A SANCTUARY IN THE JUNGLE: TERRY LYNN NICHOLS AND HIS OKLAHOMA CITY BOMBING TRIAL[1]

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FACTUAL BACKGROUND

On April 19, 1995, Timothy McVeigh, who was then 26 years old, stepped from the cab of a rented Ryder truck parked in front the Murrah Federal Building in Oklahoma City. The truck carried a 5000 pound bomb made of barrels of ammonium nitrate mixed with diesel fuel and nitromethane, with blasting caps rigged to set it off. Ammonium nitrate is a commercially-available fertilizer, whose explosive properties are well known. On a farm, ANFO (ammonium nitrate/fuel oil) charges often are used to blow stumps and for other benign purposes, and United States Department of Agriculture literature describes how to make them. McVeigh's purpose was much more sinister.

McVeigh ignited a timed fuse and walked away. The explosion devastated the building, killed 168 people, wounded hundreds more, and damaged many nearby buildings. McVeigh's motives were difficult to establish precisely, but he was a right-wing zealot convinced that the American government was the corrupt agent of an international conspiracy to deprive Americans of their liberties. He had ties to several armed militia groups.

McVeigh left Oklahoma City in his Mercury Marquis automobile, which he had parked near the Murrah Building as a getaway car. On his way North on Interstate 35, an Oklahoma trooper noticed that the Marquis had no license plate. During the routine stop, McVeigh revealed that he had a loaded pistol in his car. The trooper arrested him on the firearm and license plate charge. While McVeigh was in the Perry County, Oklahoma jail, the FBI search team in Oklahoma City found the Ryder truck rear axle and traced the truck to a rental agency in Junction City, Kansas. The agency employees described the two men who rented the truck, one of whom matched McVeigh's description. A local motel owner identified McVeigh from an FBI sketch. On April 22, 1995, FBI agents took McVeigh into custody in Perry County.

The FBI also discovered that McVeigh had a friend, Terry Nichols, whom he had first met in the Army and with whom he had lived for a time on the Nichols family farm in Michigan. Nichols' name and photograph were broadcast nationwide. Nichols was then living in Herrington, Kansas, with his wife Marife and their young daughter. On the

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[1] The entire trial transcript is on Westlaw in the database OKLA-TRANS. There are also DVDs of the pretrial and trial proceedings in the McVeigh and Nichols cases, published by PubNetics, Inc. of Denver, Colorado and available in law libraries, including the Pence Library at Washington College of Law. Michael Tigar's opening and closing arguments are in Volume XXV of the Classics of the Courtroom Series, published by Professional Education Group, www.proedgroup.com. In excerpting trial materials, the authors do not always used ellipses to indicate omissions. The phrase "sanctuary in the jungle" was used by Edward Bennett Williams, during oral argument in Alderman v. United States, 394 U.S. 165 (1969). See Michael E. Tigar, Persuasion: The Litigator's Art 281 (1999).

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afternoon of April 22, 1995, Terry Nichols – having heard of the news broadcasts – voluntarily went with his family to the Herrington police station. The local police notified the FBI and Nichols was taken into custody, first as a material witness and later as an alleged accomplice.

McVeigh and Nichols were jointly charged in Oklahoma federal court with conspiracy to use a weapon of mass destruction and to commit arson, use of a weapon of mass destruction, arson, and eight counts of first-degree murder of federal employees. Oklahoma authorities reserved the right to try the two in state court for an additional 160 homicides.

Stephen Jones of Enid, Oklahoma, was appointed counsel for McVeigh. Because of the difficulty in finding an Oklahoma lawyer who would accept appointment to represent Nichols, or who did not feel a conflict in the representation, Chief Judge David Russell of the Western District of Oklahoma appointed Professor Michael E. Tigar, then of The University of Texas School of Law, as Nichols' counsel. Because this was a capital case, Nichols was entitled to two experienced counsel.[4] The court appointed Ronald G. Woods of Houston, Texas. Woods was a University of Texas law graduate who had served as an FBI agent, an assistant district attorney in Houston, Texas, and an assistant United States attorney before being appointed by President George H.W. Bush as United States Attorney for the Southern District of Texas. After he left government service, Woods went into private practice. He and Tigar had teamed up before as co-counsel – with Dick DeGuerin -- in the defense of Senator Kay Bailey Hutchison. As the case developed, the court also appointed additional lawyers to assist with the work, as well as paralegals, experts and investigators.

THE IDEA OF SANCTUARY

The Oklahoma City bombing was world-wide news, billed as the worst act of domestic terrorism in American history. It so profoundly affected Oklahomans that it became the event by which time was measured: Newspaper articles about even unrelated events placed the date as occurring at a certain time after April 19, 1995. Tigar and Woods recoiled at the prospect of a trial in Oklahoma City, Oklahoma, presided over by a judge who had been affected in some way by the bombing and before jurors whose lives were interwoven with the important events. Regardless of where the trial was eventually held, the prosecution's case would inevitably recall, for the jurors as for all Americans, the devastation, fear and anger of the bombing and its aftermath. The government's theory of Terry Nichols' liability rested on his alleged complicity in McVeigh's actions of that morning and the preparation for them.

The overriding Nichols defense theme would have to be "sanctuary." The image of sanctuary is one of safety, reason, compassion, and redemption. Those were the human qualities on which Nichols' defense would rest. Sanctuary is a quiet place from which one could evaluate the evidence of Terry Nichols' alleged involvement, detached

[4] In a capital case, the court will also appoint additional lawyers to assist with the work, as well as paralegals and experts in relevant fields. See, e.g., Ake v. Oklahoma, 470 U.S. 68 (1985); American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989), cited with approval in Rompilla v. Beard, 545 U.S. 374, 387 n.7 (2005).

to the extent possible from the fear and anger that the bombing engendered. If he were convicted, this sanctuary would be a setting to consider the issue of punishment.

THE STORY OF THE CASE – A DUAL APPROACH

In a capital case, understanding the client's story is perhaps more significant than in other cases. The Eighth Amendment commands that the life-death decision be a "reasoned moral response:" The defense is entitled, indeed required, to find and present a complete possible picture of the accused and the offense. The accused is in turn entitled to have this evidence considered by the jury and given effect. A defense effort that fails to explore all aspects of the defendant's life and character is not only likely to fail at trial, but it also constitutes constitutionally-deficient, ineffective assistance of counsel. [5]

A capital case is bifurcated. In the innocence-guilt phase, the jurors deal with evidence focused on the elements of the charged offenses. If the jury finds the defendant guilty of a capital offense, there is a penalty phase, a trial for life. In that phase, the rules of evidence may be relaxed, and the defense – and to perhaps a lesser extent, the prosecution – is entitled to broad latitude.[6] For example, on the issue of mitigation, the Eighth Amendment requires that evidence of a mental condition that is not a defense nonetheless must be received and considered during the penalty phase, and such evidence may come from expert or lay witnesses.

So, for these constitutionally-based reasons, the advocate must think about a capital trial from two quite different perspectives: first, presenting a story of the offense that contradicts the prosecution story enough to create a reasonable doubt; and second, presenting a picture of the defendant's life that provokes a life verdict.

This dual approach does not mean that trial preparation and presentation take place on two parallel tracks that never meet. To the contrary, the advocate must begin, in the first phase, to build a bridge to the second phase. For example, a defendant may be an aider and abettor or conspirator based on relatively minor participation, and therefore be guilty of an offense from which death has resulted.[7] He or she would therefore be constitutionally-eligible for the death penalty.[8] However, minor participation is a mitigating circumstance. The best opportunity to show minor participation, however, is in the trial phase, when confronting witnesses who come to testify about the defendant's alleged activity. This is particularly so if one or more of those witnesses is a plea-bargaining cooperator. In the discussion below, the cross-examination of cooperating witness Michael Fortier had a dual purpose – first to show that Terry Nichols was not guilty, and also to point out ways in which his alleged participation was certainly no greater than Fortier's own. Both had to be done during the innocence/guilt phase of the trial.

Initially, having been denied bail, Nichols was held at the federal prison on the outskirts of Oklahoma City. There was no particular reason that he should trust

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[5] See generally Rompilla v. Beard, supra (standards for effective counsel in capital case); Wiggins v. Smith, 539 U.S. 510 (2003) (duty to investigate).

[6] The federal death penalty statute used in the Nichols case is 18 U.S.C. §§3591-96.

[7] On the relationship between trial and penalty phases, see Oregon v. Guzek, --- U.S. ---, 126 S.Ct. 1226 (2006) (defendant does not have the right to reopen guilt/innocence phase issues with new evidence in penalty phase).

[8] See LaFave, Israel & King, Criminal Procedure §3.5(f) (4th ed. 2004).

appointed defense counsel. The sad statistics on the quality of appointed counsel would give him an objective basis for doubt.[9] His own distrust of government, and his real concern about his predicament, no doubt weighed on him. The advocate's job was to build trust and to know his story. The success of the team requires the defendant's cooperation and trust. One of the paralegal assistants' jobs was to spend as much time with Nichols and his family as possible. The defense also retained a consulting psychiatrist and Georgetown Medical School professor, Dr. James S. Gordon, founder and head of the Center for Mind-Body Medicine. Dr. Gordon spent hundreds of hours with Nichols and his family.

The defense worked hard to know the details of Nichols' life, with several goals in mind. First, in the details of his relationship with McVeigh, one could build a theory of innocence. Second, jurors are more ready to acquit someone they can understand, and see as a whole person; they can get such a picture from defendant testimony, character evidence, and the testimony of family members or experts. Third, if there were a penalty phase, this life story would form the basis of proof and argument.

The Nichols trial presented two competing stories. The government had its version, which had been leaked to the media: Timothy McVeigh had recruited his friend and old Army buddy Terry Nichols to assemble the ingredients of a bomb built of ammonium nitrate and diesel fuel, and ignited with blasting caps stolen from a quarry. McVeigh had rented a Ryder truck in Junction City, Kansas, using a false name. He and Terry had mixed the bomb. McVeigh drove the truck to Oklahoma City and set off the bomb. The Nichols team had a different version. Nichols and McVeigh had known each other since Army days, and had done business together selling items at gun shows. McVeigh had lived with the Nichols family for a time. But Nichols had never embraced McVeigh's overtly racist and violent set of social attitudes, and had taken care to distance himself from McVeigh. Nichols became focused on his marriage and his family.

From the beginning, this was fundamentally a conspiracy and accomplice case, in which the rules on inchoate and accessory liability would play a large role.[10] The Nichols team never doubted that McVeigh had planned and carried out the bombing, or one or more others helped him to do so. In view of this, two basic principles of advocacy were important: First, do not make yourself look bad to the jury by denying the obvious. Second, employ the theory of minimal contradiction; look for a case theory that shifts perspective just enough to require a different result. It is never enough, in a criminal case, simply to rest on reasonable doubt. Never assume a burden you do not have, but always provide the jurors a plausible alternative view of events.

The alternative view was that Terry Nichols was unlikely to have joined with McVeigh or anyone else to plant a bomb that would kill people indiscriminately. In fact, Nichols had severed his relationship with McVeigh months before the bombing. There was evidence that, as a result, McVeigh thereafter derided Nichols as "domesticated" and reached out to others to help him with his plot. In short, the defense would tell the complete story of McVeigh's search for the equipment and personnel he would use to do

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[9] See, e.g., Stephen B. Bright, Essay: Counsel for the Poor: The Death Sentence Not for the Worst Crime But For the Worst Lawyer, 103 Yale L.J. 1835 (1994).

[10] See generally Wayne R. LaFave, Criminal Law chs. 12-13 (4th ed. 2003).

the crime. To that end, the defense called 92 witnesses in this case. Mr. Nichols did not testify.

In a relatively brief essay, it is not possible to reproduce all the evidence at this months-long trial. We can only sketch the themes and suggest how advocates deal with complex factual and legal issues. If Nichols' undeniable association with McVeigh was, as the defense would argue, innocent -- unaccompanied by either the intention to further an unlawful plan or significant acts in furtherance of such a plan – how had McVeigh carried out his crime?

The government has an obligation in all cases, but particularly in major ones, to do a careful investigation. In a high-profile case, this obligation helps to ensure that the jury's verdict and the judgment of onlookers are reliable. Yes, one says to jurors, this is a terrible crime and an historic case. Precisely for these reasons, the government has a special obligation to get it right. Therefore, the defense focused on errors and omissions in the government's forensic evidence, and on its failure to pursue leads to other conspirators.

The first and most publicized lead had to do with "John Doe #2." The witnesses at the Ryder truck rental facility all agreed that McVeigh had been accompanied by someone who was not Terry Nichols. Other witnesses saw someone with McVeigh at a Junction City, Kansas Motel and at other locations. That person matched the same description as the person at the truck rental store. The FBI had used a sketch artist to make composite picture of John Doe. The media had published the picture.

As the investigation unfolded, the defense found other evidence of McVeigh reaching out to potential accomplices, and even uncovered some of McVeigh's statements that arguably acknowledged that Nichols was not going to help him.

THE TRIAL TEAM – PREPARATION

Advocacy skills are indispensable to success, but are worthless without thorough and thoughtful preparation on facts and law. That preparation involves investigation and legal research that in almost every case require that the advocate assemble a team. Eventually, the Nichols defense team included five lawyers, five paralegals, and five investigators, with contract services from experts in several key subjects, and the help of a dozen law students at various times. The team met regularly to discuss the entire case. Under a reciprocal discovery agreement with the prosecutors, the defense had access to more that 40,000 witness statements collected by the FBI, 100,000 items of physical evidence, and dozens of expert reports. The defense turned over thousands of statements from witness that its investigators had interviewed. The defense team catalogued the physical evidence and evaluated every item to see if it had potential relevance to the defense. The court allowed the defense to retain a computer expert to help scan the witness statements and other materials so that they could be searched electronically. Lawyers and law students prepared and filed dozens of pretrial motions. From April 1995, when Tigar was first appointed, until the Nichols trial began in September 1997, the team worked full-time.

TRIAL EVENTS IN THIS ESSAY

First, we introduce the idea of sanctuary through defense motions on recusal, change of venue, and severance of defendants.

Second, we illustrate voir dire techniques designed to probe potential jurors' ability and willingness to consider all the evidence and, if there were a penalty trial, to give full effect to the law and evidence about mitigation.

Third, we have reproduced some of the opening statements that set out the defense factual themes, and expressly deal with the need to create a space where reason and compassion can have a part.

Fourth, we reproduce excerpts from the cross-examination of Michael Fortier, to illustrate the dual purpose of creating doubt about Nichols' involvement in the crime but also showing that Nichols' involvement with McVeigh was no greater than Fortier's involvement, and that Fortier was not subjected to a possible death sentence. The excerpts also show how to weave defense themes into the examination of a key cooperating witness.

Fifth, after a brief look at closing argument themes, we present portions of the penalty phase argument, to show how the idea of sanctuary dominates the defense presentation of its mitigation ideas in a capital case.

RECUSAL AND VENUE AND JOINDER: WHERE AND TO WHOM TO TELL THE STORIES

Recusal

The bomb blast had fatally damaged the Murrah Federal Office Building, and had done significant harm to the federal courthouse behind it. Indeed, the Federal Defender office had been so hard hit that the defender declared a conflict in representing either McVeigh or Nichols. Despite national and international publicity, the attitude of potential jurors in Oklahoma especially was, the defense contended, not conducive to a fair trial. The defense sought recusal of the Oklahoma federal judges and a change of venue.

The trial judge in a capital case cannot simply be a referee. Every capital case is tried at the edge of Eighth Amendment jurisprudence. The Supreme Court repeatedly revisits the constitutional contours of death. Nichols and McVeigh were tried under a 1994 statute, the text of which raised many issues of constitutionality and interpretation.[11] There was the risk that any Oklahoma judge would feel he or she had a stake in the outcome. The court of appeals for the 10th Circuit agreed. In a ruling on mandamus that the Nichols team sought, it disqualified all Oklahoma federal judges.[12] Acting under a statute permitting the court of appeals chief judge to name a trial judge, Chief Judge Stephanie Seymour selected Richard P. Matsch, chief judge of the U.S. District Court for Colorado. This was a brilliant and logical selection. Judge Matsch was known to be solid and scholarly. He respected the adversary system.

Venue

The defense then filed a motion for change of venue. Judge Matsch granted it, and moved the case to Denver, Colorado. In his opinion, he accepted a defense theory regarding the special way that jurors perceive events that they believe affect their own lives and interests. Without doubt, publicity about the Oklahoma City bombing was

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[11] Judge Matsch's consideration of constitutional and interpretation issues are reported at 940 F.Supp. 1971 (D. Colo. 1996) and 944 F. Supp. 1478 (D. Colo. 1978).

[12] Nichols v. Alley, 71 F.3d 347 (10th Cir. 1995)(granting mandamus, ordering recusal, and directing chief judge of the circuit to appoint a trial judge).

pandemic. How could it be argued, then, that Denver was any "safer" a fair trial venue than, say, Tulsa? A poll can show that fixed attitudes about the case differ in those two cities. Comments by Oklahoma public officials favoring the death penalty in the event of a conviction were also relevant. But there was more.

Scott Armstrong, a respected journalist who worked for the Washington Post and has written several important books on aspects of the legal system,[13] provided important evidence in the venue hearing. Armstrong observed that media editors serve their readers and viewers. When a tragic event happens, it may be national or even international news. But the community immediately affected has a special interest in a special kind of coverage. That community wants "justice" and "closure." Its members are more concerned than outsiders with the tragedy's effect on particular community members and groups. These special concerns can be seen in print and electronic media, as editors serve their local market. As a result of this kind of coverage, there is a high risk that community members develop attitudes that make fair and impartial consideration of trial evidence more difficult. In the language of lawyers, the sort of community sentiment that Armstrong identified is called "implied bias."

Tigar explored these themes in the following excerpts from his oral argument on the motion to change venue.[14]

> We looked, Your Honor, at the quantity of media coverage; the quality of media coverage; the content of that coverage. We looked, Your Honor, at a simple idea that undergirds all of our economic system, the idea of a market. Mr. Armstrong helped us see that the idea of the market has come to play a much bigger role in editorial decision-making than it used to do. That is, media moguls, editors, are much more sensitive to responding to the needs of their market.
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> Now, the government says that, "Well, this is a national and an international story." Of course it's a national and an international story. It was on CNN for an hour. They have an exhibit like that. It was on CNN for one hour, one time. But, by the time the dust had settled, the national media dealt with aspects of the story as they happened, and the local media replicated the whole story, beginning to end, over and over and over again.
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> This concept is the one that Dr. Vinson [government expert] and Dr. Bronson [defense expert] agreed is called, "salience." The media editors in this single Oklahoma market, that Mr. Armstrong found in his analysis, are doing this because they think that's what grabs their audience. That the sociologists call "salience," but it is, to trivialize it, like some darn song or jingle that you get in your head, driving down the road, and I start humming and I realize that it's that toothpaste commercial that my

[13] He is co-author with Bob Woodward of The Brethren: Inside the Supreme Court (1979).

[14] The complete arguments are at 1996 WL 45128 (2/02/96).

daughter listened to, or it's some other that I can't get it out of my head because the sheer force of repetition has put it there.

The people of Oklahoma were told over and over again -- this salience thing again -- that they had a special relationship to these events, and they came to believe it. But it wasn't simply that the media told them; their leaders told them; they were told by their leaders to identify themselves in this way, by Governor Keating, by Senator Inhofe. They showed that they had this sense of identity by their purchase of the memorabilia; by their adoption, their embracing of slogans, that showed the entire state and the ribbon around the Heartland. They embraced that concept as a mechanism for their recovery.

Now, there's a second part of this media difference. It isn't just that there's more in Oklahoma City. It's what Dr. Bronson called, "thematic thinking." Why is it that a prospective mock-trial jury trying the Oswald case, with all the information that it had to bring to that task, would be influenced by seeing the motion picture "JFK"? The inference is that it's because that motion picture -- and I think Dr. Vinson and Dr. Bronson agree about this -- has a powerful theory of events, cogently argued, with what seems to the onlooker to be evidence that it is so.

After all, we teach -- when we teach young lawyers to be trial lawyers -- at least I do when I've taught lawyers -- we teach them that deciders perceive whole stories. Dr. Vinson tells us that when prospective jurors come to the task of deciding and bring a set of attitudes and beliefs, that they have a whole story; that trying to present evidence that's contrary to the story they've got worked out induces cognitive dissonance and causes them to engage in coping behaviors that include nonrational ignoring of the evidence, trying to rationalize it, forgetting it, minimalizing it, and so on.

We're not saying that the local media set out to prejudice anyone; we are saying that it responded to this need. Thus, the contrast between not only the quantity but the nature of the local coverage and the national coverage is what counts.

Now, there's something that's more telling, I think, than all of this, and that's what the Supreme Court has said over and over, that death is different. Well, of course it is. That's a trivial statement. But the court, ever since Furman v. Georgia, has told us that death is different, and in a quite decisive way.

Why is death different? What's the procedural meaning of that? The Federal Death Penalty Act of 1994 is a weighing statute, and it places upon the jury the responsibility for assessing punishment. The jury doesn't simply find factors; it's makes an ultimate decision. That's the characteristic of this statute.

A lot of studies have been done, whether Furman versus Georgia has achieved its purpose. There's a recent article in the

> Harvard Law Review. Well, we're not here to debate that. What is clear is that sentencer discretion in jury sentencing cases, under weighing statutes, puts before the jury a huge quantity of highly emotionally-charged evidence and expressly invites the jury to do something that is unique to death cases, and, that is, to make a reasoned moral response, this free-floating decision, in which their sense of anguish, and anger, and sympathy, and so on, can expressly be considered.
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> Now, Your Honor stopped me yesterday because I had gone too far with Dr. Holden. I'm not sure just where I crossed the line but I hope that it was sometime after I asked him about the Bosnian Serbs, because Dr. Holden does know, as an expert, about how people identify with events: the them-versus-us. The them-versus-us here is Oklahoma versus these defendants.
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> Governor Keating has been quoted over and over again, repeating his mantra, "We will give these people a fair trial. Oklahomans are independent. We want to make sure we've got the right people, but, if we do, they should be executed," as though the Furman v. Georgia gene had dropped out of his legal chromosome makeup.
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> C. S. Lewis writes, in one of his letters, in that wonderful collection, that, "There are times, as for example on a dark mountain road at night, when we would give far more for a glimpse of the few feet ahead than for a vision of some far horizon." The few feet ahead that we can see tell us that in this time and place, that a jury, in this city, charged with that decision, would be one as to which one can confidently say there is this reasonable likelihood of prejudice.
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> Two roads, two roads, diverge before us, gathered as we are, with the decades of constitutional liberty piled so high, the anguish of the victims close at hand. To one of those roads we are beckoned, from sadness, to anger, to vengeance. Governor Keating beckons us along that road by what I suggest is deliberate design. The media have beckoned us along that road, simply by their desire to serve their market. The other road, I suggest to the Court, is the one the framers laid out for us while the memory of unfair trials in distant forums was fresh in their minds.
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> We neither dishonor nor deny the grief and anger of the victims, nor even their cry for vengeance. Your Honor, this is my 30th year in the law, and I believe, more than ever, that when we summon someone, anyone, Terry Nichols, into court, to find out whether he's going to live or die, that it is our job to construct, where we best can, a kind of sanctuary in the jungle.

One obvious question, and government counsel asked it rhetorically, is why voir dire is not an adequate remedy to explore juror attitudes and eliminate those whose minds are made up. Many cases deny change of venue motions on the theory that juror attitudes

can be explored on voir dire. To this concern, which Judge Matsch expressed in a question, Tigar replied:

> Nothing I have said, Your Honor, diminishes the power of advocacy nor the abilities of judges to ferret out bias and get at the truth, but my mother always told me not to eat my soup with a fork. Forks are good implements, but there are some things they're just not designed to do.

JOINDER AND SEVERANCE – A SEPARATE TRIAL FOR A SEPARATE DEFENSE

Even in a forum not dominated by predetermined attitudes, it is often very difficult to tell your client's story in a multi-defendant case. The very fact that the parties are joined for trial and all sitting on the same side of the courtroom may lead jurors to think that they are all involved together in the challenged conduct. Having each party represented by separate counsel can help keep the issues and evidence separate. The judge will instruct the jury that each party's case is entitled to separate consideration. But where there are antagonistic trial positions, or contradictory trial stories, joinder is problematic. The Supreme Court has spoken favorably of prosecutors' preferences for multi-defendant trials.[15] Severance motions are hard to win, and denial of severance is reviewed on appeal for "abuse of discretion" and with an eye to upholding the district judge's ruling.

For Terry Nichols, the defense position was that McVeigh did the bombing acting together with others, some of whom were known and others of whom the FBI knew about but had not tried very hard to find; but Nichols was not one of them. The Nichols team view was that McVeigh was a racist and something of a fanatic.

Both McVeigh and Nichols moved for severance. The Nichols motion focused on the fact that in capital cases individual consideration of sentencing factors is the hallmark of Eighth Amendment jurisprudence. Such consideration becomes very difficult when two defendants with very different stories are joined for trial. In order to forestall an argument that one might cure this problem by having a single trial on liability and then two separate trials on punishment if that were necessary, the defense also pointed out the ways in which the defenses of the two defendants were different and in many ways contradictory. Judge Matsch granted the severance, again in a reported opinion.[16] McVeigh was tried first.

SELECTING A JURY

The court sent out more than 1,000 jury summonses for the Nichols trial. Those summoned came to the Denver fairgrounds, about 500 of them in the morning and about 500 in the afternoon, to hear instructions from Judge Matsch and to fill out lengthy questionnaires. Given that voir dire is often truncated, and often conducted only by the judge and not by counsel, the questionnaire has become an indispensable tool for helping find qualified jurors. Jurors provide information about their residence, employment, religious affiliation, military service, education, reading habits, exposure to media coverage of the case, and so on. A person who fills out a questionnaire, and is assured

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[15] Zafiro v. United States, 506 U.S. 534 (1993).

[16] 169 F.R.D. 362 (D. Colo. 1996)(focusing in large measure on the problems of inadmissible codefendant hearsay in any joint trial, and on antagonistic defenses).

that it will be confidential, will often be more candid than in open court. Because the fairgrounds sessions were a critical trial stage, Mr. Nichols was present, dressed in normal clothes and not prison attire. There could not be any obtrusive security measures that would suggest an official judgment that he was dangerous.[17]

After several hundred jurors were eliminated from the pool based on the questionnaires, voir dire began in the federal courthouse. Jurors were summoned into the courtroom one at a time for questioning by the judge, prosecutor and defense counsel.

Voir dire is an opportunity to develop rapport with those who may be on the jury, and to provide a basis for exercising peremptory challenges, as well as establishing the basis for cause challenges. Although peremptory challenges are controversial, their utility in capital cases is obvious. Jurors are often reluctant to discuss deeply-held beliefs, and in a capital case this reluctance surely applies to their willingness to follow the law on mitigation in any penalty phase. Since at least the time of Blackstone, peremptory challenges have been said to be in favorem vitae – in favor of life – and therefore indispensable to the defendant.[18]

A newspaper article from the October 19, 1997, Daily Oklahoman captured the flavor of the defense approach to voir dire:[19]

> In the three weeks of jury selection, [Tigar has] quoted Latin to the Latin teacher, talked landmarks in Paris with a woman who went to college there and asked fans of the novel "The Horse Whisperer" if they support that gentle approach to breaking horses.[20]
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> He sits next to Nichols at the defense table - which he had scooted over to get a better view of the candidates. He often puts his large right hand on Nichols' shoulder, as if to comfort his client.
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> Jury candidates are questioned one at a time, and U.S. District Judge Richard Matsch lets prosecutors go first.
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> So Tigar, waiting his turn, makes listening an interactive exchange. Leaning toward the candidate with shoulders slumped, he holds a firm grin and bobs his head in response to certain answers.
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> When his time comes, he carries his imposing figure to the podium, where his baritone voice commands the room.

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[17] See Estelle v. Williams, 425 U.S. 501 (1976) (defendant cannot be made to wear jail apparel in presence of jury); Holbrook v. Flynn, 475 U.S. 560 (1986) (uniformed officers may be in the courtroom, provided that there is no suggestion that this is due to defendant's dangerousness).

[18] See 4 Blackstone, Commentaries 353 (15th ed. 1809).

[19] This material is adapted from Michael E. Tigar, Persuasion: The Litigator's Art 60-70 (1999), and is annotated with footnotes.

[20] This is not "making conversation" – it is a way to find out how these folks approach difficult issues. If you can find out what books jurors have read recently, you know that a given juror reads books, and you will find that a lot of them have read popular books about the legal system such as those by John Grisham or Scott Turow. "The Horse Whisperer" was a popular book at the time of this voir dire. It said something about an approach to people and issues.

"My name is Michael Tigar," he tells the candidate. "And Ron Woods, sitting right there, and I are lawyers. We were appointed ... shortly after the bombing to help out Terry Nichols. And I'd like to follow up on some of the things that were asked and spend a little time with you."

Tigar's folksy manner often gets results - candidates respond more candidly. They are engaged by his knowledge as he sprinkles in references to bioenergetics, farming, birthing methods - whatever applies.

Tigar wants to know whether candidates choose spanking or time-outs with their children.[21]

He asked a study hall supervisor how he decides who is right when there is a classroom fight.[22] He asked a school bus driver how students would describe her.[23]

From No. 52, a nursing assistant who thought death was too easy for a criminal, Tigar wanted to know what she thought a crook should contemplate while in prison. "That they would regret what they've done and that they would know that they have committed a crime that is wrong," she replied.

He sometimes goes out of his way to not seem overbearing when he is getting unsatisfactory answers and has to ask more questions.[24] "Well, I hear you say, 'I think I would,' " he said softly to one candidate. "It's like if my wife said, 'Do you love me?' and I said, 'I think I do,' she'd want to ask another question."

Tigar impressed a Teamsters member by describing the logo on his union handbook. "You still get a little booklet there with the two pictures of the horses in front looking at each other?" Tigar asked him.

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[21] In a criminal case, this is a key question, particularly when the jury will decide punishment. It also illuminates juror attitudes in any case where punitive damages or a theory of deterrence may be in issue.

[22] The study hall supervisor decides “cases” all the time, such as when there is a fight in school. How does he do it? Does he listen to both sides? Does he find it hard to set aside some preconceived idea based on who is involved?

[23] Tough but fair? Caring? Safe driver? How?

[24] During individual voir dire, negative responses give the questioner a chance to emphasize that there are no right or wrong answers, only truthful and candid ones. In pursuing information about a prospective juror, open-ended questions are the norm. When counsel senses that a juror must be challenged for cause, then is the time to switch to closed-ended questions. If a juror doesn’t answer questions directly, counsel should keep on asking. Then when you get a candid answer, you need to say “Thank you. I know this is difficult territory.” If counsel gets a “bad” answer during group voir dire, thank the juror, “I appreciate your point of view.” Then ask, “Does anybody have a different idea about this that you would like to share with us?” By this means, counsel is not only getting answers, but also watching people participate in something like a deliberative process.

"Right," he said.[25]

Tigar even spoke the language of No. 763, a psychic and energy reading enthusiast who believed her karma would catch up with her if she sentenced someone to death.

"Now, much of your reading is about the energy in the human body. Is that right?" Tigar began.

"Right," she said.

"I mean, chakras are - well, how would you define a chakra?"

"I would say the chakras are points in the body, in the energy body that interact with the physical body; and they're data centers and energy centers where we're receiving and energy is leaving our bodies," she said.

"And in your view, do they occur along meridians?" Tigar asked.

"Yes."

"So that there are meridians of energy that run in the body and along these are the chakras that are centers; is that - " he said.

"That's correct."

"And is that based on a study of Eastern medicine?" Tigar said.

"That's an ancient knowledge, yes," she replied.[26]

When No. 657 turned out to be a Latin teacher, prosecutors and reporters knew what to expect as Tigar approached the podium. He didn't disappoint.

"Have you ever heard the expression, 'Ubi societas ibi jus' " he said, then gave the translation. " 'Wherever there is society, there is this idea of justice.' ... My pronunciation is wrong, please don't grade my paper; but there's this social structure within which we all live that defines ... what the rules are?"

"Uh-huh," No. 657 said.[27]

Tigar sometimes slips in a point during his questioning - kind of to get potential jurors thinking ahead to his defense.

Jurors are expected to hear testimony that Nichols set off small explosives with his son in Kansas and a brother in Michigan. The defense will contend they were just having fun.

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[25] The questionnaire revealed that this juror was a loyal union member. He had been on strike with his union. Under his contract, he is paid his full wage during jury service. He had read his contract and knew his rights in this respect. He is therefore the kind of thoughtful intelligent juror one might want. It is important to show respect for somebody who goes to that trouble to prepare for jury service. As for knowing what is on the Teamster contract – the logo – that is old knowledge counsel happened to have, but if you needed to understand how union contracts provide for jury service, you should study that before you talk to this juror.

[26] The defense is probing here to see how “grounded” this juror is. The prosecution had tended, in its questions, to dismiss her as a “flake.” She was not.

[27] The Cicero quote is a potent observation on the rule of law, and can get the discussion started on that issue in a high-visibility trial. The aphorism is usually contrasted with another, inter arma silent leges, which means in time of war the laws are silent.

So, Tigar took special notice when a school bus driver wrote on her questionnaire that she had a friend with a homemade cannon.

"Made a big noise?" he asked.

"Yeah," she answered.

"Did everybody enjoy that?"

"Yeah," she said. "I guess so. Sometimes it was pretty loud."

"Well, you wouldn't jump to the conclusion that some fellow that wanted to set off things that made a noise on the Fourth of July was a bomber, would you?" the defense attorney said .

"No," she said.

"Wouldn't be logical?" he asked.

"No," she said again.

Point made.

Another candidate, No. 848, complained, "I felt very uncomfortable with the defense. I would not want to be in a dark alley, a light alley, day or night with them."[28]

Tigar at first had no questions, but jumped to his feet as the candidate got ready to leave .

"Excuse me, your honor. May I just put one question?" he asked.

"Yes, you may," the judge said, then joked, "In self defense? Is that name-clearing?"

But Tigar was serious.

"Ma'am," he asked, "Have you shared your views - to which you are entitled - with any of the other jurors riding in the van or in any other context?"

"No, sir," she replied.

The judge turned serious, too, telling Tigar he appreciated that question "because I didn't think of it."

The judge is trying to find 64 acceptable potential jurors, weeding out those who could never vote for the death penalty and those who automatically would. Then he will let prosecutors and defense attorneys make cuts, until 12 jurors and six alternates are left. Each side gets to knock off 23. Defense attorneys try to save their cuts for the most objectionable candidates and try to force prosecutors to waste the government's strikes.

So, defense attorneys end up trying to persuade opponents of the death penalty to consider voting for the punishment. If that happens, the judge will accept the candidate and frustrated prosecutors will have to use a strike they might have saved for someone worse. Tigar has won admirers for his skill in swaying potential jurors to be open-minded.

It happened most dramatically with No. 474, who said, "I think that's something that should be left up to God and not for me. "

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[28] This juror will be off for cause, but counsel needed to make sure that she had not spread her ideas around the other panel members.

> Prosecutors didn't ask any questions - certain the judge would remove No. 474. But Tigar switched the business manager's opinion by first asking if she would defend herself if foreign troops invaded American soil. By the time he was finished, she agreed to consider both life and death sentences.

The Nichols defense team wanted jurors who would be willing to listen to the evidence and make a reasoned decision. The voir dire questions were designed to find out how jurors confronted and dealt with issues in their daily lives: that is the surest guide to how they will behave in the jury deliberative process.

OPENING STATEMENTS[29]

Judge Matsch did not limit the time for opening statement. Each side took about two hours. Judge Matsch forbade the use of demonstrative evidence such as charts and pictures in opening. An opening statement, he ruled, was counsel's time to address the jury directly.

Tigar and Woods agreed with the maxim: never waive the right to open at the beginning of the case. The defendant usually has the right to wait and open a the beginning of the defense case. However, waiting until then sacrifices the benefits of primacy, and lets the jury hear the government's evidence without any idea of how it might be contradicted. The defense does present evidence, in the form of cross-examination, during the government's case. It is important to give the jurors a road map to what they will hear. People tend to remember and retain information that relates to a story they have heard, particularly if the story is one they are inclined to believe.

In the Nichols case, the jurors had already read, heard, and seen a great deal about the Oklahoma City bombing before they came to court. They then heard the government theory of how Nichols allegedly helped McVeigh plan, prepare and carry out the bombing. It was important for the defense to acknowledge what the jurors had heard and would hear, but to put all of that into a different context.

In a criminal case, defense counsel starts with a certain reservoir of credibility with the jurors, and seeks to conserve that credibility and transfer it to the defendant. One way to exhibit credibility is to show a command of the relevant evidence. The Nichols team wanted to do this by confronting the government's evidence and theory of the case, and by presenting a plausible alternative reality based on the idea that the government's investigation had been slipshod.

The Government's Opening

The prosecution, led by an experienced trial lawyer named Larry Mackey, knew that a main theme of Nichols' defense would be that he was not present when the bomb went off. Mackey decided to confront that issue at the outset, in opening statement:

> May it please the Court. Ladies and gentlemen of the jury, good morning. April 19, 1995, fell on a Wednesday, the middle of the workweek. On that morning, Terry Nichols was home. He was home in Herington, Kansas, with his wife and his daughter. He was home and at a very safe distance from a truck bomb that exploded in downtown Oklahoma City in front of the federal building in Oklahoma City in the heartland of America. And Terry Nichols

[29] The full text of these openings is at 1997 WL 677907 (1997).

had planned it just that way.

There were others in Oklahoma City on that morning, and Terry Nichols had planned on that, too. Tim McVeigh was in Oklahoma City on the morning of April 19. He was one of those people. And on that day, Terry Nichols knew exactly where Tim McVeigh would be and knew exactly what he would be doing.

Tim McVeigh was there to do one thing, one thing only, the only thing left to do, the final act in a plan of terrorism that Terry Nichols and Tim McVeigh had embarked upon months and months before that date.

This is a case about two men who conspired to murder innocent people. Their plan succeeded when the bomb went off and people died.

On that day, at that moment, Terry Nichols was not in Oklahoma City; but during the months before that date, Terry Nichols had been side by side with Tim McVeigh, together in their plan of violence.

And true to that plan, on Wednesday, April 19, 1995, Terry Nichols knew that Tim McVeigh would be delivering a large Ryder truck as close as he could get it to the federal building in downtown Oklahoma City. And true to that plan, Tim McVeigh detonated that bomb.

When the bomb exploded at 9:02 that morning, it consumed the truck, it destroyed the building, and it changed the face of American history forever. And it killed 168 people, men, women, and children, the cross section of this country, whites, African-Americans, Hispanics, Native Americans, people of all ages, races, and backgrounds.

For just as Terry Nichols and Tim McVeigh had planned, there were others in Oklahoma City on April 19, innocent others. And at that moment, in fact, there were hundreds of people inside the Murrah Building. Most of those people were there as workers, men and women carrying out the business of the federal government. Others were there as citizens, seeking the assistance of that very same government. And still others were youngsters and toddlers and infants entrusted by their parents to the safekeeping of the day-care center in that building.

Those who died were there inside the building. Scores of people, including 19 children, died because they were there inside the building. They were inside a nine-story building as the floor below them gave way and the ceiling above them crashed down.

The Nichols Opening

The Nichols opening was in three parts. Michael Tigar began with an overview of the allegations and evidence, seeking to establish the main defense themes. Ron Woods then took apart the FBI investigation, noting all the leads that the FBI had overlooked as it decided to focus exclusively on the theory that Terry Nichols was

Timothy McVeigh's only truly culpable accomplice. Tigar began this way:

> May it please the Court, Counsel, Mr. Nichols[30], members of the jury, on the 19th morning of April at 9:02 in the morning, or actually just a few minutes before, Timothy McVeigh parked in front of the Murrah Building in Oklahoma City. He was in a Ford F-700 truck from Ryder rentals with a 20-foot box. And Timothy McVeigh was not alone. With him in the cab of that truck were one or two other people. The driver parked the truck and set the bomb to go off.
>
> Yes, Terry Nichols was not there and did not know about the bombing until the next day. He was at home in Herington, Kansas, at 109 South 2d Street in a house he'd bought and moved into one month and six days before. He was at home. With him there were his pregnant wife, Marife; their infant daughter, Nicole; Marife Torres Nichols, born in the Philippines, who came to the United States as Terry Nichols' wife. Terry Nichols was building a life, not a bomb.[31]
>
> My name is Michael Tigar; and with our team, I represent Terry Nichols. We're here to gain respect for the undeniable fact that right now Terry Nichols is presumed innocent. We're here to help point out the hundreds of reasonable doubts that lurk in the evidence.
>
> In this opening statement, I want to introduce you first to our team members, the ones that are going to help us here; and then I want to outline for you the allegations, the charges, to point out what is not in dispute, what we agree with these prosecutors about, and what on the other hand we do contest, what the Government will try to prove and fail, and where you may find the reasonable doubts when the evidence is all in. Yes, when the evidence is all in.
>
> Can you see my hand? You can't see my hand. Not until I've turned it over and showed you both sides could you say that you've seen my hand.
>
> And just as in life, the last bit of evidence about an important thing may be the thing that lights up the whole picture, so we beg you to have open minds. We'll present evidence to you, beginning with our cross-examination of the very first witnesses

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[30] Always acknowledge your client by name in the opening. Let the jurors know that he or she is basic to the work you are about to do. Show respect to your client.

[31] This sentence, which expresses so well the theme of the Nichols case, was coined by Cathy Robertson, who was the mitigation specialist on the Nichols team. She is by profession a professor of English. She had worked with the defense team along with her husband, Adam Thurschwell. Tigar and Woods recruited her to be in charge of the mitigation evidence process. One day, in the team office, she stepped out of her cubicle and spoke this sentence aloud.

that take that witness stand; but for the first few weeks of the trial, the Government has the choice of what witnesses to bring, what evidence to bring. He that pleadeth his cause first seemeth just, but the defendant come and searcheth it out.

Over and over again, you're going to hear about the presumption of innocence. That means we start with a clean page. That means that suspicion, prejudice, prejudgment, speculation have no place.

Now, when the Government rests, we are going to present our witnesses and exhibits. So after introductions and review of the allegations here, Ron Woods and I, my co-counsel, are going to do an opening statement in three parts so that you can have a perfect way of keeping track of the strands of proof.

First, I'm going to describe for you the results of our investigation into the Oklahoma City bombing. I'm going to describe for you how Timothy McVeigh planned this crime, who he planned it with, and who helped him commit it. I will tell you about the people that Timothy McVeigh used and lied to, the people he used in ways that he had to know would put them under unjustified suspicion.

Second, Ron Woods and I are going to tell you about Terry Lynn Nichols, born and raised in a farming community, married, the father of three children. Ron will tell you about what happened when Terry Nichols first heard on the radio that he was being sought as somebody who knew Timothy McVeigh, how he went right to the police station and spent nine-and-a-half hours telling the truth -- yes, the truth -- to the FBI, even as the FBI agents lied to him, lied to his family, and lied to the court.

And third, I'm going to talk very briefly about the FBI and its laboratory, its so-called "experts," some of whom are going to testify here, how those people ignored vital evidence, used junk science, did sloppy fieldwork, and rushed to a very wrong and quite early judgment. I say "briefly," because when their witnesses testify, we will cross-examine them fully and you'll have a chance to see who it is that's right and who is not.

So who's on the Nichols team? Well, the first member is Terry Lynn Nichols. Me, I'm Michael Tigar; and I am a school teacher. I teach at the University of Texas in Austin, Texas. My co-counsel is Ron Woods, solo practitioner from Houston, former United States Attorney for the Southern District of Texas and formerly special agent for the Federal Bureau of Investigation. We have some lawyers here, young lawyers helping: Reid Neureiter from Washington, Adam Thurschwell from New York, and Jane Tigar from Austin.

Now, handling the evidence -- and you'll see these people working in the courtroom from time to time -- we have Rose Haire,

Tia Goodman, and Jan Halbert and Molly Ross from Oklahoma City and Stephanie White from Denver.

So let's begin by asking: What are those prosecutors charging that Terry Nichols did? What are they going to try to prove beyond a reasonable doubt? Well, you know there's an indictment, and there are 11 separate charges. When the case is all over, Judge Matsch will tell you what the formal, legal elements of each of these charges are; and he'll say to you, in effect, that if the Government fails to prove any element of a charge beyond a reasonable doubt, then it becomes your duty to acquit on that charge and to say "not guilty."[32]

Now, the first charge is that Timothy McVeigh, Terry Nichols, and others used -- conspired to use a weapon of mass destruction against the Murrah Federal Building and the people in it. We do not contest that Timothy McVeigh did indeed conspire with several other people to blow up that building. We agree and understand and stipulate and concede that at least 168 people died from that crime, that the crime visited enormous harms on the hundreds of others. There's no dispute about that. The dispute is can they overcome the presumption in law that Terry Nichols had nothing whatever to do with it.

But I want to warn you: The prosecutors may choose not to accept the reality that we accept. They may choose to put before you graphic, emotional, tragic evidence of the devastation on April 19. These evidence -- these events, I repeat, are -- they're not in dispute. We understand that there's not a joy the world can give like that it takes away. The prosecutors may replay these terrible images over and over as if to say that somebody has to be punished for these things. That, of course, is not the question. The question for you at the end of the evidence will be who; and that is a question to be answered, we trust, in the light shed by the evidence and the law and not in flashes of anger.

If the prosecutors present this evidence, our concern will be to show how it fits the picture that we have drawn and not theirs. We will cross-examine all the witnesses who come here, even those who have lost so much. By doing that, we mean them no disrespect. To the living, we owe respect. To the dead, we owe the truth.

Now, there will be plenty of evidence that Timothy McVeigh promised to do violence and that he preached his gospel of hate, that he assembled the bomb materials. But there will not be any witness who will say that they heard Terry Nichols utter any

[32] It is almost always a good idea to state clearly the elements of each claim and defense in opening, to help provide the jurors a framework within which to see the evidence. Tigar did this in detail for each of the counts of the indictment.

threats of violence to anybody. The key to this case is the charge, the allegation that Terry Nichols knew there was a conspiracy to use a weapon of mass destruction against the building and the people in it and intentionally joined in that agreement. As to that, Terry Nichols says not guilty, and as to that, the evidence will show you plenty of reasonable doubts. Guilt by association is not conspiracy, knowing is not conspiracy, being associated is not conspiracy.

In saying what the evidence will show -- by the way -- we don't assume a burden we don't have. Terry Nichols is innocent. He's presumed innocent. If they want to change that, they've got to bring you evidence, to satisfy you beyond a reasonable doubt. We don't have any burden of proof here. And our job is simply to show the reasonable doubts; and to do that, we'll show you the hard evidence, the truthful alternatives to their theory. And from the first witnesses they present, we'll do that when we rise to cross-examine.

Ron Woods spoke next. He began by stating a major defense theme: the government's investigation had failed to follow evidence that would have led away from Terry Nichols. His opening illustrates a good way to put evidentiary detail in perspective.

If it please the Court, counsel, Mr. Nichols, members of the jury, the evidence will show that in conducting the investigation right after the bombing that the FBI did an excellent job -- for a day and a half. The evidence will show that the FBI was able to find the rear axle of the Ryder rental truck which had been blown a block away from the site. And on that rear axle is a VIN number, a vehicle identification number. Each vehicle has a separate identification number so that it can be traced back to the manufacturer. By looking at that number, they were able to trace that Ryder truck back to a Ford manufacturer; and then the sale from Ford to Ryder rental.

They were able to go to Ryder rental's national headquarters in Miami and, through their computer records, find that that truck had been rented only two days before in Junction City, Kansas, by Robert Kling. They had that information on Wednesday, the 19th, that afternoon, quickly, by checking records and doing an efficient job.

They immediately sent the closest FBI agent they could find to Junction City, who was Scott Crabtree, in Salina, Kansas. They told him to call Eldon Elliott's Body Shop and get there right away.

Scott Crabtree will testify that he called Eldon Elliott's Body Shop, told them to keep the documents handy, don't talk about the case: I'm coming there right away to interview everybody involved in the rental.

> Agent Crabtree got there that afternoon and separated Eldon Elliott, Vicki Beemer, and Tom Kessinger, and interviewed them in depth as to the description of Robert Kling and the second person that was with him.
>
> He then had the FBI headquarters in Washington fly down that evening one of their forensic artists, who arrived in the early morning hours and met with Vicki Beemer, Tom Kessinger and Eldon Elliott separately; and by interviewing them and by getting descriptions, he was able to come up with sketches of Robert Kling and John Doe No. 2.
>
> During this period of time, the FBI, utilizing the information on the contract, had determined that the name Robert Kling and the address in South Dakota was false, did not exist, there was no address.
>
> So when the artist completed the sketches, they were designated as John Doe 1 and John Doe No. 2. This is early Thursday morning, the 20th. And you may have seen -- you may recall having seen those on television, those two sketches.
>
> That was done by talking to the three witnesses whose memory was fresh. This is on the 19th. Remember that the rental had only occurred two days earlier. Their memories are fresh. They can recall the details.
>
> The FBI then took these sketches of John Doe 1 and 2 and dispersed their forces throughout the Junction City area and the surrounding area, taking these sketches around to all the businesses, the filling stations, the restaurants, the motels, attempting to find out who John Doe 1 and 2 were. They were also at that time released nationwide on television that you probably recall seeing.
>
> They were very fortunate in arriving at the Dreamland Motel that afternoon, and the owner of the Dreamland, Lea McGown, told the FBI agents, this John Doe No. 1 sketch is Tim McVeigh, who was a renter in my motel from Friday, April 14, till Tuesday, April 18. The FBI looked at the registration records and found that Tim McVeigh had registered in his own name and had given North Van Dyke in Decker, Michigan.

Woods continued by showing the FBI's missteps and missed opportunities to locate those who were, the defense view, McVeigh's true accomplices.

CROSS-EXAMINING THE INFORMER -- MICHAEL FORTIER

As noted above, Michael Fortier was a key government witness. He had known and lived with McVeigh, and had known Nichols. He had been essential to the case against McVeigh, who was tried before Nichols and sentenced to death. He recited many of McVeigh's out-of-court declarations, admitted as conspirator statements, inculpating Nichols. In opening statement, Tigar had reminded the jury that such statements, admissible as conspirator declarations, faced two hurdles. One had to believe first that Fortier was telling the truth that McVeigh said these things, and second that McVeigh

was telling the truth if and when he said them. Consequently, Tigar was entitled under the rules to attack McVeigh's credibility as well as Fortier's, for a declarant such as McVeigh is subject to the same impeachment rules as if he or she had testified as a witness.[33] Fortier's unfavorable characterizations of McVeigh could therefore be used to undermine McVeigh's hearsay.

Fortier had traveled with McVeigh to "case" the Murrah building. Fortier lived with his wife Lori in Kingman, Arizona, where McVeigh had lived for a time. He knew of others to whom McVeigh had turned to help with the bombing, none of whom was ever prosecuted.

Fortier had given the FBI dozens of interviews, all of which were memorialized in FBI 302 reports that were not Fortier's prior statements, but rather the agent's impression of what Fortier had said. These 302s could be used to refresh recollection, but not admitted unless the agents testified.[34] Much of the cross-examination was devoted to tracking the way in which Fortier's testimony developed as he worked with the FBI and prosecutors, gradually adding more details that inculpated Nichols. As Tigar said in summation of this process, "The Marine Corps builds men; the FBI builds witnesses."

The cross-examination also focused on Fortier's drug use, in part to show that he would not be prosecuted for it. More significantly, the defense was going to call a physician who would describe the adverse effects of methamphetamine on cognition and memory.

Fortier had reached a plea bargain with the government. He pled guilty to a conspiracy to sell stolen firearms, transporting stolen firearms in interstate commerce, making a false statement that he did not know of plans to blow up the Murrah Building, and misprision of felony. He was not asked to plead guilty to a conspiracy to blow up the building, nor to any offense directly connected with the bombing. In making as good a bargain for himself as possible, he had a powerful motive to tailor his testimony to the government's theory of the case. The cross-examination would focus on this theme.

Another goal of the cross-examination was to show that Fortier was more culpably involved with the bombing than Nichols. If the jurors believed this, they might acquit Nichols of at least the more serious charges against him. If there was a penalty phase, the jurors could consider as a mitigating circumstance that others as guilty as they had found Nichols to be would not be sentenced to death.

Fortier's direct examination consumed about a day of trial. The prosecutor led Fortier through his connection with McVeigh and through McVeigh with Nichols. The thrust of the direct was to show that McVeigh and Nichols were partners, and that McVeigh had often said that he and Nichols would act together. What follows are a number of brief excerpts from a lengthy cross-examination:[35]

Opening Theme – The Charges Against Fortier

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[33] Fed. R. Evid. 806.

[34] An FBI "report of interview," known as a Form 302, is the FBI agent's "statement," and not that of the witness who was interviewed, except to the extent that he witness signs or otherwise adopts it. The Jencks Act, 18 U.S.C. §3500. See LaFave, Israel & King, Criminal Procedure §24.3(c) (4th ed. 2004).

[35] The entire cross is at 1997 WL 703345 (morning session) and 1997 WL 703866 (afternoon session).

Q. Good morning, sir.
A. Good morning.
Q. My name is Michael Tigar. I'm one of the lawyers appointed to represent Terry Nichols. You've told several different stories about what happened to you in April 1995, haven't you, sir?
A. Yes, I have.
Q. I want to ask you first about what you told us yesterday and today, and then I'm going to ask you about some of the things you said other times.[36] You have a written agreement with the government. Is that right?[37]
A. Yes, I do.
Q. You are not charged with a conspiracy to blow up the Murrah Building, are you, sir?
A. That's correct.
Q. You did not plead guilty to that; is that correct, sir?
A. Yes, sir.
Q. And you did not plead guilty to blowing up the Murrah Building; correct?
A. That is true.
Q. You didn't plead guilty to murdering anybody inside it; is that correct?
A. Yes, sir.
Q. And didn't -- the prosecutors told you, did they not, that you were being asked to plead guilty to everything that you did. Is that your understanding?
A. Yes, everything that I could be charged with.[38]

McVeigh the Racist – Fortier and Nichols Are Not

Q. Now, you mentioned that you first had a political discussion with Mr. McVeigh in the Army; is that correct? Did he share some literature with you?
A. Yes, he did.
Q. He gave you a copy of a book called The Turner Diaries; correct?
A. Yes.
Q. And is it fair to say, sir, that from that day down to the time when you last saw him, he often gave you political literature?
A. Yes, that is true.
Q. And is it fair to say, sir, that he made copies of political literature that he had and handed it out to others?
A. I believe he did.
***

[36] The jury now has an idea of the order of topics in the cross-examination.
[37] Introducing the first topic.
[38] He waffles a little in his response, but it is good enough not to require the examiner to pin it down further. Fortier has spent hundreds of hours preparing for this cross-examination. The cross-examiner must not try to get more out of it than it can possibly yield. This is the idea of immanence.

Q. And is it fair to say that this political literature that Mr. McVeigh began to share with you in the Army had a certain character?
A. Yes, I think that's fair.
Q. It was white supremacist literature; correct?
A. The book in the Army certainly was, yes.
Q. And -- now, you did not agree with the white supremacist agenda, did you, sir?
A. I do not.
Q. You do not and you did not; correct?
A. That is correct.
Q. You were his friend all of these years, but you did not share his racism; is that right?
A. That is correct.
Q. Now, you mentioned that Mr. McVeigh's attitudes changed over time. Is that fair?
A. Yes.
Q. After the events in Waco in 1993, he became much more agitated; right?
A. He was upset about the events in Waco.[39]

McVeigh Untrustworthy

Q. Now, you know that [Mr. McVeigh]'s a thief; correct?[40]
A. What do you mean?
Q. Well, sir, you and Mr. McVeigh snuck into a National Guard yard and stole things together; correct?
A. Yes, sir, that is correct.
Q. So that's thieving, isn't it?
A. Yes, it is.
Q. And Mr. Nichols wasn't with you then, was he?
A. No, he was not.
Q. Didn't have anything to do with that; correct?
A. No, he did not.
Q. So you learned that Mr. McVeigh was a thief; right?
A. Yes.
Q. Now, in addition to that, you heard Mr. McVeigh on a number of occasions say that he was going to blow up a building; correct?
A. Yes.
Q. And he told you that he was going to blow up a building while it had people in it; correct?

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[39] The "events in Waco" referred to the 1993 shootout between federal authorities and a religious group known as the Branch Davidians. The final and deadly day of the shootout was April 19, 1993, which was the reason McVeigh selected the April 19 date for the bombing. See generally Armageddon in Waco: Critical Perspectives on the Branch Davidian Conflict (Stuart A. Wright ed. 1995). This line of questions also helps to separate Fortier's and Nichols' views from those of McVeigh.

[40] We now begin to deal with McVeigh's lack of credibility.

A. Yes, he did say that.
Q. You learned that Mr. McVeigh uses narcotics; correct?
A. He has.
Q. On how many occasions have you seen Mr. McVeigh use controlled substances?
A. Two or three times.
Q. What controlled substances did you see Mr. McVeigh use on the occasions when you were with him?
A. He smoked a marijuana joint with me once; and on two or three other occasions, he used crystal meth.
***
Q. Now, you never saw Mr. Nichols steal anything; right?
A. Never.
Q. And you know that Mr. Nichols has two little kids; right?
A. At that time -- now I do, yes.
Q. Yes. And as a matter of fact, his daughter is the same age as your Kayla; correct?
A. About a year -- I think there is almost a year difference.

Fortier and McVeigh Do Things Nichols Did Not

Q. The first time after the Army that you saw Mr. Nichols was in the fall of '93. Is that right?
A. Yes, that's correct.
Q. You met him at a Wal-Mart and he came to your house and spent a little while. Right?
A. Yes.
Q. And that was the time you told us that he and your wife -- or that Mrs. Nichols and your wife, Lori, talked about babies and you and Mr. Nichols talked about that he was going to get a job as a carpenter in Las Vegas. Is that fair?
A. Yes.
Q. Now, during that time -- during that conversation, did Mr. Nichols -- did you hear Mr. Nichols threaten anybody?
A. No.
Q. He didn't say that he was going to bomb anything; right?
A. No, he did not.
Q. He didn't express any political views to you, did he?
A. No. We didn't speak about political issues.
Q. Didn't give you any political literature; correct?
A. No, he did not.
***
Q. You didn't have any political conversation of any kind with him that evening, did you?
A. Not that I remember.
Q. Now, in -- sometime in 1994 later on, Mr. McVeigh left Kingman. Correct?
A. Yes.

Q. Now, when he left Kingman -- and you told us that -- he had some kind of a sale. Correct?
A. He did. He had a sale, but it wasn't when he left. It was prior to that.
Q. All right. When he had the sale, did you buy something from him?
A. Yes.
Q. What did you buy from him?
A. Among other items, I bought some explosive items from him.
Q. What explosive items did you buy from Mr. McVeigh there in 1994 when he left Kingman?
A. I bought some cannon fuse.
Q. Some what? I'm sorry?[41]
A. Some cannon fuse.
Q. Cannon fuse. All right, sir.
A. Some blasting caps.
Q. Yes, sir?
A. Some aluminum powder that he said would blow up in some way. A can of gun powder. Possibly other items, but I can't remember.
Q. In addition to explosive items, did you buy fertilizer from him?
A. No, sir.
Q. Did you ever get fertilizer from Mr. McVeigh?
A. Yes.
Q. When did you get fertilizer from Mr. McVeigh?
A. That night he asked me to -- if I wanted to buy the fertilizer also, ammonium nitrate in the bag.
Q. That's the same night as the garage-sale night?
A. Yes.
Q. And he asked you if you wanted to buy some ammonium nitrate. What did you say to him?
A. I told him no. I didn't know how to use the ammonium nitrate. And he asked me if I would just hold onto it for him then.
Q. Did you hold onto it for him then?
A. I took it home and put it in my shed.
***
Q. You also mentioned in talking to us yesterday something about a militia. Correct?
A. Yes.
Q. Did you all contact some individual or organization about the possibility of forming a militia?
A. We contacted an individual in Prescott, Arizona, and talked to him about what his militia consisted of and how myself and Tim could build one.
Q. And who was that person?
A. I believe his name is Walter Bassett.
Q. And is that the National Alliance?

[41] Tigar heard it the first time, but maybe the jury didn't.

A. I don't know about that.[42]

***

Q. Now, was there any time in your life when Mr. McVeigh and Mr. Nichols were standing so that everybody could hear when Mr. McVeigh said in words or substance: "This is my friend Terry. We're going to blow something up that belongs to somebody else, like a building"?

A. No, sir.

Q. Was there ever a time in your life where Mr. McVeigh and you and Mr. Nichols were standing side by side, where everybody could hear each other, when Mr. McVeigh said in words or substance: "My friend Terry and I are going to blow up a building with people in it and kill people"?

A. No, sir.

***

[Fortier describes a road trip with McVeigh during which they visited the Murrah Building in Oklahoma City.]

Fortier's Drug Use

Q. Now, you told us in direct examination that you had used methamphetamine; correct?

A. Yes.

Q. How did you use it?

A. I either smoked it, or I snorted it through my nose.

Q. And when you "smoked it," you smoked it in some kind of -- how did you smoke it?[43]

A. We either put it on glass or on tinfoil, and you heat the bottom of it and it will smoke.

Q. And then what do you do with the smoke as it comes up off the glass or the tinfoil?

A. You inhale it.[44]

Q. Well, <u>you</u> can inhale it. <u>One</u> does inhale it. Is that what <u>you</u> do with it?

A. Yes.

Q. What does it do for you?

A. It makes you feel very excited.

***

Q. Now, you say also you snorted it; correct?

A. Yes.

Q. How would you do that?

A. One would form it into a line on some surface, and you take a straw --

Q. What do you mean "form it into a line"?

---

[42] Later evidence will tie Bassett to the National Alliance.

[43] This is a non-leading question, asked on cross-examination. There is almost no potential downside to this question. See Tigar, Examining Witnesses ch. 8 (2d ed. 2003)

[44] He says "you" inhale it. I do not accept this careless terminology. I am trying to make a point here.

A. Well, sometimes it comes in a powder form, or sometimes it comes in a solid form. If it came in a solid form, you'd have to crush it up into a powder. Then you could form that into a line and snort it through a straw into your nose.

Q. And show the jury how you would do that.

A. What you do is you take a razor blade or a knife or some type of sharp instrument and you would just go like this [indicating] and it would form a line.

Q. And then to snort it, what would you do? Put the straw in your nose?

A. Yes.

Q. And then what, go, "Chnchnchnchcn"? Like that?

A. Just like that.

Q. Just like that. And then it would get up -- what would it do to you when the stuff got into you?

A. Right off the bat, it would burn real bad; and then that would go away.

Q. You did this on purpose?

A. Yes. Many times.

Q. Okay. And then what would happen?

A. And then you would feel like -- I'd describe it as an excitement. It feels as if you would just get off a roller coaster and you're just very excited.[45]

More on Fortier-McVeigh Contacts With Explosives and Charges Against Fortier

Q. Now, you said that Mr. McVeigh dropped some things by your house; correct?

A. Yes.

Q. So you got some blasting caps from Mr. McVeigh. We talked about that. Correct?

A. Yes.

Q. You got some ammonium nitrate from Mr. McVeigh; correct?

A. Yes.

Q. You got some Primadet from Mr. McVeigh; correct?

A. I don't know what Primadet is.

Q. Oh. You got that stuff that -- the orange tubing that you saw during your direct examination. You got that from him; correct?

A. Yes. Blasting caps, yes.

Q. Well, it's a blasting cap, but it has the orange stuff at the end of it; right?

A. Yes.

Q. You got some Kinepack or some Kinestik, some binary explosive from him?

A. Yes.

---

[45] The judge's charge will describe a reasonable doubt as one that would cause a reasonable person to hesitate in making an important decision. In summation, Tigar could ask whether knowing Michael Fortier is a narcotics-using person who cooperated with McVeigh in so many ways, jurors would hesitate to let him baby-sit their children.

Q. You got both halves of it?
A. Yes.
Q. And your understanding is you can mix those together and you can make an explosive; right?
A. Yes.
Q. And you had all of these things at one time or another either in your house or your storage shed; correct?
A. The shed in my yard, yes.
Q. And you didn't conspire with Timothy McVeigh to blow up that building, did you?[46]
A. No, sir, I did not.

How Fortier's Story Originated and Developed

Q. Now, sir, I'd like to turn to the versions of events – the things that you said before you came here today. When is the first time that you were interviewed by the Federal Bureau of Investigation in connection with this case?[47]
A. I believe it's April 22, 1995.
Q. And do you remember on April 22, which would be a Saturday, being interviewed by Agents Williams, Petrie, and Mooney?
A. Yes.
Q. Now, they told you that they were investigating the bombing; correct?
A. Yes, they did.
Q. And you told them that you had not left Kingman, Arizona, for several months; right?
A. That's what I told them.
Q. According to you today, that was true; correct?
A. No, that is not true.
***
[Tigar asked a series of questions concerning what was true and what was false about his story to the FBI.]
Q. Well, where did this interview take place? At your house, or down at some sort of facility they had there?
A. Both places.
Q. So it started one place and then moved to another?
A. Yes.
Q. How did you decide what you were going to tell the truth about and what you were going to lie about?[48]
A. The factor would be the legality of the issue. Anything that was illegal, I would lie about.

---

[46] Again the theme: Fortier did more than Nichols and yet was not asked to plead guilty to conspiracy.

[47] Now the examination turns to an orderly development of how Fortier' story was built up over time.

[48] This is an open-ended question. It illustrates when and why such questions can be useful during cross-examination.

Q. Well, why would you do that? What were you afraid of?
A. Of getting in trouble.
Q. What kind of trouble did you think you'd get into?
A. Well, for one reason, I had a bunch of stolen weapons in my house. I did not want them to know that.
Q. Right.
A. I had prior knowledge of the bombing, and I didn't know -- I wasn't sure if that was illegal or not, but it sure did seem like it should be; so I did not want to tell them about any prior knowledge.
***
[Following up on his many talks with the FBI just after the bombing:]
Q. Okay. Did you then look at your wife and say: "Lori, let's tell them that we know Tim McVeigh. Let's tell them every time we saw him, and let's do the best we can to remember all these things that happened these last few months so that we can help"? Did you say that?
A. No, sir.
Q. Did you think that?
A. The first day of the bombing, the first morning?
Q. The 21st, sir?
A. Not on the 21st.
Q. Did you do that?
A. No, sir.
Q. In fact, sir, you were extremely proud of the confrontational approach that you took to the FBI. Isn't that a fact?
A. Yes.
***
[Tigar then played a series of excerpts from the electronic surveillance that the FBI put in place on Fortier's house trailer and telephone. During these conversations, he boasts that he is going to sell his story for a million dollars, rants at his mother for talking to the media without being paid, and boasts of his intended exploits as a potential witness. In one recorded conversation, Fortier says, among other things that he would pick his nose and flick the resulting material at the judge. He was, from his tone of voice, obviously high on something, probably methamphetamine, which can make one boastful. In one recording, he is overheard asking his wife to light a tinfoil pipe used to smoke meth. The government did not charge Fortier with any narcotics offenses.

Now the examination moves to the time when Fortier decides to become a cooperating witness.]
Q. Now, sir, there came a time when you got a grand jury subpoena; correct?
A. Yes.
Q. You and your wife, Lori, went to Oklahoma City?
A. Yes.
Q. Did you -- you stayed in a motel?

A. Yes.
Q. And at 4:30 p.m. on the 17th of May, 1995, did you call the FBI?
A. I called a number that was on the subpoena. I don't know if it was the FBI or not.
Q. And did you later that day speak to some FBI agents?
A. Yes.
Q. Now, they got there at about 5:35 p.m.; correct?
A. That sounds right.
Q. And you told them you wanted to correct the statements that you had made to the FBI in Kingman, Arizona; is that right?
A. Yes. I said that to them.
Q. And Mrs. -- your wife, Lori, what -- how does she like to be referred to? Mrs. Fortier, Ms. Fortier? What --
A. Mrs.
Q. Mrs. Okay. Mrs. Fortier said that she wanted to correct her statements, as well; correct?
A. Yes. That was her intentions, also.
Q. Now, you also said that you were fearful of reprisals from the Aryan movement if you testified against Timothy McVeigh; correct?
***
Q. Well, isn't it the way it happened, sir, that the agents got there, you told them you wanted to correct your statement, you talked about reprisals and that you didn't want Mrs. Fortier to go before the grand jury and then they asked you do you still want to correct your statement?
A. Yes, sir.
Q. All right. And then the next thing that happened, sir, isn't it, is that you and Mrs. Fortier started to talk amongst yourselves about just exactly what you were going to do?
A. Yes.
Q. And then the next thing that happened, sir, was that the two FBI agents just left the room? Isn't that what happened?
A. Yes.
Q. And while the FBI agents were out of the room, you and Mrs. Fortier talked; correct?
A. Yes, sir.
***
Q. Then you stepped out of the room; correct?
A. Yes.
Q. Where did you go?
A. I went to speak with Special Agent Volz.
Q. Physically where was that?
A. Outside the room on the balcony.
Q. This is a balcony on the second floor?
A. Yes, sir.
***

Q. And you told the agents in effect, "I want immunity, and I'll give you Tim McVeigh"? Isn't that what you said?
A. In effect, that is what I said.
Q. And they told you that they didn't have the power to give you immunity, didn't they?
A. I don't remember them saying that.
Q. Did they tell you that they were going to give you immunity?
A. No, sir, they did not.
Q. Did they tell you that they weren't?
A. I don't remember them saying they weren't.
Q. Isn't it a fact, sir, that they told you that you would not and could not be granted immunity by the interviewing agents and that only prosecutors involved could do that?
A. I don't remember them saying that.
Q. Didn't they tell you, sir, that they didn't need you to make a case against Mr. McVeigh?
A. Yes, I do remember Special Agent Volz saying that.
Q. And after they told you that, you went back in the room; right?[49]
***

Fortier's Gun Transactions Come In Now and Will Be Used at the End

Q. I show you now, sir, what has been -- . May I approach, your Honor?
THE COURT: Yes.
Q. [continuing] -- what has been marked as Defendant's 397 for identification. And the first page is a government document. I'm asking you, please, to look at the second page and tell us whether you recognize the handwriting.
A. Yes, I do.
Q. And whose is that, sir?
A. That is my handwriting.
MR. TIGAR: Your Honor, we offer pages 1 and 2 of 397. 397 is a self-authenticating government document, and page 2 Mr. Fortier has just identified.
PROSECUTOR: No objection.
THE COURT: All right. D397 is received.
Q. I'm placing up on the [ELMO] here what has been received in evidence as government's 397, page 2.
Q. Mr. Fortier, this is a firearms transaction record; correct?

[49] This is a key portion of the examination. Fortier did not admit that the FBI agents said they could not give immunity, but the jury knows he did not in fact get immunity, only a plea bargain, and the FBI practices will be in evidence from other sources. The key here is that he offered only McVeigh, not Nichols, and was turned down flat with the assertion that they already had McVeigh and did not need Fortier to make that case. The clear inference is that he would have to give them somebody else, probably Nichols, who was already in custody. His statements to the government from that point on progressively expand his alleged knowledge about Nichols.

A. Yes, sir.
Q. And you filled it out, did you not? On July 17, 1993? Right?
A. Yes, sir.
Q. And you were asked are you an unlawful user or addicted to marijuana or any depressant, stimulant or narcotic drug or any other controlled substance; and you answered no. Correct?
A. That is true.
Q. And then you signed it; right?
A. Yes, I did.
Q. And before you signed it, did you read the part that says, "I hereby certify that the answers to the above are true and correct. I understand that a person who answers yes is prohibited from purchasing and/or possessing a firearm except as otherwise provided by federal law. I also understand that the making of any false oral or written statement or the exhibiting of any false or misrepresented identification with respect to this transaction is a crime punishable as a felony"? Did you read that?
A. I do not recall. Most likely, I skipped that part.
Q. Well, was the "no" true?
A. No, the "no" was false.
Q. Why did you put a false statement on a firearms record, sir?
A. Because I knew that if you answered yes, they would not let you buy the weapon.
Q. You committed a federal felony because you wanted to have a gun?
A. Yes, sir.
***
Q. I'm going to place this in front of you, sir; and I'll ask you, please, will you turn to Tab No. 484. Is that a -- a gun purchase form dated December, 1993? Looking at page 2, D484.
A. This is a firearms transaction record.
Q. And whose is it?
A. It is mine.
Q. Did you sign it?
A. Yes.
MR. TIGAR: Offer D484.
PROSECUTOR: No objection.
THE COURT: Received.
Q. Did you make the same false statement, sir?
A. Yes, I did.
Q. And what -- what gun was it that you told the lie to get there?
A. This was a 10/22.
Q. What's a 10/22?
A. It's a small arms. It's a .22 caliber rifle.
Q. Would you look at D485, sir. Is that a firearms transaction record?
A. Yes, sir.
Q. Whose is that?

A. This is mine.
Q. We offer it, your Honor.
PROSECUTOR: No objection.
THE COURT: D485 is received.
Q. July, 1993?
A. Yes.
Q. Did you lie?
A. Yes, sir.
Q. Was it the same lie?
A. Yes, sir.
Q. What gun did you get for that lie?
A. Two guns, actually. A .38 pistol and a Mini-14 rifle.
Q. Now, under your plea agreement, you will not be prosecuted for any one of the lies you've told on these firearms forms; is that correct, sir?
A. I do not believe so.
THE COURT: I'm not sure of the answer. You don't believe it's correct --
THE WITNESS: I don't believe I'm going to be prosecuted for this.
THE COURT: All right.

Fortier's Plea Bargain

Q. Now, you testified on direct examination, sir, that you had spent some time with government lawyers discussing the matters you were going to present in court; is that correct, sir?
A. Yes.
Q. And you said you met with government lawyers about 25 times?
A. Yes. And each one of those times were for either one day or maybe two days.
***
Q. Now, I'm going to show you page 7 of the plea agreement portion of government's Exhibit 193 in evidence. That is entitled, "Breach of Agreement," isn't it, sir?
A. Yes, sir.
Q. And is that part of the deal that you have with the government?
A. Yes, it is.
Q. It says, "If further investigation discloses that Mr. Fortier conspired to bomb any federal building" -- and then it continues on with some other things. It says, ". . . then the United States will have the right to characterize such conduct as a substantial breach of this agreement," and so on. Correct?
A. Yes.
Q. And it says, ". . . in which case the obligations of the United States under this agreement will be void, and the United States will have the right to prosecute Mr. Fortier for any and all offenses that can be charged against him in any district or state." Do you see that?
A. Yes.

Q. You have not been charged with conspiring to bomb a federal building, have you, sir?
A. No.
Q. And the United States is aware of everything, all the facts, that we have talked about today, are they not?
A. Yes.
Q. They're aware that you got ammonium nitrate from Mr. McVeigh; correct?
A. Yes.
Q. They're aware that Mr. McVeigh left explosives in your house; correct?
A. Yes.
Q. They're aware that Mr. McVeigh could -- lived in your house and could use your tools; correct?
A. Yes.
Q. They're aware that Mr. McVeigh could use your phone?
A. Yes.
Q. They're aware that Mr. McVeigh borrowed your car?
A. Yes.
Q. They're aware that you went to Oklahoma City with Mr. McVeigh?
A. Yes.
Q. They're aware that you wrapped explosives for transport?
A. I was a part to that, yes.
Q. They're aware that you tried to get a storage shed in a different name than your own?
A. Yes.
Q. They're aware that you handled guns you thought were stolen?
A. Yes.
Q. They're aware you handled explosives you thought were stolen?
A. Yes.
Q. They're aware that you shared money with Mr. McVeigh in connection with the guns?
A. Yes.
Q. They're aware that you wanted to form a militia and took steps to that end?
A. Yes.
Q. They're aware that you had literature that you got from Mr. McVeigh that you had in your house; correct?
A. Yes, they are.
Q. And those are just -- those aren't all of the things we talked about today but some of them; correct?
A. That is correct.
Q. As you sit there today, sir, are you fearful that the United States will decide to charge you with conspiring to bomb a federal building?
A. No, sir, I am not.

Q. Now, you testified in direct examination -- excuse me. One moment. Let's look at more of the paragraph here, if we may. It also says that if further investigation discloses that you refused to answer any questions put to you -- well, you haven't done that, have you?
A. No, sir, I have not.
Q. " . . . or makes any false or misleading statements to investigators or attorneys of the United States or makes any false or misleading statements or commits any perjury before any grand jury or court," do you see that, sir?
A. Yes.
Q. Now, who do you understand has the right to decide whether or not you have committed perjury and prosecute you for it?[50]
A. I believe that would be the judge.
Q. Well, is it your understanding, sir, that it's prosecutors who decide whether to prosecute people?
A. Yes.
Q. You're aware that neither I nor Mr. Woods nor Mr. Nichols has any power to prosecute you if we should think that you're committing perjury?
A. I'm aware of that.
Q. Now, in your direct testimony, sir, you discussed the charges to which you have pleaded guilty and the maximum potential sentence that you might receive. Do you remember that?
A. Yes.
Q. And what do you understand to be the maximum potential sentence that you could receive?
A. 23 years in prison.
Q. Now, when -- do you expect to do 23 years?
A. I think that's a distinct possibility.
Q. Now, Judge Matsch is not the judge who will sentence you; correct?
A. No, sir.
Q. That is, another judge has been appointed for that purpose; right?
A. That is right.
Q. And you understand that's a judge in Kansas; correct?
A. Yes.
Q. Now, at the time you are sentenced, which hasn't happened yet -- correct?
A. That is correct.
Q. -- your lawyer will have the right to present reasons why the sentence should be less than 23 years; correct?

[50] This is a vital part of any cross-examination of a plea-bargaining informer. All such bargains recite that if the informer lies, he or she can be prosecuted. Prosecutors point to these terms as a guarantee of truthfulness, subject to the restrictions on "vouching." See QXR case on impermissible vouching. The cross-examiner must point out who makes the decision as to what is true or false.

A. Yes.
Q. Do you know what the guidelines' sentence is that --
A. Yes.
Q. Yes. What is it?
A. I believe it's 27 to 33 months.
Q. So if you were sentenced in accordance with the sentencing guidelines, you'd get 27 to 33 months; correct?
A. Yes.
Q. Now, your lawyer and you would have the right to argue for something less than that; correct?
A. I believe that's true.
Q. And a probation report would be prepared; correct?
A. Yes.
Q. In addition to that, the government will have the right to present evidence at that sentencing hearing; correct?
A. Yes.
Q. Now, is it your understanding that the government has the right but not the obligation to say to the judge, should it choose, that you have rendered substantial cooperation?
A. Yes.
Q. Are you aware that neither you nor I nor Mr. Nichols nor Mr. Woods would have any right to ask the judge to consider substantial cooperation? Is that your understanding?
A. Yes.
Q. Now, looking here at page 5 of your plea agreement, sir, do you see paragraph 65, Section 23 -- excuse me – Section 3553(e) motion. What do you understand a Section 3553(e) motion to be?
A. That if I fulfill my obligations with the United States prosecution, they under their sole discretion -- they may file a -- they may ask the judge to reduce my sentence.
Q. Let's read this: "If Mr. Fortier completely fulfills all of his obligations under this agreement" -- that's the first part; correct?
A. Yes.
Q. One of your obligations is to tell the truth. Correct?
A. Yes, sir.
Q. But the decision as to whether you did or not is going to be made by the prosecutors -- right -- for these purposes?
A. Yes.
Q. "At the time of sentencing, the United States will advise the sentencing judge of the full nature, extent, and value of the cooperation provided by Mr. Fortier. In addition, the United States will evaluate the information provided by Mr. Fortier pursuant to the preceding paragraph." Do you see that, sir?
A. Yes.
Q. And then it says, "If the government determines in its sole discretion that Mr. Fortier has rendered substantial assistance in the

investigation and prosecution of others involved in criminal activities" -- "others" includes others than yourself; correct?

A. Yes.

Q. ". . . then it will file a motion pursuant to" -- and it cites some laws which will so advise the judge. And then it tells you the judge has the discretion to determine the sentence. Correct?

A. Yes.

Q. Now, we read here that the United States will evaluate the information provided by Mr. Fortier. Do you read that?

A. Yes.

Q. What does "evaluate" mean to you, sir? You worked at the True Value hardware store; right?

A. Yes.

Q. What does "evaluate" mean to you?

A. It means to me like they will grade my cooperation.

Q. Pardon me?[51]

A. "Evaluate" means grade or consider how helpful I was.

Q. Okay. And the United States prosecutors are the only ones under this agreement who have any power to grade or to consider your cooperation. Correct?

A. Yes.

Q. And then the judge will decide based on what they do or do not say; correct?

A. Yes.

Q. When you went into prison, sir, had your youngest child been born?

A. No, sir.

Q. Have you seen your youngest child?

A. Yes, I have.

Q. Is it your hope, sir, to be reunited with your children?

A. Yes.

Q. Of all of the things in the world, is being reunited with your family the most important to you?

A. Absolutely.

Q. And you want that to happen as soon as you can, don't you, sir?

A. Yes, I do.

Q. And you are a man who would lie just to have a gun, aren't you, sir?

A. I did do that, yes.

MR. TIGAR: No further questions.

TRIAL EVENTS AND RESULTS

The jury heard from more than 200 trial witnesses, and saw more than 2,000 physical exhibits. More than a dozen forensic experts testified on such things as bomb residue, plastic barrel composition, truck body construction, toolmark identification, fingerprints, and handwriting analysis. The defense called witnesses to establish its theme that McVeigh had reached out, independent of Nichols, to people who would help

[51] Tigar probably heard the answer the first time, but wanted it repeated.

him with his plan. The prosecution focused on direct and circumstantial evidence of the Nichols-McVeigh connection.[52]

In the end, as noted, the jury's verdict – reached after more than a week of deliberation – was clearly a compromise – guilty only of conspiracy and involuntary manslaughter, not guilty of first degree murder, second degree murder, of arson and use of a weapon of mass destruction.

PENALTY PHASE

Judge Matsch rejected a defense contention that the verdict could not, consistent with the Eighth Amendment, lead to a penalty trial.[53]

The penalty phase was emotion-laden to an unusual degree. Groups of victims and their supporters decried the jury's initial verdict. They held public meetings around Denver in the ten-day recess between the two trial phases. In a capital case, the Supreme Court has permitted victim impact evidence. Therefore, it was expected that family members of victims would testify. The court permitted testimony from any relatives of any of the 168 victims, not only the eight federal officers named in the homicide counts. Witness after witness sobbed, and in some instances shouted. Judge Matsch intervened at some points, but interrupting this flow of painful recollection was a task that nobody in the courtroom relished undertaking.

Relatives of the federal officers displayed not only sadness but anger at the jury's finding that Nichols was guilty of involuntary manslaughter rather than murder. In addition, there was graphic testimony from medical and emergency personnel about the deaths and injuries. The defense called a number of Nichols' friends and family members attesting to his personal qualities.

In a federal death penalty case, the jurors are told to proceed in three stages. They must first decide whether the defendant had a culpable role in the death of another, under applicable intent and participation standards.[54] Next, they must decide if the prosecution has established one or more aggravating factors beyond a reasonable doubt. Finally, if they get past those two stages, they weigh mitigating and aggravating factors on which the judge has instructed them based on the statutory factors and items submitted by the parties.

In this weighing process, each juror is sovereign, in the sense that she may assign to any factor such weight as she believes it should have. Thus, a juror may think that one

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[52] The summations of the prosecution and defense, which took many hours, are available at 1997 WL 765592 (first morning, government summation begins), 765971 (first afternoon, government summation concludes, defense summations begin), 769081 (defense summation concludes, government rebuttal summation).

[53] The offenses of conviction were involuntary manslaughter and conspiracy to commit arson and to use a weapon of mass destruction. The conspiracy count did not allege any culpable intent with respect to resulting death. The defense argued that major participation in intent to kill homicide – at least express malice second degree murder – is the minimum level of criminality that will support a death sentence, and that the conspiracy count did not provide that foundation. See LaFave, Israel & King, Criminal Procedure §3.5(f) (4th ed. 2004). The government countered that the question of culpable intent would be dealt with in the penalty phase, under 18 U.S.C. §3591(a)(2).

[54] 18 U.S.C. §3591(a)(2).

mitigating factor outweighs everything else, and vote for life. A death verdict requires that all twelve jurors concur at each of the three stages. A disagreement at any stage is a life verdict under the law. This point had not yet been established by the Supreme Court[55] at the time of the Nichols trial. Therefore, when the jurors announced failure to agree on the first phase issues, the government moved for a mistrial with an eye to having another penalty trial. Judge Matsch considered the matter overnight and held that the jury's disagreement was a verdict. Under that interpretation, the sentencing decision lay with the judge. Judge Matsch sentenced Nichols to life imprisonment.[56]

The prosecution's penalty phase argument focused on what the government claimed the jury had necessarily decided by finding Mr. Nichols guilty of conspiracy, and on the destruction and loss of life in Oklahoma City. The defense took a different tack. Early on, the defense team had decided that all the testimony and argument would be conducted as calmly as possible, seeking to create an atmosphere of reason to counter the anger and sadness that pervaded the courtroom.

With respect to the first issue, culpable participation, the defense had to go back and look again at trial phase evidence. This is an example of that "bridge building" discussed above. In addition, evidence about Nichols' character and conduct from the trial phase was once again open for consideration.

The defense summation returned to the idea of sanctuary. In a sanctuary, all the people are part of the group, and of equal dignity. The argument for death must always deny those propositions that portray the defendant as "the other," or as somehow without those human qualities that entitle him to live.[57] The defense must also focus on the process by which the jurors decide, and the responsibility of each juror for the ultimate result:

> 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, when we're all done here, will tell you [in his instructions] 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

[55] Jones v. United States, 527 U.S. 373 (1999).

[56] Later, Nichols was tried for murder in Oklahoma state court, and that jury also did not vote for a death penalty.

[57] The entire argument is at 1998 WL 1057.

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.

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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 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.

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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.

[Tigar reviewed the judge's charge, element by element, recalling evidence from the trial phase as well as from the penalty phase. A guiding theme was that only the jurors knew what they had decided, and that their conspiracy verdict could lawfully have rested on Nichols' minor participation. Tigar then reviewed the aggravating circumstances alleged by the government, noting that many of them required the jurors to place their trust in Michael Fortier's version of events, again harking back to the trial phase evidence.]

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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. [Tigar analyzed some of the prosecution's attacks on defense mitigation evidence, and some of the prosecution's characterizations of Nichols's actions and motives.]

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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 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?

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[Tigar then turned to the mitigating factors that the defense had proposed and on which the judge instructed.]

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 [his wife] in the Philippines.

That he's a caretaker for others including those not related to him by blood. . . .

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.[58] 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

[58] Over the prosecution's objection, Judge Matsch included this as a mitigating factor.

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.[59]" And the prosecutor got up and reminded all of us, thinking that he would remind me, that there were

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[59] The earlier phase summation had ended with:

> 168 people died in Oklahoma City. We have never denied the reality of that. More than 30 years ago, I went to Washington, D.C., for the first time. And the very first public building I ever saw was the Supreme Court of the United States. And I saw where it said, "Equal Justice Under Law." And that means rich or poor, or neighbor or stranger, or a tax protester or not, or somebody who is different from us, or not. And wouldn't it be terrible if it was thought by anybody that a fitting memorial to the 168 who died would be to go there some dark night and chop those words off where they are on the lintel above the Supreme Court of the United States? Members of the jury, I don't envy you the job that you have. But I tell you this is my brother. He's in your hands. 1997 WL 769081.

> 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.[60]
>
> 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.

CONCLUSION

There was not even unanimity on the jury about Nichols' mental state with respect to resulting death. The jurors did not even get to weighing mitigating and aggravating factors. Juror interviews after the trial ranged wide. Many jurors professed that they lost faith in the government's competence and candor. Some of them thought that the government lawyers were prone to exaggerate. These interviews give reason to believe that the "sanctuary" idea and theme played an important role in defusing the emotion that was inherent in the case and leading the jurors to see the underlying issues.

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[60] The story of Joseph is a part of a shared cultural tradition, known to Christian, Jewish and Muslim believers and, through its popularization in musical form, to a broad audience. The story is therefore suitable for jury argument, as a story with more limited cultural significance would not be. The imagery in William Wirt's arguments in the Burr case, discussed in Professor Ferguson's essay in this volume, are drawn from materials familiar to the jurors of that time and place.