

Friday, May 30, 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 123)

Proceedings before the HONORABLE RICHARD P. MATSCH,
Judge, United States District Court for the District of
Colorado, commencing at 8:30 a.m., on the 30th 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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Western District of Oklahoma, 210 West Park Avenue, Suite 400,
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Tritico & Clary, 4300 Scotland, Houston, Texas, 77007,
appearing for Defendant McVeigh.

* * * * *

PROCEEDINGS

(In open court at 8:30 a.m.)

THE COURT: Be seated, please.

Good morning. Are we ready for the jury?

MR. HARTZLER: We are, your Honor.

MR. JONES: Yes, your Honor.

THE COURT: All right. We'll bring them in.

(Jury in at 8:31 a.m.)

THE COURT: Members of the jury, good morning.

JURORS: Good morning.

THE COURT: Now that you have heard the evidence and the arguments, the time has come to instruct you as to the law governing you in this case. You will each have a copy of these instructions for your reference during your deliberations, but I ask for your full attention now as I read the instructions to you.

Although you as jurors are the sole judges of the facts, you are duty bound to follow the law as stated in the instructions of the Court and to apply the law so given to the facts as you find them from the evidence before you.

Counsel have quite properly referred to some of the governing rules of law in their arguments. If, however, any difference appears to you between the law as stated by counsel and that stated by the Court in these instructions, you are, of course, to be governed by the instructions.

You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court.

You have been chosen and sworn as jurors in this case to try the issues of fact presented to you. You are to perform this duty without bias or prejudice as to anyone. The law does not permit jurors to be governed by sympathy, prejudice or public opinion. You are expected to carefully and impartially consider all of the evidence, follow the law as stated by the Court, and reach a just verdict.

In determining the facts, you must rely upon your own recollections of the testimony heard by you. What the lawyers have said in their opening statements, in their closing arguments, in their objections, or in their questions is not evidence. Bear in mind that the question put to a witness is not the evidence. It is the answer which is the evidence. Nothing that I may have said during the trial or may say in these instructions should be considered by you as evidence or

as any comment on the evidence. The stipulations which were read to you are included in the evidence. The exhibits received are also part of the evidence. You will have access to all of the exhibits during your deliberations. Exhibits offered and refused are not evidence and must be disregarded.

You are the sole and exclusive judges of the facts. The rulings I have made, my comments and questions to counsel, and any questions I have asked of witnesses during the trial must not be taken as expressing any opinions about the facts in this case. You are expressly instructed that the Court has no opinion as to what the verdict should be in this case.

As I told you many times during this trial, your verdict must be based solely on the evidence presented in this courtroom and in accordance with the law given in these instructions. You must completely disregard anything which you have read, seen or heard outside of this courtroom relating to the issues in this trial. It would be fundamentally unfair to consider anything not in evidence because the lawyers have no opportunity to challenge the accuracy of it or to make any comment about it. You must not allow public opinion to play any role in your deliberations. In short, you would violate your oaths as jurors if you permitted yourselves to be influenced in any manner by anything said or written by those who do not have any responsibility for a fair trial of these charges.

As I told you before the trial began, the attorneys have the duty, as advocates for their respective sides, to make objections and ask for court rulings on the admissibility of evidence. You must not consider or discuss those objections or draw any inferences or conclusions from the Court's comments and rulings. The rules of evidence provide important limitations on what the jury can fairly consider in deciding the facts in any case. The lawyers share with the Court the obligation to apply and enforce those rules by raising issues of admissibility. The attorneys also have a duty to prepare for trial, and it is common practice for them to interview witnesses and to provide discovery information to opposing counsel in advance of the trial. Witnesses have the freedom to choose whether to grant requests for interviews.

The charges in this case are contained in an indictment returned by a federal grand jury in Oklahoma. An indictment is nothing more than a document that gives notice of the charges that the Government intends to prove. It is not evidence of any kind against the defendant. The defendant is not on trial for any act or conduct not specifically charged in the indictment.

The basic principle of our law is that the defendant, Timothy James McVeigh, is presumed to be innocent of each and every charge brought against him in this indictment. The

every charge brought against him in this indictment. The defendant's pleas of not guilty put in dispute everything that is alleged in the indictment. The presumption of innocence stays with the defendant throughout the trial and entitles him to a verdict of not guilty, unless and until you, the jury, find that the evidence received during the trial has established each and every essential element of the crime charged beyond a reasonable doubt.

So the presumption of innocence means that Timothy James McVeigh must be given the benefit of any reasonable doubt of his guilt that may remain in the minds of the jurors after they have given careful and impartial consideration to all of the evidence in the case.

A reasonable doubt is a doubt based on reason and common sense, the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs. A defendant is not to be convicted on mere suspicion or conjecture.

A reasonable doubt may arise not only from the evidence produced but also from the lack of evidence. Since the burden is always on the prosecution to prove the accused guilty beyond a reasonable doubt of every element of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross-examination of witnesses for the prosecution. The law does not impose upon a defendant the burden or duty of calling any witnesses or producing any evidence.

It is alleged in Count One that, beginning on or about September 13, 1994, and continuing until on or about April 19, 1995, at Oklahoma City, Oklahoma, and elsewhere, defendant, Timothy James McVeigh, intentionally and willfully conspired with Terry Lynn Nichols, and with others unknown, to use a weapon of mass destruction, namely an explosive bomb placed in a truck (a "truck bomb") against persons within the United States and against property that was owned and used by the United States and by a department and agency of the United States, namely, the Alfred P. Murrah Federal Building at 200 N.W. 5th Street, Oklahoma City, Oklahoma, and that the object of the conspiracy was to kill and injure innocent persons and to damage property of the United States. The indictment goes on to allege means and methods used by Timothy McVeigh and Terry Nichols to further the objects of the conspiracy.

You will have copies of the indictment with you during your deliberations. Some of the statements have been removed from the original as a result of certain rulings I have made on legal points that do not concern you, and you will see that some of the paragraphs are not sequential. There are a few

gaps, and that's because of these rulings that I've made which, as I say again, do not concern you. What you will have is what the prosecution claims to have been proved by the evidence.

The statute referred to in Count One, 18 United States Code Section 2332(a), provides, in pertinent part, that "[a] person who . . . conspires to use, a weapon of mass destruction . . . against any person within the United States; or against any property that is owned, leased or used by the United States" shall be guilty of a crime.

The indictment alleges that the conspiracy charged in Count One began on or about September 13, 1994, and continued thereafter until on or about April 19, 1995. And although it is necessary for the Government to prove beyond a reasonable doubt that the offense of conspiracy was committed on dates reasonably near those alleged in Count One, it is not necessary for it to prove that the conspiracy offense was committed precisely on the dates charged.

A criminal conspiracy is an agreement to violate a federal law. It is an independent offense which is separate and distinct from the actual violation of any specific federal statute that may or may not have happened as a result of the conspiracy.

To establish the Count One offense of conspiring to use a weapon of mass destruction against people and government property, the prosecution must prove each of the following three elements beyond a reasonable doubt:

- (1) That two or more persons agreed to use an explosive bomb in a truck as a weapon of mass destruction against a federal building and the persons inside it;
- (2) That the defendant, Timothy James McVeigh, knowingly and voluntarily became a member of the conspiracy, with the intent to advance or further its objectives; and
- (3) That achievement of the objectives of the conspiracy would have substantially affected interstate commerce.

A criminal conspiracy is an agreement or a mutual understanding knowingly made or knowingly entered into by at least two people to violate the law by some point or common plan or course of action. A conspiracy is, in a very true sense, a partnership in crime.

A conspiracy or agreement to violate the law, like any other kind of agreement or understanding, need not be formal, written, or even expressed directly in every detail.

To prove the existence of an illegal agreement, the Government is not required to produce a written contract between the parties or even produce evidence of an express oral agreement spelling out all of the details of their understanding, nor is it required that the Government prove

the identity of all of the members of the conspiracy or that all of the means and methods of furthering the conspiracy set out in the indictment were used or carried out.

What the Government must prove is that the defendant, Timothy James McVeigh, and at least one other person, did knowingly and deliberately arrive at some type of an agreement that they, and perhaps others, would use a weapon of mass destruction against the Alfred P. Murrah Federal Building in Oklahoma City and the persons in it by means of some common plan or course of action as alleged in Count One of the indictment. Proof of such a common understanding and deliberate agreement among two or more persons, including the defendant now on trial, is the key element of the charge of criminal conspiracy.

To find Timothy McVeigh guilty of the conspiracy charged in Count One, you must find that at least one of the objectives of the conspiracy was to use a weapon of mass destruction against property owned, leased, or used by the United States Government. Unless the Government proves beyond a reasonable doubt that such a conspiracy actually existed, then you must find the defendant, Timothy McVeigh, not guilty on this charge.

Mere presence at the scene of an alleged transaction or event, or mere similarity of conduct among various persons and the fact that they may have associated with each other and may have assembled together and discussed common aims or interests, do not necessarily establish proof of the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some object or purpose of the conspiracy, does not thereby become a conspirator.

But a person may join in an agreement or understanding, as required for conviction, without knowing all of the details of the agreement or understanding and without knowing who all the members are. Further, it is not necessary that a person agree to play any particular part in carrying out the agreement or understanding. A person may become a member of a conspiracy even if that person agrees to play only a minor part in the conspiracy, as long as that person has an understanding of the unlawful nature of the plan and voluntarily and intentionally participates in it as something he wants to bring about.

Count One alleges an illegal agreement to use a "weapon of mass destruction." That is a legal phrase that is also applicable to Count Two. A "weapon of mass destruction" means any "destructive device" that is designed or redesigned for use as a weapon. The term "destructive device" includes any explosive bomb. To determine whether it was designed or redesigned as a weapon, you may consider the physical structure

or the device, the method or its normal operation, and the intent with which it was constructed.

The third and final element of Count One is that the objectives of the conspiracy would substantially have affected interstate commerce. A substantial effect on interstate commerce is also an element of Count Two. You are instructed for purposes of Counts One and Two that a crime substantially affects interstate commerce if it substantially interferes with, changes, or alters the movement or transportation or flow

of goods, merchandise, money, or other property between one state and another. The necessary connection with interstate commerce may be provided if you find there was a substantial disruption of the operations of federal government agencies caused by the destruction of a building housing them.

Count Two alleges that on or about April 19, 1995, the defendant Timothy James McVeigh "did knowingly, intentionally, willfully, and maliciously use, aid and abet the use of, and cause to be used a weapon of mass destruction, namely an explosive bomb placed in a truck, against persons within the United States"

The relevant statute, 18 United States Code Section 2332(a), provides in pertinent part that "[a] person who uses . . . a weapon of mass destruction . . . against any person within the United States" shall be guilty of a crime.

To establish the Count Two offense of using a weapon of mass destruction, the Government must prove four essential elements beyond a reasonable doubt:

(1) That the defendant Timothy James McVeigh used, or

aided and abetted the use of, a weapon of mass destruction;

(2) That the weapon of mass destruction was used against persons within the United States;

(3) That the use of the weapon of mass destruction against persons within the United States substantially affected

interstate commerce; and

(4) That the defendant acted knowingly, intentionally, willfully and maliciously.

Count Three alleges that, or on before April 19, 1995,

the defendant, Timothy James McVeigh, "did knowingly, intentionally, willfully and maliciously damage and destroy, aid and abet the damage and destruction of, and cause to be damaged and destroyed, by means of an explosive, namely, an explosive bomb placed in a truck, a building and other personal

and real property in whole and in part owned, possessed and used by the United States, that is, the Alfred P. Murrah Federal Building, 200 N.W. 5th Street, Oklahoma City, Oklahoma"

The relevant statute, 18 United States Code Section 844(f), provides in pertinent part that: "Whoever maliciously damages or destroys . . . by means of fire or an explosive, anv

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building . . . in whole or in part owned, possessed, or used by, or leased to, the United States" shall be guilty of a crime.

To establish the Count Three offense of destruction of federal property by explosive, the Government must prove three essential elements beyond a reasonable doubt:

(1) That the defendant damaged or destroyed a building, or aided and abetted the damage or destruction of a building, by means of an explosive bomb;

(2) That the defendant acted knowingly, intentionally, willfully and maliciously; and

(3) That the building in whole or in part was owned, possessed, or used by or leased to the United States.

For purposes of Count Three, the term "explosive" means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, detonators, and other detonating agents, smokeless powders, and any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture or device or any part thereof, may cause an explosion.

Counts One, Two and Three all require that the defendant acted knowingly, intentionally, willfully and maliciously. These terms mean that the defendant must have acted with a criminal state of mind. To have such a state of mind, the defendant must have been conscious and aware of his action, must have realized what he was doing, and must not have acted because of ignorance, mistake or accident. The defendant must also be shown to have acted with a bad purpose or evil intent.

If you find the defendant, Timothy James McVeigh, guilty of one or more of the crimes charged in Counts One through Three, you must then make an additional finding as to whether the evidence proved beyond a reasonable doubt that the crime resulted in the death of one or more of the persons named in the indictment. These offenses are different from the murder counts because the defendant's responsibility for the deaths of persons killed as a result of the criminal acts charged in Counts One through Three does not depend upon proof that he intended to kill anyone. It is sufficient if the jury finds, beyond a reasonable doubt, that death of one or more of these persons was a foreseeable result of the criminal conduct charged in these counts.

Counts Four through Eleven are first-degree murder counts charging that, on or about April 19, 1995, defendant Timothy James McVeigh did unlawfully, willfully, deliberately, maliciously, and with premeditation and malice aforethought,

kill, and aid, abet and cause the killing of eight named victims while those victims "were engaged in . . . the performance of their official duties as law enforcement officers." The victim named in Count Four is Mickey Bryant Maroney, who was employed as a Special Agent of the United States Secret Service. The victim named in Count Five is Donald R. Leonard, who was employed as a Special Agent of the United States Secret Service. The victim named in Count Six is Alan Gerald Whicher, who was employed as an Assistant Special Agent in Charge of the United States Secret Service. The victim named in Count Seven is Cynthia Lynn Campbell-Brown, who was employed as a Special Agent of the United States Secret Service. The victim named in Count Eight is Kenneth Glenn McCullough, who was employed as a Special Agent of the United

States Drug Enforcement Administration. The victim named in Count Nine is Paul Douglas Ice, who was employed as a Special Agent of the United States Customs Service. The victim named in Count Ten is Claude Arthur Medearis, who was employed as a Special Agent of the United States Customs Service. The victim named in Count Eleven is Paul G. Broxterman, who was employed as a Special Agent of the Department of Housing and Urban Development, Office of Inspector General.

Title 18 United States Code Section 1111 provides in pertinent part that: "Murder is the unlawful killing of a human being with malice aforethought. Every . . . willful, deliberate, malicious, and premeditated killing . . . is murder in the first degree." Title 18 United States Code Section 1114 in pertinent part applies Section 1111 to certain federal officials and employees.

To establish the Counts Four through Eleven offenses of first-degree murder, the Government must prove four essential elements beyond a reasonable doubt:

- (1) That the defendant without lawful justification killed or aided and abetted the killing of another human being;
- (2) That the victim was a federal employee with law enforcement functions who was killed while engaged in the performance of official duties;
- (3) That the defendant committed or aided and abetted the killing with malice aforethought, and
- (4) That the defendant committed or aided and abetted the killing in a premeditated and deliberate manner.

The second element requires that you find (a) that the victim was a federal employee with law enforcement functions and (b) that the employee was killed while engaged in the performance of official duties.

Each of the persons named in Counts Four through

Eleven was employed in a position having law enforcement functions.

Whether a federal employee was engaged in the performance of his or her official duties turns on whether the federal officer was acting within the scope of what he or she was employed to do, or whether instead the employee was engaged in a purely personal frolic. If the employee was at his or her place of business during regular working hours at the time of the killing, he or she may still be found to have been engaged in the performance of official duties, even though the employee may have been on a temporary break discussing some personal matter or arranging for food or drink. You should consider all of the facts and circumstances of the case in deciding whether the Government has proved this element.

"Malice aforethought" means that the defendant must have acted willfully and deliberately, intending to kill another person. Whether the defendant in a homicide case acted with malice at the time of the killing is an issue to be decided by inferences that may or may not be drawn from all of the surrounding facts and circumstances shown by the evidence. The law permits but does not require a jury to find that the defendant killed with malice aforethought if you find that he acted with callous and wanton disregard for human life.

Knowledge or awareness of a victim's identity and status as a federal law enforcement employee is not an essential element of these murder counts. Thus, the Government is not required to prove that the defendant knew who the victims were or what duties they were performing in their respective positions as federal employees. What the prosecution must show is that the defendant intended to kill someone and that these victims named in these counts died as a direct result of the defendant's deliberate acts.

Premeditation requires not only that the killing was willful and with malice but also that the defendant formed a specific intent to kill after planning and deliberation. This means that the defendant must have considered and reflected upon a preconceived killing at least long enough to give it a second thought.

Timothy McVeigh has been charged as a principal and also as an aider and abettor in Counts Two through Eleven. Title 18 United States Code Section 2 provides that a person may be found guilty if he aids, abets, counsels, commands, induces, or procures or willfully causes the commission of a federal crime by another person. Under this statute, a defendant is guilty as an aider and abettor if:

- (1) He willfully associated himself with a criminal venture;
- (2) He participated in it as something he wished to bring about;
- (3) He sought by his actions to make it succeed, and
- (4) The offense was committed by someone else and

(7) THE OFFENSE WAS COMMITTED BY SOMEONE ELSE AND
abettted by the defendant.

You are here to determine whether the Government has
proven the guilt of the defendant Timothy James McVeigh for
the
crimes charged in the indictment beyond a reasonable doubt.
You are not called upon to return a verdict as to any other
person. The charges as to Terry Lynn Nichols will be
determined in another trial by a different jury at a later
time. You should consider evidence about the acts,
statements,
and intentions of persons other than Timothy James McVeigh
only
as that evidence may relate to these charges against the
defendant now on trial.

So if the evidence in the case convinces you beyond
a
reasonable doubt of the guilt of Timothy James McVeigh for the
crimes charged in the indictment, you should so find, even
though you may believe that one or more other persons may also
be guilty. But if any reasonable doubt remains in your minds
after impartial consideration of all of the evidence in the
case, it is your duty to find Timothy James McVeigh not
guilty.

There are two types of evidence from -- there are
two
types of evidence which are generally presented during a
trial:
Direct evidence and circumstantial evidence. Direct evidence
is the testimony of a person who asserts or claims to have
actual knowledge of a fact, such as an eyewitness.
Circumstantial evidence is proof of a chain of facts and
circumstances indicating the existence of a fact.

It is a general rule that the law makes no
distinction
between direct and circumstantial evidence but simply requires
that before convicting a defendant, the jury must be convinced
of the defendant's guilt beyond a reasonable doubt from all of
the evidence in the case.

You have heard evidence in this trial of expressions
of opinions and beliefs held by the defendant, Timothy James
McVeigh, and of books and articles he possessed and read and
urged others to read. The defendant is not on trial for any
of
his thoughts, beliefs, or statements, which are protected by
the First Amendment to the Constitution of the United States.
The First Amendment, however, does not prevent the prosecution
in a criminal case from offering evidence of a defendant's
beliefs in an attempt to prove that he had some motive,
knowledge, or intent for committing the crimes alleged in the
indictment. Proof of motive is not essential in a case such
as
this; but when proved, motive may be an item of circumstantial
evidence that may bear on whether or why a defendant may have
committed a criminal act. Whether you agree or disagree with
the defendant's expressed opinions or beliefs is irrelevant.

The defendant is on trial only for the crimes set forth in the eleven counts of the indictment which the Government must prove beyond a reasonable doubt. You may not more convict the defendant because you may disagree with his opinions and beliefs than you may acquit him because you may agree with his opinions and beliefs.

A separate crime is charged in each count of the indictment. Each charge, and the evidence pertaining to it, should be considered separately by the jury. The fact that you may find the defendant guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged.

You, as jurors, are the sole and exclusive judges of the credibility of each of the witnesses called to testify in this case, and only you determine the importance or weight that their testimony deserves. After making your assessment concerning the credibility of a witness, you may decide to believe all of that witness' testimony, only a portion of it, or none of it.

In making your assessment, you should carefully scrutinize all of the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness in your opinion is worthy of belief. Consider each witness' intelligence, motive to falsify, state of mind, and appearance and manner while on the witness stand. Consider the witness' ability to observe the matters as to which he or she has testified and whether he or she impresses you as having an accurate memory or recollection of these matters. Consider also any relation a witness may bear to either side of the case, the manner in which each witness might be affected by your verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause you to disbelieve or discredit such testimony. Two or more persons witnessing an incident or a transaction may simply see or hear it differently. Innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, however, always consider whether it pertains to a matter of importance or an insignificant detail and consider whether the discrepancy results from innocent error or from intentional falsehood.

The reliability of eyewitness identification has been raised as an issue in this case and deserves your attention. Identification testimony is an expression of belief or impression by the witness. Its value depends upon the opportunity the witness had to observe the offender at the time

of the offense and later to make a reliable identification and upon the influences and circumstances under which the witness made the identification.

You must consider the credibility of each identification witness in the same way as any other witness. You must first decide whether the witness is telling the truth as he or she understands it, but you must do more than that. You must also decide how accurate the identification was, whether he or she saw what the witness thought he or she saw. You must also consider whether the witness had the capacity and opportunity to make a reliable observation on the matter covered in his or her testimony.

You are not required to accept testimony, even though the testimony is uncontradicted and the witness is not impeached. You may decide because of the witness' bearing or demeanor or because of the inherent improbability of his or her testimony or for other reasons sufficient to you that such testimony is not worthy of belief.

After making your own judgment or assessment concerning the believability of a witness, you can then attach some importance -- such importance or weight to that testimony, if any, that you feel it deserves. You will then be in a position to decide whether the Government has proven the charges beyond a reasonable doubt.

You have heard the testimony of two witnesses, Lori Fortier and Jennifer McVeigh, who testified under a grant of immunity from another judge of this court. What this means is that the testimony of those witnesses may not be used against them in any criminal case except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the court's immunity order.

The testimony of a witness who has been granted immunity should be examined by you with greater care than the testimony of an ordinary witness. You should scrutinize it closely to determine whether or not it is colored in such a way as to place guilt upon the defendant in order to further the witness' own interests; for such a witness, confronted with the realization that she can win her own freedom by helping to convict another has a motive to falsify her testimony.

Such testimony should be scrutinized by you with great care, and you should act upon it with caution. If you believe it to be true and determine to accept the testimony, you may give it such weight, if any, as you believe it deserves.

You have heard testimony from Michael Fortier, who pleaded guilty to certain charges after entering into a plea agreement with the Government to testify. There is evidence that the Government agreed not to prosecute this witness on other charges in exchange for the witness' agreement to plead guilty and testify at this trial against the defendant. The Government also promised to bring the witness' cooperation to

Government also promised to bring the witness' cooperation to the attention of the sentencing court.

The Government is permitted to enter into this kind of plea agreement. You should bear in mind that a witness who has entered into such an agreement has an interest in this case different from any ordinary witness. A witness who realizes that he may be able to obtain his own freedom or receive a lighter sentence by giving testimony favorable to the prosecution has a motive to falsify -- to testify falsely. Therefore, you must examine his testimony with caution and weigh it with great care. If after scrutinizing his testimony you decide to accept it, you may give it whatever weight, if any, you find it deserves.

You are instructed that you are to draw no conclusions or inferences of any kind about the guilt of the defendant on trial from the fact that a prosecution witness pleaded guilty to charges that may relate to this case. That witness' decision to plead guilty was a personal decision about his own guilt. It may not be used by you in any way as evidence against or unfavorable to the defendant on trial here.

Government witnesses Michael Fortier and Lori Fortier admitted under oath to drug and alcohol abuse. The testimony of drug and alcohol abusers must be examined and weighed by the jury with greater care than the testimony of a witness who does not abuse drugs or alcohol. The jury must determine whether the testimony of a drug or alcohol abuser has been affected by drug or alcohol abuse, the need for drugs or alcohol, or the threat of prosecution for drug use and possession.

The fact that a witness has previously been convicted of a felony or of a crime involving dishonesty is a factor you may consider in weighing the credibility or believability of a witness.

The fact of such a conviction does not necessarily destroy the witness' credibility but is one of the circumstances you may take into account in determining the weight to be given to his testimony.

You may consider any bias, prejudice, or hostility of a witness toward or against Mr. McVeigh or the Government in determining the weight to be accorded to the testimony of that witness.

You have heard testimony from several law enforcement officials. The fact that a witness may be employed by the federal government or a state or local government as a law enforcement official does not mean that his or her testimony is necessarily deserving of more or less consideration or greater or lesser weight than that of an ordinary witness. At the same

time, it is quite legitimate for defense counsel to try to attack the credibility of a law enforcement witness on the grounds that his or her testimony may be colored by a personal or professional interest in the outcome of the case. It is your decision, after reviewing all of the evidence, whether to accept the testimony of a law enforcement witness and to give that testimony whatever weight, if any, you find it deserves.

Charts or summaries have been prepared by the Government and shown to you during the trial for the purpose of explaining facts that are allegedly contained in books, records, and other documents which are in evidence in the case.

Such charts or summaries are not evidence in this trial or proof of any fact. If you find that these charts or summaries do not correctly reflect facts or figures shown by evidence in the case, the jury should disregard the charts or summaries.

In other words, such charts or summaries are used only as a matter of convenience for you; and to the extent that you find they are not in truth summaries of facts or figures shown by the evidence in the case, you can disregard them entirely.

Some charts or summaries prepared by the Government have been admitted into evidence and have been shown to you during the trial for the purpose of explaining facts that are allegedly contained in books, records, or other documents which are in evidence in the case. You may consider the charts and summaries as you would any other evidence admitted during the trial and give them such weight or importance, if any, as you feel they deserve.

A witness may be discredited or impeached by contradictory evidence or by evidence that at some other time, the witness has made statements which are inconsistent with the witness' present testimony. If you believe that any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If any witness is shown to have testified falsely concerning any material matter, you have the right to distrust such witness' testimony in other particulars; and you may reject all of the testimony of that witness or give it such credibility as you may think it deserves.

Under your oath as jurors, you are not to be swayed by sympathy. You are to be guided solely by the evidence in this case; and the crucial, hard-core question that you must ask yourselves as you sift through the evidence is has the Government proven the guilt of the defendant beyond a reasonable doubt.

It is for you alone to decide whether the Government has proven that the defendant is guilty of the crimes charged solely on the basis of the evidence and subject to the law as I give it to you in these instructions. It must be clear to

you
that once you let fear or prejudice or bias or sympathy
interfere with your thinking, there is a risk that you will
not
arrive at a true and just verdict according to the law and the
evidence.

If have you a reasonable doubt as to a defendant's
guilt, you should not hesitate for any reason to return a
verdict of not guilty; but on the other hand, if you should
find that the Government has met its burden of proving the
defendant's guilt beyond a reasonable doubt, you should not
hesitate because of sympathy or any other reason to return a
verdict of guilty.

Remember that the question before you can never be
will the Government win or lose this case. The Government
always wins when justice is done, regardless of whether the
verdict is guilty or not guilty.

The law does not compel Mr. McVeigh or any defendant
in a criminal case to take the witness stand and testify. And
you must not draw any inference from the fact that Mr. McVeigh
did not testify. It is up to the Government to prove
Mr. McVeigh guilty beyond a reasonable doubt. It is not up to
Mr. McVeigh to prove that he is not guilty. The fact that
Mr. McVeigh did not testify should not be discussed by you in
any way or play any part in your deliberations.

I explained to each of you individually at the time
you were being questioned for possible service as jurors in
this case the various possible stages, including jury
sentencing in a capital case. Your function at this stage of
the trial is to weigh the evidence in the case and to
determine
whether or not the defendant is guilty beyond a reasonable
doubt solely upon the basis of such evidence. Under your oath
as jurors, you cannot allow a consideration of the punishment
which may be imposed upon the defendant if he is convicted to
influence your verdict or even to enter into your
deliberations.

Upon retiring to the jury room, you will select one
of
your number to act as foreperson. That is the person who will
preside over your deliberations and speak for you in court.

A form of verdict has been prepared for your
convenience.

You know, of course, that your verdict must be
unanimous. All of you must be in agreement. Until all of
you
have agreed, you have not reached a verdict.

Now, when you have reached a verdict, then that
person
whom you have selected as the foreperson will complete and
fill
it out. You will have the verdict form upon which your
verdict
will be recorded, and I'm also providing you with a work copy
of that form so that as you deliberate, if you wish to use the
work copy of the form as a format for discussion, it can be

written on and remain as a part of your notes and not be written on the verdict form. There are times when a jury on a verdict form will start in and then somebody makes a mistake; so what we ask you to do is fill out the work form first and then the actual verdict form.

So the verdict is simple in its form. It simply says:

"We the jury upon our oaths unanimously find as follows": And then it says "Count One," and reminds you in parentheses, "(conspiracy to use a weapon of mass destruction)" and then there is a line provided over the words "not guilty" or "guilty"; similarly with respect to all of the other counts.

Considering each count separately, then, when you have arrived at your unanimous verdict with respect to each count, that person whom you have selected as foreperson would write in the words by that count which reflect the unanimous decision of the jury with respect to that count, be they the words "not guilty" or the word "guilty." Write it in with each count.

Now, after the first three counts, there is here in brackets: "If you find the defendant guilty of one or more of the crimes charged in these three counts, then answer the following question." And a question is posed. The question reads: "Do you find that the Government proved beyond a reasonable doubt that the crime or crimes committed by the defendant, Timothy James McVeigh, as found above resulted in the death of one or more of the persons named in the indictment?" This one asks for a yes or no answer.

Then it goes on to explain again parenthetically: "(If your answer is yes, then answer the following additional question.)" That question reads: "Was the death of such person or persons a foreseeable result of the defendant's criminal conduct?" Again, yes or no is the answer.

Then it goes on, the verdict form, to the murder counts, first-degree murder counts, Counts Four through Eleven, with the words "not guilty" or "guilty" again to be written in as you decide.

And then finally, there is a place for the foreperson to sign his or her name and enter the date upon which the jury has arrived at the verdict.

So you will take this form with you to the jury room; and when you have reached unanimous agreement as to your verdict, the foreperson will fill it in and sign the form to state the verdict upon which you have agreed. And then you will return with your verdict to the courtroom.

Now, if it should become necessary during your deliberations to communicate with the Court, you may do so in writing; but you must bear in mind that you are not to reveal to the Court or any person how the jury stands numerically or otherwise on the questions before you until after you have reached your unanimous verdict.

Now, we're going to... as I think I explained to you

now, we're going to, as I think I explained to you yesterday -- we have exhibits set up in the -- in a courtroom that is adjacent to this one and to which you will have access, as you will the entire area behind here, so that you can go in and out of there as you choose and look at the exhibits as you choose. And there will be indexes of the exhibits there to help you find anything that you want to look at.

Anything that's not in there is not an exhibit, so you may, as some jurors have in other cases -- you may recall some document or object being referred to during testimony, but you don't find it among the exhibits. And of course, it's a normal thing to ask for it; but I can't give it to you because you are going to be limited, as I am, by the evidence. And those things that are over there are in evidence, and anything that's not over there is not in evidence with respect to exhibits.

And certain exhibits, as I mentioned in these instructions, were designated as exhibits but simply used here to illustrate testimony. We call those "demonstrative" or "illustrative" exhibits. You'll remember that they were received at times during the taking of the evidence for that limited purpose. They are not in the courtroom as exhibits because they were not. They are transitory in their use during the testimony of the particular witness. And of course, that's also true with respect to those things that were not exhibits that were used for illustration in the course of the closing arguments in the case. So I just want you to be sure on that.

With respect to how you contact the Court to submit in writing any questions that you may have or any communication that you wish to have with me, there is the buzzer in there, you will recall. And that's what you will use. And our clerk of court, Mr. Manspeaker, whom you have met, I think, will respond to that and pick up from you anything that you have or any need to communicate with the Court in writing.

Now, if you will bear with us just a moment, I'm going to ask counsel to approach the bench. And I'm going to turn on this machine that makes a kind of awkward sound; but that is for the purpose of your not being able to hear what I have to say to them. So please bear with me just a moment.

(At the bench:)

(Bench Conference 123B1 is not herein transcribed by court order. It is transcribed as a separate sealed transcript.)

(In open court:)

THE COURT: There is one matter that has been called to my attention and for which I apologize. On page 10, there is the reference to Count Three, where it says in the instructions, you will note, "Count Three alleges that on or before April 19," and it should be "on or about." So much for word processing.

But in the indictment -- You will have copies of the indictment with you. Each of you will have a separate copy of the indictment, as you do with the instructions. You will note that the indictment says "on or about."

Now, with respect to your deliberations, the timing of your deliberations will be up to you. I mean, I'll defer to you on that. What we normally do is you will start deliberations immediately after we recess here, and then the normal thing is that you deliberate here during the workday; but you can decide the timing of that workday, whether it's 8:30 to 5 or whatever. And of course, the length of the deliberations entirely is a matter up to the jury. So at this point, we turn the case over to you now.

We have 18 of you here in the jury box. The law says 12 people decide the case.

The first 12 seated here beginning to my left, your right, in the first row, the six in the first row and the next six in the second row are the 12 who will deliberate in the case, if you're able to do so. And I must ask you now whether you are, because we have alternate jurors. The purpose of the alternate jurors, of course, is to be available to participate in deliberations when someone is ill or unable to proceed.

I must ask the people seated in the -- as I've described them, first 12 chairs, whether you're able to go forward now. All of you feel well enough to proceed to deliberation?

All right. Then the -- what we'll do at this time with respect to the other six is excuse you from the courtroom now. We're going to again keep you together. We'll hope to provide you with some entertainment or something to keep you busy during this time. I hope you understand the need for doing this; but you must, of course, during this time -- you

will be kept together separate and apart from others during this time. And of course, with respect to you, you ought not to be deliberating on your own. You ought not to be talking about the case. So with respect to you, I ask of you that even though you're now cocked and primed, as it were, as the 12 who are here, ready to go into deliberation, I can't allow you to do so. So frustrating as that may be to you -- and I'm sure it is -- I must ask you now to hold off on any discussion about this case among yourselves or, of course, with any other persons and continue to avoid anything outside of this evidence. And we'll try to help you with that by the persons who will be accompanying you. But again, we very much appreciate what you're doing here with us. It is certainly a vital service for us.

But I'll ask you now to leave the courtroom, go to the jury room; and whatever items that you may have and so forth there, pick them up. And you'll be escorted.

(Alternate jurors excused at 9:32 a.m.)

THE COURT: Members of the jury, as you -- I don't know if you've met formally or not: This is Mr. James Manspeaker, Clerk of the Court, who will be the person whom you will contact if necessary. And he has the verdict form and the work form and also the copies of the indictment and instructions to give to you.

Now, members of the jury, you will at this time retire, begin your deliberations in this case.

(Jury out at 9:34 a.m.)

THE COURT: We'll ask counsel to be available, of course, on no more than 10 minutes' notice so that we can resume to respond to any questions or communications from the jury, which I'll take up with you, and also to be able to respond for a verdict.

Do either counsel -- counsel for either side have anything further at this time?

MR. HARTZLER: No, your Honor.

MR. JONES: No, your Honor.

THE COURT: Then the Court will be in recess subject to call.

(Recess at 9:35 a.m.)

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REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Dated at Denver, Colorado, this 30th day of May, 1997.

Paul Zuckerman