

OPENING STATEMENT — PENALTY PHASE — DECEMBER 29, 1997

THE COURT: Members of the jury, we'll hear now an opening statement from defense.

Mr. Tigar . . .

OPENING STATEMENT

MR. TIGAR: Good morning, members of the jury.

I want to outline the procedure that we expect is going to be followed in this case. And I want to begin by saying that it is my duty as a lawyer to accept your verdict; that is, 30 years ago or however long it was, 32, I guess, I took an oath. And it was that I would accept all results reached by fair process, even if I didn't agree with parts of the result.

*19 And that more than that, of course, it's the law; that is to say, as his Honor has said and we expect will say again, nobody can challenge your verdict. Not only that, but I don't know that there is anybody in the world except you, the 12 who deliberated, who knows exactly the basis of what you decided.

The Judge's instructions gave you a lot of options. The Judge's instructions had different theories on which you might proceed, and all we know is what you stood in court and announced. And as I say, we accept it. We accept all of it. And I hope that nothing that I say will be seen by you as an attempt to get you to go back on it or to take it back or to, you know -- to impose on you some other way of seeing it. We heard the verdict read out.

And I can interpret the guilty on Count 1, not guilty on Count 2, not guilty on Count 3, a finding that there was proof that death resulted, a finding that the death was foreseeable, and then on Counts 4 through 11, a not guilty on first-degree murder, a not guilty on second degree murder and guilty on involuntary manslaughter. I could interpret those. But it's not my job to do it. Other lawyers can interpret those. It's not their job to do it. Indeed, they don't have the right to do it.

And so we start from that verdict and we try to look at a process that's going to go on here for the next few days -- not long; for the next few days. And it's like the old "God grant me the serenity to accept the things I cannot change, the courage to change the things I can, and the wisdom to know the difference."

Well, it's also clear, I think, what they want; that is to say the lawyers at this table: They want 12 of you, all 12 -- it takes 12 -- to sign a paper that says that some morning or afternoon somebody should get Terry Nichols and kill him.

We say that there are lots of reasons why all 12 of you should not sign such a paper.

Everybody who sits here as a juror was asked more questions than I think you were comfortable with about the idea of what would happen if you got to where we are right now; that is to say, what is the role of

the possibility of a death sentence, the possibility of a life sentence without possibility of parole, the idea of judge-sentencing within the guidelines -- you know, what are these -- what are these options and what do they mean to folks?

And everybody took an oath, an oath that said that no matter what we came in here with that we'd accept what the rules are. And the rules are that contrary to what you might believe, no jury that is ever faced with a sentencing decision of the kind that you are is supposed to figure if the punishment fits the crime. Indeed, I thought that was one of the most basic things that we all talked about when we were here asking questions; that is to say, the sentencing decision, whether made by a judge or made by a jury, in our country always, always, always relies on the fact that there is going to be evidence about what happened in the world -- that is to say that a terrible and tragic and horrible thing happened, and then about the defendant's role in that, what it was exactly, what the defendant's mental state was with respect to it, and then beyond that about this person here as an individual human being, over and above everything else that happened, and then finally, where the options are, what they are here; that there would be this conscience of the community, that reasoned moral response which is an extra thing, a set of circumstances that sometimes doesn't arise or at least not quite in the same way when a judge is using some guidelines that are written by administrators based on what Congress did.

*20 So that's what we're going to talk about, and it's larger than the evidence of what happened on April 19, 1995.

The procedure that we're going to follow here is in three stages, and the Judge has alluded to them; and if anything I say is at variance with what the Judge says the instructions are, then, of course, you know who to credit. I'm just going to describe in general what the stages are.

First, the jury will consider what Mr. Nichols' intent was. And unless all 12 believe that the Government has proved beyond a reasonable doubt one of two intents, then the matter goes back to the Judge to sentence in accordance with the guidelines.

Then the jury in its deliberations looks at four statutory aggravating circumstances. Again, the Government must prove these beyond a reasonable doubt, at least one of them. And unless at least one of them is proved to the satisfaction of 12, deliberations are over.

Only if those two hurdles are met by the Government's proof would the jury get into the weighing of aggravating factors; that is, consider additional aggravating factors and then mitigating factors presented by the defense.

And then in that third stage, if you got there, you would do this weighing process, remembering as the Judge said this morning that no matter how you weighed, a sentence of death is never required.

Well, if that's the way that the jury's deliberations are going to be, it's difficult for me to talk about the evidence. And I suggest to you it may be difficult for you all to compartmentalize the evidence as

it comes in.

Much of the evidence about the devastation that was wrought, about the harm that was done, about the impact on families, is not evidence that relates to the first two phases. It would come in, much of it, only if you got to the third phase; and yet you're going to hear it now before you ever start with Phase 1.

Well, I'll share with you what I'm worried about, about that: I think I said in opening statement that we know there is not a joy the world can give like that it takes away. We know that the evidence that's going to come from that witness stand will be the evidence of people who have lost a great deal, and they have feelings of great sadness about that. Some of them have feelings of anger about that. Of course, their anger, if they have it and if you catch it, if you catch hold of it, is not a legitimate concern or something to influence a decision when you get to the end; but we will all be sad and we will all be angered -- angry, perhaps at the end. We'll all see that evidence of devastation. Some of it you've already seen, but I tell you that what you are about to see is to a geometric degree, it's exponentially, it's so much greater in impact than what you've already seen that it is impossible to describe. Only perhaps some of us had life experiences in which we've gone to scenes like this, but I tell you that this evidence is affecting.

For example, Carl Brown who was mentioned: He's the father of Dana Cooper. He's the grandfather of Anthony Christopher Cooper II. Now, both of them were killed in the bombing. Dana was director of the day-care center, and her son Christopher attended the day care. And so that grandfather is going to testify.

*21 You may hear in the Government's case from a medical officer from the Oklahoma Medical Examiner's office talking about the process of recovering the victims and attempting to deal with the -- those who were injured and get them out and getting the victims out and getting them identified.

You may hear from the parents of Lakesha Levy. Ms. Levy was killed in the bombing, and they had to suffer additional trauma because of a problem in the way that the evidence was handled at the scene. Their daughter's body was exhumed and reexamined afterwards. I mean just a horrible set of personal circumstances.

And that's just a couple of examples, three examples of what the evidence is going to be.

As I say, I won't attempt to describe it for you; but it will be affecting.

What are we going to do about that? Well, I've already made one objection this morning. I don't intend, and none of us here, none of the lawyers for Terry Nichols, intend to make a lot of objections or to do behavior that is more appropriate to "L.A. Law" than to a courtroom, but it is a fact that even though the rules of evidence are different at this phase of the proceeding, there are -- there is a lot of difficult case law out there, a lot of difficult legal rules; and where we feel it's appropriate to make a dignified objection, we intend to do it. Why? Because if we didn't make an objection and if for some reason

there was a valid legal point, it's our obligation -- we'd be defaulting on our obligation, and I hope you understand that. We'll do that in a dignified way.

Are we going to cross-examine? I don't think so. We may have a question or two for this witness or that about something unrelated to the grief that they have or the things that they suffered; but somehow it seems to us that to intrude upon the stories that these folks want to tell you by cross-examining them is inappropriate. It doesn't add anything. It doesn't prove anything. There is nothing that we have extra to bring out. If there should be an exception to that, it may just be a question or two.

We don't want to quarrel with anybody who has lost so much. Certainly our doing that wouldn't help to heal.

We do hope that those that come before you who disagree with your verdict to the extent that that may be relevant in assessing what their feelings are that they're relating to you will say so.

Now, let's look at these phases that I talked about and look at the evidence. The first phase, as I say, deals with this question of intent. The Government must prove to you beyond a reasonable doubt that Mr. Nichols intentionally participated in an act contemplating that the life of a person would be taken or intending that lethal force would be used against a person and the victims died as a result of it.

Now, I could sit here with the Judge's instructions -- and indeed I spent some of the time over the early part of the holidays doing it -- trying to figure out where does that fit. Well, you'll know.

***22** You can consider, by the way, all evidence that you've heard up to now in reaching any decision that you make. In other words, we're not going to retry that part of the case; and one reason is well, you already decided. But the Government has to prove that to you beyond a reasonable doubt.

Alternatively, you could -- they would ask you to find that the defendant -- that's Terry Nichols -- intentionally and specifically engaged in an act of violence knowing that the act created a grave risk of death to a person other than a participant in the offense such that participation in the act constituted a reckless disregard for human life and the victims died as a direct result.

So the Judge will instruct you on these things, but that will be the first thing you'll consider: Did the Government prove that beyond a reasonable doubt? Unless all 12 are in accord, as I say, then it goes back to the Judge.

Then if you get past that hurdle, if the Government has satisfied you, then you get to these evidence that -- these elements Government counsel was talking about. One of the four, beyond a reasonable doubt, the Government has to show it to you:

That Mr. Nichols committed the offense after substantial planning and premeditation to commit an act of terrorism. Well, when we argue this at the end, we're going to argue the evidence of intent in much the same way that we did in arguing at the close of the other phase of

the trial. We're going to be looking at this same issue, the mental state.

Then the second one is the Government alleges that the deaths or injuries resulting in death occurred during the commission of an offense, and the offense is transportation of explosives in interstate commerce. Well, that's an example of where I don't know that there will be any evidence about that in addition to what you already heard, because what's the transportation? The prosecutor said that at least they're going to rely on two instances, one the transportation to Arizona and the other nitromethane.

Well, so you'll hear -- here comes Michael Fortier again, because it's Michael Fortier -- is the one that says that he saw all of that. And we'll be arguing again or talking again about the believability of Michael Fortier and whether that's enough to sustain a Government burden beyond a reasonable doubt.

The alternative is nitromethane. And you'll recall that the person who sold the nitromethane couldn't identify the truck by year or age or anything -- it was just a pickup truck with a camper -- and said that the purchaser certainly was not Terry Nichols but was a man who looked like a possum. We'll be talking about that at the end.

The third one of these is that the defendant committed the offense against one or more federal law enforcement officers because of such victims' status as federal law enforcement officers. You returned verdicts with respect to the eight law enforcement officers. And I'm not going to argue with you about what that did or didn't mean. You considered that question, and now you will look at whether the Government has proved beyond a reasonable doubt some such desire to act against law enforcement officers.

***23** And the final one was that the defendant knowingly created a grave risk of death. Well, the prosecutor talked about the grave risk of death. There is no question that when this bomb went off there was a grave risk of death to a large number of people other than those who actually died.

The knowingly element of the offense is going to be before you to consider.

So that -- that's the second part. They've got to prove one of those beyond a reasonable doubt to you; and as I say, the Judge will instruct you.

Then finally, if you got there, if you got past that, then you would consider the other three aggravating factors: 168 people, causing serious emotional injury, caused injury and loss to -- suffered by the victims' families. That's when that evidence would become relevant; and at that point, then you'd also consider in addition to whether or not the Government had established that beyond a reasonable doubt -- you'd take a look at Terry Nichols, the human being. And in addition to the items that are referred to by Government counsel, there are certain things that the law permits us to bring forward to you and to present evidence about, things about the circumstances of the offense and things about the circumstances of Terry Nichols.

And of course, we'll do that. For example, we will present evidence that Mr. Nichols' participation in the offense was relatively minor -- relative compared to others. That's something the law looks at in attempting to make sure that sentencing decisions are made in a fair way, in a way that is some kind of distributive justice. That's something that isn't going to take a lot of evidence but certainly it will be there for your consideration.

Then we're going to present evidence that others who were equally culpable will not be punished by death. And you'll look at the circumstances. You'll ask yourself whether other people who had a same or similar degree of involvement are going to receive death penalty. And there, we'll ask you to look at such things as the treatment afforded Michael Fortier or other people that the Government hasn't even bothered to look for.

We're going to ask you to look at Mr. Nichols' mental state, whether or not somebody was attempting to coerce him to act in certain ways. We're going to ask you to look at the fact, of course, of no prior criminal record.

But beyond those things, we want to present to you a picture of a person who -- whose life pattern is inconsistent -- inconsistent with what? Inconsistent with the first decision that you are required to make; that is to say, with respect to an intent actually to take a life -- so that will factor in there, too -- inconsistent with the aggravating factors that the Government has talked about but also inconsistent with the qualities that would say that he is beyond redemption in the sense that you will be required to consider.

It's very interesting: We're not going to relitigate what you've seen before; that is to say, we're not going to go back over all the evidence about what happened in the past and Lana Padilla talked about that, or the evidence that happened in the past about what Mrs. Nichols, Marife Nichols talked about. We're going to focus on examples, events, in Terry Nichols' life that give you a glimpse into who he is.

***24** What happened after he was arrested? It was nearly a year before he was permitted to touch his children; that is to say, there were regulations that said that he had -- there had to be a glass wall. And so how did he keep in touch with his children during that time? How did he reach out to them? What sorts of human characteristics did he display towards them? And you'll see that.

My describing it isn't going to help you understand or see what it is. You'll see it. You'll see the fact that yes, he's been in custody, he was denied bail, which meant that there are certain things that were denied him such as sharp objects like pencils and pens and so how he would fashion cards to send his children using little colored toothpaste to make the designs in the corners and how finally when contact visits, as they're called, were allowed he would welcome his children in and try to meet with them under circumstances that were as normal as possible; the younger children, to work with them with flash cards and to work with them to be as much of a father to them under these circumstances as he could; how he tried to keep in touch with Josh, his son, to talk to him on the phone, to write him letters to provide guidance; how he reached out to his family, to his sister, to his brothers, to his mother and father, in all of this how he used his

creativity to benefit these people in his family and to bring to them whatever it was that could make up for the fact that he was in the circumstance that he is.

You're going to hear a little more about what I said in opening statement, what we had evidence about before; that is to say, this extraordinary dedication to the well-being of his children. You'll recall that when Mr. Nichols went into the Army, he did so because he had been having marital difficulty with then Mrs. Nichols, now Lana Padilla, and that they had a young son, Josh. And it wasn't very long after he went in that he found that Josh was for all intents and purposes not being taken care of. So he went and got Josh and was raising him as a single parent, hired somebody to take care of him when he was off on the post; and finally at the urging of his superiors in the Army obtained a honorable discharge so that he could continue to care for Josh and that when he returned to Michigan to care for Josh, he found that Lana's sons by a former marriage needed care, also; so he started raising them.

You'll find that in his community, growing up, he reached out to help a number of people and was active in doing things, not just what you'd expect in farm country but well beyond that.

In short, members of the jury, we're going to present a picture of Terry Nichols, the human being. And when you've heard that evidence, we're going to ask you to do a number of things. First is to consider it with respect to that first group of questions that you'll have; that is to say that you may think it unlikely that he would have formed that specific intent to kill. And when you do that, of course, you will reflect on the meaning of the verdict that you've already rendered that we're not going to argue with you about and we trust that nobody else will try to.

*25 Second, we'll ask to you look at that with respect to the intent elements that must be proved with respect to those aggravating factors; that is, the fact that what happened was severe and devastated a lot of people is of course not enough. The Government has this extra burden with respect to intent.

And finally, should you get there, what we'll suggest to you is that the death penalty in this case is not a reasoned moral response to what the evidence shows has occurred here. And I'm not going to try to anticipate the sorts of arguments that we will make at the end. I can promise you this: Nobody can educate you, nobody can try to convince you as to what your morals ought to be. That's not -- that isn't contemplated by the rules. When reasoned moral response is spoken of, it is really a handing over to you to reach very deep inside yourself to a place that you may not have visited before and to ask yourself as the conscience of the community what's required.

We submit that if you get there that it will be appropriate for you -- it will be appropriate for you -- and that's the most I can say -- to choose life.

CLOSING ARGUMENT -- PENALTY PHASE -- JANUARY 5, 1998

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

defense counsel.

Mr. Tigar . . .

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

THE COURT: Counsel.

CLOSING ARGUMENT

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

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

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

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

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

***18** 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.

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

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

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

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

*19 The Government has spent a great deal of time this morning going back over the evidence in the earlier phase of the trial. Well, I'm not going to go back over it with them, but I heard an extraordinary thing. I heard that Government urging you to find beyond a reasonable doubt that this happened based on the assertion which was repeated here that Mr. Nichols helped Mr. McVeigh build a bomb at Geary Lake on April 18, 1995. That assertion, I suggest, is like the 13th stroke of a grandfather clock in the night: It casts doubt not only on

itself but upon everything you heard up to that point, because the evidence was initially from Mr. Wahl -- and you'll recall this and you'll have the chance to talk it over -- that there was a blue or a brown pickup out there; that it was parked next to a Ryder truck, and that was -- and Mr. Wahl had plenty of opportunity to observe. And then all of a sudden, that theory of the case that that -- those two trucks had been parked together to build a bomb came crashing down around the prosecutors' ears when it turned out that the description of the headlights didn't match the kind of a truck that Mr. Nichols had; that in fact you couldn't see the white line of any kind of a camper top on the truck that Mr. Nichols had, and most dramatically of all that for two-and-a-half years the FBI hid from everybody the fact that when Mr. Wahl first described the episode, he said the truck was gray.

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

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

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

I'm not going to give my earlier summation again. You know what you found, you know what the evidence is.

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

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

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

Now, we did not hear in oral argument here -- maybe we'll hear it

on rebuttal -- but, you know, you heard 55 witnesses, and the Judge repeatedly cautioned you about those things. And the only one that you heard that had anything to do with Mr. Nichols' intent was Mr. Dilly, William Dilly, who had been with him in the Army. And you remember Mr. Dilly. He came and said, well, everybody looked up to Terry Nichols, including Timothy McVeigh, although that was proof that somehow that Terry Nichols must have controlled Timothy McVeigh and not the other way around.

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

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

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

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

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

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

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

What's this first aggravator? What's the first one they want you to find beyond a reasonable doubt? During the commission of an offense

under [18 U.S.C. Section 844\(d\)](#), transportation of explosives in interstate commerce for certain purposes. And the Judge will give you detailed instructions about what that means, the intent with which one must act. That's an aggravating circumstance that the Government must either prove Mr. Nichols did directly or that he aided and abetted. The definition of "aiding and abetting" is the same one that you had in Counts Two and Three and Eight and Four, Five, Six, on through Eleven in the first part of your deliberations. So it's exactly the same definition.

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

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

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

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

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

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

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

But for the Government to come in here and suggest that beyond a reasonable doubt you should find that Mr. Nichols committed some other crime or aided and abetted it based on the testimony of Michael Fortier

is subject, we suggest, to all of the objections that we made the last time that I stood before you and made a closing argument.

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

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

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

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

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

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

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

These are decisions that you will make. And the interesting thing

about them is that when you look at these things, this is something that with respect to mitigating factors, if one juror finds a mitigating factor to have been shown, for that juror, for that one of you, you'd say, I find that and I vote it and I weigh it and that's going to be part of my decision. So unlike this process of looking for some sort of unanimity or uniformity, individual decision is the watchword. And you'll see that on the form.

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

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

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

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

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

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

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

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

But when I talk about this process, I want to say that I believe something else. And I don't want to say it in an effort to reach into a place that I'm not entitled to be but to share with you some thoughts about a concept of justice, to share with you some thoughts that

suggest that if you come to this point you would turn your face towards the future and not towards the past.

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

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

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

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

THE COURT: Overruled.

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

MR. MACKEY: Same objection.

THE COURT: Proceed.

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

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

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

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

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

Why is it necessary if you're going to ask 12 people to sign a piece of paper that says go get him someday and take him and put him on a gurney and put poison in his veins -- why do they have to exaggerate? Why do they have to do that?

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

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

MR. MACKEY: Objection.

THE COURT: Overruled.

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

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

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

*26 Second, that another defendant or defendants equally culpable in the crime will not be punished by death. Michael Fortier -- Michael Fortier was not asked to take a count that would carry a death sentence. He wasn't even asked to do that. His wife, Lori, is home with

the kids. You heard what Michael Fortier did. You heard his relationship with Timothy McVeigh; and without suggesting for a moment that you should decide, try to dictate to you one way or another, because again this is bound up with what you did before -- you know what you thought about that. That mitigator is in there for your consideration.

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

No prior criminal record. Of course.

A concerned and loving son.

A concerned and loving father.

A devoted and loving husband.

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

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

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

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

A positive impact on the lives of many people.

Committed to self-improvement.

Served honorably in the United States Army.

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

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

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

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

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

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

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

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

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

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

When I concluded my earlier summation, I walked over to Terry

Nichols and said, "This is my brother." And the prosecutor got up and reminded all of us, thinking that he would remind me, that there were brothers and sisters and mothers and fathers all killed in Oklahoma City. Of course, when I said, "This is my brother," I wasn't denying the reality of that. I hope I was saying something else. I was talking about a tradition that goes back thousands of years, talking about a particular incident, as a matter of fact. You may remember -- most of us learned it I think when we were young -- the story of Joseph's older brothers, Joseph of the many-colored coat, now the "Technicolor Dream Coat" in the MTV version. And they were jealous of him, cast him into a pit thinking he would die, and then sold him into slavery. And years later, Joseph turns out to become a judicial officer of the pharaoh, and it happens that he is in a position to judge his brothers. And his brother Judah is pleading for the life or for the liberty of the younger brother, Benjamin; and Joseph sends all the other people out of the room and announces, "I am Joseph, your brother." That was the story, that was the idea that I was trying to get across; that in that moment, in that moment of judgment, addressing the very human being, his older brother Judah, who had put his life at risk and then sold him into slavery, he reached out, because even in that moment of judgment he could understand that this is a human process and that what we all share looks to the future and not to the past.

***28** 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.