

Wednesday, May 28, 1997 (morning)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 96-CR-68

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TIMOTHY JAMES McVEIGH,

Defendant.

REPORTER'S TRANSCRIPT

(Trial to Jury - Volume 118)

Proceedings before the HONORABLE RICHARD P. MATSCH,
Judge, United States District Court for the District of
Colorado, commencing at 9:00 a.m., on the 28th day of May,
1997, in Courtroom C-204, United States Courthouse, Denver,
Colorado.

Proceeding Recorded by Mechanical Stenography, Transcription
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APPEARANCES

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Houston, Texas, 77007, appearing for Defendant McVeigh.

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PROCEEDINGS

(In open court at 9:00 a.m.)

THE COURT: Be seated, please.

We have a couple of matters before bringing the jury
back. I appointed Mr. Pagliuca to consult with the witness,

Debbie Brown. Where is he?

MR. PAGLIUCA: Good morning, your Honor.

THE COURT: Are you able to tell us after -- you did consult with Debbie Brown about her role as a witness here, that she may be asked some questions which I suppose could possibly incriminate her.

MR. PAGLIUCA: That is correct, your Honor, and I did consult with her. I've also requested the prosecution afford her use immunity under 18 U.S.C. 6003. That request has been declined. I would make a similar request of the Court understanding that in this circuit and in most circuits, the law has been interpreted to be a judicial -- nonjudicial function, an executive function, but I would make that request.

THE COURT: Yes, I have no authority to grant the request.

MR. PAGLIUCA: I understand, your Honor. In spite of the lack of any immunity, Ms. Brown has indicated a desire to testify in this matter and is ready to proceed.

THE COURT: All right. And then you may be in the courtroom while she's on the stand.

MR. PAGLIUCA: Thank you, your Honor.

THE COURT: Have that known to her. If you want to go out and inform of her of that, that's fine. I've got a couple of other matters to deal with here.

MR. PAGLIUCA: I would like to do that, your Honor.

THE COURT: All right. Please do.

Now, we have stipulations, one of which -- there are actually two stipulations, and I was thinking there was only one. And I think I've only reviewed one with Mr. McVeigh, that being the testimony of Shann Woods and the two exhibits; right?

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

THE COURT: We also have a stipulation with respect to Jamie Carroll Gilley.

MR. NIGH: Yes, your Honor.

THE COURT: All right. And, Mr. McVeigh -- you can remain seated for this, Mr. McVeigh.

Mr. Nigh, did you go over this stipulation with Mr. McVeigh?

MR. NIGH: Yes, your Honor, we went over both of them.

THE COURT: All right. And you understand, Mr. McVeigh, this also is a stipulation about what Jamie Carroll Gilley would testify to if she did appear as a witness and testify; and that is that she's the assistant manager of Conoco gas station at 813 South Washington in Junction City, Kansas, and was so employed through 1995. "From approximately mid March, 1995, until approximately mid April, 1995, I sold diesel fuel approximately 12 times to a customer who always

paid cash for his fuel purchases. As best I recall, he purchased diesel fuel on those occasions in amounts ranging from approximately 18 to \$25, and I never saw him put diesel fuel in a separate container. The customer always drove a pickup truck, except on one occasion when he drove a beige car.

I believe this customer was always alone when I saw him.

"During April 1995, I worked alone two days a week, Wednesday and Sunday, from 3 p.m. to 11 p.m. I recall seeing this customer on one of those two days before the bombing in Oklahoma City. It may have been Easter Sunday that saw the customer --" I guess that should be "I saw," but "that saw the customer and sold him diesel fuel, because I recall saying to him that 'I do not generally get into the Easter holiday,' and he said he did not care for it, either.

"A few days after the bombing in Oklahoma City, I saw a picture of Terry Nichols on the news. I believe that Terry Nichols is the customer I've been describing who drove a pickup truck and always paid in cash. Of course, I cannot be sure.

"I was first interviewed by FBI agents on April 28, 1995. The agents were interested in my sales of diesel fuel that I recall. I said that I was not certain, but that I thought it was on Easter Sunday that I saw Terry Nichols. When

I spoke with FBI agents the following day, I said that I was certain that I saw Terry Nichols in the late afternoon of Easter Sunday, April 16, 1995, when he purchased diesel fuel. I did not notice any other individuals with Terry Nichols on that day.

"I also told agents that the purchase occurred between 5 and 6 p.m. and that I fixed the time based upon my observation of the weather, which was intermittent rain and clouds with an occasional sunlight just before sunset. Business was extremely slow, so I particularly noticed Terry Nichols drive into the station."

That's the stipulation. Do you agree with it, Mr. McVeigh?

THE DEFENDANT: Yes, sir.

THE COURT: All right. And we already did talk about

the Shann Woods stipulation as to her testimony. And Exhibits F9 -- Defendant's F9 and Government's 1648. Do you remember?

Okay. The other thing is the offer with respect to the Inspector General's report concerning the FBI Laboratory. And my ruling based on my view that the report other than the pages that I identified yesterday did not contradict, impugn, or impeach any of the testimony or exhibits in evidence excepting for those pages.

You, Mr. Jones, were going to reserve -- well, to consider that and then take a position on it this morning, as I understand it.

MR. JONES: We have, your Honor, and our position is

MR. JONES: We have, your honor, and our position is that -- and we offer J403 in its entirety as evidence of history of routine of these units of the FBI with respect to laboratory analysis, and we stand on our offer of the entire document rather than excerpts.

THE COURT: All right.

MR. JONES: Should the Court persist in its ruling, then we simply ask that this be filed as a offer of proof of what --

THE COURT: Yes.

MR. JONES: -- we did offer and kept separate of the exhibits admitted into evidence.

THE COURT: J403 is to be taken into the record as a proffer. And if this be error, so be it. I adhere to my ruling that it does not contradict, impugn, or impeach any of the testimony or exhibits excepting the possibility of that portion which is not now being offered, so I think we're ready to resume.

When do you want me to read these stipulations? Do you want to do that the first thing?

MR. NIGH: Yes, your Honor. And also before I call the first witness, I'd like to offer C64A and C65A, which are redacted versions of the facial identification fact sheets.

THE COURT: Oh, yeah, those were discussed.

Any objection to that?

MR. HARTZLER: Mr. Mackey is not here, but I rely on representations of defense counsel that they reached an agreement on what should be redacted, so we have no objection.

THE COURT: So C64A and C65A.

MR. NIGH: That's right, your Honor.

THE COURT: So C64 and C65 will not be exhibits. These are substituted for them; right?

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

THE COURT: Where are they?

Good question; right?

MR. NIGH: They're right here, your Honor.

THE COURT: Oh, we have them.

I'll inform the jury of that.

MR. NIGH: All right.

THE COURT: Okay. Bring in the jury.

(Jury in at 9:08 a.m.)

THE COURT: Members of the jury, good morning.

We're sorry to keep you waiting for these few minutes, but this was another time where to take a little time saved some time. And I'll be reading to you in a moment stipulations that have been arrived at with respect to the testimony of two witnesses, what that testimony would be if they were here, and that's what we've been discussing.

Also, there were exhibits that were referred to when Mr. Rozycki was testifying, who was the FBI employee who drew the composite drawings. And in the course of his testimony, two documents referred to as the FBI facial identification fact sheet that he filled out in connection with that work were offered. There was an objection to certain portions. We have

what we say redacted that, which is a fancy way of saying took some things out that are not relevant; and those documents are now received documents, are now received as C64A and C65A in substitution for what was talked about as C64 and C65. It's something we do in cases where a document has portions of it that are really not relevant to the issue. So we took those portions out, and those exhibits are received.

Now, let me read to you what has been agreed as the stipulations which is to the testimony of two witnesses who will not come and testify in person.

First, "It is stipulated and agreed that if called as a witness in this case, Shann," S-H-A-N-N, "Woods," W-O-O-D-S, "would testify as follows:

"In April of 1995, I was the manager of the Conoco gas station located at 813 South Washington Street in Junction City, Kansas.

"In the regular course of business, the Conoco gas station maintained the cash register tape which recorded transactions involving fuel purchases.

"Defendant's Exhibit F9 is a photocopy of a portion of the cash register tape maintained by the Conoco gas station for April 16, 1995. The register tape reflects that on April 16, 1995, at 5:09 p.m., a diesel fuel sale was made. 21.593 gallons of diesel fuel were purchased at the price of \$1.029 per gallon, the total price paid was \$22.22 and it was a cash sale.

"Government Exhibit 1648 is a copy of the cash register tape maintained by the Conoco gas station for April 15, 1995. The entries on that tape containing the notation 'DSL,' which is all caps, "reflect sales of diesel fuel at the date and time indicated."

"It's also stipulated and agreed that Jamie," J-A-M-I-E, "Carroll," C-A-R-R-O-L-L, "Gilley," G-I-L-L-E-Y, "cannot appear to testify in person because she has just given birth to a child. If called as a witness in this case, Jamie Carroll Gilley would testify as follows:

"I am the assistant manager of the Conoco gas station located at 813 South Washington, Junction City, Kansas, and was so employed through 1995.

"From approximately mid March, 1995, until approximately mid April, 1995, I sold diesel fuel approximately 12 times to a customer who always paid cash for his fuel purchases. As best I recall, he purchased diesel fuel on those occasions in amounts ranging from approximately \$18 to \$25, and I never saw him put diesel fuel in a separate container.

"The customer always drove a pickup truck, except on

one occasion when he drove a beige car. I believe this customer was always alone when I saw him.

"During April, 1995, I worked alone two days a week, Wednesday and Saturday --" excuse me -- "Wednesday and Sunday, from 3 p.m. to 11 p.m. I recall seeing this customer on one of those two days before the bombing in Oklahoma City. It may have been Easter Sunday that I saw the customer and sold him diesel fuel because I recall saying to him that I do not generally get into the Easter holiday, and he said he did not care for it, either.

"A few days after the bombing in Oklahoma City, I saw a picture of Terry Nichols on the news. I believe that Terry Nichols is the customer I have been describing who drove a pickup truck and always paid in cash. Of course I cannot be sure.

"I was first interviewed by FBI agents on April 28, 1995. The agents were interested in any sales of diesel fuel that I recall. I said that I was not certain but that I thought it was on Easter Sunday that I saw Terry Nichols.

"When I spoke with FBI agents the following day, I said that I was certain that I saw Terry Nichols in the late afternoon of Easter Sunday, April 16, 1995, when he purchased diesel fuel. I did not notice any other individuals with Terry Nichols on that day.

"I also told agents that the purchase occurred between 5 and 6 p.m. and that I fixed the time based upon my observation of the weather, which was intermittent rain and clouds with occasional sunlight just before sunset. Business was extremely slow, so I particularly noticed Terry Nichols drive into the station."

That's the stipulated testimony of these witnesses, and you will accordingly accept that as testimony in the same sense as all of the other testimony presented to you in the course of this trial.

And we have these exhibits to be received, the exhibits referred to in the stipulation?

MR. NIGH: Yes, your Honor.

THE COURT: Agreed? Both the Government's and the Defendant's.

MR. HARTZLER: They're agreed.

THE COURT: All right. They're received.

Now, the next witness.

MR. NIGH: Debbie Brown, your Honor.

THE COURT: All right. Deborah Brown.

THE COURTROOM DEPUTY: Would you raise your right hand, please.

(Deborah Brown affirmed.)

THE COURTROOM DEPUTY: Would you have a seat, please.

Would you state your full name for the record and spell your last name.

THE WITNESS: Deborah Brown, D. B. B. R. O. W. N.

THE WITNESS: Deborah Brown, B-R-O-W-N.

THE COURTROOM DEPUTY: Thank you.

THE COURT: Mr. Nigh.

MR. NIGH: Thank you, your Honor.

DIRECT EXAMINATION

Deborah Brown - Direct

BY MR. NIGH:

Q. Good morning, Miss Brown.

A. Morning.

Q. First of all, would you tell us where you currently live, in what city.

A. In Seattle, Washington.

Q. How long have you lived in Seattle?

A. October will be two years.

Q. Before you lived in Seattle, did you live in Kingman, Arizona?

A. Yes.

Q. Was it when you were in -- what grade were you in when you moved to Kingman?

A. I was in the sixth grade.

Q. In the sixth grade?

A. Yes.

Q. Did you essentially grow up in Kingman?

A. Yes.

Q. And attended school there through high school?

A. Yes.

Q. When you were in school there in Kingman, did you come to know Michael Fortier?

A. Yes.

Q. What time or how old were you approximately, when you met Mr. Fortier?

Deborah Brown - Direct

A. It was when I was in the sixth grade. I'm not sure what that would be, probably 12. I'm not --

Q. Did you continue to know Mr. Fortier through the time that you were in school?

A. Yes.

Q. Eventually after high school -- let me go back for a second. Did you know Lori Fortier during that period of time at all?

A. No.

Q. Now, after high school, did there come a time where you opened a business in Kingman?

A. Yes.

Q. What was the name of the business?

A. The Beach Club.

Q. Would you describe for us what kind of business The Beach Club was.

A. It was a tanning salon. We sold some swimsuits and a few things along that line.

Q. So people would come in and lay in the tanning bed and

2. So people would come in and lay in the tanning bed and get

bronzed?

A. Yes.

Q. Was there a whole lot of need for a tanning salon in Kingman, Arizona?

A. I felt there was, yes.

Q. All right. Let me show you, if I may, what's been marked

Deborah Brown - Direct

for identification as P138.

MR. NIGH: P138. And I can use the ELMO.

BY MR. NIGH:

Q. If you'll look on that television screen in front of you. Do you see that?

A. Yes.

Q. Do you recognize what's depicted in the photograph?

A. Yes.

Q. Is that the marquee sign for The Beach Club tanning salon and the other businesses that are there in the strip mall?

A. Yes.

Q. Is that how it appeared during the fall of 1994?

A. Yes.

MR. NIGH: Your Honor, I'd move for the admission of P138.

MR. HARTZLER: I'm sure I have no objection -- oh, we've got it now.

No objection.

THE COURT: All right. P138 received.

MR. NIGH: May I publish it?

THE COURT: Yes.

BY MR. NIGH:

Q. There were some other businesses there in the same strip mall; is that correct?

A. Yes; that's correct.

Deborah Brown - Direct

Q. Now, let me show only you, if I may, what's been marked for identification as P139.

Do you recognize what's depicted in that photograph?

A. Yes.

Q. And is that a picture of The Beach Club tanning salon itself?

A. Yes, it is.

Q. Is that how it appeared during the fall of 1994?

A. Yes.

MR. NIGH: Your Honor, I'd move for the admission of P139.

MR. HARTZLER: No objection.

THE COURT: Received, may be published.

BY MR. NIGH:

Q. Ms. Brown, there is a light pen there on the witness stand

in front of you. It's a black pen that has a string on it. Would you put that under the glass and show us about where The Beach Club tanning salon stopped and the business next door to it started.

A. Sure. Do I need to push that button, no?

Q. I think you just write on the glass. Put it up against the glass below.

A. Approximately right in here.

Q. All right.

A. Right before the corner there.

Deborah Brown - Direct

Q. Okay. Now, there's a business that appears to be to the left in the photograph. What is that business?

A. That used to be a Christian book store, sold novelty things. Then the Mail Room next to it.

Q. Okay. Would you circle for us the Mail Room, please.

All right. Thank you. If you'll push the button on the pen, those marks will go away.

There you go.

Ms. Brown, did there come a time when you met Lori Fortier?

A. Yes.

Q. Approximately when was that?

A. It was approximately April of 1993.

Q. Was that in connection with The Beach Club tanning salon?

A. Yes.

Q. What happened in reference to Ms. Lori -- Ms. Fortier and The Beach Club?

A. She was referred by a friend of the family, a relative of my boyfriend, to come down and see if we might need anyone because she had been looking for a job for a while. And she recommended her to me. Said she was a good person.

Q. Did you hire her as a result of that?

A. Yes.

Q. When approximately was it that you hired Miss Fortier?

A. Approximately May of '93. Maybe late April.

Deborah Brown - Direct

Q. How long did Miss Fortier continue to work for you there at

The Beach Club?

A. Through August of '94.

Q. While she was working for you there at The Beach Club, did

you become familiar with Tim McVeigh?

A. Yes.

Q. How did that come about?

A. He was coming -- he was moving back to town, and Lori brought him in to introduce him to me when he came back.

Q. How did she introduce him?

A. "This is a good friend of ours, Tim McVeigh. He's going to

be the best man at our wedding."

Q. After that, did you see Mr. McVeigh on occasion?

A. Yes.

Q. How often?

A. It varied. Sometimes I'd see him once a week, sometimes more often.

Q. Did he pick his mail up anywhere there in the vicinity?

A. Yes.

Q. Where was that?

A. At the Mail Room.

Q. Did there come a time during the period that Miss Fortier worked for you that you became aware that she and Michael Fortier were involved in drug use?

A. Yes.

Deborah Brown - Direct

Q. How did that come about?

A. Lori had told me about a trip that Michael and her had taken to the river, Laughlin, and how they were high the whole time on marijuana and methamphetamine.

Q. Approximately when did that conversation occur?

A. The first part of 1994.

Q. After that, did you have occasion to see Miss Fortier use methamphetamine or other drugs?

A. Yes.

Q. How often did that occur?

A. How often did I see her or know she was doing it? Almost every day.

Q. When did that begin?

A. That began from the minute that I found out that she was doing it. She pretty much had it from there on out. She may have had it before, but I just didn't know.

Q. So that we're clear about this, were you yourself using methamphetamine during that period of time?

A. Yes, I was.

Q. Were you using it as often as Miss Fortier was using it?

A. No, I would say I was not.

Q. Did Michael Fortier participate in the use of methamphetamine --

A. Yes.

Q. -- during the same period of time?

Deborah Brown - Direct

A. Yes.

Q. How would that come about?

A. I wouldn't --

Q. In other words, how did you know that or where did it occur?

A. It occurred at my business, The Beach Club. It also occurred at a tanning convention in Las Vegas. Pretty much just whenever all three of us were together

just whenever all three of us were together.

Q. Where would Miss Fortier utilize methamphetamine when she was at your business?

A. Where would she do it?

Q. What part of the business?

A. She would go into the rest room.

Q. Did you obtain any methamphetamine from Michael or Lori Fortier?

A. Yes.

Q. How much methamphetamine would you obtain from -- well, first of all, which one of them would you obtain it from?

A. Both.

Q. And how much would you obtain at a time?

A. 1 gram.

Q. Was it a gift from them, or did you pay for it?

A. I paid for it.

Q. How much did you pay for 1 gram of methamphetamine?

A. It ranged on -- between 80 and a hundred dollars depending

Deborah Brown - Direct

on when they were trying to get rid of it and how quickly they needed to get rid of it.

Q. Approximately how many occasions did you purchase a gram of

methamphetamine from Michael and Lori Fortier?

A. Approximately between five and ten times.

Q. During -- sometime during the course of the summer or fall of 1994, did you negotiate a business transaction with the Fortiers?

A. Yes.

Q. What kind of a -- what was that transaction about?

A. They knew that I was going to be moving to Las Vegas. We were buying a house up there. And they -- they approached me about buying the tanning salon. And -- that was the first I really thought about selling it. We just came up with a price and went from there.

Q. Let me place in front of you what's been marked for identification -- first of all, before I do that, let me ask you, was there ever a writing prepared to memorialize the negotiations that you had with the Fortiers?

A. Yes.

Q. Now let me show you, if I may, what's been marked for identification as P168.

Do you recognize that?

A. Yes.

Q. Is that the contract that you negotiated with Michael and

Deborah Brown - Direct

Lori Fortier for the purchase of The Beach Club tanning salon?

A. Yes.

Q. And is it dated July 17 of 1994?

A. Yes.

MR. NIGH: Your Honor, I'd move for the admission.
P168.

MR. HARTZLER: No objection.

THE COURT: Received. P168 may be published.

BY MR. NIGH:

Q. Whose handwriting is this in, Miss Brown?

A. Lori Fortier's.

Q. And it appears that the price reflected in this contract
is

\$70,000; is that right?

A. That's correct.

Q. How was the price to be paid?

A. \$35,000 up front, and I was willing to make terms with
them

for the other 35.

Q. And are those terms set forth in this document?

A. Yes.

Q. They were to pay a monthly payment of \$194.57 until
\$35,000

was paid?

A. Yes.

Q. Did the Fortiers perform on this contract?

A. No.

Q. When was it that it became apparent that they were not

Deborah Brown - Direct

going to perform?

A. In August of 1994.

Q. How did they feel about that -- how did they express to
you

that they felt about that?

A. They were very upset. Lori cried on several occasions
because of it. She was embarrassed because she had told
people

in the community that she would -- was purchasing it. We
actually had even gone through some of the paperwork. The
cosmetology license was switched into her name. She was
pretty

sure that she was going to be obtaining the business.

Q. Why did they not obtain the business?

A. They didn't obtain the business because in order for them
to get the loan, they were -- they would have to put her
parents' house up for collateral, and she said that she
couldn't do that to her parents just in case anything ever
happened; that was all they had.

Q. Did Ms. Fortier indicate that she was going to try again
or

try to improve their financial condition?

A. Yes.

Q. What did she say in that regard?

A. I told her I would work with her, whatever she could do,
she was my choice to purchase the tanning salon. I cared
about

her, and I was willing to wait and work with her.

Q. Did anything ever transpire as a result of that?

A. No.

Deborah Brown - Direct

Q. What was the Fortiers' financial condition during the fall of 1994?

MR. HARTZLER: Objection to relevance.

THE COURT: Overruled.

THE WITNESS: Poor. They -- they didn't have very much money at all.

BY MR. NIGH:

Q. Were they receiving any form of assistance?

A. Yes, they were assisting -- or their baby was on either state or some kind of assistance to get formula and diapers and that sort of thing.

Q. Did, during -- During this period of time, Ms. Brown, did Lori Fortier ever say anything to you about dealing with the police?

A. Yes.

Q. What did she say to you about dealing with the police?

A. On one occasion -- I was always very scared of being caught with any kind of drugs. And she would try to reassure me that it would be okay; that she had drugs on her all the time, she'd been pulled over with drugs on her several times, and she has an innocent face and she's believable and that she thinks that I would be, also, for me to not worry.

Q. Because she had an innocent face in dealing with the police? Is that what she said?

A. Yes.

Deborah Brown - Direct

MR. NIGH: That's all I have, your Honor.

THE COURT: Mr. Hartzler, do you have some questions?

MR. HARTZLER: Very few -- few, few, thank you.

THE COURT: All right.

CROSS-EXAMINATION

BY MR. HARTZLER:

Q. Good morning, Miss Brown.

A. Good morning.

Q. Was that a pretty tough move to go from Kingman to Seattle?

A. I actually moved from Kingman to Las Vegas and from there to Seattle.

Q. And you're happy in Seattle now?

A. Yes, I am.

Q. You said that you left the Kingman area, I think, sometime in the fall of 1994?

A. We were having a house built during the time that Lori was trying to purchase The Beach Club in Las Vegas. My boyfriend

trying to purchase the Beach Club in Las Vegas. My boyfriend and I were planning to move there. We actually moved into our home in October of '94.

Q. So you moved in the fall of '94?

A. Yeah.

Q. Did you attend the Fortiers' wedding?

A. Yes.

Q. And let me ask you a little bit about Michael Fortier's appearance. Did it change with some regularity?

Deborah Brown - Cross

A. I'm not sure what you're asking me.

Q. Well, sometimes he would be grungy and unshaven, and then other times he could clean his act up and look pretty nice?

A. On special occasions, I've seen him look pretty nice.

Q. So on his wedding, for example, he was clean-shaven, well-groomed?

A. Yes.

Q. And on other occasions, he would let his beard grow, his hair grow?

A. Yes.

Q. I'd like to show you, and I'm not sure of the easiest --

MR. HARTZLER: Let me tender to defense counsel

what's

marked as Government's Exhibit 1561. And if we may just show it to the witness.

THE COURT: Yes, show it to the witness.

BY MR. HARTZLER:

Q. You see it on your screen there, a photograph?

A. Yes.

Q. Can you identify those two people?

A. That's Mike and Lori.

Q. And do you know when that photograph was taken?

A. At their wedding.

MR. HARTZLER: We move the admission of Government Exhibit 1651.

MR. NIGH: No objection, your Honor.

Deborah Brown - Cross

THE COURT: 1561 is received, may be published to the jury.

MR. HARTZLER: Thank you.

BY MR. HARTZLER:

Q. And remind us, if you can, of the date of the wedding.

A. I don't recall.

Q. End of July, 1994?

A. Approximately.

Q. Before you left Kingman; right?

A. Yes.

Q. And then there would be times when he would -- Michael Fortier would grow his beard and let his hair grow long; right?

--5--

A. Most of the time, yes.

Q. Most of the time he looked pretty grungy around Kingman?

A. He had -- yes, the grunge look.

Q. Okay, thank you.

You said that this contract negotiation terminated in the fall of 1994; is that right?

A. Yes.

Q. So you sold the club before you left?

A. No.

Q. Is it still under your ownership?

A. No.

Q. So it's been sold or closed?

A. No. It actually -- my boyfriend at the time -- his mother

Deborah Brown - Cross

decided that she was going to just take it. She forged some documents and put her name on it, forged my name, and took the business, basically told me, If you want it back, go get yourself some lawyers.

Q. Okay. Just so I understand the background of this, you had

about, what was it, 25,000 in fixtures and inventory in the club at the time you were offering to sell it; is that fair?

A. Approximately, yes.

Q. And there was no real estate; it had a lease on that location that we saw in the photographs; is that right?

A. Yes.

Q. So the only assets of the company were the fixtures and inventory, worth about 25,000; is that right?

A. Yes.

Q. So the additional . . . it would be \$45,000 was in goodwill; you would have the goodwill of the company, about \$45,000. Is that how you came up with the figure of \$70,000? I was just subtracting 25,000 --

A. We kind of came up with it that way. Lori had approached me to buy the salon. I wasn't going to sell it at the time. That's the number we came up with.

Q. But these negotiations were completely finished and had come to an end in the fall of 1994; is that right?

A. It was always left open-ended.

Q. It was still open-ended today?

Deborah Brown - Cross

A. Not today. It was until Phyllis actually took it over, which was probably a year and a half after that. It was after the reason why we're here. She took it over.

Q. But there's nothing about the possibility of their purchasing this club that influences your testimony today. Is that not fair?

A. No. Nothing would influence my testimony today.

Q. You understand, of course, that you are now under oath?

A. Yes.

Q. And because you're under oath, you understand your obligation to tell the truth?

A. Yes.

Q. And it's for that reason that you have freely admitted your drug use; is that right?

A. Yes.

Q. And you wouldn't lie about your drug use when you came in here and testified; is that not true?

A. That's true.

Q. But I take it it's not something you're particularly proud of?

A. No.

Q. Not something you tell the police about when you encounter them in a traffic stop?

A. No.

Q. It's because you've been called into the courtroom and

Deborah Brown - Cross

you've been placed under oath --

A. It's because --

Q. -- and it's because you've been asked about it?

A. It's because I feel I've been called here to tell the truth; and for both sides' fairness, I think Tim should get a fair trial, whether that be incriminating myself or not.

Q. Right, I'm just talking about -- it's not information you would volunteer around the community and certainly not to law enforcement officers, if you're stopped for a traffic stop?

A. That's fair. I haven't been stopped before.

Q. But Lori Fortier said that she had been stopped?

A. Yes.

Q. And she indicated to you that she wasn't particularly concerned about what could happen to her because of this drug, this possession of drugs; is that not true?

A. Yes.

Q. Now, this methamphetamine -- and I don't mean to suggest I'm in any way condoning its use, but it's not an hallucinogenic drug. Is that not true?

A. For myself, it wasn't. I can't speak for other people.

Q. Okay. It kind of makes you, it makes your system --

A. It gave me more energy.

Q. It increases your energy?

A. Yeah.

Q. Makes you a little wired?

Deborah Brown - Cross

A. Yes.

Q. Wouldn't cause you to lie about things?

A. It could.

Q. Didn't cause you to lose any memory, did it?

A. No.

Q. And the fact that you've used drugs hasn't influenced your testimony here today, has it?

A. No.

MR. HARTZLER: I have nothing further.

THE COURT: Any redirect, Mr. Nigh?

MR. NIGH: No, your Honor. Thank you.

THE COURT: Witness excused, then?

MR. NIGH: Yes, please.

THE COURT: Agreed, Mr. Hartzler?

MR. HARTZLER: Yes. Thank you, your Honor.

THE COURT: You may step down. You're excused.

MR. NIGH: May her attorney be excused, if he

wishes,

during this time?

THE COURT: Yes.

Yes. Mr. Pagliuca, you're excused.

MR. JONES: Your Honor, we've reached that point in the proceedings where we're going to play certain tape recordings, and I believe the Government has agreed to waive the foundation --

THE COURT: Yes.

MR. JONES: -- on the matters, and they may simply be played. And we've also reached agreement, I believe, on what portion may be played.

THE COURT: Are we ready to proceed?

MR. JONES: Yes, we are.

THE COURT: Have the tapes been marked in some way

so

that we can make a record on it?

MR. NIGH: Yes, they have, your Honor. The first

one

I would offer is Exhibit P203, which is a conversation on April 29 of 1995, between Michael Fortier and Glen.

THE COURT: This is simply an audible tape?

MR. NIGH: That's correct.

THE COURT: And is this one of those tapes done

while

there was a listening device?

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

THE COURT: Agreed?

MR. HARTZLER: We agree.

THE COURT: The Government stipulates to that?

MR. HARTZLER: Yes.

THE COURT: All right.

MR. NIGH: Your Honor, if we might inform the Court, the sound quality is a little worse than the rest of the tapes, and I wanted the Court to be aware that. It improves with the

next three tapes. And the total time of the tapes, so the Court will know, is approximately an hour and 15 minutes for four tapes.

THE COURT: Well, we'll take a break at somewhere, then, and we'll try to have patience with the sound.

MR. NIGH: Thank you, your Honor, I appreciate that.

Your Honor. I misspoke. P203 is actually April 30

of
1995, instead of April 29.

THE COURT: All right.

MR. NIGH: If we could play that.

THE COURT: And this was in the Fortiers' residence.

MR. NIGH: Yes, your Honor; and it's a telephone conversation.

THE COURT: All right.

THE COURTROOM DEPUTY: Do you want the ELMO on, or video? ELMO?

MR. NIGH: Technical difficulties.

THE COURT: Don't look at me to help.

THE COURTROOM DEPUTY: Audio mute is off.

THE COURT: You can come up to assist here, if you want.

(Defendant's Exhibit P203 played.)

THE COURT: May we have a stipulation that the Exhibit P203 and these other exhibits will constitute the record rather than requiring the court reporter to try to take all this down?

MR. NIGH: Yes, your Honor.

THE COURT: Is that agreed, Mr. Hartzler?

MR. HARTZLER: Of course. She was trying to do it?

THE COURT: I didn't look. But I think it's an impossible task.

All right. The next --

MR. NIGH: Next, your Honor, I would offer Defendant's Exhibit P202, a telephone conversation on April 28, 1995, between Michael Fortier and Lonnie Hubbard.

THE COURT: And about how long is this one?

MR. NIGH: This one is 18 minutes, your Honor.

THE COURT: All right.

Play it.

(Defendant's Exhibit P202 was played.)

THE COURT: We'll take the recess at this point, it being about midmorning. So, members of the jury, we'll take our usual 20-minute break during which, of course, continue to follow the Court's admonitions given at all earlier recesses, remembering that the trial is not yet complete.

You're excused now, 20 minutes.

(Jury out at 10:14 a.m.)

THE COURT: We'll be in recess.

(Recess at 10:15 a.m.)

(Reconvened at 10:35 a.m.)

THE COURT: Be seated, please.

Are we ready for the jury?

MR. JONES: Yes, your Honor.

THE COURT: All right.

(Jury in at 10:35 a.m.)

THE COURT: Mr. Nigh, the next tape.

MR. NIGH: Next, your Honor, is Defendant's Exhibit P201, a telephone conversation on April 25, 1995, between Michael Fortier and John Fortier. The time of this tape is

approximately 3 minutes.

THE COURT: All right. It's received, may be played.

(Defendant's Exhibit P201 played.)

MR. NIGH: The last audiotape, your Honor, is Defendant's Exhibit P204, conversation on May 8, 1995. Telephone conversation between Michael Fortier and Lonnie Hubbard. The running time on this tape is approximately 9 minutes.

THE COURT: All right.

(Defendant's Exhibit P204 played.)

MR. NIGH: Your Honor, finally, there is a videotape of a television interview on April 26, 1995. It's Exhibit P175.

THE COURT: P175?

MR. NIGH: Yes, your Honor.

THE COURT: Received. You may play it.

(Defendant's Exhibit P175 played.)

MR. NIGH: Your Honor, I think Mr. Jones has messed up the audio.

THE COURT: Try again?

MR. NIGH: Yes, your Honor.

(Defendant's Exhibit P175 played.)

MR. JONES: Your Honor, I believe we have an agreement with the Government that -- I need to move over here a little closer to Mr. Hartzler -- that P270 may come in.

MR. HARTZLER: 750.

MR. JONES: I'm sorry. 750.

THE COURT: P750.

MR. JONES: Yes, your Honor.

THE COURT: Received.

MR. JONES: And also McVeigh Exhibit --

MR. HARTZLER: P751.

MR. JONES: -- 751, which is a copy of Armed and Dangerous from Mr. Nichols' house; and I think we have an agreement on this that this color on it and red tags are the fingerprint tape or powder or whatever it was and was not on the original.

MR. HARTZLER: That's correct.

THE COURT: P751 is received with the stipulation.

MR. JONES: And, your Honor, we have McVeigh Exhibit H1 and O-70, which the Government objects on the grounds of relevancy but not foundational ground; and may I simply pass these to the Court for a ruling?

THE COURT: Yes.

The objections are sustained. The exhibits excluded, H1, O-70.

MR. JONES: And, your Honor, we have an agreement to admit C70 -- I'm sorry -- 750.

MR. HARTZLER: 750.

THE COURT: All right.

MR. JONES: May I give these exhibits to the clerk?

THE COURT: Certainly.

C750 is received by agreement.

MR. JONES: If I might have one moment, your Honor.

THE COURT: Yes.

MR. JONES: The defense rests.

THE COURT: The defense rests.

Are there rebuttal witnesses?

MR. HARTZLER: There are, your Honor. Government calls Marife Nichols -- or recalls Marife Nichols.

THE COURT: All right. Marife Nichols.

Ms. Nichols, you were previously sworn and testified as a witness in this case. You're now being recalled under that same oath.

THE WITNESS: Yes.

THE COURT: You may take the stand.

(Marife Nichols was recalled.)

THE COURT: Mr. Hartzler?

MR. HARTZLER: Thank you, your Honor.

Marife Nichols - Direct
DIRECT EXAMINATION

BY MR. HARTZLER:

Q. Good morning, Mrs. Nichols. You understand that you're testifying pursuant to the same agreement we had with you before when you testified; is that correct?

A. That's correct.

Q. So you understand that you retain your privilege to refuse to testify against your husband and we will not construe this testimony as a waiver of that privilege. Correct?

A. Right.

Q. You also understand that we have agreed not to use anything you say here today directly against your husband. Is that correct?

A. Yes.

Q. I also have advised you that I will not ask you about any of your conversations with your husband, so that I'm not trying

to elicit anything that he said to you. You understand?

A. Yes, I do understand.

Q. Thank you.

When you previously appeared here, you testified about activities that occurred on Easter Sunday, 1996. You remember?

A. Yes.

Q. I believe you said you went to church and then talked about

what happened that afternoon.

A. Yes.

Marife Nichols - Direct

Q. I'd like to direct your attention to the day before
Easter

EASTER,

which would be Saturday, April 15, 1995. Did I say '94?
1995.

A. Okay.

Q. Are you familiar with that date, and do you have a
recollection of what happened?

A. Not much right now.

Q. Okay. Did you ever make a recording, any kind of written
record, of your activities on that day when they were still
fresh in your mind?

A. Yes.

Q. And at that time, did you record those activities to the
best of your recollection at that time?

A. Yes.

Q. I'd like to show you, if I may approach or hand the clerk,
what's been marked as Government's Exhibit 1649 and ask if you
can identify this document.

Can you identify that, Mrs. Nichols?

A. This is my handwriting that I wrote probably two, three
weeks before the incident.

Q. Two or three weeks? I didn't hear the -- two or three
weeks what?

A. Two, three weeks before the bombing.

Q. Okay.

A. Oh, after the bombing. I'm sorry.

Q. Okay. Thank you. And this records the events -- this is
a

Marife Nichols - Direct

page from a diary that you prepared? Is that right?

A. Yes.

Q. This is the date -- page 4 of the activities on April 15,
1995, Saturday; is that right?

A. That's right.

MR. HARTZLER: Your Honor, I move this pursuant to
Rule 803 as prior recorded recollection, which I would ask
that
it be admitted not for purposes of publication but for simply
to read it -- read the relevant portions pursuant to the rule.

MR. JONES: I don't think I have any objection to
that, but may I ask Mr. Hartzler -- may I confer with him as
to
what is the relevant portion?

THE COURT: Yes, you may.

(Discussion off the record between Mr. Hartzler and
Mr. Jones.)

MR. JONES: No objection.

THE COURT: All right. You may proceed.

MR. HARTZLER: If I may, your Honor, I'll read the
relevant portions and ask Mrs. Nichols to confirm.

THE COURT: Yes.

BY MR. HARTZLER:

Q. This recorded recollection of the events of September
(sic)
15, 1995, reads beginning at the entry for 11:30 as follows:

"Left the house, went to Junction City. Stop at Conoco gasoline station."

Marife Nichols - Direct

Is that correct so far?

A. Yes.

Q. And do you recall stopping at that Conoco station on Saturday, April 15, 1995?

A. Not right now.

Q. It goes further to describe that you went to Manhattan to get the mail, went to Kinko's to have a business card -- I can't read the next word. "Sticker" -- or sticker with your address?

A. Yes.

Q. I've been advised that I referred to it as September 15. It's April 15. Is that right? It says right on top of the record.

A. April 15.

Q. I beg your pardon?

A. Yes, it is April 15.

Q. April 15, which would be the day before Easter on Saturday.

A. Yes.

Q. Right?

And the rest of the record reflects activities in terms of going to Wal-Mart, two different Wal-Marts; right?

A. Yes.

Q. And do you recall that you went home after that?

A. That's correct.

Q. Okay. And you and your husband stayed home that evening;

Marife Nichols - Direct

is that right?

A. That's right.

Q. And then you've already told us about getting up the next morning and what you did on Easter Sunday.

A. Yes.

MR. HARTZLER: Nothing further, your Honor.

MR. JONES: I just have a few questions. May I just stand here?

THE COURT: Yes.

CROSS-EXAMINATION

BY MR. JONES:

Q. Ms. Nichols, you prepared this memorandum that Mr. Hartzler

read from at least two weeks after the bombing and perhaps as long as three weeks?

A. Yes.

Q. And was this something that you prepared for the FBI?

A. No.

Q. Something you prepared for whom?

A. For myself, because I forget lots of stuff.

Q. All right. And short of what you wrote here, you have no memory of this today?

A. That's correct.

Q. On this -- when you say that you left the house at 11:30, you went straight to Junction City?

A. Yes.

Marife Nichols - Cross

Q. And then the first place you went to in Junction City was the Conoco service station?

A. Yes. That's what I wrote.

Q. All right. So by your memory, the latest you would have been at the station was 12:30?

A. Perhaps, yes.

Q. Yes. Because it's about 30 minutes from Herington to Junction City, isn't it?

A. Yes.

Q. And you went to the station first?

A. Yes.

Q. All right. Are you satisfied that you would have been there by 12:30?

A. Yes.

MR. JONES: Thank you. Nothing further.

MR. HARTZLER: She may be excused.

THE COURT: Agreed to excuse the witness?

MR. JONES: Yes, your Honor. Thank you.

THE COURT: You may step down. You're now excused.

THE WITNESS: Thank you, your Honor.

THE COURT: I might just explain --

You can leave.

I might just explain to the jury that what has just been done here is what we call the "recorded recollection exception" to the hearsay rule. What is written there would normally be hearsay; but when a witness does not have enough recollection today about previous events to be able to testify fully and accurately about them and has previously made a record to reflect that knowledge, then under those circumstances, that record made by the witness can be read into evidence because of the insufficient present recollection; and that was done here.

Next?

MR. HARTZLER: James Hawkins.

THE COURTROOM DEPUTY: Raise your right hand, please.

(James Hawkins affirmed.)

THE COURTROOM DEPUTY: Would you have a seat, please.

Would you state your full name for the record and spell your last name.

THE WITNESS: James M. Hawkins, H-A-W-K-I-N-S.

THE COURTROOM DEPUTY: Thank you.

THE COURT: Mr. Hartzler.

MR. HARTZLER: Thank you, your Honor.

REPECT EXAMINATION

DIRECT EXAMINATION

BY MR. HARTZLER:

Q. Mr. Hawkins, how are you employed?

A. I'm a special agent with the FBI.

Q. How long have you had that position?

A. 25 years.

Q. Where are you currently working?

James Hawkins - Direct

A. I'm currently assigned to the Tulsa resident agency in Oklahoma.

Q. And how long have you been assigned to the Tulsa resident agency?

A. Well, I've been there since January of 1990. I was assigned to the OKBOMB Task Force here for a year. I went back there in May of last year, May 6 of last year, and have been so

assigned since then.

Q. You got a promotion and went back to Tulsa?

A. Yes, I am the supervisor for the office in Tulsa.

Q. So for approximately how long were you working on the investigation of the Oklahoma City bombing?

A. From April 19 of 1995, till about May 6 of '96, I believe.

Q. In your capacity as one of the agents that worked on this case, did you conduct any investigation to determine the capacity of the diesel gas tank or diesel fuel tank in Terry Nichols' truck?

A. Yes.

Q. What did you do?

A. I -- in August, I believe, of '95, I had the vehicle towed to a garage in Oklahoma City, downtown Oklahoma City.

Q. Did you make any efforts to determine the capacity before you had the vehicle towed?

A. Yes. I -- there was an owner's manual in the glove compartment of the vehicle and I consulted that, determined

James Hawkins - Direct

that according to the manual, the tank held 20 gallons.

MR. JONES: If the Court please, I'm going to object to this as hearsay.

THE COURT: Sustained.

BY MR. HARTZLER:

Q. And after you reviewed the owner's manual, tell us what you did in terms of towing the vehicle.

A. I arranged to have the vehicle towed to a garage in downtown Oklahoma City and arranged for a mechanic at that garage to have the vehicle put up on a lift and arranged to have the vehicle tank drained completely to ascertain what quantity of fuel it would hold after it completely drained.

Q. And did you witness the draining of the fuel tank?

A. Yes.

... 100.

Q. After the fuel tank was drained, what did you observe?

A. The mechanic that drained the tank took -- he used a milk gallon carton, a plastic container, and refilled that container

ten times, put 10 gallons of diesel into the tank, and after transported it or drove it to a station about 5 miles out of the downtown area and topped it off with diesel fuel.

Q. And what was your purpose in topping off the tank?

A. I wanted to ascertain exactly how much that vehicle would contain, the tank itself.

Q. Now, recognizing that a small amount of diesel would have been used in your 5-mile trip to the gas station, you arrived

James Hawkins - Direct

there with something short of 10 gallons in the tank. Is that right?

A. Yes, sir.

Q. And how many gallons of diesel fuel were you able to pump into the tank at that station?

A. 11.187, I believe.

Q. So the total amount of fuel that you witnessed being put into that gas tank, topping it off from being completely drained, was what on that day?

A. 21.187.

Q. I'd like to show you, if I may obtain assistance, what's previously been entered into evidence as Defense Exhibit F9. Do you see in the center of the -- this is a cash register receipt for a purchase of diesel fuel on April 16, 1995, for a total of 21.593 gallons. Do you see that?

A. Yes, sir.

Q. And let me ask Agent Hersley to simply write beside this copy of that document the number or what I should say is the number of gallons that you were able to put into that tank to top it off, to fill it, from being drained.

A. Yes, sir.

Q. What was the total number you put in the day you did this?

A. 21.187.

Q. So in comparing those two numbers, is that fuel tank -- does that fuel tank have enough capacity to receive

James Hawkins - Direct

21.593 gallons?

A. No, sir.

Q. I'd like to show you first of all --

MR. HARTZLER: We should mark this as our next, Government's Exhibit 1652, simply the new exhibit with the handwriting on it.

May we offer that as 1652.

THE COURT: Well, what did you write on? A copy of the exhibit?

MR. HARTZLER: Yes, yes.

THE COURT: All right. Then is there any objection

to
1652?

MR. JONES: No, your Honor, not at all.

THE COURT: It's received.

BY MR. HARTZLER:

Q. Now, I'm showing you a page from an exhibit that's previously been admitted as Government's Exhibit 1648. And you see that it reflects a diesel purchase on 4-15-95 at 12:15. The purchase is for 14 gallons -- 14.586 gallons. Is that what you see?

A. Yes, sir.

Q. Did the fuel tank in Terry Nichols' truck have sufficient capacity to accept that much diesel fuel?

A. Yes, sir.

MR. HARTZLER: Nothing further.

THE COURT: Any cross-examination?

MR. JONES: I don't have any questions of this witness.

THE COURT: All right. Then I take it he's excused.

MR. HARTZLER: He's excused.

THE COURT: You may step down. You're excused.

MR. HARTZLER: The Government calls Steven Burmeister.

THE COURT: Mr. Burmeister, you also have previously been sworn and testified, and you return to the stand under that oath.

THE WITNESS: Yes.

(Steven Burmeister was recalled.)

DIRECT EXAMINATION

BY MS. WILKINSON:

Q. Mr. Burmeister, you were present when Dr. Whitehurst and Dr. Lloyd were testifying yesterday, weren't you?

A. Yes, I was.

Q. I would like to address some of the issues that they raised with you or they raised in their testimony yesterday.

When you have tested items in the laboratory for explosive residue, do you have a policy as to what you do when you receive items in a cardboard box?

A. Yes, I do.

Q. Do you recall back in May of 1995 when you received Mr. McVeigh's clothing for testing?

Steven Burmeister - Direct

A. Yes, I do.

Q. Were those items in plastic bags?

A. Yes.

Q. How were the plastic bags transported to you?

A. They were received in a cardboard box.

Q. Was it your understanding that that was the same cardboard box that had been used to transport them from Noble County Jail?

MR. TRITICO: Excuse me. I'll object to that question. It calls for speculation on the part of witness and/or hearsay.

THE COURT: Sustained.

BY MS. WILKINSON:

Q. Agent Burmeister, as part of your review of Mr. McVeigh's clothing, did you determine the chain of custody for those items?

A. Yes.

Q. And as part of that, did you discuss with others how those items had been transported from Noble County Jail to the laboratory?

MR. TRITICO: I'll object to that question. It calls for a hearsay response.

THE COURT: Sustained.

MS. WILKINSON: I didn't ask him for the conversation, your Honor, just for did he have that discussion.

Steven Burmeister - Direct

THE COURT: Well, what point is there if he can't testify to the discussion?

MS. WILKINSON: I'll move on.

BY MS. WILKINSON:

Q. Agent Burmeister, you said you received the clothing in a box. Is that correct?

A. Yes.

Q. What did you do to that box when you received it?

A. As part of my procedures, when I receive a cardboard box at

any time, the first thing that I will do is actually examine the exterior of the box.

Q. Why do you do that?

A. Well, it's a procedure that I employed. I've had it in place now for quite some time, to examine the outside of the box for any possibility of explosive residue being on the exterior of the box. That's the first thing that I will do before actually entering into the box.

If I have a positive, that's when I'll make a note of it.

Q. And when you have a positive, what do you mean?

A. If I get a positive detection of an explosive residue, that's when I'll make a note in my records that there is indeed

a positive, and that's for the explosives that I will be looking to.

Q. So back in May of 1995, when you received Mr. McVeigh's

Steven Burmeister - Direct

clothing, did you test the box that contained the items in the plastic bags?

A. Yes. I did

A. Yes, I am.

Q. What were the results?

A. There was nothing on the exterior of the box.

Q. Now, you are familiar with the contamination study that Dr. Whitehurst discussed yesterday that occurred in May of 1995; correct?

A. Yes, I am.

Q. And you told us during your original testimony that you had

reviewed that study; is that right?

A. That's correct, yes.

Q. And were you able to determine if the bench that was tested

in the Explosives Unit that tested positive for explosives residue was Mr. Mills' bench?

A. I've reviewed those photos; and that particular photo was not Mr. Mills' bench, no.

Q. So there were no positive results of high-explosive residue

on Mr. Mills' bench. Correct?

A. That's correct, yes.

Q. Now, you also heard Dr. Whitehurst say that -- or at least start to say that he believed that there are some smokeless powders that contain PETN. Do you recall that?

A. Yes.

Q. Did you conduct research into that fact?

Steven Burmeister - Direct

A. Yes, I have.

Q. And did you review the article that the defense introduced which listed smokeless -- elements that were contained in smokeless powder?

A. Yes. I examined that particular article. Yes.

Q. And did you also examine other treatises on explosives and explosive residues?

A. Yes.

Q. What other treatises did you examine?

A. The other one was a document by Dr. Yinon, his textbook. Other textbooks, Urbanski, that wrote on explosives, as well as

an article in the Picatinny Arsenal.

Q. Are those all known experts and known treatises in your field?

A. Yes. They're kind of the -- the set of bibles that we would use for our profession.

Q. And what did you determine about whether there is currently

PETN being used in smokeless powder?

A. There is no current use in smokeless powder for PETN.

Q. And why -- did you determine why the article that the defense introduced listed PETN as an element of smokeless -- a possible element of smokeless powder?

A. Yes.

Q. What did you determine?

A. In looking back, there was at one time a chart that was

Steven Burmeister - Direct

prepared by the FBI, and it was prepared in 1985, and the particular chart actually listed it as "smokeless powders/explosives." And it was a list of items that (1) it gave the molecular weights of those particular materials; and it was just for -- an examination chart for using it for instrumental purposes. And it was derived, like I said, back in 1985, only as an internal reference document.

Q. And did that document supposedly list items that were in smokeless powder and explosives?

A. Yes. It contained both.

Q. Now, back in -- on April 22, 1995, you were not in the laboratory, were you?

A. No.

Q. Where were you?

A. April of 1985?

Q. April of 1995. April 22, 1995.

A. I was at the crime scene.

Q. Okay. And is it your understanding in your research of the

chain of custody of the clothing that the clothing arrived at the laboratory, Mr. McVeigh's clothing arrived at the laboratory, on April 22, 1995?

A. Yes.

Q. And Mr. Mills checked in that clothing. Correct?

A. That's correct, yes.

Q. And who received the clothing from Mr. Mills on that day?

Steven Burmeister - Direct

A. That would have been Mr. Martz.

Q. Now, you've told us earlier that there are technicians who assist you in your examinations; is that right?

A. Yes.

Q. What was Agent Martz' role on April 22, 1995?

A. He would have been serving as a technician role for myself under my direction, yes.

Q. Did he collect some preliminary data on the clothing?

A. Yes, he did.

Q. And did he provide that data to you?

A. Yes.

Q. Did you review it?

A. Yes, I did.

Q. Did you conduct any additional tests?

A. Yes, I did.

Q. Are those the tests that you described for the jury during your direct examination during the Government's case in chief?

A. Yes.

Q. And did you also review Agent Martz' work with him personally?

A. Yes, I have.

Q. Did you review the chromatograms and other charts that he

provided and prepared in his preliminary analysis?

A. Yes, I did.

Q. Now, when you receive that type of data from technicians,

Steven Burmeister - Direct

who analyzes the data?

A. Well, it's ultimately the examiner -- is the primary individual who will review the charts and data. And it's that person who will actually decide whether additional work is required to go back and do further examination, or come to some

conclusion with the data that's at hand.

Q. So in this case, with regard to the clothing, who was responsible for analyzing the data?

A. That was myself.

Q. Who was responsible for issuing the final conclusions?

A. Myself.

Q. In doing that, did you compare Agent Martz' work to the additional tests that you conducted?

A. Yes.

Q. Were those results consistent, or inconsistent?

A. They were consistent with one another.

Q. Now, the machines that Agent Martz used to conduct those preliminary tests: Were those machines that Dr. Whitehurst testified he was qualified to use?

A. Yes.

Q. Did you review the anticontamination procedures that Mr. Martz used when he tested the clothes?

A. Yes. I reviewed those with him.

Q. And did you receive his notes that he prepared in conducting those tests?

Steven Burmeister - Direct

A. Yes, I did.

Q. Did Dr. Whitehurst also conduct a test on a sample that had

been extracted from Mr. McVeigh's clothes?

A. Yes, that's correct.

Q. In doing that, did he generate notes?

A. Yes, he did.

Q. Did he provide those notes to you?

A. Yes, he did.

Q. And did they also become part of your work product?

A. Yes.

Q. Did Dr. Whitehurst in his capacity of testing that sample also test the solution that Mr. Martz had used?

A. The -- he tested an original solution that would have been the precursor to derive the secondary solution.

Q. Was the purpose of his testing of Mr. Martz' solution to determine whether there was any contamination?

A. I'm sorry. Could you repeat that one more time.

Q. Yes. What was the purpose of Dr. Whitehurst testing

Mr. Martz' original solution?

Mr. Martz' original solution?

A. That would have been to determine the original blank of the

entire system, so it would have been a raw -- a pristine version of the solvent used.

Q. And what were the results of Dr. Whitehurst's testing of Mr. Martz' solution?

A. That it was negative as far as any presence of any items.

Steven Burmeister - Direct

Q. So it was clean?

A. Clean.

Q. When Mr. Martz conducted these tests on April 22, were they

conducted before Mr. McVeigh's clothing went to the Photography

Unit and the Hair and Fiber Unit?

A. Yes, they were.

Q. So the residues that he found were present before it had traveled to the laboratory; correct?

A. Yes.

Q. As part of your analysis of the chain of custody, have you become familiar with the procedures used by the Special Photo Unit and the Hair and Fiber Unit?

A. I am familiar with them, yes.

Q. What precautions do they take to avoid contamination?

A. Their surface is cleaned first. There is a brand-new -- actually a huge board that is placed down in the entire area, which is actually disposed of once they're completed with an area. They do wear gloves. Everything is cleaned, and to my satisfaction with discussing it with them that I'm confident that the surface was well done.

Q. Based on your review of Mr. Martz' preliminary data collection and your additional testing, do you have any reason to believe any residues that weren't present when Mr. Martz tested the items somehow appeared on the items before you tested them?

Steven Burmeister - Direct

A. I don't think that would have occurred.

Q. Now, you also heard Dr. Whitehurst talk about Q507, which is also known as Government's Exhibit 664. And he expressed some concerns about how the crystals could have remained on that piece after the rainstorm. Do you recall that?

A. Yes, I do.

Q. Now, do you have an explanation for why those crystals could have remained?

A. I have an opinion as to why they remained, yes.

Q. What is your opinion?

A. My opinion is that these crystals -- they could have survived because of the components that might have been present

in the actual substance tests. There are chemicals -- the

aluminum, silicon and sulfur that is detected are components that are found in some of the coatings for prills. And I have -- I think that those coating materials helped the survivability of those crystals during that humid environment.

Q. Do you believe it's possible that when the detonation of the explosive device occurred that the prills actually embedded

into Q507 as prills instead of as crystals and the deterioration was protected or slowed down by the coatings?

Is that what you're saying?

A. I'm not saying that they were actually prills at one time sitting on the surface. I think that the prill actually struck

the surface and shattered and was parts of fragmentations of

Steven Burmeister - Direct

the prills, and that portion was embedded onto the surface.

Q. You have reviewed the chain of custody for Q507 as part of your analysis; isn't that right?

A. Yes.

Q. And you saw the picture of Q507 in place?

A. Yes, I did.

Q. You were also present shortly after Mr. Kelly took custody of Q507. Isn't that right?

A. Yes.

Q. Now, do you have any reason to believe that Q507 was not seized at the scene by Mr. Kelly?

A. I have no reason to believe otherwise.

Q. You heard Dr. Whitehurst claim that Q507 had had paint analysis conducted by the FBI. Correct?

A. That's correct.

Q. And that's why he believes that Agent Williams told him that that particular piece had been seized by a civilian; right?

A. Yes.

Q. Do you know if the FBI Laboratory conducted any paint analysis on Q507?

A. There was no paint analysis run on Q507.

Q. Are you familiar with another piece of the Ryder truck that

had paint analysis and it was recovered by a civilian?

A. I'm aware of another piece, yes.

Steven Burmeister - Direct

Q. And could it be possible that Dr. Whitehurst is confusing those two pieces?

A. It's possible, yes.

Q. Do you have any reason to believe that Q507 was not recovered in the parking lot across from the Murrah Building on

April 21, 1995?

MR. TRITICO: Objection, asked and answered.

THE COURT: Sustained.

MS. WILKINSON: No further questions.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. TRITICO:

Q. Now, Agent -- Special Agent Burmeister, you testified a moment ago that you have a policy of -- for testing cardboard boxes when you receive items in them?

A. Yes.

Q. Did you bring it with you?

A. It's a policy that I've had in place since the time that I started --

Q. Special Agent Burmeister, did you bring the policy with you?

THE COURT: You mean a written policy?

MR. TRITICO: Yes, sir.

THE WITNESS: There is no written policy for this, that's correct.

Steven Burmeister - Cross

BY MR. TRITICO:

Q. Nowhere in your notes do you describe the policy that you claim to utilize when have you a cardboard box, do you?

A. Only if it's a positive will there be a notation.

Q. Special Agent Burmeister, in your notes, do you describe the policy that you used, the unwritten policy, for checking cardboard boxes?

A. There is nothing written in the notes to determine that. That's correct.

Q. And since you -- if I understand your policy, you only write it down if you get a positive on the box; right?

A. That's correct.

Q. And so there is no way to know by looking at your notes that you ever checked that box, is there?

A. No. That's not correct.

Q. Well, you didn't get a positive, did you?

A. That's correct, if --

Q. So you didn't note it in your notes -- would you?

A. If there was a positive, I would have made a note in my notes.

Q. And if I understand your testimony, you didn't get a positive.

A. That's correct. There was no positive.

Q. So you didn't note it in your notes?

A. Say that again. I'm sorry.

Steven Burmeister - Cross

Q. Since there was no positive by your testimony, there is no notes regarding the testing of the box, is there?

A. That's correct, no positives --

Q. I can read your notes five or six times and never find an

entry in there regarding the testing of the box. Isn't that right?

MS. WILKINSON: Objection. Argumentative, your Honor.

THE COURT: Overruled.

BY MR. TRITICO:

Q. Correct?

A. Could you ask the question one more time. I'm sorry.

Q. Sure. I could read your notes five or six times and never will I find an entry in there regarding your testing of that box; right?

A. Like I said, only if there is a positive finding will there be a notation.

THE COURT: Well, the answer is it isn't in the notes. Right?

THE WITNESS: That's correct. It's not in the notes.

THE COURT: All right.

BY MR. TRITICO:

Q. Now, you were discussing the smokeless powder issue. Now, you didn't read that article when Dr. Whitehurst gave it to you in 1995, did you?

A. No, that's not correct.

Steven Burmeister - Cross

Q. Well, do you recall testifying on cross-examination just a few days ago when I asked you if you had ever seen that article

and you said you don't recall ever seeing it or reading it?

A. My recollection is I said -- stated that I don't recall receiving that article with that memo.

Q. And do you recall my asking you if you had ever read that article before? And you said no?

A. I don't have a recollection of that, but --

Q. You did not do any research with respect to PETN, the possibility of PETN being in smokeless gunpowders in 1995, did you?

A. That's -- that is correct. At that time in 1995, that's correct.

Q. You went back after I cross-examined you the other day and that's when you did the research at the request of Ms. Wilkinson; isn't that correct?

A. Not at her request, no.

Q. How many conversations have you had with the Israeli Military Institute that produced the bullets that Mr. McVeigh had when he was arrested?

A. I have not had any direct contact with them regarding that, no.

Q. Have you ever called them to find out if they use PETN in the construction of their bullets?

A. I'm aware that it is in the construction of the bullets.

A. I'm aware that it is in the consideration of the bullets,
if

Steven Burmeister - Cross

we're referring to the cartridge and bullet.

Q. And you never tested those bullets, did you, in your investigation in this case? Isn't that right?

A. Which bullets are you referring to?

Q. The IMI bullets.

A. That were recovered in this case?

Q. Yes, sir.

A. Not in this case, no.

Q. Now, with respect to the crystals that you found on Q507 -

-
well, actually, with respect to Q507, that's the only item that

you showed Dr. Whitehurst that had ammonium nitrate crystals on

it in this case; right?

A. It's the only one that I showed him, yes.

Q. Now, you were present for Dr. Whitehurst's testimony yesterday; correct?

A. Yes, I was.

Q. Now, what you heard him say with respect to the paint testing on Q507 was that it wasn't conducted because he had a problem with the protocol at the lab, is exactly what he said, wasn't it?

A. I'd have to review that testimony. That, I'm not sure of.

Q. As a matter of fact, that was the basis for the discussion he had with Special Agent Williams that -- when Special Agent Williams told him it had been found by a citizen; right?

A. I'm not sure if I can speak on that. I don't recall that

Steven Burmeister - Cross

particular testimony.

Q. You don't recall that part of it yesterday?

A. That's correct.

Q. Sure. Now, with respect to the crystals on Q507, if I understand your testimony, it's your belief that these prills were blasted into the side of Q507 after it miraculously lost 90 percent of its half-inch original body and what the silicon and the aluminum that you found on it is the remains of the coating. Right?

A. That is a component in coating materials, yes.

Q. ICI Joplin prills in 1994 also had talc as a coating, didn't they?

A. That's correct, yes.

Q. And a component of talc is magnesium; isn't that correct?

A. That's correct.

Q. You found no magnesium in the crystals on Q507, did you?

A. The elemental profile did not show any magnesium in those crystals. That's correct.

MR. TRITICO: Thank you, sir. I'll pass the

witness.

THE COURT: Any redirect?

MS. WILKINSON: No further questions, your Honor.

THE COURT: You may step down.

MR. HARTZLER: The Government rests on rebuttal.

THE COURT: The Government rests.

I take it there is no surrebuttal.

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

THE COURT: That means, members of the jury, that

the evidence is now closed, which means that you've heard all of the testimony that you're going to hear in this trial; but the case is not over, the trial is not over, because what remains, of course, are the arguments of the lawyers, the closing arguments in which they have the opportunity to speak to you and attempt their interpretations of that evidence and suggest how you should decide this case and the instructions that I will give you with respect to the law that you must follow in the case.

Now, we're almost to the noon hour, and it's no -- there is no way in which we can complete all of that this afternoon; so what I'm going to do is let you go home early today; and when we come back tomorrow at 9:00 in the morning, we'll submit this case to you and present to you the arguments of counsel and the instructions that I will give you on the law. And then the case will be yours to decide, and you will begin your deliberations.

So this time, of course, in between is very critical for you to follow the instructions that I've always given and at some times given sort of lightheartedly, but I only did that to sort of relieve the monotony of your having to hear the same thing every time you leave the courtroom, which, of course, the rules require me to do, to mention that to you each time.

But now I must emphasize and underline it, because you're in a position now where you've heard it. You've heard the testimony; and obviously, it's a matter of human nature for you now to wonder, Well, what is it that I've heard? What does it mean?

Don't do that. It would be a violation of your oaths to do that. You must keep open minds. You must remember that when you come to decide this case, there will be 12 people who will decide the case. And you will share in your deliberations your recollection of testimony of witnesses, your opinions and impressions with respect to witnesses and all of those things; so you function in deliberating as jurors as one of a group of 12. And it is the dynamics of that group of 12 that is a very important part of what a trial by jury is all about. You know,

you don't just all go off and then come together and say, Well, what have we all decided, and sort of take a vote on it. You discuss the case.

And I'll be talking to you about this in greater detail, of course, when I give you the instructions about the law that will assist you in approaching your decision in the case; so please, let the matter rest now until you come together tomorrow and we give you this case to decide with the arguments and the instructions.

And of course, also, with the knowledge that the evidence is closed, there will be, I am sure, many things said about this trial. There will be people who will be trying to predict what the jury is going to do. That's the nature of our

media, calling on other lawyers to have their opinions about what they think the trial all means. None of that can come to your attention. It would be a violation of your oaths to, you know, hear it, or see it. So you have to be extremely careful now, and I'm sure you will be.

I just mention these things so that you can really appreciate and understand the importance of it fully and be prepared to come in here tomorrow still with open minds, ready to receive arguments and instructions before even in your own minds you come to think about what you have or haven't -- what is the significance of what you have and haven't heard.

So, of course, don't discuss the case among yourselves or with any other persons, and don't let yourselves be exposed to anything that may be on television, radio, newspapers, magazines, anything at all. And then, as I say, come to us tomorrow morning ready to receive this case.

You're excused now until 9:00 tomorrow morning.

(Jury out at 11:52 a.m.)

THE COURT: The evidence having now been closed, is there a defense motion?

DEFENDANT'S MOTIONS AT THE CLOSE OF EVIDENCE

MR. JONES: Yes, your Honor. We renew our Rule 29 motion, I believe it is, for judgment of acquittal and all the other motions filed heretofore.

RULING ON DEFENDANT'S MOTIONS

THE COURT: All right. Well, the Rule 29 motion for judgment of acquittal on insufficiency of the evidence is denied. The other motions, the rulings are again renewed and the motions denied.

I'd like to see counsel this afternoon for an instructions conference. I am suggesting 2:00 in chambers.

MR. HARTZLER: That's fine.

MR. NIGH: Yes, your Honor.

THE COURT: All right.

MR. HARTZLER: Thank you, your Honor.

THE COURT: Then as far as the trial in the courtroom,

we'll resume at 9:00 tomorrow morning.

(Recess at 11:53 a.m.)

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REPORTERS' CERTIFICATE

We certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Dated at Denver, Colorado, this 28th day of May, 1997.

Paul Zuckerman

Kara Spitler