes Code defines negligent conduct but fails to give a specific definition of grossly negligent conduct. We have been told that, under the Crimes Code:

> A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and intent of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

We have concluded that Sambor should have been aware that a fire -- indeed, a greater one than initially occurred here -- could have resulted from the use of the satchel charge. The charge was designed to blow a hole in the roof, and there allegedly were incendiary materials inside. This was potentially like throwing a lighted match on a wood pile. Sambor should have perceived the risk, and, while we find that his conduct does not rise to the level specified in the involuntary manslaughter statute, we find that he was negligent not to have done so.

However, no catastrophic explosion or immediately inextinguishable fire did result. Instead, only a small roof fire ensued. The use of the satchel charge itself thus did not result in death, injury or unjustifiable destruction.

We have examined in detail whether Sambor's conduct with respect to the decision to drop the satchel charge was the legal

cause (i.e., the cause under the law) of the harm which resulted. As discussed above, we were instructed that, in order to be the direct cause of a result, a person's conduct must be a direct and substantial factor in bringing about that result. A person whose conduct is such a direct cause may be criminally liable even though there are other direct causes. There can be more than one direct cause. But a person's conduct is not a direct cause if the intervening acts of others, or the actions of the victims themselves, or the occurrence of another event, plays such an independent, important and overriding role in bringing about the result, compared with the first act, that the first act does not amount to a direct and substantial factor in bringing about the result. The conduct need only start an unbroken chain of events. However, whether the conduct of others relieves the original actor of liability for his first act also depends on whether the intervening conduct was foreseeable to the original actor.

In deciding whether Sambor's actions were the direct cause of the resulting harm, and whether that harm was legally foreseeable, we considered, among other things, whether Sambor knew (1) that there was gasoline on the roof of the MOVE compound; (2) that there may have been explosives inside the house; (3) that the Fire Department would have difficulty fighting any fire because they could not go inside the house; (4) that the persons on the scene would not immediately extinguish the fire; (5) that the Fire Commissioner could misjudge his Department's ability to fight the fire if allowed to burn; and (6) that MOVE was likely

to remain in a burning house and/or to hold its children in the house.

Here, as discussed earlier, the direct cause of the resulting harm was not the decision to use a satchel charge. Rather, the death, injury and destruction which occurred resulted from the failure to extinguish the roof fire and MOVE's decision to remain inside the burning compound and to keep their children inside. We have concluded that, although the possibility of fire was foreseeable (whether from the ignition of gasoline, the ignition of explosives or simply the ignition of roofing and bunker materials), the possibility that the fire would rage out of control, killing people in the basement, was not foreseeable. This entire issue, however, is more appropriately discussed in the context of analyzing whether Sambor is criminally liable for his part in the decision to let the fire burn, which we have done in Part VIII. We conclude that Sambor's promotion of the satchel charge proposal was not the legal cause of the harm which occurred here.

Because we concluded that the evidence did not establish the elements of the relevant crimes, we did not need to give detailed consideration to whether Sambor's conduct, if arguably criminal, was nonetheless defensible under one of the statutory justification provisions, including mistake and use of force in law enforcement. Therefore, we will only briefly review these two statutory defenses. (The evidence does, however, establish the elements of

one crime -- criminal mischief -- and so we will analyze in more detail the statutory defense relevant to this crime.)

One possible defense is the defense of mistake. If an actor is ignorant of or mistaken about a fact, and there is a reasonable explanation or excuse for that ignorance or mistake, his ignorance or mistake is a defense if it negates the state of mind which must be proven. Thus, if Sambor was ignorant of, or mistaken about, the risks inherent in the use of the satchel charge, he could not have had the requisite mens rea for any crime.

Another relevant defense is the statutory provision for the use of force in law enforcement. Under the statute, the use of the device was an arguably appropriate use of force by the police, who were trying to make lawful arrests in the face of deadly resistance. Generally, a police officer may use any non-deadly force he believes necessary to make an arrest, or to defend himself or another from bodily harm while making that arrest. Deadly force -- that is, force readily capable of causing death or serious bodily injury -- may be used if the police believe that it is necessary (1) to prevent death or serious bodily injury to themselves or another; and (2) to prevent resistance or escape which would avoid the arrest, or if the person sought has committed a violent felony, is trying to escape, and has a deadly weapon, or is likely to kill or seriously hurt someone unless quickly arrested.

The defense of justification is especially important with respect to the crime of criminal mischief. Criminal mischief can be proven where the actor negligently damages tangible property

of another in the employment of fire or by explosion. However, we have concluded that the evidence establishes only that Sambor intended to destroy the bunker, which the City could have dismantled lawfully had it pursued its civil remedies and which Sambor could legitimately destroy pursuant to the statutorily authorized use of force to effect arrests. The evidence, therefore, cannot support the lodging of a criminal mischief charge against Sambor.

In sum, for the reasons set forth above, we have concluded that the decision to let the fire burn, not the use of a satchel charge, was the root cause of the loss of life and property which occurred on May 13, 1985. That decision and its legal consequences are discussed in the next chapter of this report.