

THE COURT: Members of the jury, good morning.

JURORS: Good morning.

THE COURT: As we indicated what our schedule would be when we recessed on Friday, we are now going forward with the closing arguments of counsel, after which I will instruct you with respect to the law. And again, the burden of proof here, generally speaking -- although I'll talk about the burden of proof in the instructions -- being on the Government, we first hear from Government's counsel, then defense counsel, and then Government counsel in rebuttal, just as we did at the other stage of the trial.

So at this time I will call on Miss Wilkinson.

CLOSING ARGUMENT

MS. WILKINSON: Thank you, your Honor.

Good morning, ladies and gentlemen.

JURORS: Good morning.

MS. WILKINSON: May it please the Court, counsel.

Well, it's almost over. You've been here for a very long time. Some of you, in fact one of you, since September 30, when we first began jury selection. You've listened to a lot of evidence, and you've made some very difficult decisions, and you found Mr. Terry Nichols guilty of Count One of the conspiracy. You found him guilty of participating in that conspiracy, and now you spent the last week listening to some very difficult evidence in what we call the penalty phase of this proceeding. I want to spend this morning -- and I'm going to talk to you for about an hour this morning -- talking about choices, choices that Terry Nichols made and choices that you will have to make this week.

Terry Nichols made choices starting back in September of 1994 when he was with Timothy McVeigh and Timothy McVeigh asked him to join the conspiracy to bomb the Murrah Building and the people inside of it. Everyone else said no to Timothy McVeigh. Terry Nichols said yes. He made a choice that day. He made a knowing and willing choice, and you found that he made that choice to participate in the conspiracy.

He made that choice not only to make that agreement to bomb that building and the people inside of it, but he made a choice to assist Timothy McVeigh and to make their goal a reality.

If Terry Nichols had said no to Timothy McVeigh, we might never be here, we might have never been here. No one else had said yes to Timothy McVeigh but Terry Nichols; and because of that, because of the choices that Terry Nichols made, there are 168 consequences to his choices. 168 dead people in Oklahoma City within seconds of 9:02 a.m. It is because of Terry Nichols' choices that those 168 people were killed.

Your final decision that you will make when the lawyers are finished talking and the Judge instructs you on the law will be one that you make as the conscience of this community. You must decide what the appropriate punishment is for someone who knowingly and intentionally agreed to use a weapon of mass destruction against the Murrah Building and the people inside of it. You must decide what the appropriate

punishment is for someone who knew that the deaths were foreseeable and for someone who participated in a crime where 168 deaths resulted. You must decide what should happen to Terry Nichols.

Each and every one of you told us during jury selection that you believe that the death penalty was an appropriate punishment in certain circumstances. Now it is time for you to set aside your emotions, be they sympathy, compassion, or fear, and make a decision about Terry Nichols based only on the facts.

When you do that, when you find that Terry Nichols had the intent necessary, when you find that he knowingly created a grave risk of harm, and when you find that the crime of conspiracy resulted in the deaths of 168 innocent men, women, and children, and you balance that against Terry Nichols' life, you will see that a sentence of death is just and is a reasoned response of the moral conscience of our community.

This decision is obviously a very important one and a very difficult one, but you are not alone when you make it. A sentencing decision such as this unfortunately does not come with a formula that you can follow to determine a just result. But there is a framework. There is a framework that the Judge will describe to you when he gives you the law and a framework that you will see in the special verdict form that you will be given for your deliberations. There are specific steps that you must follow before you ever get to the final decision of determining whether Terry Nichols' sentence should be life or death.

But you will get there. And when you get there, you will have to make a final decision as the Judge has instructed you previously. You must make a moral judgment about the worth of a specific life balanced against the societal value of a deserved punishment. That is your duty and your obligation as jurors representing the conscience of our community.

But this decision that you make is not one that you will make in a vacuum. The citizens of this country have already spoken. The citizens that you represent as the conscience of the community have already said that the death penalty is appropriate in certain admitted circumstances, and our community has already spoken about the potential penalties for this specific crime. They have provided for the possibility of a death sentence when someone knowingly and intentionally conspires to use a weapon of mass destruction where deaths resulted. That is what you found already in this case.

Anyone who participates in a conspiracy to use a weapon of mass destruction and against the people inside of it faces the possibility of the death penalty. Therefore, it's your obligation to consider all of the possible penalties with an open mind. You took an oath at the beginning of this case to have an open mind throughout the entire guilt phase and the penalty phase, and that is still your obligation today.

You must carry out your duty in making the findings on the special verdict form and weighing the sentence of life or death consistent with that oath. It would be wrong for you to eliminate any of the possible penalties based only on your

eliminate any of the possible penalties based only on your verdict.

The Court has repeatedly told you that you have received the penalty-phase information because you found Terry Nichols guilty of knowingly and voluntarily agreeing to use an explosive bomb in a truck as a weapon of mass destruction against a federal building and the people inside of it. You were the ones that found that deaths were foreseeable and that deaths resulted. That is the verdict that you rendered based on the law as the Court instructed you. No one can question that verdict, nor can any of you change it. And it is because of those findings that we argue to you today that the death penalty is a just punishment for Terry Nichols.

With your verdict of guilt beyond a reasonable doubt for Count One, the conspiracy to use the weapon of mass destruction against the Alfred P. Murrah Building and the people inside of it, you had to make several findings. You had to make several findings that were set forth for you in the Court's instructions.

First, you found that Terry Nichols knowingly and deliberately agreed to use a weapon of mass destruction against the Alfred P. Murrah Building in Oklahoma City and the persons inside of it. The Judge instructed you that you had to make that finding beyond a reasonable doubt before you could convict Terry Nichols of Count One, and you did that. Terry Nichols knew what the agreement was. It was to bomb the Alfred P. Murrah Building and the people inside of it. He and Timothy McVeigh agreed to do that.

MR. TIGAR: Your Honor, I'm going to object to mischaracterization of the Court's instructions.

THE COURT: Well, the jury will have the original instructions.

You'll have the original instructions in front of you in your deliberations.

So you may proceed.

MS. WILKINSON: Thank you.

Second, you found that Terry Nichols knew the purpose or the goal of the agreement and that he deliberately entered into that agreement intending in some way to accomplish the goal. The Judge instructed you on that, and you had to make that finding beyond a reasonable doubt before you could find Terry Nichols guilty of Count One.

Third, you had to find that the crime substantially affected interstate commerce.

If there is any question about the law that you had to apply to find Terry Nichols guilty beyond a reasonable doubt, as the Court said, you will have a copy of the instructions, and you can refer to them at any time during your deliberations in this phase.

You made two additional findings when you returned your verdict. And you said, one, that the deaths in this case were foreseeable; two, that the deaths in fact resulted from the crime of conspiracy.

We know that the foreseeability of the deaths is obvious from the agreement to bomb the building and the people inside of it. We submit to you, ladies and gentlemen, no one

could not have contemplated the possible deaths of the people inside the building when they agreed to use a weapon of mass destruction. You found that Terry Nichols and Timothy McVeigh agreed to use that weapon of mass destruction. It wasn't a cherry bomb. It wasn't a bottle rocket. This was a 4,000-pound bomb of -- weapon of mass destruction. And it was intended for use against the Murrah Building and the people that worked there. That is the agreement that you found, and Terry Nichols knew that deaths could result from that agreement.

To carry out your duties during this phase, you must also follow the law as the Judge instructs you. And he will tell you and you will see from the special findings form that you have to make a series of decisions that I have just referred to. The findings are the framework that you must use to make your decision. And because this framework is so important, I want to spend my time reviewing with you the evidence and the information that you've received that you should consider when you follow his Honor's instructions.

First, you should know that you are permitted to consider all of the information from the guilt phase. You can consider that for the sentencing decisions. And you probably have noticed during this past week that neither the defense nor the Government presented evidence during the penalty phase on all of the aggravating and mitigating factors that you will see in your verdict form. Neither side has to. We don't have to do that because you are permitted to consider the evidence that you have already heard. So even though the defense did not present any evidence in the penalty argument about Terry Nichols' role in the offense, they can still argue that as a mitigating factor. So, too, can we argue that the deaths or injuries resulting in the deaths occurred from a crime of transporting explosives over state lines, even though we did not present any of that evidence during the penalty phase.

I say this just so you know there's no confusion -- all of the evidence that you've already considered in the guilt phase, you can apply to your decisions in sentencing.

But before you all get to consider the aggravating and the mitigating factors that you must balance and decide what the just punishment is, there are findings that you must make and findings that I want to review with you. You must make findings about the intent, the intent of Terry Nichols. And in this case, there are two different intent findings that you must review.

The first -- and you can find either one or both -- the first is that Terry Nichols intentionally participated in an act. You will hear from his Honor, I believe, that an act is a conspiracy, and of course that makes sense because someone makes an agreement and we punish someone for a conspiracy, so a conspiracy is an act. And you know that Terry Nichols intentionally participated in the conspiracy, so you can find that Terry Nichols intentionally participated in an act.

The next requirement is that he did that contemplating that the life of a person would be taken. You have already found that the deaths were foreseeable. That is a sufficient

basis to find that Terry Nichols contemplated that the life of a person would be taken. But you can also use your common sense. You found that he knowingly and willingly agreed to use that bomb against not only the building but the people inside of it. What in the world did he think that bomb would do to the people inside of the Murrah Building?

He knew that death was a possibility, and he didn't care.

The second portion of that intent requirement, which you can find, is that Terry Nichols intended that lethal force would be used against a person and that the victims died as a result. Again, you've already found that Terry Nichols agreed to use a weapon of mass destruction. Your common sense tells you that a weapon of mass destruction is lethal force. He knew that would be used against a person because he agreed to use that weapon of mass destruction against the Murrah Building and the people inside of it. And you have already found that the victims died as a result of that act, that act being the conspiracy.

So you should have no difficulty, ladies and gentlemen, finding the intent as described in the first intent requirement, either as contemplating the life of a person would be taken or that lethal force would be used against a person and that someone would die as a result.

The second intent requirement or finding that you can make is that Terry Nichols intentionally and specifically engaged in an act of violence. Well, you know he intentionally and specifically agreed to conspire with Timothy McVeigh. You already made that finding. The question is: What is an act of violence? The Court will give you instructions on this also and tell you that an act of violence can be a conspiracy.

We ask you to find that a conspiracy to use a bomb against a building and people is an act of violence. If that is not a violent conspiracy, then what is? The only purpose of Terry Nichols' conspiracy with Timothy McVeigh was to destroy the Murrah Building and the people inside of it. That was what they intended to do. That was why they agreed to work together. Terry Nichols engaged in an act of violence on the day that he and Timothy McVeigh agreed to bomb the Murrah Building.

Once you find that, you must find that he knew that the act -- that is, the conspiracy -- created a grave risk of death to a person other than the person who is participating in the event, or the offense, such that that constituted what we call a reckless disregard for human life, and a victim died as a result.

A grave risk of death. Did the conspiracy create a grave risk of death? You know from all of the evidence that we presented to you in the guilt phase and the penalty phase, and from the evidence that Mr. Nichols presented, that he knew that a mass -- a weapon of mass destruction used against the Murrah Building could create a grave risk of death. He admitted to the FBI that he knew how to build bombs. He admitted that he knew what ammonium nitrate and fuel oil could do. And he had agreed to use that weapon against the Alfred P. Murrah Building and the people inside of it.

But if there was anything that showed you that he

But if there was anything that showed you that he knew the grave risk of death that would be created, it was his own brother Les Nichols. He saw his own brother almost die as a result of a fuel blast. Les Nichols suffered horribly and almost died as a result of those blast injuries. Terry Nichols was there by his side. He knew up close and personal the horrors that one suffers as a result of a fuel explosion. A bomb of ammonium nitrate and fuel of 4,000 pounds could only be worse. You will recall the scars on Les Nichols' face, the burns and the skin grafts that he had. Terry Nichols saw those scars.

How can he tell Royia Sims who looked like this before the blast and looked like this after that he had no idea that placing a weapon of mass destruction in front of the Alfred P. Murrah Building would make her go from this to this? He knew the grave risk of death. Royia Sims almost died that day.

You heard from Melissa Webster that she literally saved Royia Sims' life by putting her in the ambulance instead of tagging her for dead as everyone else had instructed her to do. Royia Sims suffered the grave risk of death.

Terry Nichols cannot say that he did not know that a massive truck bomb used against the Alfred P. Murrah Building would create a grave risk of harm and death for anyone in the vicinity of that truck bomb.

You must also find that he did this with a reckless disregard for human life. Well, I submit to you that knowing what he knew about his own brother, knowing what he knew about bombs, Terry Nichols' picture should be in the dictionary next to the words "reckless disregard." He did not care about the consequences of his choices. He did not care who lived and who died.

And as you found, victims did die as a result of his conspiracy. So when you go back and you review the special verdict form, find Terry Nichols had the intent as set forth by his Honor in each and every instance. The findings that you've already made in this case make it easy for you to find that Terry Nichols specifically engaged in a conspiracy -- violent conspiracy; that he created the grave risk of death; and that he had reckless disregard for human life.

Once you make those findings, your next step will be to analyze what we call the statutory aggravating factors, and those are the factors that the Government presents to you to show you why Terry Nichols' sentence should be death. All of those factors, we submit to you, have been proven beyond a reasonable doubt. The first one is that death or injuries resulting in death occurred during the commission of the offense of transporting explosives in interstate commerce, which really just means transporting explosives over state line.

As we review the evidence for that, we must look back at the guilt phase, evidence that was presented to you, but looking back at it in light of the findings that you've already made, in light of the verdict. You have already said that Terry Nichols knowingly agreed to bomb the Alfred P. Murrah Building and the people inside of it, so let's review what he did in light of that.

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He knew in the fall of 1994 what the goal of the conspiracy was, and you found that he joined that conspiracy to help accomplish the goal. So what did he do knowing that's what he and Timothy McVeigh intended to do? He bought 4,000 pounds of ammonium nitrate. He stole explosives from the quarry. He transported those explosives to Arizona. He transported those explosives later back from Arizona to Kansas. And finally, just three days before the bombing, he drove to Oklahoma City to stash the getaway car with Timothy McVeigh. Three days before the bombing, he was in the city in which he knew was the target of the bombing.

Your findings show that Terry Nichols agreed to bomb the Alfred P. Murrah Building, not just the federal building, but the Alfred P. Murrah Building. So he was in that city three days before the bombing, knowing exactly what Timothy McVeigh intended to do.

When he left that getaway car there with Timothy McVeigh and drove McVeigh back to Kansas, he was assisting Timothy McVeigh in the most basic way in transporting those explosives on April 19. Timothy McVeigh was able to drive that Ryder truck from Kansas to Oklahoma City on April 19 because his car, his getaway car, was left there. He was able to cross state lines with 4,000 -- with a 4,000-pound truck bomb because Terry Nichols helped him just three days before.

Now, the Judge will instruct you that you do not have to find that Terry Nichols himself transported the explosives. He could have done something to assist Timothy McVeigh, and that is enough to find this aggravating factor beyond a reasonable doubt. But you can also find that he transported explosives in the fall of 1994 with the knowledge and intent that they would be used unlawfully to damage or destroy any building or property. Well, you know Terry Nichols did that because you found that he knew what the goal of the conspiracy was. The goal was to bomb the Alfred P. Murrah Building and the people inside of it. So in the fall of 1994 when he transported explosives for Terry Nichols -- for Timothy McVeigh, he knew that those explosives would be used for an unlawful purpose and for destroying a building.

So you can find either. You can find that Terry Nichols, just days before the bombing, assisted Timothy McVeigh with the transportation of the explosives by helping him stash the getaway car, or you can find that he transported explosives himself in the fall of 1994 in furtherance of the conspiracy.

The second statutory aggravating factor that you'll have to look at is that in the commission of the conspiracy offense, Terry Nichols knowingly created a grave risk of death to one or more persons in addition to the actual victims; that is, that people who weren't killed were faced with the grave risk of death. You know that Terry Nichols didn't create this grave risk of death by accident or mistake. He knew there was a grave risk of death just by virtue of the size of the bomb.

He purchased 4,000 pounds of ammonium nitrate. He assisted Timothy McVeigh in obtaining 1500 pounds of nitromethane. Now, knowingly creating that grave risk of death is not the same as intending the deaths of the individuals.

Terry Nichols doesn't need to intend to kill the victims to create that grave risk of harm. Terry Nichols did create that grave risk of harm when he participated in the conspiracy, and that grave risk of harm actually occurred when Timothy McVeigh detonated that bomb outside the Alfred P. Murrah Building at 9:02 a.m.

You heard from numerous survivors during this penalty phase as well as Sue Mallonee from the Oklahoma Department of Public Health who told you about the grave risk of death that hundreds of people faced on the day of the explosion.

You heard the story of course of Royia Sims. But you also heard from Dr. Andy Sullivan who told you about Daina Bradley, the woman who was trapped in the rubble, about to die, her leg crushed under thousands and thousands of pounds of rubble. Dr. Sullivan himself was scared, afraid the building would come down on both of them. They both faced the grave risk of death that day. They faced it because of Terry's indiscrim -- Terry Nichols' indiscriminate actions. He and Timothy McVeigh didn't care how that building came down, but they wanted to destroy the Alfred P. Murrah Building and the people inside of it.

Luckily for Daina Bradley, Dr. Andrew Sullivan was a hero that day. He stayed in that little hole, and he described to you quite graphically, was able to amputate Miss Bradley's leg and remove her from the building. She survived the grave risk of death, but her family did not. She lost her two children and her mother, and her sister suffered serious injuries, all because Terry Nichols created the grave risk of death when he agreed with Timothy McVeigh to bomb the Alfred P. Murrah Building.

That aggravating factor, we submit to you, ladies and gentlemen, was proven beyond any doubt.

The final statutory aggravating factor that you will review when you deliberate together is that Terry Nichols committed the conspiracy offense of a substantial planning and premeditation to create an act of terrorism. Again, this one is almost self-explanatory. Terry Nichols and Timothy McVeigh agreed to bomb a federal building and to use a weapon of mass destruction against the people inside of it. That is plain and simple an act of terrorism, indiscriminate bombing and killing against not only men and women of the federal government, but against innocent civilians, children, and babies.

Terry Nichols participated in the substantial planning and premeditation because he agreed almost seven months before the bombing to assist Timothy McVeigh with their criminal conspiracy. Terry Nichols back in the fall of 1994 plotted and planned with Timothy McVeigh. He quit his job, he joined forces with Mr. McVeigh and in a little less than five weeks had bought or obtained all the components that they needed to bomb the Murrah Building and the people inside of it.

But you know that Terry Nichols engaged in substantial planning and premeditation during the conspiracy because of the letter that he wrote on November 5 to his cohort in crime, Timothy McVeigh. Terry Nichols was so concerned about the planning and the plotting of this crime that he let -- he set forth the circumstances for the continuation of that plot even

forth the circumstances for the continuation of that plot even in the event of his own death. You can't get much more planning and premeditation than that.

And when you hear the testimony of the mitigating factors of Mr. Nichols, that he was a good father, that he now -- that he, now that's he's in prison that he's been caught for his crime, has written letters to his son Josh about the three Rs, think about where he was on November 5, November 7, and November 22, when he wrote those letters to Timothy McVeigh and Lana Padilla. As Mr. Mackey pointed out to you in closing rebuttal argument, there is no letter from Terry Nichols to his son Joshua back then about the importance of doing his best and about reading, writing, and arithmetic.

When Terry Nichols thought that he might never return to the United States, he thought about only one thing. He thought about Timothy McVeigh and their plot to bomb the Murrah Building. And you have seen that letter -- and you can look at it again if you like -- where Terry Nichols tells Timothy McVeigh where the storage sheds are, where the stolen goods are stored, and how he might keep those storage sheds until the spring of 1995 when he knew Timothy McVeigh would detonate that bomb in front of the Alfred P. Murrah Building.

That factor of premeditation and planning as to the conspiracy, which is the only offense that you are considering in this penalty phase, was proven beyond any doubt.

Once you analyze those three, as I said, statutory factors, there are three additional non-statutory aggravating factors that we present to you. And I suggest that these three factors will not be disputed. The first one is that the conspiracy offense in question was committed by Terry Nichols and it resulted in the deaths of 168 people. There's no doubt whatsoever that the conspiracy resulted in the deaths of 168 people. And that is the true horror of Terry Nichols' crime to plot the bombing of the Murrah Building. His plot, his criminal agreement, and his actions with Timothy McVeigh resulted in the largest number of deaths from any crime in the history of America.

Not only can you find that aggravating factor beyond any possible doubt, we submit that you should weigh that very heavily when you consider all of the aggravating and mitigating factors you must analyze in determining Mr. Nichols' sentence. Terry Nichols agreed to and participated in the plot to use the weapon of mass destruction, and whether he intended that 168 people die is irrelevant to this factor. The point is he participated in the offense, the deaths resulted.

You have already found in the guilt phase that deaths resulted from the conspiracy. This is why we have the possibility of a death sentence for a crime such as this one. Terry Nichols conspired to do something that can only be described as evil. He agreed to use a truck bomb against a building and against people who had no idea; and he didn't care, based on that agreement, whether those people lived or died.

I ask you, isn't 168 incidents of reckless disregard for another person's life enough? If Terry Nichols didn't know that there was a day-care center in the building and he agreed to bomb that building, he should have known. If he did not

care enough to find out who the targets were, should he somehow be rewarded with his life? No. He didn't have to agree with Timothy McVeigh to bomb the Alfred P. Murrah Building and the people inside of it. Others said no to Timothy McVeigh. Terry Nichols said yes.

In the end when you weigh these factors, ask yourselves if as the conscience of the community you want to tell Terry Nichols and others that his reckless disregard for 168 human lives somehow makes his participation in this crime any less heinous.

Terry Nichols didn't care who his victims were, and he did not take one step to ensure that the results of his criminal conspiracy would not total 168 deaths and 500 wounded and injured. He didn't care. The results of his acts are not disputed. You found the 168 deaths resulted -- or you found that deaths resulted from his conspiracy. His responsibility is not diminished in any way, and you should find that this factor weighs heavy on the scales of justice when you decide what the just and reasoned and moral punishment is for a man who commits this crime.

The second factor, the non-statutory aggravating factor, you must weigh is that the committing of this conspiracy offense, Terry Nichols caused serious physical and emotional injury, including maiming, disfigurement, and permanent disability, to numerous individuals. Again, Terry Nichols' actions caused all of these injuries. And the key word here is "caused." That word does not mean specific intent to do so. It is just like the deaths that resulted from the conspiracy.

The injuries of Sue Walton, who two-and-a-half years ago -- who -- excuse me, who two-and-a-half years later still wears that contraption on her leg that looks like a torture device, the injuries suffered by Captain Randy Norfleet that ended his career as a Marine pilot were the result of Terry Nichols' agreement and actions to bomb the Murrah Building and the people inside of it.

And the scars on Sergeant Titsworth's face and heart that he will carry with him as he lives with the reality that not only did he suffer serious injuries during his first day at the Murrah Building, but that he lost his youngest daughter, Kayla, four, even the emotional injuries to families, friends, rescuers, and survivors described for you were caused by Terry Nichols' choices and by Terry Nichols' actions.

Alice Dennison, who you may recall is the daughter of Secret Service Agent Mickey Maroney, has a heart that is now broken because of the loss of the one man she told you promised would never break her heart.

The emotional injuries to people like John Youngblood, Jr., and Megan Allen who lost their fathers and go on in life without the guidance and love that only parents can give them, those are the results of Terry Nichols' choices.

You heard information on this aggravating factor not to generate any undue sadness or sympathy for the families and the survivors but to give you the facts that resulted from Terry Nichols' actions. As difficult as it was for you to hear

some of these stories, it's not the emotion that you must rely on to make your decision.

But in some way, it is the facts of this case that are the most tragic and long-lasting results of Terry Nichols' conspiracy. The facts are that 168 people were killed. The facts are that mothers and fathers were taken from their children. The reality is sisters and brothers lost their siblings in the blast. And the grim and unbelievable fact of scores of parents who lost a total of 19 children from the age of four months to five years in the bombing, that is not emotion, unfortunately, that is not a nightmare. Those are facts, facts you must consider when you determine if Terry Nichols should be sentenced to life or death.

When you go back to deliberate and you put the emotion aside, what you will be left with are all of those facts, all of those facts that were presented to you, as we are permitted to do, to prove those aggravating factors beyond any possible doubt.

The final aggravating factor that we have proven to you is that committing the conspiracy, Terry Nichols caused several injuries and losses suffered by the victims' families. This aggravating factor we commonly refer to as "victim impact" is the final aggravating factor we ask you to consider. But here again, there is no dispute that the conspiracy that Terry Nichols participated in caused the severe injuries and losses to the victims' families. You've already found that the deaths were foreseeable and that the deaths resulted from this conspiracy, so obviously the injuries also resulted from this conspiracy.

But amazingly enough, after all you heard during the three days of the Government's penalty-phase information, it was just a glimpse into the pain and suffering these families have experienced. At times I'm sure it was more than you thought you could hear. Each story was sad and poignant in its own way. But the fact is the losses these families suffered are realities of this kind of horrible crime. There are so many terrible effects of a crime to bomb a federal building and the people inside of it. These are the consequences of Terry Nichols' choices.

As one of you has said during jury selection, whoever participated in this crime played judge, jury, and executioner and had to know about the devastation it would cause.

MR. TIGAR: Objection, your Honor.

THE COURT: Yes, we'll strike that reference.

MS. WILKINSON: The devastation began -- or the actual devastation began on April 19, 1995, but it continues today. And it will be in the hearts of all Americans for many years to come. The impact on the families, the community, and our country cannot be underestimated.

A few of the stories you heard in the past few days represent the impact of this crime on all of our citizens, the youngest ones like Don Ferrell's granddaughter who says when she plays with her dolls that they're going to Oklahoma City

and they'll be killed by a bomb, or Glen Westberry's five-year-old son who asked his mother to run a red light so he could die and go to heaven to be with his Paw Paw, older children like Karla Wade who described the effect of the loss of her father with so many eloquent words and also with the sadness of feeling like a 40-year-old woman in a 23-year-old body, parents like Constance Favourite who felt like the death of her daughter, Lakesha Levy, happened twice, once when she died in the bombing and the second time when she had to be exhumed and buried again, and even grandparents like Carl Brown who lost his daughter Dana and his grandson, Anthony Cooper, and he also lost that day his will and desire to carve toys for the only grandchild he had.

The impact on these people was quite personal, but there's also been an impact on every mother or father who thinks about sending their child to day care. It causes us to look twice when we see an unattended Ryder truck outside a building, and it makes us all wonder about the security of our own citizens who were never before the victims of an act of terrorism by our fellow Americans.

These are all the results of Terry Nichols' crime. Sometimes it seems almost too hard to imagine and comprehend the full extent of the damage, death, and destruction that occurred. The three days of testimony gave you a glimpse. But don't forget, it was only a glimpse of the suffering and loss that resulted from Terry Nichols' actions. This was a crime so grave, so far-reaching that we could not bring you every victim, every survivor, and every family member that was affected by this tragedy. You saw just a few, unfortunately, who described for you in their own words the impact of this crime on them, a legitimate factor for you to consider when you determine Terry Nichols' sentence.

But please recall that this tragedy did not start on April 19, 1995. It began when Terry Nichols said yes to Timothy McVeigh. It began when Terry Nichols knowingly and deliberately agreed to use the weapon of mass destruction against the Murrah Building and the people inside of it. The crime he agreed to commit happened. The consequences of that crime are before you, and you must analyze the facts that resulted when you weigh them against the mitigating factors that the defense has presented to you.

You will see when you look at the special verdict form that the defense has presented 14 mitigating factors for you to consider, but these mitigating factors are different from aggravating factors. Unlike the aggravating factors, you and your fellow jurors do not have to agree that the defendant proved each factor. The standard is that the defense has the burden of proof to show by a preponderance of the evidence that the mitigating factors have been proven. And some of these factors we do not dispute. Terry Nichols has no criminal record, and all 12 of you should so find. But there is a serious dispute about some of the factors, and I wanted to spend a few minutes addressing some of those factors that we do not think Terry Nichols has proved.

The Judge will tell you that the burden is on the defendant to prove by a preponderance of the evidence each of

adequate to prove by a preponderance of the evidence each of the mitigating factors has been established. Some of you may agree. Some of you may disagree. The special findings form allows you to record the number of jurors that agree that that factor was found. Of course that does not mean that every mitigating factor has to be given any particular weight. One of you may believe one factor was proven but may decide that it doesn't carry much weight when you balance those factors against the aggravating ones.

No one in this courtroom will ever tell you that you must weigh the factors evenly, and that is the difficult part about your decision. You all must decide together and individually the weight you will give those factors and then how you weigh one factor against another.

For example, if you find that Terry Nichols had no criminal record, that doesn't mean it has to be a significant factor in your weighing process. You all will decide what weight to give each factor that is proven. But I want to discuss the factors we believe have not been proven and that none of you should find.

The first is that Terry Nichols' participation in the conspiracy was relatively minor. The question is: Did the defense prove by a preponderance of the evidence that Terry Nichols' participation in the conspiracy, not the other crimes, but in the conspiracy, was relatively minor?

We submit to you that Terry Nichols was a major participant in the conspiracy. That is the relevant offense here. Not Counts Two or Three, but the participation in the conspiracy. You have already found that he agreed with Timothy McVeigh, and now you must look at what he did knowing that he made that agreement.

He agreed almost seven months before to bomb the Alfred P. Murrah Building and the people inside of it. He bought 4,000 pounds of ammonium nitrate almost six months before. He stole explosives around that time and assisted with the purchase of 1500 pounds of nitromethane. He wrote the letter five months before. He robbed Roger Moore and kept stolen property in his house. But perhaps most importantly, he knew about the plan for months and months. He had plenty of time to change his mind. And he didn't.

Indeed, three days before the bombing, he went to Oklahoma City, the target of their conspiracy; and that evening, as he told the FBI, he drove by the Alfred P. Murrah Building several times. He could have changed his mind at that moment. He could see that glass wall facing 5th Street as he drove by the Alfred P. Murrah Building. He knew the grave risk of death it would create to put a truck bomb in front of that building, glass shards going everywhere, concrete tumbling down on the people inside of it. He saw that, knowing the agreement they had three days before the bombing; and he did nothing.

In fact, he did everything to cover his tracks. You know -- and it's not been disputed because Marife Nichols told you -- he lied to his own family about where he was going. That shows you he knew what he was doing was wrong. He didn't forget that he and Timothy McVeigh had agreed to bomb the Murrah Building in April of 1995. He knew that was the target of destruction. And so he didn't want his wife to have any

idea that he had been in that city in the days before the bombing. So he lied to his wife that he now tells you he's such a loving husband to. And he lied to his son Josh and told him that even though it was the day before Josh was leaving to go home, he couldn't ride with him to Omaha because he didn't know if there would be enough room and what kind of trouble Timothy McVeigh was in.

His state of mind based on your findings is clear that day. He knew that he was going to help Timothy McVeigh leave the getaway car in Oklahoma City, and he didn't care. But even up to 24 hours before the bombing, he helped Timothy McVeigh.

We proved to you that Terry Nichols built the bomb at Geary Lake with Timothy McVeigh and that he lied about his whereabouts that morning on April 18. Terry Nichols told the FBI that he loaned Timothy McVeigh his car. At this point, it doesn't matter which one you believe. Either way, based on your finding that he knew the goal of the conspiracy, he was assisting Timothy McVeigh with the plot. He knew that Timothy McVeigh was going to bomb the Alfred P. Murrah Building, and it didn't matter if he knew when or at what time. He knew that was a goal; and on April 18, he built the bomb, or according to Mr. Nichols, loaned his truck to Timothy McVeigh.

The months of the agreement, the actions that he took, and all of the waiting show you that Terry Nichols was a substantial player in this conspiracy. Terry Nichols did many things throughout the fall and spring of 1995. Do not say in your verdict that Terry Nichols had a relatively minor role in this conspiracy.

The second mitigating factor that we dispute is that another defendant or defendant that's equally culpable in this crime will not be punished by death. You know that's not true for Timothy McVeigh. And the only other individual who you know about this crime -- or who knew about this crime was Michael Fortier. He said no to Timothy McVeigh, and Timothy McVeigh left Arizona. Terry Nichols said yes, and Timothy McVeigh stayed in Kansas in the fall of 1994 and stored all of the bomb components near Terry Nichols until the day before the bombing. Michael Fortier is not equally culpable to Terry Nichols.

But don't get me wrong. Michael Fortier did an unforgivable thing. When he failed to report the bombing before it occurred, he did something that no one should ever do. But that is not the crime that we are here to discuss. We are here to discuss the conspiracy, the agreement, and the actions to plot the bombing of the Murrah Building.

What Terry Nichols did that Michael Fortier did not do was agree to bomb the building and the people inside of it and then take action to participate in that conspiracy. The defense has not met its burden of proving that anyone was equally culpable of the crime, not Michael Fortier and certainly not any of the John Doe 2 suspects.

First, you should not find that any other suspect has been proven because there is no evidence as to the actual

identity of any John Doe 2 sighting. That would be pure speculation on your part and inappropriate. And there has been no evidence that if this John Doe 2 were ever identified that he would not get the death penalty, so it would be wrong for you to find that someone who was equally culpable for this crime was not going to receive the death penalty.

The final factor or mitigating factor that I want to discuss with you this morning is the one that says Terry Nichols was under unusual and substantial duress. There is no basis for that finding. The crime we are discussing here is conspiracy. No one forced Terry Nichols to agree to bomb the building and the people inside of it; and in the fall of 1994, Terry Nichols wasn't under any duress. Terry Nichols had a good job. He had a wife and a family. He chose, he made the choice, to quit his job, send his family away, and conspire with Timothy McVeigh. That is not duress. Where is the evidence that Terry Nichols was under this supposed unusual and substantial duress? Not just duress, but unusual and substantial duress. No one held a gun to his head and said: Agree to bomb the building, or we'll kill you. He agreed in the fall on his own. You found that he knowingly and deliberately entered that conspiracy. That defies a finding of duress.

He also spent the fall and the spring participating in that conspiracy. Do not tell the community that you represent that Terry Nichols was forced to commit the crime of conspiracy to bomb the Murrah Building and the people inside of it. No one could have forced Terry Nichols to agree to that plan.

Terry Nichols could have done what everyone else did when Tim McVeigh discussed taking action against the government. They said no. Terry Nichols said yes. And if there was any evidence that Terry Nichols was under unusual and substantial duress, he had every opportunity to do two things: He could have called the police and reported the crime. He could have told the police where Timothy McVeigh was, where the bomb components were, and he could have stopped this crime from ever happening. And that would have ended any supposed duress that he was under.

But he got a second opportunity. On April 21, he knew that Timothy McVeigh was in custody. He spoke to the FBI for nine-and-a-half hours, and he didn't mention one word about unusual or substantial duress. He didn't say that he was forced to do anything. In fact, he lied about what he did, and he lied about Timothy McVeigh. He said he trusted Timothy McVeigh to live up to his agreements. If there had been any duress, any force used on Terry Nichols to agree to bomb the Murrah Building and the people inside of it, he could have reported it when he knew Timothy McVeigh was safely in federal custody, and he did not.

How can you permit a defendant who had every opportunity to tell the police that he was forced to commit this crime to now claim, two-and-a-half years later, that he was under unusual and substantial duress? You know what those words mean. They mean exactly what you think they mean. There was no evidence that Timothy McVeigh held a gun to Terry Nichols' head for seven months. Terry Nichols had opportunity

NICHOLS head for seven months. Terry Nichols had opportunity after opportunity to get out of the conspiracy and report the crime to the authorities.

He never did it because he wasn't under any duress, either usual or unusual, substantial or insubstantial. Terry Nichols, as you found, knowingly and deliberately entered this conspiracy.

Now, many of the other factors that are set forth by the defense are debatable, but I will leave those up to you. You all can decide among yourselves who believes those findings or those factors were proven and who does not. But just remember: As you review what kind of father, husband, and son Terry Nichols was that he deceived everyone around him about his plan to bomb the Murrah Building and his activities with Timothy McVeigh.

Once you go through the process of determining what factors have been proven, then you must sit down and do the most difficult task. You must weigh those factors. Some of you may disagree on the mitigating factors, but what matters is how you weigh those factors and how you determine a just, moral sentence for Terry Nichols.

You were chosen as a body of 12 to make this decision.

Each and every one of you must make a moral judgment. But you are not alone responsible for the decision. Our citizens have decided that 12 people are to make this decision, not one. As one unanimous body, you must decide if a punishment of life or death is warranted for Terry Nichols' crimes and for his life. That is the simple but difficult question you will confront. Confront it together, and remember that you speak as the conscience of the community.

As such, you have the responsibility, the important responsibility, to tell Terry Nichols and the citizens of this country what a just sentence is. You must make that moral judgment about the worth of Terry Nichols' life, balanced against the societal value of the deserved punishment for this crime. And your reasoned judgment must not be arbitrary. You all know that this crime was heinous. You all know that this was a crime against the American citizens, and you all know that the impact of this crime was felt in every corner of our country.

With that in mind, you must look at Terry Nichols, you

must look at his life and the actions that he took. We know that what we're asking you to do is very difficult. But your emotion, your sadness, your sympathy, or your preconceived notions should not affect your moral, reasoned judgment.

Terry Nichols said yes. He made a choice, a knowing, informed choice. He chose with Timothy McVeigh to bomb the Alfred P. Murrah Building with a weapon of mass destruction and use it against the people inside. The consequences of his choices and his actions are 168 dead people and hundreds and thousands of injured. That is the crime that Terry Nichols is

guilty of. When you look at that crime and you look at Terry Nichols, you will see that the just sentence, the sentence based on a moral, reasoned decision, is death.

THE COURT: Members of the jury, we're going to take the recess before hearing from defense counsel. It is a little earlier than our normal time but a more appropriate time to break in. I don't want to interrupt counsel. And we'll be taking our recess for the usual 20-minute period.

But before you go, I just want to explain something with respect to an objection made and sustained by me and the requirement that you disregard the statement, which was when Ms. Wilkinson made a reference to what she remembers one of you may have said in the course of the jury selection. And, of course, we ask each one of you separately and individually a lot of things about what you thought with respect to penalty and sentencing. And I just want to explain that I sustained that objection and you must disregard. It isn't what you said you thought before you came in here. That was a part of the jury selection process. But what is the -- what are the important words for each of you on the jury is what you said in the oath and agreeing in the oath not to go according to what you think the law ought to be but what it is, as I explained it to you and as I will explain it to you in more detail at the conclusion of the arguments.

So I simply want to make it clear the basis for the objection and my sustaining it. No one of you in any way is held to what you said when we were asking you about your attitudes and experiences and beliefs excepting with your understanding and agreement that you will follow the law and decide the case, decide this sentence issue, according to the evidence and the law as I will give it to you, which, of course, will happen after the completion of the arguments. As I said earlier, there will be defense counsel's arguments, and the Government has a rebuttal opportunity; and then I'll instruct you.

And, of course, as you well know, during the time of this recess, you must continue to have open minds. It isn't until you've heard it all that even in your own minds you should address the questions put to you and of course not discuss the case with other jurors or anyone else and continue to avoid things outside the evidence.

So we're going to excuse you now for 20 minutes. You're excused.

(Jury out at 9:52 a.m.)

THE COURT: All right. We'll be in recess. 20 minutes.

(Recess at 9:53 a.m.)

(Reconvened at 10:11 a.m.)

THE COURT: Please be seated.

(Jury in at 10:11 a.m.)

THE COURT: All right. Members of the jury, we're ready to hear from defense counsel.

Mr. Tigar . . .

MR. TIGAR: May it please the Court . . .

THE COURT: Counsel.

CLOSING ARGUMENT

MR. TIGAR: . . . Counsel, Mr. Nichols, members of the jury, just shy of two weeks ago -- it was in the afternoon --

you came in and you rendered a verdict in this case. And since that time, it would come as no surprise to you to know that pundits and hired lawyers and TV-talk-show hosts and lawyers and everybody has tried to figure it out. But the Judge is going to tell you in a few minutes when we're all done that all of that figuring and all of that posturing and all of that parading can't change a fact and it can't change the law. The verdict that you rendered is your verdict. It is final. It is binding on everybody in this courtroom, including the jurors who reached it.

And I am not going to spend any time at all trying to tell you what you decided. I think that would be arrogance for me to tell you what you decided. Rather, I'm going to talk about the things that the Judge will when we're all done here tell you that are yet to be decided, keeping in mind that there is no going back on what's been done.

I won't take long. When we're done here, this time that we've spent together, which has represented an enormous sacrifice, I know, for all of you, will be done and you'll go back to your jobs and back to the community. We'll all go back to our jobs, the prosecutors to other cases, me back to teaching school, Mr. Nichols to a prison, which is the result of the verdict that you already reached, not a pretrial detention facility but a prison. And one of the things we're here to decide today is whether or not in addition to that, beyond that, over and above that, 12 of you should sign a piece of paper that authorizes a sentence of death to be carried out with respect to Mr. Nichols; that authorizes somebody to come get him one day and carry out a sentence that he be put to death.

What you won't see when you go back, by the way, is any of us on this side joining the parade of talk-show hosts and as-told-to books. I think those things are a disgrace to a profession that tolerates them, and I think they are a disgrace to lawyers who do that.

So when I'm done, the prosecutors will get a chance to rebut. We won't have any chance to respond to that. But let me talk about this process.

Your verdict was that Mr. Nichols was guilty of the crime of conspiracy to carry out -- use a weapon of mass destruction; that he was not guilty of use of the weapon of mass destruction; that he was not guilty on Count Three, and then with respect to those eight counts, an acquittal on the first-degree and second-degree murder charges and a conviction on the involuntary manslaughter.

Now, the Judge gave instructions at that time. And as I say, I can't describe for you what it is that you decided, and I don't think it's right for anybody to try to tell you what it is that you decided. The Judge did permit you to convict Mr. Nichols of the crime of conspiracy even if he did not know all the details of the agreement or understanding or even if he played only a minor role so long as he understood the unlawful nature of the plan and voluntarily and intentionally participated in it.

I ask you when you look at the effect of what you decided on what you're going to do now to look back at the instructions that the Court gave you at that time because it

instructions that the Court gave you at that time because it was clear to us, although we might be wrong, that you had read those instructions with extraordinary care and discussed amongst yourselves what those words meant as you were making a decision.

Well, as you discussed what the words meant and then applied them in your decision, that's the decision you made. So you'll have them again so that you can go back and refresh your mind about what it is that was involved in the things that you did and what was involved in the things that you didn't do.

And if you do that, I suggest that you will avoid an error such as the one made no doubt unintentionally by the prosecutor in summing up: The crime he agreed to commit happened. Well, the happening of it, I had always thought, was Count Two and the agreeing part was Count One. But that, as I say, will be before you to decide.

Now, why does the Government want you to reach a verdict of death in this case? Well, they say it is to vindicate some vision of the law. They say it is because of certain facts that they have shown to you.

Let me talk, if I might, about the facts and the law.

The process that you'll get into when you go back into the jury room to deliberate is in three stages. The first stage, as Counsel said, requires you to look at two findings. And unless you are unanimous beyond a reasonable doubt as to these, the process is over -- if you answer no; that is, there is a reasonable doubt. You come back and the Judge sentences on Counts One as he will on Counts Four through Eleven in accordance with the law.

The first of these is "The defendant intentionally participated in an act contemplating that the life of a person or lives of persons would be taken or intending that lethal force would be used against a person."

There was no requirement in your Count One finding that you find intent to kill, and therefore as you consider this, this first issue, you have the freedom given to you by what you understand to be your verdict and by what the law is as the Judge instructed you.

The Government has spent a great deal of time this morning going back over the evidence in the earlier phase of the trial. Well, I'm not going to go back over it with them, but I heard an extraordinary thing. I heard that Government urging you to find beyond a reasonable doubt that this happened based on the assertion which was repeated here that Mr. Nichols helped Mr. McVeigh build a bomb at Geary Lake on April 18, 1995. That assertion, I suggest, is like the 13th stroke of a grandfather clock in the night: It casts doubt not only on itself but upon everything you heard up to that point, because the evidence was initially from Mr. Wahl -- and you'll recall this and you'll have the chance to talk it over -- that there was a blue or a brown pickup out there; that it was parked next to a Ryder truck, and that was -- and Mr. Wahl had plenty of opportunity to observe. And then all of a sudden, that theory of the case that that -- those two trucks had been parked together to build a bomb came crashing down around the prosecutors' ears when it turned out that the description of

prosecutors said when it turned out that the description of the headlights didn't match the kind of a truck that Mr. Nichols had; that in fact you couldn't see the white line of any kind of a camper top on the truck that Mr. Nichols had, and most dramatically of all that for two-and-a-half years the FBI hid from everybody the fact that when Mr. Wahl first described the episode, he said the truck was gray.

I don't want to rehash what we argued about in the guilt phase, but I respectfully suggest to you that this takes you back to that evidence from the prior phase.

Then the Government spent some time in talking about these issues, telling you about Oklahoma City. Well, most of that evidence did come in in the trial of the earlier phase. But you remember at this phase Mr. Norfleet, Randy Norfleet, the Marine. He had been to a prayer breakfast at the Myriad Convention Center near the federal building. He has a 1992 black Ranger pickup truck, a picture of which you saw; and he was in a hurry to get to the office and so he parked in front of the Murrah Building shortly before 9:00 and took the elevator up. And he said he was amazed to find a parking place in front of the Murrah Building at that hour of the morning.

Well, here we are again: How did the Ryder truck that Timothy McVeigh was driving get a place to pull in that wasn't already occupied in front of the Murrah Building at 9:00 in the morning? Well, two witnesses told you that they saw somebody with that Mercury before and shortly after the event so that somebody could go in there and reserve or help to make sure that that parking place would be available.

I'm not going to give my earlier summation again.

You know what you found, you know what the evidence is.

Well, then the second one: "The defendant intentionally and specifically engaged in an act of violence." The Judge will tell that you a conspiracy can be an act of violence but it need not be. That's for you to decide whether you think that's satisfied and beyond a reasonable doubt. That lies within your discretion.

"Knowing that the act created a grave risk of death such that participation constituted a reckless disregard for human life." And there again, you'll go back to the verdicts that you've already reached with respect to resulting death in Counts Four through Eleven and you'll look at the evidence in this case and you'll make a decision.

And, members of the jury, let me be clear again about this: That at that point, if you -- unless you're satisfied beyond a reasonable doubt that the Government has met that burden, the process of deliberation is finished and the Judge is the one that sentenced -- who does the sentencing.

Now, we did not hear in oral argument here -- maybe we'll hear it on rebuttal -- but, you know, you heard 55 witnesses, and the Judge repeatedly cautioned you about those things. And the only one that you heard that had anything to do with Mr. Nichols' intent was Mr. Dilly, William Dilly, who had been with him in the Army. And you remember Mr. Dilly. He came and said, well, everybody looked up to Terry Nichols, including Timothy McVeigh, although that was proof that somehow

that Terry Nichols must have controlled Timothy McVeigh and not the other way around.

Well, cross-examination quickly revealed that Mr. Nichols was only in the Army for a year; that after he got out of the Army, Mr. McVeigh accelerated through the ranks and became a leader in his own right; that he had a storage shed in Junction City; that he bought manuals connected with bombs, and that one of his buddies was Joel Johnson, who had been dishonorably discharged and was also interested in bombs -- facts, by the way, that emerged only when we had produced for us Mr. Dilly's first call to the FBI, not some later interview that was done.

I do think it's important in considering these first two things that evidence that you saw that -- that you didn't see in the first part of the case could be considered; that is to say, when you saw Mr. Nichols and heard about his relation with his family, you might think it unlikely that he would form such an intention, and you could consider that.

I want also to emphasize a distinction that the prosecutors made. Lana Padilla was asked when she was here: Isn't it a fact that Terry Nichols and his son Josh built explosive things together? Yeah, they built pop bottle things, is what that turned out to be, to use on the farm during the time that they were together. To attribute that or to make that equivalent to some plan to blow up a building, we suggest, loses all sense of proportion.

If there had been any more to it than that, believe me, with 30,000 interviews and thousands of agents to conduct them, you would have heard about it. And the burden is theirs, not ours. The burden is theirs and it's beyond a reasonable doubt.

Think, then, back to the witnesses. Passing reference was paid in the prosecutor's summation to the evidence that we put on: Who was with Timothy McVeigh and Eldon Elliott and Vicki Beemer at the Ryder rental place? Who was with Timothy McVeigh since that wasn't Terry Nichols' truck? What about Mr. Farley and what he saw on the evening of the 18th, all those people and the ammonium nitrate fertilizer? What about the scientists with the flooded laboratory? What about the fingerprint man who couldn't count fingerprints? And I'll come to Michael Fortier in a little while.

So we respectfully suggest -- and I won't labor it -- that the answers to the first two questions are that there is a reasonable doubt and that the Judge should sentence on Count One.

Then if you did get past that and say yes, you come to Part 2; and if they don't make it past Part 2, once again it goes back to the Judge.

What's this first aggravator? What's the first one they want you to find beyond a reasonable doubt? During the commission of an offense under 18 U.S.C. Section 844(d), transportation of explosives in interstate commerce for certain purposes. And the Judge will give you detailed instructions about what that means, the intent with which one must act. That's an aggravating circumstance that the Government must

either prove Mr. Nichols did directly or that he aided and abetted. The definition of "aiding and abetting" is the same one that you had in Counts Two and Three and Eight and Four, Five, Six, on through Eleven in the first part of your deliberations. So it's exactly the same definition.

What is the transportation of explosives that is alleged here? Well, is it from Kansas to Arizona? Oh, yes, says the Government. That's Kansas to Arizona. And what is the evidence of that? Why, Michael Fortier, of course.

Or it's from Arizona back to Kansas? And what is the evidence of that? Michael Fortier, of course -- but contradicted by the phone records because the Government's theory was that Mr. Nichols came, got a key from Michael Fortier, got the explosives, and met Tim McVeigh somewhere. And the timing Michael Fortier described was absolutely contradicted by the phone records that show that Mr. Nichols had, at the time Mr. Fortier said he was handing him a key, been calling from Las Vegas, Nevada, which is 90 miles away.

The other evidence: transportation of nitromethane. You heard the evidence, and I'm not going to tell you what to think about it. That was, as I said in opening statement, the man who didn't recognize a pickup truck and said that he sold nitromethane to someone who looked like a possum.

With respect to the events shortly before April 19 -- that is, the three days -- again, you're going to have to consider the relationship between that and the findings you've already made with respect to Counts Two and Three.

Let's look at Michael Fortier for a minute, because it's going to be relevant to some of the things we're talking about here. Did Michael Fortier say no? The Judge instructed you that one can become a member of the conspiracy without any formal kind of agreement or a handshake. Michael Fortier stored explosives, discussed the use of explosives, helped find a storage shed, had explosives, wrapped up explosives in Christmas paper, went to Oklahoma City, cased the building, helped make a false ID, transported stolen weapons, committed theft, had plastic barrels -- I mean, you remember that even on redirect examination Government counsel said, "Well, you didn't have any plastic barrels, did you?"

"I had three of them, three 55-gallon ones I had for my trash."

We're not here to judge Michael Fortier. Michael Fortier will be sentenced to a term of imprisonment by a federal judge, not Judge Matsch, not a judge in Oklahoma, for the things that the Government asked him and required him to plead guilty to. That's what's going to happen to him.

But for the Government to come in here and suggest that beyond a reasonable doubt you should find that Mr. Nichols committed some other crime or aided and abetted it based on the testimony of Michael Fortier is subject, we suggest, to all of the objections that we made the last time that I stood before you and made a closing argument.

Then the second: "The defendant in the commission of the offense knowingly created a grave risk of death"; that is to say that this defendant specifically knowingly wanted -- knowingly created this grave risk of death to others. It isn't simply the risk of death was created -- and let me stop here

simply the risk of death was created and let me stop here and say again what I've said, I think, since the first time I stood here: We know what happened in Oklahoma City. We know the devastation that it caused. We were always and have always been prepared to acknowledge that fact to you. There isn't any question about that. And if you happened to look over at us while we were watching this evidence and think that maybe our reactions weren't what you would have expected, we've seen all the tapes. We've seen all the photographs. We've read all the victims' interviews. For two-and-a-half years, we have dealt on a daily basis with that reality and understood it.

That is not the issue. Anytime you get to an issue in this case that requires you to find that there was devastation, that there was harm, that there was injury, I don't think the evidence permits you to hesitate. But that is not the finding you're being asked to make here. You're being asked to make a finding about Mr. Nichols' relationship to that harm that we all concede existed.

And then the third: "The defendant committed the offense after substantial planning and premeditation to cause the death." The word "premeditation" has been before you before. You have confronted it in your verdict on Counts Four through Eleven.

I'm not going to suggest to you that there is any particular result that is required by your verdict. You know what you decided, and I'm not going to insult you by telling you what you decided. But the Government is asking you to find that beyond a reasonable doubt, and we say to you that there is at least a reasonable doubt as to that.

And so if you do not answer yes unanimously to these three, once again, the matter comes back to Judge Matsch, who sentences Mr. Nichols along with his sentence on Counts Four through Eleven in accordance with the law.

Well, then we get to Part 3. Suppose that you did answer yes beyond a reasonable doubt to the questions on 1. Suppose that you did answer the questions yes beyond a reasonable doubt on Part 2, all three of them -- or any of the three, rather, and you got to this third decision, the weighing process.

Well, Judge Matsch will tell you that although we sometimes call it weighing, that's probably a mistake, because as I said in opening statement, you will be asked to make some decisions and then to reach inside yourselves to go to a place that you have never been, perhaps, and to make a decision. And because it's a place that is so deep inside you, it's not one that I or anyone else is permitted to be. Because it is a decision described as one of morals and conscience, it's one in which I don't think that I or anyone else is permitted to try to instruct you or to guide you or to suggest to you.

These are decisions that you will make. And the interesting thing about them is that when you look at these things, this is something that with respect to mitigating factors, if one juror finds a mitigating factor to have been shown, for that juror, for that one of you, you'd say, I find that and I vote it and I weigh it and that's going to be part of my decision. So unlike this process of looking for some

sort of unanimity or uniformity, individual decision is the watchword. And you'll see that on the form.

And if you get that far, it will be clear that there were 168 people that died. Whether you find causation -- that is to say that his actions caused it or resulted in it -- that's for you to find.

"The defendant caused serious physical and emotional injury." No question there was injury. The question of causation is for you to find.

"By committing the offense, the defendant caused severe injuries." The question of causation is for you to find.

I don't know what to say about the evidence that was introduced here, the 54 people who testified beyond what you already saw. The proceedings were interrupted several times by the Judge reminding us that the evidence that we saw there could only be considered with respect to the third set of decisions, the final set of decisions you were going to reach. And it wasn't -- isn't even relevant for the most part to the earlier decisions that you're going to confront on the verdict form that's in front of you.

And then even if you thought that it was important or relevant for those, it only goes to the question of what harm was caused and not on the question of what Mr. Nichols' role or responsibility or participation was.

I feel now when I think about that evidence as though I'm standing before you and trying to sweep back a tide of anger and grief and vengeance. And I'm given pause by the fact that I feel that way, and I wonder if sometimes you might feel that way. But when I think that, then I think also of the instructions that the Judge is going to give you, because those instructions, as we contemplate this tide of anger and grief and vengeance, can get us all to higher ground, because the instructions will tell you that neither anger nor grief nor vengeance can ever be a part of a decision reached in a case of this kind.

I am, when I say this, not attacking these victims. We know their sacrifice. But we know that with the centuries of our civilization piled so high that we have come a very long way from justice based on vengeance and blood feuds.

This trial was moved from Oklahoma City because, I submit to you, it was thought that even the neighbors of those who lost so much would not do to sit in judgment. And to them, therefore, we can only say when we hear their grief and their anger and their desire for vengeance, "Bless those in need of healing."

But when I talk about this process, I want to say that I believe something else. And I don't want to say it in an effort to reach into a place that I'm not entitled to be but to share with you some thoughts about a concept of justice, to share with you some thoughts that suggest that if you come to this point you would turn your face towards the future and not towards the past.

We presented to you only nine witnesses. We could, as I suppose the other side could for theirs, have presented to

you many, many more. But they told you about Terry Nichols, the son of Robert and Joyce, the brother of Susie and James and Les, the father of Christian and Nicole and Joshua, the husband of Marife, the friend who had helped save the farm of Lyle Rauh. Each of these witnesses lives in a community. And we were trying to give you a picture of what Terry Nichols was like, this -- his life that we're presenting to you.

And I was interested to see the reaction of the prosecutors to that, because I respectfully submit to you that it really wasn't fair. You remember when Donna Carino testified, the midwife, about the home birth, and the prosecutor took out an exhibit that the defense had but didn't offer about whether or not the midwife had signed a form saying there was no chromosomal damage, suggesting to you that maybe there is something irresponsible about having a home birth with a midwife because how could she know that.

Well, I submit that that's not fair. 35 years ago when my son was born at home and the midwife attended, I didn't think I was doing anything wrong; and if I was ever tried for anything, I wouldn't suggest that that is something that ought to be held against one.

MR. MACKEY: Judge, let me interject and object to personal rendition.

THE COURT: Overruled.

MR. TIGAR: Of course, my son did turn out to be a public defender, and maybe that's something other than what one would hope.

MR. MACKEY: Same objection.

THE COURT: Proceed.

MR. TIGAR: I don't think that's fair.

Letters: The prosecutor tells you he went away to the Philippines and he didn't even think about Josh; all he thought about was Tim McVeigh. Nonsense. Nonsense. You heard the evidence. You heard the evidence that early in November, Lana Padilla wrote him a letter and said, "There is a problem with Josh," and he dropped everything, he went home, he took Josh, they went camping, he spent all that time with him.

You heard that he had been away from Marife for less than two months, and he couldn't stand the fact that he was away from her, so he changed the power of attorney on his stock, changed the life insurance, put everything in storage, went to the Philippines, and surprised her. You heard the evidence.

And then they say that even in the letters he left behind there was no concern for Josh. Well, members of the jury, you'll have the letters. You just have to ask for them. They won't all be in the room again for you to look at, but you can get them. But you remember them.

What does he say to Tim? The storage sheds are going to be -- the rent was up in February, not April, nothing to do with April. The pickup truck -- that's for Josh. Make sure that Marife gets the money. Give Josh this money. Give Josh that money. Here's the money I left behind the counter. I mean on and on for pages, members of the jury.

Why is it necessary if you're going to ask 12 people to sign a piece of paper that says go get him someday and take

to sign a piece of paper that says go get him someday and take him and put him on a gurney and put poison in his veins -- why do they have to exaggerate? Why do they have to do that?

Terry Nichols: Did he trust too much? Did Terry Nichols trust too much? Did he make that mistake? On the 4th of May, 1995 -- M621 -- the first letter he wrote after he was in jail. Now, mind you, all of this has happened. Here he is, he goes in, he talks to the FBI, they've recorded -- he doesn't know it -- they've recorded his conversation with his momma, they've got him in jail, and he writes a letter: "Mother --" and he asks her to make sure that Marife is taken care of. And who does he ask her to turn to even at that moment? "See if you can help her out by talking to Agent Scott Crabtree, FBI, Salina, Kansas." On the 4th of May, 1995, Terry Nichols still thinks that Scott Crabtree could be his friend, at least so far as helping Marife Nichols.

Well, I cannot instruct you, as I say, on the moral choice. I can remind you that every one of the Judge's instructions from the prior phase applies here, including the one about no inference being drawn, no discussion of the fact that Mr. Nichols did not take the stand. That's something that is between Mr. Nichols and his counsel, a decision that with further proceedings hanging over him, he might reasonably make.

MR. MACKEY: Objection.

THE COURT: Overruled.

MR. TIGAR: But it is something about which the Judge is going to instruct you.

Now, if you get there, you're going to find a list of mitigators at page 5 of your jury form and then after that, a place to consider all of these things, each individually, and then a place to sign that says do you think it's death, life without possibility of parole, or some lesser sentence to be decided by the Court, which sends it back to Judge Matsch to consider in accordance with the law which binds us all here, and along with those counts on which you found him guilty of involuntary manslaughter.

Mitigator 1: That Terry Nichols' participation in the offense was relatively minor. The term "relatively" is for you to define. I've already read out the excerpt from the Judge's instruction on Count One, which permitted you to find him guilty of conspiracy even if you found he only played a minor role. That's for you.

Second, that another defendant or defendants equally culpable in the crime will not be punished by death. Michael Fortier -- Michael Fortier was not asked to take a count that would carry a death sentence. He wasn't even asked to do that. His wife, Lori, is home with the kids. You heard what Michael Fortier did. You heard his relationship with Timothy McVeigh; and without suggesting for a moment that you should decide, try to dictate to you one way or another, because again this is bound up with what you did before -- you know what you thought about that. That mitigator is in there for your consideration.

Duress. Why is that in there? Well, that's in there because at one time Michael Fortier (sic) said, "I'm going to force Terry Nichols to do it." I don't know what you thought about that statement of Michael Fortier's made at a time when

he himself was carrying a gun because he was frightened, but it's in there for your consideration.

No prior criminal record. Of course.

A concerned and loving son.

A concerned and loving father.

A devoted and loving husband.

These are by a preponderance, by the way. No one is requiring you to find or asking you to find that he was a perfect any of these. That is a standard, I suggest, that none of us could meet.

Concern for the welfare of his family, even in difficult circumstances, to the point where when his mother would send him money to buy things that they don't give you when you're in the prison, his commissary money, he would turn right around and send that to Marife in the Philippines.

That he's a caretaker for others including those not related to him by blood: Lyle Rauh, Simpson, Walsh.

A creative person, who has tried to use his creativity for the benefit of others.

A positive impact on the lives of many people.

Committed to self-improvement.

Served honorably in the United States Army.

And then one that may give you pause, if you get there, No. 14: That Terry Nichols is a human being. Well, you'll find it, I suggest; but this emphasizes the individuality of the decision that you're to reach, the decision that says that for each individual deliberating juror, the weighing, how much of it goes into this process of decision is for you; that ultimately, when the matter is in your hands, you're going to decide what feels for you to be this conscientious response, this reasoned moral response.

Now, what if you get back there and somebody says:

An eye for an eye? Well, you could start by saying: Wait a minute. Let's read the instructions. Shall we? Because there is no place for vengeance of that character in the decision that all of us here took an oath to administer.

You took an oath with respect to the questionnaire, another oath when we had you here to talk to you back and forth and asked all of those questions, and another oath to well and truly try. And all of those oaths dealt with the necessity and importance of following the Judge's instructions.

But, of course, even then, an eye for an eye, conscience of the community? Well, the words do appear, I know, in the Old Testament. They appear at a time when God is instructing the people of Israel about a system of blood feud and vengeance. But later on even at that time when a court was convened to decide who should live and who should die, called a Sanhedrin, it was decided that a judgment of death could only be pronounced in the Temple. And so the Sanhedrin stopped meeting in the Temple. And why? Because in the earliest stages of the development of our cultural tradition, it was recognized that when the law in its solemn majesty directs that life be taken, that can be crueler than deliberate vengeance because it teaches, because it is a voice that comes from a

place that is at war with a reasoned and compassionate system of social organization.

I suggest to you that the Government wants to drag you back to a time of vengeance. I suggest to you that the FBI agent who said to Lana Padilla on the 21st of April, 1995, before a jot of evidence was in his hand, "Those two guys are going to fry," symbolized a rush to judgment that is at war with what the conscience of the community ought to do and ought to think about.

I submit to you that to surrender your deliberations to vengeance is to turn your back on lessons that we have all learned with great difficulty and a great deal of pain.

Nobody knows the depths of human suffering more than those who have been the systematic victims of terror; and yet in country after country, judicial systems are saying that in each case, the individual decision must triumph over our sense of anger. Even the Supreme Court of Israel freed from a death sentence a man found to have no direct participation in the deaths of people that he had been accused of killing.

In South Africa, when Mandela was released from prison, it was decided that it would be very, very difficult despite the record of violence against the black majority to obtain a death sentence and that a system would be put in place to make sure that acts of vengeance and anger were not carried out in the name of the law.

Well, I've gone through the form and I've gone through the instructions. And if I've said anything that makes you think that I'm trying to tell you what you already decided or what you ought to think in terms of your deepest convictions, please disregard it.

The last time I spoke to you in a closing argument, I said some things. Let me finish now by noting: The recommendation you're going to make, if you get to the point of choosing one of those three things, is binding on the Judge. If you get to that point, you've got those three choices and that's what's going to happen: death, life without parole, some other sentence.

When I concluded my earlier summation, I walked over to Terry Nichols and said, "This is my brother." And the prosecutor got up and reminded all of us, thinking that he would remind me, that there were brothers and sisters and mothers and fathers all killed in Oklahoma City. Of course, when I said, "This is my brother," I wasn't denying the reality of that. I hope I was saying something else. I was talking about a tradition that goes back thousands of years, talking about a particular incident, as a matter of fact. You may remember -- most of us learned it I think when we were young -- the story of Joseph's older brothers, Joseph of the many-colored coat, now the "Technicolor Dream Coat" in the MTV version. And they were jealous of him, cast him into a pit thinking he would die, and then sold him into slavery. And years later, Joseph turns out to become a judicial officer of the pharaoh, and it happens that he is in a position to judge his brothers. And his brother Judah is pleading for the life

or for the liberty of the younger brother, Benjamin; and Joseph sends all the other people out of the room and announces, "I am Joseph, your brother." That was the story, that was the idea that I was trying to get across; that in that moment, in that moment of judgment, addressing the very human being, his older brother Judah, who had put his life at risk and then sold him into slavery, he reached out, because even in that moment of judgment he could understand that this is a human process and that what we all share looks to the future and not to the past.

Members of the jury, we ask you, we suggest to you, that under the law, your judgment should be that this case go back to Judge Matsch and that he reach the just and appropriate sentence under the law and under the verdict that you've already reached.

I won't have a chance to respond to what the prosecutor says, but I know that after your 41 hours of deliberations on the earlier phase, you're all very, very accustomed to thinking up of everything that could be thought.

My brother is in your hands.

THE COURT: Mr. Ryan . . .

REBUTTAL ARGUMENT

MR. RYAN: Thank you, your Honor.

May it please the Court . . .

THE COURT: Counsel.

MR. RYAN: . . . members of the jury, good morning.

Nine weeks ago, we began this process. As Ms. Wilkinson told you earlier, you've heard a lot of evidence, seen a lot of witnesses, over 150, 160 witnesses, seen many exhibits. You've deliberated. And I'm confident you've heard more about the Oklahoma City bombing and its effects than you really wanted to know, information that I told you when we began this process would be painful for you to hear. And finally, you've heard information about the defendant, Terry Nichols. In the months and years ahead, the witnesses, even the important witnesses, the exhibits, your memory will begin to fade.

But there is one thing that no one of us will ever forget, and that is that a tragedy befell Oklahoma City on April 19, 1995, a terrible, terrible tragedy. And unlike other tragedies in history, this was no act of God. This was not an earthquake or a flood. It was not a ship running into an iceberg. It was not a disease or a tornado or a plague. This was an act that resulted from the conspiracy of two men, Timothy McVeigh and Terry Nichols. It was an act of injustice. Injustice.

Now, there is nothing you can do as a jury to bring back to life those who died. There is nothing you can do to make whole the bodies who were maimed --

MR. TIGAR: Your Honor, I'm going to object to improper rebuttal.

THE COURT: Overruled. You may proceed.

MR. RYAN: -- or the injuries that so many people received, and there is nothing you can do to mend the broken spirits of those who remain. But it is your responsibility to write the final chapter in the history of the Oklahoma City bombing. It's your duty. It is your responsibility.

And that chapter should read history -- should record

and that chapter should read history should record that history reflects that justice was done in this trial.

You've been selected by both the United States and the defense to act as the conscience of the community in this case, and you've seen it. You've seen what occurred and you've seen the tragedy that resulted in Oklahoma like few people in this world will ever see.

If this had been a case involving a conspiracy to result in the death of a single person, you know, there is no question that that family member, family member from that deceased, should be brought before you to tell you about the impact of that crime. I hope we did not offend you by bringing you 39 members of 39 deceaseds' families. Please remember that 129 families had to be told that they could have no one testify in this case.

If an occasional witness became angry or showed emotion, please set aside that display of emotion but don't disregard the scope and extent of their loss.

Judge Matsch advised you early in this proceeding there were three choices that you have with respect to a sentence. The first was a choice of the death penalty, a choice to be made by the jury. The second option was life imprisonment, again an option only available as a sentence by the jury. And the third option is a lesser sentence, some lesser term of years than life to be decided by Judge Matsch.

MR. TIGAR: Objection, your Honor.

THE COURT: Overruled.

MR. RYAN: Now, I know it must be tempting to refer the matter for sentencing to Judge Matsch. I'm sure you feel that he's a wise man, a wise judge with many years of experience. But that's not the question of who imposes the sentence or who decides the sentence. The question is do you want Terry Nichols to receive a punishment of less than life. If you do, then the option is Judge Matsch.

THE COURT: Well, that's an incorrect statement of the law. The Court can impose a life sentence.

MR. RYAN: I'm sorry, your Honor. I misunderstood your instructions to us last week.

THE COURT: Proceed.

MR. RYAN: But before I proceed one moment longer, let

me urge you that in a crime that resulted in the deaths of more people that can fill this entire courtroom at this moment, a sentence of less than life would be an unconscionable result. It would be simply unconscionable.

MR. TIGAR: Object, your Honor.

THE COURT: The objection is overruled.

Let me just say now to you, members of jury, that I will be telling you that if you choose to have as your decision in here a sentencing to be done by the Court, the Court would sentence according to law and include all of the options that are available, and there are certain guidelines that the Court would follow. I'm not going to go through all of those guidelines with you. But, of course, that can mean a sentence of less than life.

MR. RYAN: I would urge you, members of the jury,

that
the only real choice in this case is the choice between life imprisonment and death. The facts and circumstances of this case simply do not warrant the option of a sentence of less than life. For a crime of this nature with these results, a sentence of less than life would never, ever be the moral conscience of the American community.

Now, defense counsel spoke to you earlier about these steps that the Court will instruct you upon. And the first step that was discussed with you by Mr. Tigar was the step with respect to the intent of the defendant in entering into this conspiracy. Now, when you get a -- back in the jury room after the Court has instructed you, you'll receive a special findings form for you to examine. And contrary to what defense counsel said to you moments ago, you will not find the words "murder" or "kill" or "intent to murder" or "intent to kill" or "malice" or "malice aforethought" anywhere in that verdict form.

And it's not like premeditation that you were instructed on with respect to the murder counts. You're not being asked to respond with respect to the intent to commit murder. You've already done that. And that's why those words are not in this instruction.

These instructions deal with issues such as was it contemplated when this conspiracy was entered into that death would result. That's the intent element.

The second hurdle, according to the defense, is the question of the statutory aggravating factors. Those were discussed with you briefly this morning, and I won't repeat that. I will simply note defense counsel gave short shrift of that aggravating factor that deals with did this conspiracy pose a grave risk of death to others.

I intend to speak to you some this morning about how you might look at the mitigation that was offered in this case by the defense, the perspective that you might bring to that mitigation.

At the outset, let me make it clear we don't contest many of these factors that are offered in mitigation. We don't contest that Terry Nichols is a human being or that he was committed to his own self-improvement or that he was in the Army for a year or that he is a creative person.

But please consider this: Don't think the fact that Terry Nichols is a human being or that he made Christmas pinatas or he drew pretty pictures while he's been in prison is some type of real mitigation, is some sort of justification for this crime. If you give that any weight, it should be very little, particularly when you place that up against -- side by side with the aggravating factors shown in this case through the evidence that you've heard.

The defense has put on a good deal of information about the life of Terry Nichols, called several witnesses, told you about that life; that he came from a good family, he had loving parents, parents and a family that were so nice they set aside what they were doing to go help a neighbor who was needing his cows to be milked. A respected farm family, according to his sister.

He had one few criminals have. He had a good home,

he had loving parents, and he had supporting siblings, supportive brothers and sisters.

This is not a reason or a justification for conspiring with Tim McVeigh to use a weapon of mass destruction against the Murrah Building.

They also presented information to you about the fact that Terry Nichols is intelligent; that he was educated; that he was creative; that he was artistic. They showed you a Terry Nichols who had the financial means to take his family snow-skiing, water-skiing, to vacation in Florida. Clearly, Terry Nichols had all the advantages.

But when you think about this -- and the perspective that I ask you to approach this information with is, is this information mitigation? Does it really mitigate the offense?

Terry Nichols did not grow up in a crime-ridden neighborhood. He didn't have a mother who was on crack cocaine. He didn't have an absent father when he was a child. He wasn't born with fetal alcohol syndrome. He wasn't taught to hate. He wasn't deprived of moral guidance. He wasn't born with some type of mental defect or learning disorder.

The facts I've just mentioned -- they might be real mitigation for some crimes, but that's not the information that you've heard.

If anything, the information you heard makes it more difficult to comprehend and understand what would make someone enter into this type of conspiracy, a conspiracy with no parallel in American history.

Surely the defense is not suggesting that it's okay to execute someone who comes from a ghetto or from a lower class than to treat someone with all the advantages differently, better, to spare his life.

In this country, we have, or we should have, equal treatment for all. And I urge you to reject this type of emotional bond that the defense has tried to build that Terry Nichols is like us, he's not so horrible, he's just like one of us.

Terry Nichols is not like one of us. Terry Nichols conspired to use a weapon of mass destruction, a truck bomb, against a building in a downtown metropolitan community.

Give him equal treatment. Don't give him the advantage of his advantages.

The remaining mitigating factors that you heard about Mr. Tigar discussing this morning, or many of them, revolve around the notion that Terry Nichols was a loving son, a loving husband, and a loving father. Was he a loving son?

You heard that Terry Nichols went to Michigan where his mother lives in April of '95 to attend gun shows. While he was in the area, he stopped by her house only to find that she was in Florida.

You received a great deal of information, stacks and stacks, sheets, about phone records made by Terry Nichols. You'll not find a record there where Terry Nichols called his mother, Joyce Wilt.

Was he a loving father? Mr. Tigar reminded you this morning about that call between Lana Padilla and Terry Nichols in November of 1994 -- a couple of days after the Roger Moore

in November of 1994, a couple of days after the Roger Moore robbery. Lana Padilla didn't know how to find Terry Nichols. She had to write a mail drop in Manhattan, Kansas, to ask him to please call home so she could talk to him about Josh.

And you remember that testimony when she said when he called and she was wanting to talk about the welfare of Josh, Terry Nichols was wanting to talk about an uprising against the government.

The defense called Lana Padilla to say what you would expect the mother of his child to say. And it wasn't moments later they called witnesses to trash her.

And remember that one of the skills that Terry Nichols taught his son, his 11-year-old son, was how to make an explosive. It was belittled today as a small explosive. And remember how Terry Nichols when he went to go to the Philippines in November of '94 -- how he left 200 pages of antigovernment rhetoric with Barry Osentoski with one request: Please teach this information to Josh Nichols.

MR. TIGAR: Objection, your Honor. This misstates the evidence.

THE COURT: Well, the jury knows the evidence and can consider whether it's a misstatement.

Proceed.

MR. RYAN: Remember -- was he a loving husband? Remember how Terry Nichols sent Marife and his daughter to the Philippines so he could go be with Tim McVeigh? And remember when defense counsel -- when Marife was on the stand and defense counsel said there is 117 calls from Terry Nichols to Marife during the six months she was in the Philippines? They neglected to tell you that only a tiny fraction of those calls were ever completed. Five. Five calls for a total time of less than an hour and a half.

This is a man, a husband, who got up from Easter dinner three days before the bombing, left his family, went to Oklahoma City to be with his friend, Tim McVeigh, who lied to his wife about where he was going, lied to his wife about what he was doing the week before the bomb, a man who only now prepares Valentines and Easter cards knowing that one day they would be exhibits in a hearing.

Would a loving son, husband and father commit an act of terrorism and leave his family to pick up the aftermath?

You know, I say these things to you about him, Terry Nichols, as a son and a father and a husband not because he deserves the death penalty for the way he treated his family, simply to point out that that's not really mitigation. His actions towards his family are not mitigation. We're asking for the death penalty because of the crime he committed, an act of terrorism.

The nine witnesses the defense called attempted to tell you the story of Terry Nichols; but you know they didn't tell you the whole story, not by any means. There were no photographs, there was no testimony about what occurred the year before the bombing, how he treated his family during that year. You know at some point in his life something went terribly wrong; and when something went terribly wrong in his life, it went terribly wrong for 168 people in Oklahoma City.

Terry Nichols is a product of his choices, as

Ms. Wilkinson reminded you. He chose to leave the family farm in Michigan, he chose to leave the Donahue farm in Kansas to be with Tim McVeigh, and he chose to enter into this conspiracy. Now it's time -- it's time for Terry Nichols to accept responsibility for his actions.

One of the mitigating -- claimed mitigating factors mentioned by the defense this morning was that there is another defendant who is equally culpable to Terry Nichols who didn't get the death penalty. As Ms. Wilkinson pointed out, we can't charge someone that we can't identify, so you must disregard all of that information about whether or not there is someone out there. If there is someone out there and they're found, they'll be prosecuted.

What he's referring to is Michael Fortier. But before I respond to that argument, let me make one thing very clear: We are not here to defend Michael Fortier. Michael Fortier, as Ms. Wilkinson reminded you, could have picked up a telephone, called the police, and most likely prevented this tragedy. What he failed to do is indefensible. His omission is unforgivable.

But Michael Fortier is not as culpable as Terry Nichols. Michael Fortier did not rent two storage lockers in Council Grove, Kansas, to store bomb components. Terry Nichols did that.

And Michael Fortier did not clean out Terry -- Tim McVeigh's locker in Herington the day after the Oklahoma City bombing. Terry Nichols did that.

And Michael Fortier did not steal explosives in Marion, Kansas, and transport them to Arizona. Terry Nichols did that.

And Michael Fortier did not go to Ennis, Texas, to buy nitromethane with Tim McVeigh. Terry Nichols did that, too.

And Michael Fortier did not sell gold coins to finance the purchase of the nitromethane. Those were the acts of Terry Nichols.

And Michael Fortier did not buy 4,000 pounds of ammonium nitrate, the main charge of this bomb. Terry Nichols did that.

And Michael Fortier did not obtain the Bridges credit card under an alias name and share it with Tim McVeigh, a call -- a card that was used to make telephone calls to acquire bomb components. That was a card that Tim McVeigh shared with Terry Nichols.

Michael Fortier did not rob Roger Moore, and Michael Fortier did not knowingly and intentionally drive five hours each way on Easter Sunday to help Tim McVeigh stash the getaway car. And central Kansas is a place that Michael Fortier was nowhere near in April of '95. That was Terry Nichols' backyard.

The next factor, mitigating factor, the defense claims is that Terry Nichols' role in the conspiracy was a minor one. I want to remind you with respect to this that this burden,

unlike the other burdens in this case, is on the defense. They must prove to you by a preponderance of the evidence that Terry Nichols had a minor role in the conspiracy.

And I ask you when you analyze this question of minor role, please remember that you're analyzing his role and the crime for which you found him guilty, conspiring to use a weapon of mass destruction against the Murrah Building.

You are not -- and I emphasize not -- analyzing what his role was in taking the truck bomb to Oklahoma City and igniting the bomb. That's not the crime. The Court will instruct you on this. It's the role in the conspiracy.

And, you know, who is to say how this conspiracy got started, who influenced who. Whose idea was it: Was it Terry Nichols', or Tim McVeigh's to bomb the Murrah Building?

The evidence is that both of these men were upset with the government. And you remember the testimony of Marife. She was so concerned about Terry Nichols' antigovernment views that she called Terry Nichols' mother to ask for guidance.

Both these men were upset over Waco, both had antigovernment material, both shared antigovernment feelings. And remember, please, when you deliberate that Terry Nichols is 12 years older than Tim McVeigh. You heard from Dave Dilly. Mr. Tigar talked about him this morning. The one thing that came out clear from his testimony is that as between the two men, Terry Nichols was the leader, Tim McVeigh the follower. You've heard how intelligent Terry Nichols is. You've heard how he was the platoon leader the entire time these men's company was being in Army training.

And you heard how Tim Mc -- excuse me -- and you heard how Terry Nichols knew how to make an ammonium nitrate bomb well before he ever met Tim McVeigh. By your verdict, you've already found that Terry Nichols knowingly and deliberately entered into this conspiracy. You have found that it was foreseeable that death would result from this conspiracy. And you know all of the actions that Terry Nichols took right up until the end. These were not minor actions.

You know, minor role might be someone who gave the plans of the Murrah Building to his co-conspirators or suggested a place to rent a truck where they wouldn't ask for identification. But a minor role is not someone who deliberately and knowingly planned the attack, purchased and stole the components and stored them in lockers and stashed a getaway car days before the bombing. The defense has not met its burden of proving that Terry Nichols had a minor role.

The final mitigating factor raised by the defense was that Terry Nichols was under some sort of unusual or substantial duress. Defense counsel didn't talk long about that and for good reason. There is not much to say. He picked out a line that Michael Fortier told you about where Tim McVeigh said, "I think I can make Terry do it." This is the same Michael Fortier that just two weeks ago the defense was calling this crazed methamphetamine user. Either accept his testimony or don't, but don't allow the defense to pick and choose what they like.

The burden of duress -- proving this is upon the defense. And they haven't met that burden. They called no witnesses, introduced no exhibits. Who knows what Tim McVeigh meant when he said that to Michael Fortier? Was he bragging? Was he trying to sound like a tough guy? Was it some ploy to recruit Michael Fortier? Who knows? But one thing is clear: The statement that we're talking about was made in March of 1995, a time frame after which Terry Nichols had already done quite a number of things. And you recall those things, and I won't discuss them further with you. But the bomb components were already in storage under aliases of Ted Parker and Joe Kyle.

You've not heard any evidence at all, not a shred, that Terry Nichols was ever afraid of Tim McVeigh or that Terry Nichols was ever threatened by Tim McVeigh. And as Ms. Wilkinson pointed out, Terry Nichols spent nine hours with the FBI at a point in time that Tim McVeigh was well in custody and of no possible threat, and he mentioned not a word of duress. And he didn't mention it for a reason: There was no duress. These were his voluntary actions.

The evidence you've heard is that Terry Nichols and Tim McVeigh were friends. They were business partners. They were Army buddies. They shared a calling card. They spent time together. They spent so much time together that Marife Nichols was jealous.

Nothing in this case, ladies and gentlemen, when you look at all the mitigation you've heard, comes close to minimizing Terry Nichols' participation in this conspiracy to bomb the Murrah Building and the people inside. It in no way lessens his responsibility for this crime, and it in no way explains his reprehensible conduct and actions.

As you deliberate in this case and you consider these matters of mitigation and aggravation, I ask you to think of the lady of justice with the blindfold across her eyes and a scale on each side. And when you think about the scale that holds the aggravation and aggravating circumstances of this case, think about 4,000 pounds of weight that causes that scale to fall. And when you think about the mitigation, the justification you've heard, think about grains of sand softly falling on the plate of mitigation.

This trial has almost come to a close. And an irony struck me this morning as I was preparing to come here today. From April, 1995, until January, 1998, over two-and-a-half years, Terry Nichols has received due process. The United States is such a remarkable country. He has had a full and complete trial. He's had extremely competent counsel. He's been afforded every right guaranteed by our constitution. He and his counsel participated in the selection of you, the jury. He's had numerous counsel including paralegals, investigators. And I ask you: Where was the due process for the men, women and children of Oklahoma City, of the Murrah Building?

MR. TIGAR: Objection, your Honor.

MR. RYAN: They never had a trial. They never had a team of lawyers. They never had a moment's warning. They never had a chance to beg for mercy, as Mr. Tigar has so eloquently done for Mr. Nichols today.

And the mothers and fathers of the 19 children don't

And the mothers and fathers of the 168 children don't hold their babies, as Terry Nichols does every week.

I've talked to you -- I've spoken to you some this morning about what has not been proven in mitigation. What I'd like to talk to you in the few minutes I have remaining is what has been proven. You learned that Terry Nichols was raised by his family on a farm. You saw a picture of Terry Nichols and his mother sitting on a tractor. Blake Kennedy will never sit with his mother on a tractor on their farm in Amber, Oklahoma.

You saw -- and you heard about Terry Nichols, the Boy Scout. Elijah and Aaron Coverdale will never enjoy scouting.

You heard about Terry Nichols who liked to climb trees. Jaci Rae Coyne died before she ever saw the world from the top of a tree.

You learned that Terry Nichols enjoyed walking on his hands when he was a boy. You remember the video of Brandon Denny, the child that you saw limping in the office of his physical therapist. He can't even hold a bag of Animal Crackers in his hand.

You saw a picture of Terry Nichols and his Christmas pinatas. Antonio Cooper, Little Tone: He'll never take a swing at a Christmas pinata. He'll never take a swing at a ball.

You saw a picture of Terry Nichols holding his newborn son -- excuse me -- newborn daughter. Mike Lenz will never have a chance to coach his wife while she's pregnant, help her in her delivery, be with that child and its mother when the child is born; and he will never hold his son in his arms.

When you go back to deliberate and talk about the case, consider first, if you will, please, the voluntary acts of Terry Nichols that led to the attack on the Murrah Building; second, consider the extreme consequences of those voluntary acts; and third, consider the excuses that were offered to you as justification for this crime.

And then I ask you to render a sentence, an appropriate sentence, a sentence that reflects the moral conscience of the community, a sentence that is appropriate for the deaths of 168 American men, women, and children.

And I thank you.

THE COURT: Members of the jury, everyone comfortable enough to go forward? I'd like to go forward with the instructions.

JURY INSTRUCTIONS

THE COURT: Now, of course as I tell you in these instructions -- and you will have a copy of the original instructions that I gave you in detail at the close of the evidence in the case when it was given for you to decide on the charges in the case, and I'm not going to repeat all of them now. You'll have that in writing. But before I begin with these instructions, I just remind you of two things said then. One is, of course, that these arguments of counsel are just that. They're arguments in the case and they are not a part of the evidence or the information to be considered. That's what came from the witness stand and the testimony of the witnesses and the exhibits that were received.

Also, as I said in the original instructions, it's

appropriate for counsel in the case to state in their arguments what they believe the law may be -- and there has been some dispute about that and I've made some quick rulings here, but I just want to remind you that if any difference appears to you between the law as stated by any of the lawyers in the case and the law as I give it to you in the instructions, you are, of course, to be bound by the law as given to you by the Court in the instructions.

Now, Terry Lynn Nichols has been found guilty of the crime of conspiracy as charged in Count One of the indictment. The jury in this case also decided that Terry Lynn Nichols was not proved guilty beyond a reasonable doubt of the crimes charged in Counts Two and Three in the indictment and, as to the eight counts of first-degree murder, found him guilty of the lesser included offense of involuntary manslaughter. The sentencing on the guilty counts on those eight counts of involuntarily manslaughter is a matter to be determined by the Court.

Your prior verdict acquitted Mr. Nichols of Counts Two and Three and acquitted him of first-degree murder and second-degree murder on Counts Four through Eleven. I instruct you that these verdicts represent final and binding determinations as to the issues that you necessarily decided in reaching your decisions; that is, as I have said, no party is entitled to ask you to change your verdict at this stage, nor are you entitled to do so under the law.

The statute defining the Count One offense, 18 United States Code Section 2332(a), provides that if death results from the conspiracy, the punishment may be death, imprisonment for life without any possibility of being released, or any lesser sentence provided by law and decided upon by the Court. The selection among these three choices must be made by the jury. Even though you have found Mr. Nichols guilty of this charge carrying a possible death sentence, the law requires that you approach this sentencing decision with an open mind, able to give meaningful consideration to all possible sentences.

A copy of the indictment, a copy of your completed verdict form, and a copy of the previous instructions given to you at the close of the trial will be given to you for your reference in making your findings. You will also have individual copies of these instructions and the special findings form.

As I have told you previously, you must decide whether the appropriate sentence for the defendant is: (1) death, (2) life in prison without possibility of release, or (3) some other lesser sentence to be decided by the Court. Your recommendation that the defendant be sentenced either to death or to life in prison without possibility of release will be binding on this court, and I will sentence the defendant according to your recommendation. In the event you choose the third option and recommend that the defendant receive some lesser sentence, I will impose some other lesser sentence than death or life in prison without the possibility of release in

accordance with applicable law.

As I mentioned during arguments here, that will be done according to certain guidelines, which I'm not going to go into you -- into detail with you now; but, of course, a sentence to a number of years -- and there is no parole in the federal system of sentencing. Under federal sentencing, the sentence of whatever number of years is the number of years the person serves. There is no parole board to release anyone early. So, of course, given the defendant's age, a sentence to a specific number of years could be a sufficient number of years as to be the equivalent of a life sentence for that person.

Now, before deciding on the appropriate punishment, you must consider additional information about the crime and about the uniqueness of the defendant as an individual human being. The parties have presented information pertaining to aggravating and mitigating factors at this sentencing hearing. The information you may consider also includes the evidence presented at trial and any fact findings you made in arriving at your verdict. Thus, you may consider the testimony, exhibits, and stipulations offered by both sides during the guilt phase and the parties were not required to reoffer that.

Based on your consideration of evidence presented at trial and the information presented at this sentencing hearing, you must make a series of findings to guide you in arriving at a reasoned moral response to Mr. Nichols' crime, background, character, and circumstances of the crime. These findings are to be entered on the special findings form, and you will have this form, each one of you, a draft copy of it. And it is in sections.

Section 1 of the special findings form asks you to decide what the evidence and information provided to you at the trial and at the sentencing hearing proved as to Mr. Nichols' intentions. The Government has alleged that Terry Lynn Nichols engaged in the conspiracy with two types of intent:

(1) That Mr. Nichols intentionally participated in an act contemplating that the life of a person or persons would be taken or intending that lethal force would be used against a person or persons and the victim or victims died as a result of that act;

Second, that Mr. Nichols intentionally and specifically engaged in an act of violence knowing that the act created a grave risk of death to a person or persons other than a participant in the offense, such that participation in the act constituted a reckless disregard for human life and the victim or victims died as a direct result of the act.

Participation in a conspiracy involves the act of conspiring or agreeing with one or more other persons to commit a crime. The act of conspiracy or agreeing to use a weapon of mass destruction against persons and property may but need not be considered to be an act of violence.

There can be no sentence to death or imprisonment for life without release unless all of the jurors agree that the Government has proven at least one of these intentions beyond a reasonable doubt. You will recall that the instructions given at the close of the trial informed you that a reasonable doubt is the kind of doubt that would make a reasonable person

is the kind of doubt that would make a reasonable person hesitate to act in the most important of his own or her own affairs. When you have unanimously agreed on your answers to these two questions, the foreperson will write "yes" or "no" on the appropriate lines on Section 1 of the special finding -- findings form for each of these two intent elements. If you answer "no" with respect to both elements, then conclude your deliberations, sign the certification in Section 6 of this form and advise the Court that you have reached a decision. If you answer "yes" with respect to either or both of these intent elements, then continue your deliberations and proceed to Section 2 of the form.

Section 2 of the special findings form asks whether the Government has proved beyond a reasonable doubt three statutory aggravating factors. An "aggravating factor" is some circumstance that tends to support imposition of the death penalty. A "statutory aggravating factor" is one specifically prescribed by Congress. The Government has alleged three such statutory aggravating factors:

(1) That the deaths or injuries resulting in death occurred during the commission -- during the commission of an offense under 18 United States Code Section 844(d); that is, transportation of explosives in interstate commerce for certain purposes.

(2) That the defendant in the commission of the conspiracy offense knowingly created a grave risk of death to one or more persons in addition to the victims of the offense.

(3) That the defendant committed the conspiracy offense after substantial planning and premeditation to commit an act of terrorism.

There are specific elements that must be established by proof beyond a reasonable doubt for each of these three statutory aggravating factors.

The first statutory aggravating factor alleged is that the deaths or injuries resulting in death occurred during the defendant's commission of another crime, the interstate transportation of an explosive with the knowledge and intent that the explosive will be used unlawfully to damage or destroy any building or property. To establish this aggravating factor, the Government must prove beyond a reasonable doubt each of the essential elements of that crime as set forth in Title 18 United States Code Section 844(d). This was not one of the crimes charged in the indictment.

That section provides, in pertinent part, that: "Whoever transports . . . in interstate . . . commerce any explosive with the knowledge or intent that it will be used unlawfully to damage or destroy any building, vehicle, or other real or personal property shall be guilty of a federal felony. There are two essential elements to this crime: First, the defendant must knowingly and willfully have transported or aided and abetted in the transportation of an explosive from one state to another. Second, the defendant must have done so with the knowledge or intent that the explosive would be used unlawfully to damage or destroy any building, vehicle, or other real property.

To act knowingly and willfully, a 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; that is, he must have transported or aided and abetted in the transportation of the explosive with the knowledge or intent that it would be used unlawfully to damage or destroy any building, vehicle, or other real or personal property.

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.

The second statutory aggravating factor alleged is that the defendant, in the commission of the conspiracy offense in the indictment, knowingly created a grave risk of death to one or more persons in addition to the dead victims of the offense. This aggravating factor requires the Government to prove the defendant's conduct not only resulted in death but also posed a significant risk of death to other persons who were in close proximity to those who died in terms of time and location. The defendant must have acted knowingly in creating this grave risk of death to other persons, which means that he must have been conscious and aware of the grave risk of death, must have realized what he was doing, and must not have acted because of ignorance, mistake or accident.

The third statutory aggravating factor alleged is that the defendant participated in the conspiracy offense after substantial planning and premeditation to commit an act of terrorism. "Premeditation" means that the defendant must have considered and reflected upon the plan at least long enough to give it a second thought. "Substantial" means that the planning and premeditation must be more than the minimum required for the commission of the offense. An "act of terrorism" means an activity that involves: (a) a violent act or an act dangerous to human life that violates federal law; and (b) appears to be intended to intimidate or coerce a civilian population or to influence the policy of a government by intimidation or coercion.

The Government must prove at least one of these statutory aggravating factors beyond a reasonable doubt. You should write "Yes" or "No" on the appropriate lines on Section II of the special findings form to indicate your unanimous answers to the question of whether the Government proved the existence of such particular factor beyond a reasonable doubt. If you answer "No" with respect to all three factors, then conclude your deliberations, sign the certification in Section VI of the form, and advise the Court you have reached a decision. If you answer "Yes" with respect to one or more of these three factors, then continue your deliberations and proceed to Section III of the form.

Section III of the special findings form asks you to find whether the Government has proved beyond a reasonable

doubt three additional aggravating factors, called non-statutory aggravating factors, it has alleged. Again, an "aggravating factor" is a circumstance that tends to support imposition of the death penalty. A non-statutory aggravating factor is one that Congress has not specifically prescribed. The three non-statutory aggravating factors alleged are:

(1) That the offense committed by the defendant resulted in the deaths of 168 persons.

(2) That in committing the offense, the defendant caused serious physical and emotional injury, including maiming, disfigurement, and permanent disability to numerous individuals.

(3) That by committing the offense, the defendant caused severe injuries and losses suffered by the victims' families.

These non-statutory factors are self-explanatory and do not require further instruction. You should write "Yes" or "No" on the appropriate lines on Section III of the special findings form for each of these three non-statutory aggravating factors to indicate whether you unanimously find that the Government proved each factor beyond a reasonable doubt. Regardless of your findings as to any non-statutory aggravating factors, you should continue your deliberations and proceed to Section IV.

Section IV of the special findings form asks you to find whether the defendant has proved any mitigating factors by a preponderance of the evidence. Mitigating factors are not limited by statute. The law permits you to consider any relevant mitigating information presented by the defendant. "Relevant mitigating information" include -- includes anything in the defendant's background, record, or character, or any circumstances of the offense which suggests to you that a sentence other than death should be imposed. The defendant must prove the existence of mitigating factors by a preponderance of the evidence or information.

A "preponderance of the evidence" or information means an amount of evidence or information sufficient to persuade you that a contention is more likely true than not true or that a factor is more likely present than not present.

Not only is the burden of persuasion different for aggravating and mitigating factors, the unanimity requirement that exists for aggravating factors does not exist with respect to mitigating factors. Any one or more jurors may find the existence of a mitigating factor and may then consider that factor in weighing the aggravating and mitigating factors even though other jurors may not agree that the particular mitigating factor has been established. This weighing decision must be made by each juror giving individual consideration to the aggravating factors unanimously found by all of the jurors and such mitigating factors as may be found by that juror.

After completing your findings as to the existence or absence of any aggravating or mitigating factors, you will then engage in a weighing process. In determining whether a sentence of death is appropriate, all of you must weigh any aggravating factors -- statutory and non-statutory -- that you unanimously found to exist, and each of you must weigh any mitigating factors that you individually found to exist.

mitigating factors that you individually found to exist.

Because the findings of mitigating factors are individual to each juror, the weighing that each of you must engage in is necessarily an individual process. After each juror has performed that individual weighing process, the jury as a whole must determine by unanimous vote whether the proven aggravating factor or factors sufficiently outweigh any proven mitigating factor or factors to justify a sentence of death.

The process of weighing aggravating and mitigating factors is not a mechanical process. You should not simply count the number of aggravating and mitigating factors and decide which number is greater, but instead you must consider the weight and value of each factor. Whatever findings you make with respect to aggravating and mitigating factors, the jury is never required to impose a death sentence.

Your role in this proceeding is to be the conscience of the community in making a moral judgment about the worth of a specific life balanced against the societal value of what the Government contends is the deserved punishment for this particular crime. Your decision must be a reasoned one, free from the influence of passion, prejudice, or any other arbitrary factor. In this regard, I repeat the cautions that I gave you during the hearing with respect to particular witnesses.

After engaging in the process described above, the jury must record the moral judgment as to the appropriate sentence. The place for recording the sentence is Section V of the special findings form. The jury must write in on the line one of three possible sentences: (1) "Death"; (2) "Life in Prison -- Imprisonment Without Possibility of Release"; or (3) "Some Other Lesser Sentence." Each member of the jury then should sign his or her name at the bottom of Section V.

The jury, in considering whether a sentence of death is justified, shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim, and the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime no matter what the race, color, religious beliefs, national origin, or sex of the defendant or any victim may be. Section VI of the special findings form contains a certification to this effect and must be signed by each juror.

So again, you will have, each of you, a working copy of the special findings form; and, of course, it simply goes step by step with these instructions and compares with the instructions that I have given to you; and each of you, of course, will have a copy of these instructions. And it simply has beside each -- or below each question the words "Yes" or "No" and a space provided and where the foreperson would write in your answers to these questions, be they "Yes" or "No," and proceeds in the manner that I have instructed; and with respect to the mitigating factors, you will see them listed. And with respect to them, rather than a "Yes" or "No" finding, it simply describes the factor -- for example, that Terry Nichols' participation in the offense was relatively minor -- and then it has number of jurors who so find. These are individual findings, as I've said, in these instructions; so the

foreperson would simply write numerically the number of persons finding that, if it be zero, zero; if it be 12, 12, or of course any number in between.

And then the form, as I say, tracks along with the instructions; and as I said in the instruction, it begins, Section I, with these two questions about intent and says that if you answered "No" with respect to both of the above, then you conclude your deliberations and you don't do the rest of it, you go directly to Section VI of the form and sign on that if it be true, and you've arrived at a decision because in the absence of a finding of either of these intents, then the matter is the equivalent of returning the case to the Court for decision.

And the same is true with respect to the possibility that on the statutory aggravating factors if the jury should determine that none of them has been proven beyond a reasonable doubt, then again, you conclude your deliberations because the law requires at least one of those to be found. So that's what this means with respect to the sections in which you go and why this is a process that goes through those sections.

Then, of course, if one -- at least one of the intentions is found and one of the aggravating factors is found, then you do complete all of the verdict form and including each of the -- consider each of the non-statutory aggravating factors and consider each of the mitigating factors that are set out on this special findings form.

And then, of course, ultimately, under the recommendations section, it simply has this "defendant, Terry Lynn Nichols, shall be sentenced to," and there is a line upon which the foreperson would write that decision, be it death, life imprisonment without possibility of release, some other lesser sentence to be decided by the Court. And then again different from the original verdict form, each of the jurors signs. And there is a space provided for the signature of each juror; and finally the certification with respect to that no discriminatory basis was applied here.

Now, if you'll excuse us for just a moment, I'm going to have one last conference at the bench with counsel.

(At the bench:)

(Bench Conference 154B2 is not herein transcribed by court order. It is transcribed as a separate sealed transcript.)

(In open court:)

THE COURT: Word processors are wonderful things, except that they make mistakes sometimes -- or the people using them do. There is a typo in the verdict form, and counsel have kindly brought that to my attention; and we will change the verdict form because there is an inadvertent typographical error.

Now, it is time to turn this matter to the jury for

decision. And, of course, we've had 18 people in the jury box throughout this trial so that we would have alternate jurors to be available if need should arise.

12 of you in the first 12 chairs here are the ones who deliberated and decided on the verdict in this case; and unless there be some reason or illness or something like that affecting any of you now, it will be the 12 of you who will decide.

Everybody ready on the deliberating jury to proceed?

All right. Then the six alternate jurors are now excused in the case. We're not going to have you wait somewhere, because your job is now done. And of course, I know you -- as was the case when I told you you weren't going to participate in deliberations on the counts of the case, you may have mixed feelings with respect to that; but I want you to know that all of us involved in this case genuinely and sincerely appreciate the commitment that you have made, the time that you have invested, your attention to this case, and your being a part of this trial. It is simply, however, the law that 12 people make the decision; and as I've said, there is always -- and there always has been the possibility that some person or persons would be unable to continue. And of course, we wanted to be sure that we had 12 people who could decide in the case.

So what I am going to now ask of the alternate jurors is, as was the case when I turned the decision on the counts over to the jury -- we'll ask you to go to the jury room and get your things and then go to a different room to stand by for a few minutes, because I'll just visit with you a few minutes before asking you to -- or discharging you. As I said, you're not going to be standing by now. You'll be discharged from your duty in this case. So if the alternates would please proceed to the jury room and get your things.

(Alternate jurors out at 12:08 p.m.)

THE COURT: And, of course, what I'm going to discuss with the alternate jurors is that they're not to be talking about this case while the jury is deliberating. So we're going to at this time, as soon as we get the clearance from the alternate jurors, members of the jury, have you retire to the jury room to begin your deliberations. But we'll wait until those folks clear the area. So, of course, you're not to talk to them or to anybody other than the members of the jury. And of course, in your deliberations, now, again the person you've selected as the foreperson will preside over your deliberations in the manner previously followed.

I've mentioned, I think, that if you want to look at any of the original exhibits, they can be provided at your request. We don't intend, unless it's necessary, to set up that exhibits room again but simply provide any other exhibits -- from the trial, I mean. The exhibits that came in during this information, sentencing phase of the hearing, will of course be provided to you now.

And do we have an index of those that's been prepared?

MR. MACKEY: For the penalty hearing, yes, your

..

Honor.

THE COURT: Yes.

MR. TIGAR: Yes, your Honor.

THE COURT: Okay. We'll provide that to you; and we'll also, of course, provide you with some lunch.

So, members of the jury, at this time, you will retire to deliberate on the issues before you.

(Jury out at 12:09 p.m.)

THE COURT: All right. We'll be in recess subject to call.

(Recess at 12:10 p.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 5th day of January, 1998.

Paul Zuckerman

Kara Spitler

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