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19 Defendant Nichols.

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1 PROCEEDINGS

2 (Reconvened at 9:00 a.m.)

3 THE COURT: Please be seated. Good morning.  
Are we

4 ready to proceed.

5 Mr. Woods?

6 MR. WOODS: Thank you, your Honor. Mr.  
Schlender.

7 THE COURTROOM DEPUTY: Would you raise your  
right

8 hand, please.

9 (Frederick Allen Schlender, Jr., affirmed.)

10 THE COURTROOM DEPUTY: Would you state your  
name for

11 the record and spell your last name.

12 THE WITNESS: It's Frederick Allen Schlender,  
Jr.

13 Last name is S-C-H-L-E-N-D-E-R.

14 THE COURTROOM DEPUTY: Thank you.

15 THE COURT: Proceed.

16 MR. WOODS: Thank you.

17 DIRECT EXAMINATION

18 BY MR. WOODS:

19 Q. Good morning, Mr. Schlender.

20 A. Good morning.

21 Q. My name is Ron Woods. I'm one of the lawyers that  
was

22 appointed by the Court to represent Terry Nichols.

23 You and I have never meet, we've never had a  
chance to

24 discuss your testimony; is that correct?

25 A. That's correct.

Frederick Schlender, Jr. - Direct

1 Q. Would you tell the Court briefly where you work and  
what

2 the nature of your duties are.

3 A. I work at Mid-Kansas Co-op Association in  
McPherson,

4 Kansas. I'm a location manager at that location.

5 Q. What duties does the location manager have?

6 A. He oversees the operations of the -- at my location  
there,

7 McPherson area.

8 Q. And what type of articles do you sell at the Mid-  
Kansas

9 Co-op in McPherson?

10 A. Have a farm store style with tires, batteries,  
accessories,

11 oil, products, along with government products. We have  
farm

12 chemicals, fertilizer; and we also do custom  
application

13 services. We do have grain facilities, handle grain.

14 Q. What do you mean by custom application?

15 A. Custom application is we apply product, chemical  
fertilizer

16 for individuals.

17 Q. Do you take it and -- the fertilizer out to the  
farms and

18 apply it when the farmer requests them?  
19 A. As a custom application; correct.  
20 Q. Yes, sir. How long have you been with Mid-Kansas  
Co-op?  
21 A. Since 1979, April of '79.  
22 Q. And during that time, you picked up a college  
degree there  
23 at McPherson; is that correct?  
24 A. I graduated in 1980 with a bachelor of science  
degree;  
25 right.

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Frederick Schlender, Jr. - Direct

1 Q. I want to call your attention to the events  
surrounding the  
2 bombing of the federal building in Oklahoma City on  
April 19.  
3 Did you observe any of the television coverage starting  
that  
4 day of April 19, 1995?  
5 A. I observed some television coverage, that's  
correct.  
6 Q. You live in McPherson, which is near Wichita; is  
that  
7 correct?  
8 A. I live in Burden, Kansas --  
9 Q. Yes, sir, 20 miles south of McPherson. And you  
work in

10 McPherson; is that correct?

11 A. That's correct.

12 Q. What television stations do you receive both in  
Burden and

13 in McPherson?

14 A. Be all three major networks.

15 Q. Out of where?

16 A. The networks would be -- Wichita has all three of  
them out  
17 of there.

18 Q. How close is McPherson to Wichita?

19 A. That is 60 miles away.

20 Q. Are you approximately 85 miles away from Junction  
City?

21 A. That would be correct.

22 Q. What newspapers do you receive there in McPherson  
and in

23 Burden?

24 A. The one that I receive is the Hutchinson News.

25 Q. How close is Hutchinson to you?

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Frederick Schlender, Jr. - Direct

1 A. Hutchinson is from McPherson about 25 miles away.

2 Q. Do you know where Marion, Kansas, is?

3 A. Yes, I do.

4 Q. Is that approximately 22 miles to the east?

5 A. Approximately, yes.

6 Q. Do you know where Herington, Kansas, is?

7 A. Yes.

8 Q. Is that approximately 40 miles to the northwest?

9 A. To the northwest; correct.

10 Q. Do you take the Hutchinson newspaper? Is that  
correct?

11 A. That's correct.

12 Q. Do you subscribe to any magazines, national  
magazines, such

13 as Time, Newsweek, U.S. News, et cetera?

14 A. No, I don't.

15 Q. Starting on April the 19th, you did observe some of  
the

16 coverage; is that correct?

17 A. That day I worked late, on the 19th. I don't  
believe I saw

18 anything there. But after that, I would have seen some

19 television, not a whole lot, but some. I listen to the  
radio

20 more than I watch television.

21 Q. You have a radio there at the co-op?

22 A. Yes, we do.

23 Q. Do you have a TV?

24 A. No, we do not.

25 Q. And you watch TV at home in the morning and  
evenings?

Frederick Schlender, Jr. - Direct

1 A. Mostly in the evenings; correct.

2 Q. Now, starting on April the 20th, do you recall that  
the

3 events surrounding this bombing in Oklahoma City began  
to focus

4 in central Kansas?

5 A. Yeah. Somewhere along that line I do remember  
that; that's

6 correct.

7 Q. Do you recall that on April the 20th there were  
national

8 news stories and certainly local news stories that the  
bomb --

9 the truck that was allegedly used in the bombing was  
rented in

10 Junction City?

11 A. That's correct.

12 Q. And that's near to you; is that correct?

13 A. That's correct.

14 Q. And that the person who rented the truck allegedly  
stayed

15 at the Dreamland hotel in Junction City?

16 A. I had not really been on top of that. I don't  
recall that,

17 no.

18 Q. Do you remember seeing that at all on that weekend  
starting

19 Thursday, Friday, Saturday, the 20th, 21st, 22d?  
20 A. Didn't see anything on the motel at all, no.  
21 Q. All right. Do you recall hearing in the national  
news and  
22 in local news that the FBI said that the bomb that blew  
the  
23 building down was approximately a 4800-pound ammonium  
nitrate  
24 bomb?  
25 A. In that time frame, yes.

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Frederick Schlender, Jr. - Direct

1 Q. Do you recall seeing newscasts of the arrest of  
Terry  
2 Nichols in Herington, Kansas, on or about April 21 or  
Saturday  
3 morning, the 22d?  
4 A. I remember seeing that in the newspaper; correct.  
5 Q. Do you recall seeing the television coverage where  
6 Mr. Nichols was led from an automobile into the  
courthouse  
7 handcuffed and with a bulletproof vest on by the U.S.  
marshals?  
8 A. Did not see television. I just saw a picture in  
the  
9 newspaper on that.  
10 Q. Of Mr. Nichols?

11 A. Mr. Nichols; that's right.

12 Q. Had you seen that television portrayal of Mr.  
Nichols at

13 any time in the last two years?

14 A. No, I have not.

15 Q. But you did see the newspaper photo?

16 A. I did see the newspaper; correct.

17 Q. Did you see the news -- the television coverage of  
the home

18 in Herington where Mr. Nichols lived?

19 A. No, I did not.

20 Q. Did you see a newspaper clipping of it?

21 A. I don't recall. Basically I had glanced at  
pictures, don't

22 recall seeing anything of that nature, sir.

23 Q. Do you recall receiving any information that he had  
worked

24 at a farm in Marion, which is 22 miles from where you  
worked?

25 A. No, I don't recall that, sir.

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Frederick Schlender, Jr. - Direct

1 Q. Do you know the Donahue farm near your co-op?

2 A. No, I don't.

3 Q. He's not one of your co-op members?

4 A. Not to my recollection, no.

5 Q. Do you know the Donahue trailer manufacture in  
Durham?

6 A. I do know of a Donahue trailer manufacture in  
Durham, yes,

7 I do.

8 Q. Durham's about, what, 10, 15 miles, from McPherson?

9 A. I believe a little further than that.

10 Q. Northeast?

11 A. Northeast; that's right.

12 Q. About how far would you estimate it is?

13 A. Be 25 miles, sir.

14 Q. Now, beginning that next week, Monday, Tuesday,  
Wednesday,

15 do you recall receiving or seeing on the news the  
search of

16 Terry Nichols' house in Herington?

17 A. Did not see any coverage on that, no, I did not.

18 Q. Did you read about it in the newspaper or hear  
about it on

19 the radio?

20 A. I heard about it on the radio, I'm sure.

21 Q. What did you hear?

22 A. Nothing that rings a bell in my mind, nothing that  
comes to

23 mind, sir.

24 Q. But you recall that --

25 A. I recall that they were searching, yes, sir.

Frederick Schlender, Jr. - Direct

1 Q. You recall that he was under arrest and that they  
searched  
2 his house?

3 A. If I recall correct, sir, he was taken into  
custody, not  
4 arrested first, but then later arrested. I recall  
that.

5 Q. And that they searched his house, do you recall  
that?

6 A. Hearing about that, yes, sir.

7 Q. Okay. And then on Wednesday, the 26th of April, do  
you  
8 recall any publicity concerning the preliminary hearing  
which  
9 was held in Wichita, which is approximately 58 miles  
from your  
10 place of business?

11 A. Nothing but from the radio, that it was going to be  
12 happening; right.

13 Q. Do you recall hearing any of the details that came  
out of  
14 that hearing?

15 A. No, I did not.

16 Q. Do you recall hearing about an antitank rocket that  
was  
17 allegedly found in Mr. Nichols' house?

18 A. No, I did not.

the 19 Q. Did you receive any details from the media, then,

20 following day, on April 27, Thursday, concerning the  
21 preliminary hearing of Mr. McVeigh in Oklahoma City?

22 A. No. No details, sir, no.

23 Q. And then did you -- were you in town on the  
following days,

24 April the 28th, which would have been Friday, and then

25 Saturday, the 29th?

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Frederick Schlender, Jr. - Direct

1 A. I would have been at work, sir, yes.

in 2 Q. What hours do you work, and when is the store open

3 McPherson?

location 4 A. The store is open between 7:30 and 5:30 at the

between 5:00 5 where my office is at. And my hours usually range

7:30, 6 and 6:00 in the morning, I usually go till, sometimes

that we're 7 8:00 o'clock at night, especially this time of year

8 talking about.

9 Q. This is the planting season?

that time. 10 A. That's basically all kinds of things going on at

11 Q. Yes, sir. How many days a week are you open?

half a 12 A. We're open five days, of that nature. Saturday,  
13 day, till noon.  
14 Q. Now, I want to call your attention to that Sunday,  
April 15 the 30th. Did you have an occasion to meet with an FBI  
agent 16 and an ATF agent?  
17 A. That's correct.  
18 Q. Where did you meet them?  
19 A. We met at the store where my office is at.  
20 Q. What time was that?  
the 21 A. I believe it was in the -- 2:00 o'clock or so in  
22 afternoon, that Sunday afternoon.  
23 Q. Are you normally there on a Sunday afternoon?  
24 A. No, we're not.  
why was 25 Q. How was that meeting arranged? Who set it up, and

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Frederick Schlender, Jr. - Direct

1 it at the McPherson co-op on the day you're closed?  
2 A. I was called upon -- asked questions about a ticket  
that 3 they wanted to ask questions about to me.  
4 Q. And you went down and you were interviewed by the  
FBI and

5 the ATF; is that correct?

6 A. That's correct.

7 Q. Who was present during the interview?

8 A. Two individuals were there, Budke and Coffey, I believe it

9 was, from the ATF.

10 Q. Mr. Budke was the FBI and Coffey was the ATF?

11 A. That's correct.

12 Q. Who interviewed you?

13 A. Budke interviewed me.

14 Q. Who took the notes?

15 A. That was Mr. Budke.

16 Q. Were other people present at the co-op at that time?

17 A. At the Sunday afternoon, I don't believe there were anybody

18 else there. Just the interviewing officers and myself.

19 Q. Did you see Mr. Showalter come down that day?

20 A. He came, and then I left at that time, too.

21 Q. And there's another employee, Donna -- what's her last

22 name, Frasier?

23 A. Schaefer.

24 Q. Schaefer?

25 A. Uh-huh.

Frederick Schlender, Jr. - Direct

1 Q. Was she there that day?

2 A. She was not there that day.

3 Q. Do you know whether or not she was also interviewed  
by the

4 FBI that day?

5 A. She was, I believe, interviewed that day, but at  
her home.

6 Q. Now, what did the FBI show you when they began the  
7 interview and they wanted to talk to you about the  
items they

8 were showing you? What was it that they had?

9 A. They did not have any items to show me.

10 Q. Okay. What did they say that they wanted to  
question you

11 about?

12 A. About a ticket -- ticket number they gave us.

13 Q. All right. And so you then looked up a ticket  
number?

14 A. Yes, we did.

15 Q. On a cash transaction, that co-op has -- you have  
three

16 copies, is that correct, of each transaction?

17 A. That's correct.

18 Q. Explain to the Court where those three copies go.

19 A. The original copy goes to our main office in  
Moundridge,

20 Kansas. The second copy is our record copy at -- stays

at our

21 location. The third copy goes with the purchaser of  
the

22 product.

23 Q. And did they show you any ticket at all, or did  
they just

24 have a ticket number?

25 A. They just had a ticket number, sir.

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Frederick Schlender, Jr. - Direct

1 Q. What did you do, then, pursuant to their request,  
if they

2 made one, concerning that ticket number?

3 A. We looked that ticket number up and found that  
ticket, sir.

4 Q. Did you find another ticket, also in the same name?

5 A. Another ticket was found, yes.

6 Q. And did you do the searching for that?

7 A. My secretary, Donna Schaefer, did that.

8 Q. Was she there that day doing it?

9 A. No. She had found the ticket that preceding  
evening.

10 Q. On Saturday?

11 A. On Saturday evening; right.

12 Q. So you had in your possession, then, to look at,  
two

13 tickets?

14 A. That's correct.

15 Q. And both of them were in the name Mike Havens?

16 A. That's correct.

17 Q. What was the date, the earliest date on, of the two  
18 tickets?

19 A. The earliest ticket was September 30, 1994.

20 Q. All right. And what was the date of the second  
ticket?

21 A. October 18, 1994.

22 Q. Yes, sir. Now, in examining those two tickets,  
were you

23 able to determine whether or not you had written up  
either one

24 or both?

25 A. In examining the tickets, I had written up the  
second one,

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Frederick Schlender, Jr. - Direct

1 the October 18 ticket.

2 Q. Did the FBI ask you to try and recall through your  
memory

3 the incident surrounding the writing up of that ticket?

4 A. That's correct.

5 Q. Did they give you time to think about it?

6 A. Not a whole lot of time. They just wanted me to  
try to put

7 down the physical things that I could remember, yes.

8 Q. And you could remember some of the things; is that  
correct?

9 A. Some of the details; correct.

10 Q. Did you have any memory of the earlier event,  
September 30?

11 A. Not as detailed, sir, not as detailed.

12 Q. Who wrote up the earlier ticket, Mr. Showalter?

13 A. That's correct.

14 Q. Did you have -- did you tell the FBI that you had  
some  
15 memory of the earlier incident?

16 A. I had some memory of the earlier ticket, yes.

17 Q. Did you tell them at that time?

18 A. I believe I did at the first time, yes.

19 Q. Have you had an opportunity to review the  
memorandum that  
20 the FBI wrote up concerning your testimony -- not your  
21 testimony, but your discussion with the FBI that day?

22 A. Yes. I have visualized the 302's, yes.

23 Q. In front of you, in that package you will find the  
two  
24 302's. And let's start with Exhibit No. T which is the  
first  
25 one that was written concerning the interview with you  
on that

Frederick Schlender, Jr. - Direct

1 Sunday, April the 30th.

2           When you review these, sir, were they accurate  
as to  
3 what you told the FBI?

4 A. Yes, they were.

5 Q. If you would, go to page 3 where you go into the  
6 description of the individuals. So that we have an

accurate

7 record here, if you would, sir, read into the record  
what you

8 told the FBI that day, starting on page 3.

9 A. Okay. In the top of the page, sir?

10 Q. Yes, sir.

11 A. Okay. "In effort to recall the October 18, 1994,  
sales

12 transaction, Schlender reviewed his daily planner.  
Schlender

13 had general recollections of the sales transaction  
reflected in

14 receipt no. 96582. Schlender indicated he could not be  
a

15 hundred percent sure of his recollection, but he did  
recall two

16 white males making that purchase. Schlender advised  
the white

17 males arrived at the co-op driving a pickup truck with  
a camper

18 shell, pulling a trailer. The driver of the truck came  
into

19 the cooperative and made the purchase. The passenger

of the

20 truck remained in the truck up until the truck was  
brought

21 around and backed up to the warehouse. At that time  
the

22 passenger exited the truck and watched loading the  
fertilizer

23 into the trailer.

24 Schlender described the individual making the  
25 purchase, approximately six foot, medium to slight  
build,

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Schlender 1 light brown hair, mid-30s to 40 years of age.

2 believes the purchaser may have been wearing a coat,  
but he

3 could not specifically recall the color of the coat.  
Schlender

4 spoke briefly with the purchaser who indicated he was  
going to

5 use fertilizer to plant his wheat. Schlender advised  
this was

6 somewhat unusual in that it had rained on October 17,  
1994, and

7 that farmers generally do not plant immediately after a  
rain.

8 Schlender also indicated that most of the farmers he  
deals with

9 use liquid nitrogen fertilizer in planting wheat."

10 Q. And the next paragraphs?

11 A. "Schlender briefly saw the passenger as he loaded  
the  
12 fertilizer into the trailer. Passenger exited the  
truck to  
13 watch Schlender load the fertilizer. Schlender could  
recall  
14 the passenger being a white male approximately the same  
age,  
15 mid-30s or a little older, with clean-cut hair.  
Schlender  
16 described the truck as late 1970 style possibly Dodge  
17 three-quarter-ton, four-wheel-drive pickup truck.  
Schlender  
18 believed the truck was dark-colored, possibly black,  
with a cab  
19 height shell. Schlender believes the shell was a light  
color,  
20 possibly white.

21 Schlender believes the truck may have had a  
Kansas  
22 license tag with Marion, Kansas, sticker. Schlender  
could not  
23 recall seeing any rust or prominent paint on the truck,  
24 indicating that it appeared to be in good condition for  
a truck  
25 of that age. Schlender described the trailer as a bed  
portion

Frederick Schlender, Jr. - Direct

1 of a single-axle pickup truck. Schlender believed it  
was made

2 from a 1960 model, three-quarter-ton Ford pickup.  
Schlender

3 could recall the trailer was red in color with white  
Ford

4 lettering on the tailgate. Schlender indicates the  
trailer was

5 in fairly good condition with a bumper and standard  
taillights.

6 Schlender could not recall if the taillights were  
working.

7 Schlender could not recall the trailer having license  
tag.

8 Q. Now, is that an accurate rendition of what you told

9 Mr. Budke that day?

10 A. That is very close; right.

11 Q. Now, you said you've reviewed that 302. Is there  
anywhere

12 in that 302 any information concerning the earlier  
purchaser,

13 any of your recollection on the September 30 purchase?

14 A. No, there was not.

15 Q. Now, as to your knowledge of pickups, you go into  
detail as

16 describing the pickup, three-quarter, et cetera.

17 A. Uh-huh.

18 Q. What kind of vehicle do you own?

19 A. I own a car and a pickup, also.

with the  
would  
it up

20 Q. And as I understand you, before you went to work  
21 co-op, you worked in the harvest; in the summers, you  
22 start down the Panhandle, Texas and Oklahoma and follow  
23 through Kansas, Nebraska, Dakotas, and through Wyoming?  
24 A. Through Wyoming, didn't get to the Dakotas.  
25 Q. You did that for three years or so?

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Frederick Schlender, Jr. - Direct

1 A. Three years.  
2 Q. Other than the combine and the truck that carries  
the  
3 wheat, what were the majority of the vehicles that were  
4 utilized in harvesting transaction?  
5 A. The big trucks and the pickups and the combines;  
correct.  
6 Q. And how many members are in your co-op, sir?  
7 A. Over 2,000, sir.  
8 Q. Would you say that the majority of those  
individuals have  
9 pickups?  
10 A. Majority do, yes, sir.  
11 Q. And they come to your co-op, is that correct --  
12 A. Yes, sir.  
13 Q. -- in automobiles?

14 A. Yes, they do.

15 Q. Would it be fair to say that the vehicle of choice  
in  
16 central Kansas is a pickup?

17 A. For the farmer, yes.

18 Q. Would it be fair to say that you are familiar with  
pickups  
19 and can describe a pickup?

20 A. I can describe a pickup, yes.

21 Q. Have you seen trailers like you described in and  
about  
22 central Kansas?

23 A. Yes, I have.

24 Q. While it's not overly common, it's not uncommon to  
see  
25 these cut-off pickup bed trailers, is it?

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Frederick Schlender, Jr. - Direct

1 A. Not uncommon, no.

2 Q. And when you described the Ford lettering, you  
understand  
3 that Ford has a trademark logo that's recognized  
worldwide,  
4 just like the Coca-Cola logo and others; is that  
correct?

5 A. That's correct.

6 Q. Now, FBI and the ATF came back two days later on

Tuesday,

7 did they not?

8 A. That's correct.

9 Q. Did they tell you why they wanted to interview you  
further?

10 A. No further, no. They did not say. They said they  
wanted

11 to interview us again or interview me again on the  
bombing of

12 the Murrah Building.

13 Q. Were you able to recall for the FBI what time those  
two

14 purchases were made, starting with the October 18, the  
one that

15 you wrote up?

16 A. We went through the tickets of that day, trying to  
pinpoint

17 a time, and also with the customers that were  
surrounding that,

18 their normal times of coming into our store, and we did  
come to

19 a conclusion there, yes.

20 Q. On October the 18th, there were approximately 77  
sales

21 transactions that you went through the tickets; is that  
22 correct?

23 A. October 18, yes. There were less than there were  
on the

24 September 30 time frame.

25 Q. You had 108 sales transactions on September 30; is  
that

Frederick Schlender, Jr. - Direct

1 correct?

2 A. That sounds correct.

3 Q. And by going through those, you were able to figure  
out

4 what time the transactions occurred?

5 A. Approximately, yes, sir.

6 Q. And you had -- did you have an independent  
recollection,

7 yourself, of what time the transactions occurred, or  
were you

8 just using the tickets to determine?

9 A. Using the tickets, sir.

10 Q. What time did the transaction occur on October the  
18th?

11 A. On October 18, we had figured between twelve and  
12 one-thirty.

13 Q. On the 18th?

14 A. On the 18th.

15 Q. Okay. What about on September the 30th?

16 A. I believe that was in the four to four-thirty  
range, sir.

17 Q. Now, have you reviewed the 302 that the FBI wrote  
up, the

18 memorandum of their discussion with you on Tuesday, May  
the 2d?

19 A. Yes, I have.

20 Q. And is it accurate?

21 A. For the most part, sir, yes.

22 Q. So that we have an accurate record, I would like  
for you to

23 read only that portion of the 302 where you get into  
the

24 description of the individuals again. I believe it's  
-- starts

25 with the bottom of paragraph -- or excuse me -- the  
bottom

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Frederick Schlender, Jr. - Direct

1 paragraph of page 2. But please look through that to  
make sure

2 I'm correct. Is there anything earlier than that where  
you get

3 into the description of the individuals or car?

4 THE COURT: Is this Exhibit U?

5 MR. WOODS: I'm sorry, your Honor. It is  
Exhibit U,

6 which is the FBI 302 of May the 2d, '95.

7 THE WITNESS: No. That was the first time we  
got into

8 physical descriptions, yes.

9 BY MR. WOODS:

10 Q. That's the bottom paragraph of page 2?

11 A. Uh-huh.

12 Q. And then a little bit into page 3?

13 A. That's correct.

14 Q. Okay. Would you read into the record that bottom  
paragraph  
15 and over into the next page.

16 A. "Schlender was asked if he could recall a physical  
17 description of the customer identifying himself as Mike  
Havens

18 on the October 18, 1994, purchase as well as the  
passenger of

19 the vehicle driven by Havens. Schlender advised he  
believes

20 the driver of the vehicle, who was also the purchaser  
of the

21 ammonium nitrate, had light brown hair, which was  
trimmed

22 short, but not a crew cut. The passenger which  
accompanied the

23 purchaser had dark-colored hair which was slightly  
longer than

24 the purchaser's hair.

25 Schlender advised he has seen television  
coverage of

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Frederick Schlender, Jr. - Direct

1 the bombing the federal building of Oklahoma City and  
has

2 specifically seen photographs of Timothy James McVeigh.

3 Schlender does not believe the purchaser of the  
ammonium  
4 nitrate on October 18, 1994, nor the passenger  
accompanying the  
5 purchaser on October 18, 1994, nor -- excuse me, nor  
the  
6 passenger accompanying the person was McVeigh.  
Schlender also

7 advised that he has seen photographs of Terry Lynn  
Nichols and  
8 Nichols, may have been the purchaser of the ammonium  
nitrate on  
9 October 18, 1994.

10 Schlender is not aware of any of the vehicles  
11 associates with either McVeigh or Nichols other than  
the  
12 tan-colored Mercury Marquis that McVeigh was driving at  
the  
13 time he was arrested in Perry, Oklahoma. Schlender  
advised he  
14 may be able to identify the pickup truck involved in  
the  
15 October 18, 1994, purchase if he was provided with a  
photo  
16 lineup of the various pickup trucks."

17 Q. Why did you suggest a photo lineup of various  
pickup  
18 trucks?

19 A. I felt confident in the physical appearances that  
were in  
20 my mind, that I could identify.

21 Q. Did you think that was the fair way to do it,  
that's the

22 way the law enforcement did it, with lineups?

23 MR. MENDELOFF: Objection, your, as to his  
judgment of

24 law enforcement --

25 THE COURT: He's not offering this as an  
opinion about

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Frederick Schlender, Jr. - Direct

1 law enforcement practices but his own --

2 MR. WOODS: His own belief of why he suggested  
a photo

3 lineup of pickup trucks.

4 THE COURT: I'll receive it for that purpose.

5 You may answer.

6 THE WITNESS: Would you repeat that question.

7 BY MR. WOODS:

8 Q. Yes, sir. Did you feel that was the fair way to do  
it?

9 A. I felt that in the physical features that I  
remembered the

10 vehicle, that would be the way to identify, yes.

11 Q. Okay. Now, after that event on Tuesday, May the  
2d, you

12 had a few other meetings with the FBI concerning the  
records

13 and such as that; is that correct?

14 A. A few others; right.

15 Q. Nothing concerning the description of the  
individuals or

16 the automobile; is that correct?

17 A. Nothing, no.

18 Q. And then you went down to Oklahoma City to testify  
at the

19 grand jury on July the 6th, '95; is that correct?

20 A. That's correct.

21 Q. And have you had a chance to review that testimony?

22 A. I've looked at that, yes, sir.

23 Q. And is it accurate? Is there any mistakes?

24 A. It was accurate to what I said, yes, uh-huh.

25 Q. And that was under oath; is that correct?

615

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1 A. That is correct.

2 Q. In fact, that was to a grand jury. Do you  
understand what

3 the grand jury's function was?

4 A. To a certain extent, yes, uh-huh.

5 Q. Did you understand that this was the body that was  
going to

6 make the decision whether or not to charge these two

7 individuals with death penalty offenses?

8 A. Did not know about to be the death penalty, no,  
just know  
9 about if they could charge the offenses.

10 Q. In the grand jury, there were three lady  
prosecutors, Miss

11 Arlene Joplin, Vicki Behenna and Kerry Kelly, that were  
with  
12 you at the time; is that correct?

13 A. Just remember Vicki being there with me; that's  
correct.

14 Q. How did you get to Oklahoma City?

15 A. I drove down there myself.

16 Q. Did you have a subpoena that directed you to come  
that day?

17 A. Yes, I did.

18 Q. Did you meet with any of those three individuals  
before you

19 began your testimony?

20 A. Not the day of, no.

21 Q. The day before?

22 A. There was one time before that, yes.

23 Q. Well, what day did you meet with individuals to go  
over

24 your testimony for the grand jury?

25 A. I cannot recall exact dates, sir. It wasn't right

1 preceding. It was several days before that.

2 Q. Was it over a week before that?

3 A. I would assume that, yes.

4 Q. Who did you meet with?

5 A. Met with Vickie on that.

6 Q. Did she go over the 302's with you?

7 A. As I recall, yes.

8 Q. Did she tell you the importance of your testimony  
in front

9 of the grand jury?

10 A. I'm sure if I was being called in, it was  
important, sir.

11 I don't know if she dwelled upon that.

12 Q. Okay. Did you talk about the description of the  
13 individuals with Miss Behenna before you testified in  
the grand  
14 jury?

15 A. Going over the 302's, I'm sure we talked about  
that, yes,  
16 sir.

17 Q. Was there a discussion about your description of  
the driver  
18 of the vehicle, Mike Havens, being 6-foot tall?

19 A. In the 302s, I had stated he was approximately 6-  
foot tall;  
20 right.

21 Q. Now, you didn't state that in the grand jury; is  
that  
22 correct?

23 A. I can't recall that, sir. I'd have to look to see.

with  
24 Q. Did Miss Behenna tell you that that was a problem  
25 identifying Mr. Nichols?

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Frederick Schlender, Jr. - Direct

1 A. No, it wasn't. She did not state that, no.

2 Q. Any discussion about the height of Mr. Nichols?

3 A. No discussion about the height of an individual,  
no.

4 Q. Did you and Miss Behenna discuss the description of  
the  
1970's

5 vehicle being a three-quarter Dodge pickup of the  
6 variety that was a four-wheel drive?

7 A. We talked a little bit about that, yes.

8 Q. Did Miss Behenna tell you that was a problem with  
9 describing Mr. Nichols' vehicle?

10 A. No, she did not.

11 Q. Did you learn at that time that Mr. Nichols had  
a GMC  
12 '84 pickup that was a half-ton?

13 A. I did not know what vehicles he had, no, sir.

14 Q. And then you did go into the grand jury on July the  
6th,  
15 '95, and testify concerning, among other things, the

the 16 description of the individuals and the description of

17 automobile; is that correct?

18 A. That's correct.

19 Q. Did you describe to the grand jury the same  
description you

20 had given the FBI, the 1970's Dodge three-quarter-ton,

21 four-wheel-drive pickup?

22 A. Without looking, sir -- may I look?

23 Q. Well, let me suggest this so we have an accurate  
record. I

24 would like to go to the portions of this transcript  
where you

25 describe the individuals and the vehicle and have you  
read the

618

Frederick Schlender, Jr. - Direct

1 answer and I'll read the question, if that's acceptable  
with

2 you. It's only a few pages, and we can finish it in a  
couple

3 minutes.

4 A. Okay, go ahead, sir.

5 Q. That's going to be Exhibit No. V in front of you.  
Please

6 examine the front page so we're sure that this is your  
grand

7 jury testimony of July the 6th, '95.

8 A. That's correct, sir.

9 Q. And I want to start on page 8. The earlier pages  
give some

10 preliminary matters about your background, about the  
co-op, and

11 about the two tickets.

12 A. Correct.

13 Q. Is that acceptable with you, to start on page 8?

14 A. That's correct.

15 Q. And what we'll do here, I'll be the one who's  
asking the

16 questions, and you play yourself as the one who  
answered.

17 Those were your answers under oath; is that correct?

18 MR. MENDELOFF: Your Honor, pardon me. I'd  
have to

19 object to this. I'm not sure what the purpose of this  
is.

20 It's already under oath, it's already part of the  
record.

21 THE COURT: Is your purpose to remind the  
witness what

22 he said?

23 MR. WOODS: Yes, your Honor.

24 THE COURT: Okay.

25 MR. WOODS: He has a recollection. He says  
this is

Frederick Schlender, Jr. - Direct

1 true and accurate and this is what he told the grand  
jury.

2 THE COURT: All right. You may proceed.

3 MR. WOODS: All right.

4 BY MR. WOODS:

5 Q. I'll start with that bottom Q on page 7, just put  
it in  
6 context, Mr. Schlender.

7 "What about once somebody purchases this much  
of a  
8 product? Is it loaded immediately, or do you all  
deliver to

9 that person's house?"

10 A. I said, In most instances it's picked up.

11 Q. Go ahead and read what you said.

12 A. "There's very few times it is delivered. In this  
instance  
13 it was picked up."

14 Q. "The customer picked it up right then?"

15 A. Yes, he did.

16 Q. "Were you involved at all in" --

17 THE COURT: You didn't read the answer  
correctly.

18 THE WITNESS: Okay. Uh-huh.

19 THE COURT: You've got to read what's there.

20 THE WITNESS: All right.

21 BY MR. WOODS:

22 Q. "Were you involved at all in loading that  
fertilizer for

23 that customer?"

24 A. "As I recall, yes, I was involved in the loading of  
it."

25 Q. "Okay. Now, let me have you look and then we'll  
try and

620

Frederick Schlender, Jr. - Direct

Exhibit 1 clarify something -- let me have you look at grand jury

2 No. 2 and ask you again if you can identify that."

3 A. "Okay. Yes, that's a ticket from our location at

4 McPherson."

5 Q. "Again, that's a sales ticket?"

6 A. "Sales ticket; correct."

7 Q. "And the date of that ticket?"

8 A. "The date is 10 -- or October 18, 1994."

9 Q. "And the name again?"

10 A. "Is Mike Havens."

11 Q. "And it shows patron account?"

12 A. "Same 10 code or cash account. Let's put it that  
way."

13 Q. "And it's sold by?"

14 A. "This one was sold by myself."

15 Q. "You actually did this?"

16 A. "I actually did this transaction."  
17 Q. "All right. And it shows that that was purchased  
by Mike  
18 Havens on October 18, '94."  
19 A. "October 18, 1994, was 40 50-pound bags of 3400 or  
ammonium  
20 nitrate."  
21 Q. "Fertilizer?"  
22 A. "Fertilizer; right."  
23 Q. "And again the price was?"  
24 A. "Total per bag was \$5.40 or total cost \$216 plus  
tax.  
25 Makes it 228.74."

621

Frederick Schlender, Jr. - Direct

1 Q. "And that would have been the same amount as the  
2 September 30 sale?"  
3 A. "Same exact amount as the September 30."  
4 Q. "And do you recall selling this ammonium nitrate  
fertilizer  
5 to Mike Havens?"  
6 A. "I recall the, how should I say? I would not able  
to  
7 identify the individual. I recall the individual,  
shall we  
8 say, description of the individual. I know he was a  
white

kind of 9 individual, let's say middle aged, 30, 40s, clean-cut,  
individual, 10 light brownish hair. I briefly spoke with the  
just asking 11 being as I try to keep people at ease as customers,  
And as 12 him what he was doing and some of the things like that.  
plant 13 I recall, he spoke of planting wheat, was using this to  
of year. 14 wheat. And that would have corresponded to that time  
15 Let's put it that way."  
16 Q. "And this is a conversation you're having with this  
17 customer at the time you're filling out the receipt?"  
18 A. "Right, uh-huh."  
Havens 19 Q. "Okay. Do you then load -- does the customer Mike  
20 take this fertilizer with him, or is it delivered?"  
21 A. "It is picked up at that time."  
22 Q. "Okay. And do you load this fertilizer?"  
time from 23 A. "This time I believe I did load it, also. At the  
at the 24 our -- from our recollection, there was two of us there  
the 25 time. I would have been the one to be able to drive

1 forklift, so I would have loaded it; that's correct."

2 Q. "So you would have loaded both the sale of ammonium  
nitrate  
3 on September the 30th and the sale of ammonium nitrate  
4 October 18th?"

5 A. "That's what I recall, yes."

6 Q. "All right. Specifically do you recall what you  
loaded the  
7 fertilizer into or onto on either one of those  
particular  
8 dates?"

9 A. "As I recall, the type of apparatus it was hauled  
on was a  
10 pickup bed, which was, to explain that, it is a pickup,  
that's  
11 the frame. They cut it off at the frame behind the cab  
and put  
12 a hitch on it and they use it to haul things in it at  
that  
13 time."

14 Q. "All right. And that was being pulled by what?"

15 A. "As I recall, a dark-colored pickup, also had a  
topper on  
16 it which is flat with the top of the cab of the pickup,  
that  
17 was pulling the trailer. Let's put it that way."

18 Q. "All right. Let me back up because I'm not sure I  
19 understand. There was a pickup truck?"

20 A. "Uh-huh. That was pulling a trailer."

21 Q. "Do you recall the color of the pickup truck?"  
22 A. "I believe it was dark-colored. I don't know  
whether you'd  
23 call it black or blue or whatever, but it was dark-  
colored."  
24 Q. "And the top of the back of the pickup truck was  
what?"  
25 A. "There was a topper, I call it. Like I say, it's  
not a

623

Frederick Schlender, Jr. - Direct

1 camper, called a topper, goes the same height as the  
pickup,  
2 the top of the pickup."  
3 Q. "Okay. And it goes the length of the bed, then?"  
4 A. "Right."  
5 Q. "And what color was that, if you recall?"  
6 A. "As I recall, light-colored."  
7 Q. "A white or a beige?"  
8 A. "Something of that nature; right."  
9 Q. "And then attached to this pickup with the topper  
was  
10 this?"  
11 A. "Was a trailer."  
12 Q. "A trailer that was made out of a bed of a pickup  
truck?"  
13 A. "Right. Uh-huh."

14 Q. "Do you recall the color of that trailer?"  
15 A. "As I recall, it was a reddish color, something in  
the  
16 nature of a colored bed or pickup bed or trailer.  
Let's put it  
17 that way."  
18 Q. "Now, did you load the fertilizer into the pickup  
with the  
19 topper on it, or did you load it into the red trailer?"  
20 A. "It was loaded on the trailer. There is no way  
possible to  
21 put it into the camper on the pickup."  
22 Q. "And again, this sale of ammonium nitrate on  
October the  
23 18th was a palletful?"  
24 A. "Right."  
25 Q. "That would have been, as you described earlier, 40

624

Frederick Schlender, Jr. - Direct

1 50-pound bags on a pallet that was wrapped?"  
2 A. "A wood structure that was clear wrapped wrapping  
or shrink  
3 wrapping, as we call it, around it."  
4 Q. "And you pick up the pallet?"  
5 A. "Uh-huh."  
6 Q. "And you take it over to the trailer or the red  
pickup

7 truck?"

8 A. "Usually the trailer is backed over, the apparatus  
or  
9 whatever you're loading the vehicle on is backed over  
to the  
10 warehouse where we load out of, right."

11 Q. "And then you just push it on that trailer and they  
take  
12 off?"

13 A. "Push it on that trailer, uh-huh."

14 Q. "Let me refer you back now to the September the  
30th  
15 purchase."

16 A. "Uh-huh."

17 Q. "I know you didn't do that purchase. You believe  
you might  
18 have loaded that fertilizer into -- was there a trailer  
then as  
19 well?"

20 A. "Trailer."

21 Q. "Or was it just a pickup?"

22 A. "It was a trailer as well."

23 Q. "On September the 30th?"

24 A. "That I can recall; right."

25 Q. "Do you recall: Were there one or two people in  
the pickup

Frederick Schlender, Jr. - Direct

1 when you loaded it?"

2 A. "The first date, I can't recall. I believe on the

second

3 day, as I spoke earlier, one individual came in with,

in that I

4 describe, and then the second time, somebody got out of

the

5 vehicle when we were loading, so there was an

individual also

6 along as a passenger at that second time."

7 Q. "Okay. So while you were writing Grand Jury

Exhibit No. 2,

8 which is the sale receipt for October 18, only one

individual

9 was in the co-op?"

10 A. "Right."

11 Q. "Did they back around to the back of the co-op?"

12 A. "No. Our load-out facility is right in the front

in a

13 different building adjacent to the main office or our

farm

14 store.

15 Q. "So do they just pull up there and then you --"

16 A. "Back over there, and then we come out with a

forklift

17 apparatus to load the product onto whatever they're

hauling."

18 Q. "And it was at this point in time while you were

loading

19 the fertilizer onto the pickup that you saw a second  
20 individual?"

21 A. "Second individual came up and stood beside the  
pickup on  
22 the passenger side; right."

23 Q. "Did you have any conversation with that second  
24 individual?"

25 A. "None at all."

626

Frederick Schlender, Jr. - Direct

1 Q. "What about any description? Can you describe that  
2 individual?"

3 A. "Very similar to the other individual. Probably I  
would  
4 say in the 6-foot range, slight build. Other than  
that, not  
5 much. Didn't have as much time with that individual."

6 Q. "Do you recall the dark-colored pickup that was  
there with  
7 the -- I'm going to call it a trailer, the red trailer  
attached  
8 to it --"

9 A. "The trailer."

10 Q. "Did you notice any license plate? Did you write  
down a  
11 license plate number or anything of that nature?"

12 A. "Did not write down a license plate; but as I

recall, there

13 was none on the trailer. There was a Kansas tag on the  
pickup.

14 My recollection was the preceding county to the east,  
which is

15 a Marion County tag."

16 Q. "And how do you know that?"

17 A. "It goes back to from our recollection or my  
recollection

18 that the individual was told to come to our location  
from

19 another branch over east of us, so that that made sense  
in my

20 mind; that they came from our location east of town.  
That

21 would have had a Marion County tag. And as I recall,  
there was

22 that tag. Let's put it that way."

23 Q. "Do the Kansas tags state what county they're  
from?"

24 A. "They have a county two-letter designation that  
tells what

25 county they're in."

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Frederick Schlender, Jr. - Direct

1 Q. "Okay. Now, stop for just a second. You said that  
this

2 person came from the east and you've got a phone call  
about it.

3 Slow down and start that over again. What are you  
talking

4 about there?"

5 A. "As I recall, we were notified, 'cause we store  
more of the

6 product, that somebody was interested in."

7 Q. "More ammonium nitrate?"

8 A. "Right."

9 Q. "And you recall by who?"

10 A. "One of two locations I can think of, would be one  
to the

11 north of us and one to the east, an adjacent town  
called Galva

12 and one north of us at Lindsborg.

13 Q. "Are these Mid-Kansas Co-op branches?"

14 A. "These are branches of ours, one of the 19 we  
have."

15 Q. "Okay. And you recall receiving a phone call from  
somebody

16 at one of those two locations, although you can't  
recall

17 which?"

18 A. "No, I couldn't recall which came by phone calls.  
Could be

19 radio contact. We do have two-way radios between  
locations,

20 which saves on long-distance calls. Let's put it that  
way.

21 For short messages and communication between mobiles."

22 Q. "All right. Somebody from those other Mid-Kansas  
locations

23 call you at McPherson and say what?"

24 A. "Saying that there's a person interested in a  
quantity of

25 product."

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Frederick Schlender, Jr. - Direct

1 Q. "What quantity of product?"

2 A. "We're talking about a ton of the 3400 ammonium  
nitrate

3 fertilizer."

4 Q. "So somebody was at their branch a requesting a ton  
of

5 ammonium nitrate?"

6 A. "As I recall; right."

7 Q. "And they were inquiring of you to see if you had  
it?"

8 A. "Right, inquiring to make sure we had that amount  
of

9 product if and we could handle, you know, the sale of  
it or

10 transaction of it; right."

11 Q. "And you answered yes?"

12 A. "Yes."

13 Q. "And did they indicate they were going to send that  
14 customer over?"

15 A. "They would more than likely have; right."

16 Q. "So when somebody showed up with a Marion County  
tag on the  
17 back of their car, you just related back to that phone  
call  
18 that you received from the other branch?"  
19 A. "Would not surprise me coming -- our area spreads  
into  
20 Marion County, anyway."  
21 Q. "All right. Do you recall if you received the  
phone call  
22 before the first sale of ammonium nitrate on September  
30, or  
23 would it have been before the second sale of ammonium  
nitrate  
24 on October the 18th?"  
25 A. "The first sale, the September 30 transaction."

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Frederick Schlender, Jr. - Direct

1 Q. "That's all the questions I have with this witness  
at this  
2 time. Can he be excused."  
3 And the grand jury foreman excused you; and  
Miss  
4 Behenna said, "If you would, just wait outside the  
door. The  
5 grand jury may have questions of you and we'll bring  
you back  
6 in."  
7 A. "Okay. That's fine."

8 Q. And then you came back in, and there were further  
questions

9 about your meeting with this individual. And the  
question by

10 Miss Behenna is:

11 "Mr. Schlender, is it unusual to buy -- for  
one

12 individual to buy that much fertilizer, ammonium  
nitrate

13 fertilizer?"

14 A. Answered, "We as a company have bag prices and ton  
price

15 quantities. I would say we probably don't use ammonium  
nitrate

16 pricing in ton allotments as much as we do other  
quantities of

17 fertilizer, but it's not uncommon to see ton lots to go  
out of

18 a product such as this.

19 Q. "What about for a non-member of the co-op to  
purchase that

20 much ammonium nitrate fertilizer? Is that unusual?"

21 A. "That is, as I described earlier, the producer,  
when I

22 talked with him, was using it on the farm to plant  
wheat, no,

23 that's not unusual, if he's planting wheat. Described  
how far

24 that would go, that would go about 40 acres, roughly  
speaking,

25 if you're planting wheat, so, no, it wouldn't be  
unusual there

Frederick Schlender, Jr. - Direct

1 at that county."

2 Q. "What about to go through a ton of ammonium nitrate  
3 fertilizer in an 18-day period. I mean one ton was  
bought at  
4 the end of September and we have another ton being  
bought or  
5 purchased on the 18th. Is that unusual to go through  
that much  
6 fertilizer?"

7 A. "Not knowing other than he was using it to plant  
wheat,  
8 don't know the acreage or anything involved, otherwise,  
no, it  
9 wouldn't be uncommon, no. Wheat, that would be 80  
acres of  
10 wheat. That would not be uncommon for the amount of  
farm  
11 ground in our area; as far as somebody putting out that  
much  
12 wheat, let's put it that way And in that period of  
time, no --  
13 that's, in fact, in most cases, it probably would have  
been a  
14 little quicker than that, let's put it that. You can  
plant  
15 40 acres with a small drill in a day's time. So, no,  
that

16 would not be uncommon for that time frame."

17 Q. "So based upon your answers I assume you were not  
18 suspicious, then, when Mr. Havens came back on the 18th  
to  
19 purchase yet another ton?"

20 A. "No, I was not."

21 Q. "Does the co-op require an address from a nonmember  
when  
22 they purchase items or product from the co-op?"

23 A. "No, there is no address required. And in all  
aspects on a

24 cash transaction, not even a name is required. Let's  
put it

25 that way."

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Frederick Schlender, Jr. - Direct

1 Q. "So it was just quite by accident that Mike Havens'  
name  
2 got on the receipts?"

3 A. "I suppose in my eyes I would ask, I had to ask,  
paying  
4 cash, was as a cooperative system, if the individual  
buys stock

5 within a year, in our fiscal year, which runs from  
March

6 through February, he can retain earnings on purchases  
that he

7 purchased before he bought stock, so anytime during  
that period

that 8 of time. So anybody who says they're a farmer there in  
did 9 aspect, we probably asked his name just so in case he  
could be 10 purchase stock later on, that he could be, that he  
products. 11 able to earn credit to his purchase of that, of these

12 Let's put it that way."

op?" 13 Q. "Did Mike Havens ever become a member of the co-

14 A. "No, he did not."

purchasing 15 Q. "Have you ever dealt with Mike Havens before in

16 fertilizer or any other product from the co-op?"

17 A. "No, not that I can recall."

Have you 18 Q. "And what about since October and September '94?

19 had any other dealings with Mike Havens? "

20 A. "No, not that I can recall."

you've 21 Q. "Do you recall anything specific other than what

to 22 already given us about the two individuals that came in

have long 23 purchase this ammonium nitrate fertilizer? Did they

wearing? 24 hair, short hair? What kind of clothes were they  
Can 25

you give any of that kind of detail?"

Frederick Schlender, Jr. - Direct

1 A. "They were not long hair. I would say they were  
clean-cut.

2 As far as he had a coat on, that's about all I can say.  
It

3 wasn't anything unusual attire. Let's put it that way.

4 Nothing strikes my mind what they were wearing, just I  
would

5 say an average dress for that time of year."

6 Q. "To apply this ammonium nitrate fertilizer on a  
wheat

7 field, do you have to have some type of applicator to  
put it

8 on?"

9 A. "There would be a an apparatus on the drill. In my  
10 discussion with him, yeah, he was putting it on,  
putting it in

11 his drill, which there is a fertilizer box or  
attachment, which

12 he puts it down with the seed as he's planting it."

13 Q. "And he described to you how that was going to  
work?"

14 A. "Well, he didn't describe it, 'but if he said he  
was going

15 to put it on with his drill, that's just, in my mind --  
that's

16 what he was doing."

17 Q. "That was your assumption?"

18 A. "My assumption; correct."

19 Q. "Did you ask him where he was farming?"

20 A. "No, I did not."

21 Q. "Did you ask him how much farmland he had?"

22 A. "No, I did not."

23 Q. "What is the shelf life of ammonium nitrate?"

24 A. "Depends on how it's stored. Probably going to get  
a  
or  
25 better answer from somebody involved in marketing that

633

Frederick Schlender, Jr. - Direct

1 technical aspects of that more than I am. Put it this  
way. We  
2 probably knew we were going to store it over a six-  
month period  
3 of time. I don't know what the shelf life or what it  
would be  
4 of ammonium nitrate fertilizer.

5 Q. Any other questions from the grand jury? May this  
witness  
6 be excused." The grand jury foreman excused you and  
you said,  
7 "Thank you. Good-bye."

8 A. That's correct.

9 Q. Now, Mr. Schlender, did you tell the grand jury  
that you  
10 could not identify Mike Havens?

11 A. I couldn't identify him positively.

12 Q. Did you qualify it in front of the grand jury?

13 A. Don't believe I did qualify it in front of the  
grand jury.

14 Q. Your answer was to the grand jury -- was that you  
could not

15 identify the individual, period.

16 Did you tell the grand jury that this  
individual, Mike

17 Havens, told you he was farming to the east of  
McPherson?

18 A. No, I did not.

19 Q. Did you tell the grand jury that he said he was  
farming in

20 Durham?

21 A. No, I did not.

22 Q. Now, Mr. Mendeloff advised me yesterday that your  
now

23 testimony is that Mike Havens told you that he's  
farming in

24 Durham?

25 A. That's correct.

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Frederick Schlender, Jr. - Direct

1 Q. Well, let's start with these meetings that you've  
had with

2 Mr. Mendeloff. When was the first time you met with

3 Mr. Mendeloff?

4 A. Been in September of this past year.

5 Q. September '96?

6 A. September '96; correct.

7 Q. So that's a full two years after the event in  
question that

8 you're being asked to remember; is that correct?

9 A. In that time frame; correct.

10 Q. Where did you meet with Mr. Mendeloff?

11 A. Met in the law enforcement center across from our  
office

12 location.

13 Q. Who was present?

14 A. Mr. Hersely was there, also.

15 Q. Mr. Hersely with the FBI?

16 A. That's correct.

17 Q. Just the three of you?

18 A. Just the three of us; correct.

19 Q. What was the purpose of the meeting as explained to  
you by

20 either of the individuals?

21 A. Purpose of the meeting was to go over information  
that I

22 had involving the bombing of the Murrah Building.

23 Q. Did they explain to you you were going to be a  
witness at

24 the trial?

25 A. Did not explain it to me at that time.

Frederick Schlender, Jr. - Direct

1 Q. What did they explain to you?

2 A. Explained to me, as I said, they were wanting  
information

3 from the bombing of the Murrah Building in Oklahoma  
City.

4 Q. Who did the talking for the Government?

5 A. Mr. Mendeloff did.

6 Q. Did you go over your two 302's and your grand jury  
7 testimony with the individuals at that time?

8 A. We looked at it. That's correct.

9 Q. What was the discussion concerning the 302's and  
the grand  
10 jury testimony?

11 MR. MENDELOFF: Objection, your Honor, vague.  
It's

12 not really --

13 BY MR. WOODS:

14 Q. Let's start with the 302. Let's start with the 302  
of

15 April the 30th, '95, when you described the truck as  
being a

16 1970s Dodge three-quarter-ton, four-wheel-drive pickup.  
What

17 was the discussion concerning that?

18 A. There was very little discussion of the pickup,  
sir. We

19 just looked at the 302's and the grand jury inquiry.  
20 Q. Was there a discussion that there was a problem  
with that  
21 description of the vehicle?  
22 A. No, they did not ever question what I described the  
vehicle  
23 as.  
24 Q. What day was it that they showed you this photo  
lineup?  
25 A. They showed it to me the first time toward the tail  
end of

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Frederick Schlender, Jr. - Direct

1 our time together.  
2 Q. So this date in question was September '96?  
3 A. September '96.  
4 Q. What was in the, quote, "photo lineup"?  
5 A. Had one vehicle, sir. Different angle shots of it.  
6 Q. How many photos of the same vehicle did you see?  
7 A. Three photos, sir.  
8 Q. On that first day, you only saw three photos?  
9 A. That's correct.  
10 Q. And were they the same vehicle?  
11 A. Same vehicle, yes.  
12 Q. What kind of vehicle was it?

13 A. It was a dark-colored pickup with a white topper,  
sir.

14 Q. Was it a '70s Dodge?

15 A. Was not a '70s Dodge, no.

16 Q. Was it three-quarter-ton, or a half-ton?

17 A. I couldn't tell you, sir. Not a lot of difference  
there.

18 Q. Pardon me?

19 A. There's not a lot of difference there, sir, between  
a

20 three-quarters-ton and a half-ton.

21 Q. The length of the bed?

22 A. Standard bed.

23 Q. Look at -- in front of you you will see Exhibits A  
through

24 J.

25 Do you recognize those photographs as having  
seen them

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Frederick Schlender, Jr. - Direct

1 before?

2 A. I'd seen some of them, sir, yes.

3 Q. Which, if you would, by the number -- or the  
letter, excuse

4 me -- what, by the letter, had you seen on that first  
day in

5 September '96?

6 A. Saw B. B primarily, sir. I cannot tell you for  
sure on  
7 the others.  
8 Q. When you -- well, you saw three that day; is that  
correct?  
9 A. That's correct.  
10 Q. Then when did you see the remaining seven?  
11 A. Well, I don't know if I saw the remaining seven,  
but I do  
12 remember the D and E, sir.  
13 Q. What day was it that they showed you other photos  
of the  
14 same vehicle?  
15 A. Next visit was in October, if I recall, sir.  
16 Q. Where did that visit take place?  
17 A. At the same place the first visitation did.  
18 Q. And other than the remaining photos of the GMC '84  
pickup,  
19 what did they show you?  
20 A. The second time they showed me trailers, sir.  
21 Q. Now, let's go back to this meeting in September  
'96. In  
22 the 302 -- we're still on the 302 of April the 30th  
that the  
23 Government is going over with you. What discussion did  
you  
24 have about your description of Mike Havens being 6-foot  
tall?  
25 A. Had no discussion on the size of the individual,  
no.

Frederick Schlender, Jr. - Direct

1 Q. What discussion did you have about the 1960's  
2 three-quarter-ton Ford cutoff-bed pickup trailer?

3 A. September, we did not discuss that at all, no, sir.

4 Q. Just focused on the vehicle?

5 A. On the vehicle.

6 Q. What else did you focus on?

7 A. Recall us basically going over the information I  
had on the

8 302's and on the grand jury inquiry.

9 Q. You went through your grand jury testimony with  
them, also?

10 A. We looked at that, yes. Didn't go thoroughly  
through it

11 but looked at it.

12 Q. Was there a discussion concerning this description  
you gave

13 of a Kansas license plate?

14 A. At that time, I cannot recall if we discussed the  
Kansas

15 license plate or not, no.

16 Q. Did you discuss it the second time?

17 A. Second time, possibly. I'm not certain, sir.

18 Q. Well, Mr. Mendeloff has advised me that your now  
testimony

19 is that you were mistaken, it wasn't a Kansas license

plate.

20 A. I assumed that from information that I had received  
a call  
21 from the points east and north of us, and I assumed  
that the  
22 individual would have come from that direction.

23 Q. In your grand jury testimony, you told the grand  
jury that  
24 you saw it; that it also had a Marion County sticker on  
it?  
25 think that

MR. MENDELOFF: Objection, your Honor. I

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Frederick Schlender, Jr. - Direct

1 misstates the testimony. He's only reading one portion  
of it.

2 BY MR. WOODS:

3 Q. Did you tell the grand jury that you saw a Kansas  
license  
4 plate with a Marion County sticker?

5 A. I stated that, but I did state also the reasoning  
that I  
6 stated it that way.

7 Q. Did Mr. Mendeloff or the FBI tell you that that was  
a  
8 problem because Mr. Nichols had blue Michigan plates on  
his  
9 vehicle?

10 A. No, he did not.

11 Q. When did you learn that?  
12 A. Just right now. I didn't know he had that.  
13 Q. But at any rate, you backed off of the testimony  
about the  
14 Kansas license plate, and now you say that you don't  
recall a  
15 license plate on the vehicle?  
16 A. No. I think my grand jury inquiry says my  
reasoning in  
17 saying it was a Kansas plate and a Marion County tag.  
18 Q. But you didn't really see a tag, that you just  
speculated  
19 because they came from the east?  
20 A. I stated I did not write down a tag number, so I  
did not  
21 see the tag; right.  
22 Q. But you saw a Kansas license plate?  
23 A. I assumed that, sir.  
24 Q. Can you recall any further topics that you had in  
this  
25 meeting in September '96?

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Frederick Schlender, Jr. - Direct

1 A. No other, sir, no.  
2 Q. Did they go through the grand jury testimony with  
you, read  
3 it to you, or did you read it and they discussed it?

4 A. As far as I know, sir, I glanced at it. We didn't  
go over

5 it thoroughly. No, we did not, sir.

6 Q. How long did the meeting last?

7 A. That went approximately an hour, I believe.

8 Q. Which one was taking notes?

9 A. Mr. Mendeloff was.

10 Q. What was the next meeting you had with Mr.  
Mendeloff and

11 the FBI?

12 A. That would have been in the October, as I said  
previously.

13 Q. Okay. What date did that occur?

14 A. I'm just saying October, sir. I can't pinpoint a  
time or

15 date.

16 Q. Where did that meeting take place?

17 A. As I said earlier, at the law enforcement center.

18 Q. Who was present?

19 A. Mr. Mendeloff and John Hersely.

20 Q. How long did the meeting last?

21 A. As far as I remember that one, very brief. Half  
hour to an

22 hour.

23 Q. Who took notes at that meeting?

24 A. Mr. Mendeloff did.

25 Q. What topics of your 302 and grand jury testimony  
did you

Frederick Schlender, Jr. - Direct

1 discuss at this meeting?

2 A. Topics of the vehicle and trailer. Other than  
that, I

3 don't recall anything, sir.

4 Q. Is this the meeting that they showed you the photos  
of the

5 trailers?

6 A. That's correct.

7 Q. If you would, look at the exhibits in front of you,  
which

8 are K through Q.

9 A. Yes, sir.

10 Q. Are those the photos that were shown to you?

11 A. Not all of them, sir.

12 Q. How many photos were shown to you in October of  
'96?

13 A. I believe the five photos K through O that I can  
recall,

14 sir.

15 Q. And you stated that you knew of the Donahue trailer  
16 manufacturing in Durham?

17 A. I knew of that; that's correct.

18 Q. And by this time you knew that Terry Nichols had  
worked at

19 the Donahue farm from the publicity in the case?

20 A. I had heard that, yes.

21 Q. Okay. And did you identify these flatbed trailers  
as the

22 trailer you were describing earlier as a 1960's

23 three-quarter-ton Ford cutoff-bed trailer with Ford  
lettering

24 on the back?

25 A. I told them that possibly the trailer could be  
that, yes.

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Frederick Schlender, Jr. - Direct

1 Q. Well, is your testimony possibly now, or is it  
you're

2 identifying this as the trailer?

3 A. I'm saying this possibly could be the trailer.  
We're

4 talking about a good amount of time involved from the  
5 transaction till the time we saw these pictures.

6 Q. Yes, sir, two years. And the Government's working  
with you

7 now to get you prepared for trial; is that correct?

8 A. Wasn't said it was getting me prepared for trial.  
It was

9 working --

10 Q. What did they -- how did they characterize these  
meetings

11 that they keep having with you in September and

October? Did

12 they meet with you also in November?

13 A. No. I don't believe they did in November, no.

14 Q. December?

15 A. No.

16 Q. Now, met in September and October, is that it?  
Before you

17 got over here for this testimony?

18 A. Met in January, also, sir.

19 Q. Oh, you met with them in January. How did the  
Government

20 characterize these meetings with you?

21 A. They're characterizing that they're trying to get  
22 information involving the bombing of the Murrah  
Building, sir.

23 Q. Well, the FBI and the grand jury already got the  
24 information, didn't they?

25 A. They have, yes.

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Frederick Schlender, Jr. - Direct

1  
argumentative.

MR. MENDELOFF: Objection, your Honor,

2 THE COURT: Sustained.

3  
Court, we

MR. WOODS: Your Honor, may it please the

4  
Government has

5 offered, provided to us and described as the photos  
that they  
6 have shown to Mr. Schlender, that being A through Q, A  
through  
7 J being the pickup and K through Q being the trailer.  
The  
8 Government has represented to us these are the ones  
they showed  
9 to him. So we're relying on the Government's  
representation.

10 MR. MENDELOFF: No objection.

11 THE COURT: And is that representation  
correct?

12 MR. MENDELOFF: It is accurate.

13 THE COURT: All right. The exhibits are  
received.

14 MR. WOODS: And I'd like to publish No. K,  
your Honor.

15 THE COURT: All right.

16 You can either look at the screen in front of  
you, or  
17 you can look at the exhibit itself.

18 THE WITNESS: Okay.

19 BY MR. WOODS:

20 Q. Now, on the screen before you, see Exhibit K, which  
is  
21 photos of the Donahue trailers at the Donahue farm. Is  
this  
22 what you now say you were earlier describing as a  
1960's  
23 three-quarter-ton Ford cutoff-bed trailer with Ford

lettering

24 on the back?

25 MR. MENDELOFF: Objection, your Honor. That  
misstates

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Frederick Schlender, Jr. - Direct

1 the 302 and his testimony.

2 THE COURT: Yes. You'll have to rephrase it.

3 MR. WOODS: Yes, your Honor.

4 BY MR. WOODS:

5 Q. On the first time you were interviewed by the FBI,  
you gave

6 a description to Agent Budke that the trailer was a  
1960's Ford

7 three-quarter-ton cutoff-bed trailer.

8 MR. MENDELOFF: Objection, your Honor. That  
9 misstates --

10 THE COURT: Sustained. I mean he said Ford  
lettering,

11 and so forth; so it's not completely accurate.

12 BY MR. WOODS:

13 Q. I'm going to read from your 302, Mr. Schlender.  
"Schlender

14 described the trailer as a bed portion of a single-axle  
pickup

15 truck. Schlender believed it was made from a 1960's  
model

the 16 three-quarter-ton Ford pickup. Schlender could recall  
the 17 trailer was red in color with white Ford lettering on  
fairly 18 tailgate. Schlender indicated that the trailer was in  
19 good condition with a bumper and standard taillights.  
working. 20 Schlender could not recall if the taillights were  
tag." 21 Schlender could not recall the trailer having a license

22 Now, is this the trailer you're now  
identifying as the

23 one you described on April the 30th, '95?

24 MR. MENDELOFF: Objection, your Honor.  
There's two

25 trailers in this photo. I'm not sure what he's  
referring to.

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Frederick Schlender, Jr. - Direct

1 THE COURT: There do appear to be two.

2 MR. WOODS: Yes, your Honor.

3 BY MR. WOODS:

4 Q. Let's look at the one in the foreground. Which one  
are you

5 identifying as the pickup you saw on April the 30th?

6 A. I believe this is the one in the foreground, sir.  
I

7 believe I stated it was possibly a 1960's style three-

quarter-

8 ton Ford with white lettering. You're talking about a  
9 six-and-a-half month period.

10 THE COURT: You don't have to explain your  
answer;

11 just --

12 THE WITNESS: Okay.

13 THE COURT: -- give it.

14 BY MR. WOODS:

15 Q. And I'm going to show you Exhibit M. Is that the  
white

16 lettering, the white Ford lettering that now becomes  
Donahue?

17 A. That's the --

18 MR. MENDELOFF: Objection, your Honor --

19 THE COURT: Sustained as to the form of the  
question.

20 BY MR. WOODS:

21 Q. Is that the white lettering that you're identifying  
as

22 April the 30th, '95?

23 A. I stated as possibly Ford with white. This is the  
block

24 lettering, as Ford has block lettering that Ford has on  
their

25 vehicles at that time.

Frederick Schlender, Jr. - Direct

1 Q. Was your memory fresher in April of '95 than it was  
in  
2 October of '96?

3 A. Should have been fresher; and it's obvious, sir,  
should  
4 have been fresher in 19 -- in April than it would have  
been in  
5 October of '96. It's obvious.

6 Q. Now, in the grand jury, you were asked, after you  
were  
7 invited to back in at the end -- you were asked if this  
was an  
8 unusual transaction. And you went on for approximately  
two  
9 pages to explain that, no, it's not an unusual  
transaction.

10 And I've received a letter from Mr. Mendeloff, and let  
me read  
11 it to you, because it relates to what your now  
testimony is.

12 MR. MENDELOFF: Objection, your Honor. I  
don't think  
13 this is proper questioning.

14 THE COURT: Sustained.

15 MR. WOODS: All right.

16 BY MR. WOODS:

17 Q. Is your testimony now concerning the question of  
whether or  
18 not it was a unusual transaction -- is your now  
testimony that

19 it was an unusual transaction?

lot of 20 A. At the time of the grand jury inquiry, there was a

of this 21 guilt involved on myself for being involved in the sale

22 product that was allegedly --

question? 23 Q. Excuse me, Mr. Schlender. Can you answer the Is

24 it now your testimony that the transaction was unusual?

25 A. It is unusual, yes. But I was trying to explain my

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Frederick Schlender, Jr. - Direct

1 answer --

2 THE COURT: No, you don't have to explain.

3 BY MR. WOODS:

question is 4 Q. You don't need to explain at this time. The

wasn't 5 after explaining for two and a half pages that it

6 unusual, is your now testimony that it was unusual?

7 A. Yes, it is unusual.

you're 8 Q. Is there anything else that you can tell us that

testimony 9 changing your testimony on so I know what your now

10 is?

11 MR. MENDELOFF: Objection, your Honor.

12 THE COURT: Too general.

13 BY MR. WOODS:

14 Q. Well, what about the description of the individual?  
What

15 is your now testimony?

16 A. Testimony is as I stated.

17 Q. Six-foot tall?

18 A. Approximately 6-foot tall.

19 Q. 30's to 40's?

20 A. That's correct.

21 Q. How else would you describe him?

22 A. Had short hair, light brown in color.

23 Q. Any further description?

24 A. I don't believe I've had any further.

25 Q. Was he wearing glasses?

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Frederick Schlender, Jr. - Direct

1 A. I can't recall that, sir.

2 Q. Did he have a mustache or beard?

3 A. Don't believe he did, sir.

4 Q. Did he have any obvious tattoos?

5 A. None that I can recall, sir.

6 Q. Any scars?

7 A. None that I can recall.

8 Q. Wearing a earring?

9 A. No, I can't recall that.

10 Q. Now, is your testimony now that he did tell you  
where he

11 was farming?

12 A. I believe he did in our discussion of his purchase,  
went

13 through it thoroughly, yes, sir.

14 Q. When we went through it thoroughly. Are you  
talking about

15 when you and Mr. Mendeloff went through it?

16 A. I'm saying in my mind, I went over many times  
trying to

17 recollect what transpired in that October 18  
transaction.

18 Q. When did you inform the Government that he said he  
was

19 farming in Durham?

20 A. I believe it was the first time I met with Mr.  
Mendeloff in

21 October this past year.

22 Q. Well, you met with him the first time in September?

23 A. September, excuse me, sir.

24 Q. What else can you tell us about your discussion  
with Mike

25 Havens that's not reflected in your 302's and in your  
grand

Frederick Schlender, Jr. - Direct

1 jury testimony? You were with him a few minutes on  
October the

2 18th; is that correct?

3 MR. MENDELOFF: Objection, your Honor. It's  
4 overbroad.

5 MR. WOODS: I'm trying to narrow it down, your  
Honor.

6 BY MR. WOODS:

7 Q. You were with him a few minutes on October the  
18th; is

8 that correct?

9 A. That's correct.

10 Q. What can you tell us that you now remember about  
his

11 discussions with you?

12 A. Sir, when I deal with a customer, I try to make him  
at ease

13 and talk with him, and I do ask them questions on what  
he was

14 using the product for. And it's part of my business to  
know

15 farmers, so that's why I ask questions, twofold  
reasons, to

16 make them at ease and to find out information, sir.

17 Q. Well, I understand the reason. What I'm asking you  
is what

18 did he tell you that you now remember?

19 A. I believe that he was farming over in the Durham  
area, as I

recall, 20 said. He was using this to plant wheat; that's what I

21 sir.

grand 22 Q. When they asked you that question in front of the

know, I 23 jury, about where he was farming, you said, No, I don't

24 didn't ask him?

not 25 MR. MENDELOFF: Objection, your Honor. That's

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Frederick Schlender, Jr. - Direct

1 what he just said.

2 THE COURT: Sustained.

3 BY MR. WOODS:

where he 4 Q. Did they ask you in front of the grand jury about

5 was farming?

6 MR. MENDELOFF: Objection, your Honor.

we have 7 THE COURT: We've been over it. I don't think

8 to go over the same material.

9 MR. WOODS: Yes, your Honor.

10 BY MR. WOODS:

Durham; is 11 Q. Your now testimony is that he was farming in

12 that correct?

13 A. That's correct.

14 Q. Was there anything else in that conversation that  
15 Mr. Havens told you that was not reflected in the 302's  
or the  
16 grand jury testimony?

17 A. No other, sir.

18 Q. Now, Mr. Schlender, there were some investigators  
that came  
19 to see you back in June of '95; you remember that?

20 A. Not recall them, no, sir. No, I can't.

21 Q. You remember on June 16, '95, when two  
investigators, Miss

22 Sparks and Mr. Reid came to talk to you?

23 A. I do remember the names, now, yes, sir.

24 Q. You refused to discuss the matter with them, didn't  
you?

25 A. I refused 'cause of the litigations that were  
brought up

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Frederick Schlender, Jr. - Direct

1 from the victims of the bombing.

2 Q. Okay. And in November the 7th when investigators  
from our  
3 team came to talk to you, you refused to talk to them,  
also; is  
4 that correct?

5 A. I don't remember seeing any investigators from  
yours in

6 November, no.

7 Q. Do you remember seeing investigators from our team  
at any 8 time?

9 A. No --

10 Q. That asked to talk to you?

11 A. No, I can't recall, sir.

12 Q. Do you get requests from a number of individuals to  
talk to 13 you about this case?

14 A. No, I don't.

15 Q. Did the FBI tell you on October -- excuse me, on  
April the 16 30th or May the 2d not to talk to anybody concerning  
this case?

17 A. No, they did not.

18 Q. You just did that on your own volition?

19 A. Yes.

20 MR. WOODS: Well, I appreciate the opportunity  
to talk 21 to you now, Mr. Schlender.

22 THE WITNESS: Thank you.

23 THE COURT: Mr. Mendeloff.

24 MR. MENDELOFF: Thank you, your Honor.

25 CROSS-EXAMINATION

Frederick Schlender, Jr. - Cross

1 BY MR. MENDELOFF:

2 Q. Mr. Schlender, just so the record's clear, let me  
ask you,

3 I believe it's your testimony that you saw the  
purchaser of

4 this ammonium nitrate on two occasions; is that right?

5 A. That's right.

6 Q. Let me focus on the first occasion, September 30,  
1994.

7 A. Uh-huh.

8 Q. Where did you see him?

9 A. Would have seen him when I loaded the ammonium  
nitrate onto

10 the trailer.

11 Q. All right. Did you speak briefly with him during  
that

12 loading process?

13 A. Very briefly then, to ask him to let the end gate  
down and

14 told him how I was going to put that onto the trailer  
with the

15 forklift.

16 Q. Put the pallet onto the trailer?

17 A. Onto the trailer; right.

18 Q. When you spoke with him, where were you looking?

19 A. I was looking at him, I spoke to him, yes, sir.

20 Q. Now, do you have a business practice regarding how  
you talk

21 to customers?

22 A. In most cases, we try to make them at ease and try  
to look

23 at them when we're talking to them, sir.

24 Q. How far away were you from the purchaser on this  
trip?

25 A. On that day, I would say approximately 10 feet.

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Frederick Schlender, Jr. - Cross

1 Q. And how long did it take to load the pallet onto  
the

2 apparatus?

3 A. I would say approximately two minutes, sir.

4 Q. What was the lighting in the area?

5 A. It was natural lighting. It was outside the  
building.

6 Q. Let me ask you, you also had a meeting with the man  
several

7 weeks later, two weeks later on April -- October 18; is  
that

8 right?

9 A. That's correct.

10 Q. Between the October 18th session and the session at  
the end

11 of September, which is the one that's clearer in your  
mind?

12 A. Of the two, it would be the October 18.

13 Q. And do you remember what happened in the October 18  
14 session, where was it?  
15 A. The October 18 happened, he came to the farm store  
of ours.  
16 Q. How far away -- I'm sorry, go ahead.  
17 A. And it happened there in the store.  
18 Q. Where were you standing?  
19 A. I was behind the counter at our store there, sir.  
20 Q. And where was he?  
21 A. He was, oh, approximately 5 feet away at the edge  
of the  
22 counter there, sir.  
23 Q. What was the lighting in the room?  
24 A. That would have been fluorescent-type lighting in  
our  
25 building there, sir.

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Frederick Schlender, Jr. - Cross

1 Q. Did you speak with him?  
2 A. I spoke with him.  
3 Q. When you spoke with him, did you pay attention to  
him?  
4 A. Yes, I would have, I was dealing with a customer.  
5 Q. For the same reason that you just mentioned; is  
that right?  
6 A. That's correct.

7 Q. When you were talking to him, where did you look?

8 A. I would have looked at him in the eyes, sir.

9 Q. How long did this transaction take place?

10 A. I would say around five minutes.

11 Q. Can you tell Judge Matsch what you said to him and  
what he  
12 said to you in this transaction?

13 A. Yes. I, when the customer comes in, I greet him,  
ask him

14 if I can help him. And then he had stated that he  
wanted a ton

15 of ammonium nitrate fertilizer. I did talk to him  
about what

16 he was using the ammonium nitrate for.

17 Q. What did he say?

18 A. And he said he was planting wheat.

19 Q. Did you make a suggestion about different approach?

20 A. I told him he could use an alternative nitrogen  
source in

21 bulk which would be cheaper, but he wanted to stay with  
the

22 bags.

23 Q. All right. Did he say why he wanted to stay with  
the bags?

24 A. So he could haul it easier, he had no way to really  
haul in

25 bulk.

Frederick Schlender, Jr. - Cross

1 Q. Did he say where he was hauling?

2 A. He was hauling it to the Durham area where he  
farmed, sir.

3 Q. Now, when he told you he was going to use it for  
farming,

4 did you ask him any other question?

5 A. I would have asked him his name basically speaking  
because

6 of the reason that we went through on the grand jury  
inquiry,

7 if he was, could become a member later.

8 Q. All right.

9 A. And also I also asked him, since he was farming, we  
have a

10 tax exemption for farm inputs, you could sign a stamp  
11 exemption, but he refused to do that.

12 Q. And what did he say when you offered him the tax  
exemption

13 for farming?

14 A. He said he'd pay the tax.

15 Q. Is that uncommon to farmers to do that?

16 A. Yes, it's uncommon.

17 Q. Did you fill in a receipt at that time?

18 A. We filled a receipt, yes.

19 Q. And did you give him a copy?

20 A. I gave him a copy, yes.

21 Q. How did he pay for that?

22 A. He paid cash, as I recall.  
23 Q. \$230?  
24 A. It would have been yes --  
25 Q. Was that an unusual amount for that day?

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Frederick Schlender, Jr. - Cross

1 A. For that day, it would have been, yes.  
2 Q. At this point did you give him any instructions?  
3 A. I told him to load the product, we needed to back  
over to  
4 our warehouse, to the south of our farm store. And I  
proceeded  
5 to go get the forklift for loading.  
6 Q. Let me ask you about this transaction. Was there  
any  
7 reasons why you focused on it?  
8 A. Well, the main reasons I had focused on that would  
be he  
9 was farming, potential new customer, those would be the  
two  
10 main reasons I would say I focused upon him.  
11 Q. Was it common for a customer to buy an entire  
pallet of  
12 fertilizer, of a ammonium nitrate fertilizer?  
13 A. No, it was not common.  
14 Q. In fact, these two transactions, where do they rate  
in

15 terms of size of transactions among all your customers  
that

16 year?

17 A. It would have been one of the tops, sir.

18 Q. Have you ever seen the man before these two  
transactions?

19 A. No, I did not see him before that.

20 Q. When you went over to the shed, what happened next?

21 A. As I recall, he was already backed over there, and  
I

22 proceeded to get the pallet of ammonium nitrate, and as  
I

23 recall, he had the end gate down, and I went ahead and  
slid it

24 on the trailer. At that time.

25 Q. And while you were sliding it on, did you see  
another

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Frederick Schlender, Jr. - Cross

1 individual?

2 A. Another individual was standing by the back of the  
pickup

3 truck, yes.

4 Q. How long did you look at that second person?

5 A. I glanced at him, I didn't look very long.

6 Q. When you were putting the second pallet of  
fertilizer onto

7 the end gate --

8 A. Uh-huh.

9 Q. -- did you focus on the other person, the driver?

10 A. I would have focused more on the driver than I  
would on the

11 passenger. 'Cause he was the purchaser.

12 Q. And after you put the pallet onto the end gate --

13 A. Uh-huh.

14 Q. -- did you say anything to the driver?

15 A. I told him thank you. And appreciated his  
business, and

16 that was it.

17 Q. How far away were you on this occasion from the  
driver?

18 A. Would have been very similar, 10 feet, as was the  
first

19 time we loaded.

20 Q. The same amount of time as the first time?

21 A. Same amount of time.

22 Q. How was the lighting?

23 A. It would have been outside, so it would have been  
sunlight

24 then, or . . . .

25 Q. Now, you were asked questions concerning your  
interview

1 with the FBI in April and May --

2 A. That's correct.

3 Q. -- 1995. Did the FBI ever tell you where they  
found the  
4 ticket they were asking you about?

5 A. No, they didn't.

6 Q. Did you hear it from any other source?

7 A. Later we heard from the news service, but it was  
later in  
8 the week.

9 Q. After both interviews?

10 A. After both interviews.

11 Q. Now, let me direct your attention to your second  
interview.

12 In that interview, you, I believe, testified that you  
stated

13 that you thought the person that had purchased the  
ammonium  
14 nitrate may have been Terry Nichols?

15 A. That's correct.

16 Q. And that was based on what kind of observation?

17 A. Based on newspaper observations.

18 Q. How many times did you see his face in the  
newspaper?

19 A. I would say approximately two times, sir.

20 Q. Was that the same day or on prior days?

21 A. It would have been prior days, sir.

22 Q. Can you tell the Court how it was that this issue

came up

best of 23 in the interview? What did the agent say to you to the

24 your memory and what did you say?

And I 25 A. They asked me what media coverage I may have seen.

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Frederick Schlender, Jr. - Cross

coverage. 1 said I seen some TV and mostly newspaper media  
And 2

draw your 3 then they asked, Does anything in this media coverage

believe it 4 attention? And that's when I had said that I do not

purchased the 5 was McVeigh, but it could possibly be Nichols who

6 product.

could you 7 Q. Now, when you say it could possibly be Nichols,

to? 8 tell the Judge what level of certainty you're referring

sir. 9 A. If possibly would have been better than 50 percent,

10 Q. Now, you were also asked questions regarding your  
11 descriptions during the FBI interviews.

12 A. Uh-huh.

13 Q. About a view of the pickup truck that you saw?

A. Right.

in fact 14 Q. At the time that you gave those interviews -- and  
15 until today, did you know what precise type of truck  
16 Mr. Nichols had?

17 A. No, I did not.

read 18 Q. Let me ask you, one of the things you stated as you  
was 19 your 302's into the record today, was that the truck

What did 20 possibly a Dodge three-quarter ton four-wheel drive.  
21 you mean by possibly a Dodge?

color, it 22 A. Possibly would have been that style body, that  
23 was a physical features that I could recall in my mind.

24 Q. Were you certain about the model?

25 A. No, I wasn't certain.

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Frederick Schlender, Jr. - Cross

description 1 Q. What were you most clear about in terms of your  
2 of this vehicle?

colored 3 A. The dark color and the white-colored or light-  
4 topper.

even 5 Q. Okay. And what about the structure of the topper,  
6 with the cab?

7 A. Correct.

8 Q. Now, let me ask you, as to the license plate, you  
were

9 asked a series of questions about that?

10 A. That's correct.

11 Q. In your original interview with the FBI, did you  
state that

12 you were certain that the truck had a license plate?

13 A. No, I did not state that.

14 Q. What did you say?

15 A. I said it possibly could have had.

16 Q. Did you say why you only were saying it had a  
plate?

17 A. We talked about the phone call that we received on  
the

18 individual.

19 Q. When you first interviewed with the FBI, did you  
explain

20 what you meant by possibly, or did that come up later?

21 A. That came up later.

22 Q. Let me ask you about your description of the  
trailer. You

23 were asked whether you had stated affirmatively to the  
FBI that

24 the trailer was a '60s model three-quarter ton Ford  
pickup bed

25 trailer. Is that what you said?

## Frederick Schlender, Jr. - Cross

1 A. I said it possibly was that.

2 Q. What were you trying to communicate to the FBI in  
that  
3 first interview about this pickup trailer?

4 A. It looked to me as it was a pickup bed trailer.

5 Q. Are you saying that it was a pickup bed trailer or  
that it  
6 looked like a pickup bed trailer?

7 A. That it looked like it.

8 Q. What about the lettering on the trailer?

9 A. On the end gate?

10 Q. Right.

11 A. Lettering was Ford style lettering.

12 Q. Were you saying that you saw the words Ford there?

13 A. I could not recall seeing the words Ford there, no.

14 Q. Finally, let me ask you to look in the --

15 MR. WOODS: It's the last one.

16 BY MR. MENDELOFF:

17 Q. The last exhibit there, the grand jury testimony,  
let me  
18 direct your attention to page 24 of that testimony.

And let me  
19 ask you to look at line 5. Do you see that?

20 A. Right.

21 Q. When Mr. Woods -- Mr. Woods was asking you some  
questions,

Havens 22 he asked you whether you told the grand jury that Mr.  
23 was farming in Durham?  
24 A. That's correct.  
ask you 25 Q. Now, is the question, does the question 5 state,

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Frederick Schlender, Jr. - Cross

1 whether you told him that?  
2 A. No, he asked if, did you ask him where he was  
farming.  
3 Q. Did you ask him where he was farming, or did he  
tell you  
4 where he was farming? Which of the two?  
5 A. I believe he told me he was farming.  
6 MR. MENDELOFF: Thank you, nothing further,  
your  
7 Honor.

8 THE COURT: Mr. Woods.

9 MR. WOODS: Yes, your Honor.

10 REDIRECT EXAMINATION

11 BY MR. MENDELOFF:

Mendeloff 12 Q. Mr. Schlender, how many times have you and Mr.  
13 gone through those written questions?  
14 A. We haven't gone through those questions.

15 THE COURT: You mean the written questions,  
you mean 16 the transcript of the grand jury?

17 MR. WOODS: No, your Honor, the ones that  
18 Mr. Mendeloff just read off by rote to the witness.

19 THE COURT: How could you read them by rote;  
isn't 20 rote by memory.

21 MR. WOODS: Well, they sounded by rote.

22 BY MR. WOODS:

23 Q. The questions that Mr. Mendeloff read to you, how  
many 24 times have you gone through that with Mr. Mendeloff?  
25 A. We've never went through those questions, sir.

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Frederick Allen Schlender - Redirect

1 Q. What did you discuss last night after the testimony  
here?

2 A. We met briefly, probably 15 minutes. Asked me a  
few direct 3 questions and we departed.

4 Q. What were the questions he asked?

5 A. He asked, I recall one definite question on  
the . . . sir,

6 I can't recall exactly.

7 Q. Well, it's last night.

8 A. Right.

you 9 Q. 12 hours ago. What questions did Mr. Mendeloff ask

10 last night?

11 A. He would have asked about how the pictures that you  
have on

12 exhibit were, how they approached me with those  
pictures, sir.

13 I recall that, sir.

14 Q. And how did they approach you?

15 A. They asked me if those were anything similar to  
what I

16 could recall in my description of the vehicle I give on  
the

17 302's, sir.

18 Q. Okay, what was your answer?

19 A. He asked me that question, and I said that they  
were

20 similar, sir.

21 Q. What other question did he ask you?

22 A. I believe that was it, sir.

23 Q. Did you say 15 minutes?

24 A. He was in and out, sir. That was right after the  
Court

25 series yesterday.

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Frederick Allen Schlender – Redirect

1 Q. After the press conference and then go up and meet

in his

2 office?

3 A. We were there very briefly, sir.

4 Q. One question?

5 A. The one I remember, sir, yes.

6 Q. Were there other questions?

7 A. Cannot recall, sir.

8 MR. WOODS: Thanks a lot, Mr. Schlender.

9 MR. MENDELOFF: May I?

10 THE COURT: You may.

11 RE-CROSS-EXAMINATION

12 BY MR. MENDELOFF:

13 Q. Mr. Schlender, last night did we talk about what  
your

14 testimony would be about the license tag?

15 A. I don't recall that at all, sir, no.

16 Q. Did we talk last night about what your testimony  
would be

17 about the description of the truck?

18 A. No, we did not.

19 Q. What about the trailer? What did we talk about  
with

20 respect to that?

21 A. Not that I recall of anything, sir.

22 Q. Do you remember us talking about the bumper on the  
trailer?

23 Let me try to refresh your memory.

24 A. Okay, sir, yes.

25 Q. And what did I ask you about the bumper?

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Frederick Allen Schlender – Recross

and I 1 A. Asked me if what -- if there was a bumper on that,  
the bumper 2 said that the trailer was slick, it didn't look like  
as far 3 was cut off, it was intact, everything was legit on it,  
4 as the trailer.

your 5 MR. MENDELOFF: Thank you, nothing further,  
6 Honor.

7 MR. WOODS: No further questions.

now and 8 THE COURT: Mr. Schlender, you may step down  
likely to 9 you can leave. But I want to caution you that you're  
10 be called as a witness in the trial of this case.

11 THE WITNESS: Okay.

12 THE COURT: And one of the things that will be  
13 required of witnesses and is now required of you is  
that you do 14 not discuss your testimony with other witnesses or  
persons who 15 may be called as witnesses.

16 THE WITNESS: Okay, sir.

17 THE COURT: Do you understand?

18 THE WITNESS: Thank you.

19 THE COURT: You can leave.

20 Well, does that complete our witnesses for  
those  
21 motions?

22 MR. WOODS: It does from Mr. Nichols' team,  
your  
23 Honor.

24 THE COURT: All right. Well, we'll take a  
recess now  
25 and then come back and hear argument on the motions.  
We'll

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1 recess until 10 minutes to 11:00.

2 (Recess at 10:30 a.m.)

3 (Reconvened at 10:50 a.m.)

4 THE COURT: Please be seated.

5 All right. I'll hear argument; and we'll  
start with  
6 the McVeigh motions, Ms. Merritt.

7 MS. MERRITT: Yes, your Honor.

8 THE COURT: You want to argue that?

9 DEFENDANT MCVEIGH'S ARGUMENT RE EYEWITNESS  
IDENTIFICATION

10 MS. MERRITT: I do.  
11 Your Honor, we know from the Supreme Court  
that the  
12 linchpin of eyewitness testimony is reliability; and  
what we  
13 believe is that the Government in this case out of a  
sea of  
14 sightings has picked the few people that they believe  
support  
15 their theory and will tell -- and most fit the story  
that they  
16 want to construct in this case.

17 The first thing the Court -- that we have  
argued is  
18 that the identification procedures that were utilized  
in this  
19 case were impermissibly suggestive and that they are  
likely to  
20 lead to irreparable misidentification.

21 Now, the Government argues that we must show  
that the  
22 Government participated or somehow facilitated or  
furthered  
23 this pretrial procedure as being -- the suggestive  
pretrial  
24 procedure in order for the Court to determine that it  
could  
25 be -- that it wasn't appropriate; and we've presented  
law to

going to 1 the Court to suggest that that is not so. And I'm not  
position 2 dwell on it because it's in the briefs; but it's our  
suggestive 3 that even an accidental encounter, if it's unduly  
4 can create an irreparable likelihood of  
misidentification which  
hearing 5 would warrant the Court from preventing the jury from  
6 that testimony concerning the identification. And in  
this 7 case, the Government presented evidence to show to the  
Court 8 that its agents did not cause the massive pretrial  
publicity of 9 the perp. walk or the walk-out from the Noble County  
Jail.

10 That isn't the test. The test is whether the  
who 11 walk-out, the consequences of that walk-out, no matter  
12 caused it, created a likelihood of misidentification in  
this 13 case.

14 And it's our position that the testimony at  
this 15 hearing this week has shown that it did.

16 In addition, we would argue to the Court that  
the 17 Government did, in fact, promote the likelihood of  
18 misidentification in this case because of its continual

19 advisement in pretrial publicity of the details of this  
case.

20 If the Government had merely suggested or told the  
public that

21 a man named Timothy McVeigh had been arrested and  
charged with

22 the Oklahoma City bombing, we would not be in the  
position we

23 are in today, aside from the perp. walk.

24 But the Government didn't do that. The  
Government

25 advised in pretrial publicity that it believed that  
Timothy

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1 McVeigh was an individual named Robert Kling that  
rented a

2 truck. That caused the witnesses at Elliott's to  
identify

3 Mr. McVeigh.

4 The Government in pretrial publicity also  
advised that

5 it was Timothy McVeigh who drove the truck from  
Oklahoma to

6 Kansas, passing the gas station that Mr. Skrdla works  
at. This

7 we believe caused Mr. Skrdla's identification.

8 If the Government hadn't revealed and  
publicized the

9 details of the crime, we wouldn't have the degree of  
10 suggestibility that we have in this case.

11 I don't think there is any other case in  
history in  
12 which the singular image of a charged defendant has  
been  
13 displayed to so many people across America. The Court  
is well  
14 aware, it didn't need to see the walk-out again, and  
it's well  
15 aware of the media. I'm not going to dwell on how many  
times  
16 this image was depicted, because we all know it was  
depicted  
17 nonstop for days, weeks and even months. When it  
slowed to not  
18 being nonstop, it was consistently shown every time  
there was a  
19 news story about the Oklahoma bombing.

20 There are probably very few people that have  
not seen  
21 the image of Timothy McVeigh.

22 Eyewitness testimony is inherently unreliable,  
and  
23 there are problems with it. The Department of Justice  
this  
24 year through its own research project, the National  
Institute  
25 of Justice, released a study called "Convicted by  
Juries,

1 Exonerated by Science"; and I believe I've cited this  
in some  
2 of my pleadings. And in this study, what the council  
did was  
3 it took 28 case where people had been wrongly  
convicted; and in  
4 looking at why those people were wrongly convicted,  
they were  
5 found to have been wrongly convicted later because of  
DNA  
6 testing. DNA testing exonerated these people. All of  
these  
7 people had been charged and convicted of murder and  
rape. They  
8 served together in excess of 100 years in prison. In  
24 of the  
9 28 cases -- that's 85.7 percent -- faulty eyewitness  
10 identification was the cause or one of the principal  
causes of  
11 the identification -- and of the conviction -- excuse  
me. So I  
12 think that this issue is critical.

13 I would also point out to the Court that Neil  
vs.  
14 Biggers and the factors enumerated in Neil vs. Biggers  
was in  
15 1972. That's 25 years ago. Since 1972, there has been  
a huge  
16 amount of scientific research on the -- on eyewitness  
17 identification and its reliability, and perhaps the

most

18 important factor that the scientists are relying -- are  
now  
19 saying is that the level of certainty of the witness is  
a weak,  
20 at best, correlation in terms of accuracy of the  
21 identification.

I'd  
22 First of all, with respect to certainty -- and  
23 just like to address this as a principle first -- it's  
24 certainty at the time of the identification; it is not  
25 certainty at the time the witness testifies in court.

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1 The new research shows -- and there are  
studies, and  
2 we have asked the Court to allow us to present expert  
testimony  
3 on this issue so they can go through the studies with  
the  
4 Court -- that eyewitnesses' statements of certainty are  
5 indications of the eyewitnesses' belief about the guilt  
of the  
6 accused, as opposed to being statements about the  
clarity of  
7 their memory. And that is the problem that we have  
here. We  
8 have a parade of witnesses who, while we do not agree  
with

that 9 their confidence of their identification, they believe  
as an 10 they are confident that their selection of Mr. McVeigh  
11 individual is correct.

12 And there are so many problems with that that  
the 13 Government should not be able to discount all of the  
other 14 problems with the remaining Neil vs. Biggers factory  
(sic) and 15 rely solely on certainty.

16 Second, the research shows that the only time  
that 17 certainty is a reliable indicator of an identification  
is when 18 the eyewitness has not already learned the status or  
the 19 identity of the accused. In this case, virtually every  
witness 20 has said they knew the identity of the accused and they  
had 21 seen his image; therefore, their level of certainty,  
according 22 to these scientists, is rendered meaningless.

23 What I'd like to do now is go through the --  
each 24 witness that testified and talk about some of the Neil  
vs. 25 Biggers factors and why we believe that the Neil vs.  
Biggers

1 factors have not been met in this case and that the  
totality of  
2 the circumstances do not obviate the problem with the  
pretrial  
3 procedures.

4 With respect to Mr. Kessinger, his opportunity  
to  
5 view, at least to view John Doe No. 2, was poor. He  
said he  
6 couldn't see. He only saw him from the side, he didn't  
see his  
7 body, and he was focused on what he called Un. Sub. No.  
1.

8 With respect to his prior description, it was  
9 inaccurate. His rendition of the clothing was  
inaccurate. He  
10 said that the person that he identified as Un. Sub. 1  
was  
11 wearing camouflage-type clothing. He was clearly  
inaccurate  
12 about the chin, and I would refer the Court to  
Defendant's  
13 Exhibit AA. I think it's clear from this photograph  
that there  
14 is nothing abnormal about Mr. McVeigh's chin, nor does  
he have  
15 any blemishes.

16 Agent Rozycki testified that the composite  
drawing of

of that 17 Un. Sub. 1, the hairline and the forehead and the chin  
caused the 18 person, three features, one of which is the one that  
was more 19 witness to most focus on the face of that individual,  
20 like Mr. Hertig than it was Mr. McVeigh.

and the 21 The length of time between the confrontation  
ask 22 identification: Why did the Government wait 11 days to  
done 23 Mr. Kessinger to identify Mr. McVeigh? They could have  
That 24 it -- they held a lineup on April 22 in Oklahoma City.  
of the 25 would have been within three days or within five days

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and seen 1 encounter. He could easily have gone to Oklahoma City  
Robert 2 if he could have picked the person he believed to be  
and nor 3 Kling out of the lineup. The Government didn't do it,  
it. 4 has it offered any explanation for why it hasn't done

Kessinger 5 With respect to his level of certainty, Mr.  
6 expresses on the witness stand that he is extremely

confident.

7 But again, we would say that this pertains to the  
scientific

8 principle of the confidence malleability principle; and  
we

9 would again request to present expert testimony of

10 Dr. Elizabeth Loftus on that point.

11 Another psychological principle that's at play  
with

12 Mr. Kessinger is that of uncommon transference, where  
he

13 transfers what he sees on one occasion with something  
he sees

14 on another occasion. He's already stated that he did  
that with

15 respect to John Doe 2. When he first described John  
Doe 2 to

16 the authorities, he thought he was describing the  
person who

17 accompanied Robert Kling on April 17 to Elliott's Body  
Shop.

18 After some 20 meetings with prosecutors and  
FBI

19 agents, he then came to believe that his description of  
John

20 Doe No. 2 was in reality an innocent person named Todd  
Bunting,

21 who happened to accompany an individual named Michael  
Hertig to

22 Elliott's Body Shop, also to rent a Ryder truck the  
following

23 day, April 18, 1995.

the 24 Now, it's curious that as certain as he was in  
being the 25 beginning of John Doe 2 not being Todd Bunting but

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him from 1 person who was in the shop on April 17 -- and it took  
2 April until November, after all those meetings with the  
certain 3 Government to change his mind -- he remains equally  
as Un. 4 today that the person he saw on April 17 and refers to  
was 5 Sub. 1 is Timothy McVeigh, as opposed to the person who  
of the 6 with Todd Bunting on April 18. It's another indicator  
7 unreliability.

at play 8 One of the -- another psychological principle  
And 9 here is one called the experimenter expectancy effect.  
person 10 what the scientific studies have shown is that if the  
person 11 asking the questions or if the interviewer or if the  
suspect, that 12 conducting the lineup knows the identity of the  
should be 13 that is an invalid interviewing technique; that it

the 14 done by a neutral person, someone who does not know who  
-- that 15 suspect is, because what happens is they transfer their  
to the 16 knowledge of who the suspect is on a subliminal basis  
studies 17 person who is making the identification. And there are  
able to 18 that support this; and Dr. Loftus, of course, would be  
19 testify as to these.

to pay 20 With respect to Mr. Elliott, he had no reason  
Biggers 21 attention; so his degree of attention in the Neil vs.  
22 factors is poor. His prior description, again like  
23 Mr. Kessinger, fails the Neil vs. Biggers test.

then, he 24 First, he advises that there was one person;  
Crabtree 25 advises us there are two. And I believe it was Agent

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of the 1 who confirmed that Mr. Kessinger shared his information  
remembered them 2 physical characteristics of Robert Kling as he  
Government 3 with both Ms. Beemer and with Mr. Elliott, and the  
4 has in fact conceded that to us in a letter.

5                   So with Mr. Elliott, we have the problem of  
6 contamination, we have the problem of pooling of  
information.  
7 How do we know whether the -- his recollection today is  
based  
8 upon what he saw himself on April 15 or 17, or what he  
learned  
9 from Mr. Kessinger on April 19, after the first call  
from the  
10 FBI saying we think the truck that caused this bombing  
was  
11 rented at your shop?

12                   The length of time between the confrontation  
and  
13 Mr. Elliott's identification is even more critical than  
it was  
14 with Mr. Kessinger. Here, the Government waits 47 days  
to ask  
15 Mr. Elliott to make an identification. Again, he gives  
them  
16 his description on April 19; and on April 22, there is  
a lineup  
17 held in Oklahoma City, and Mr. Elliott is not asked to  
go to  
18 that lineup and try and identify the person he believed  
to be  
19 Robert Kling.

20                   Mr. Elliott's memory is clearly influenced by  
what the  
21 social scientists would call post-event information.  
His  
22 original memory trace is weak; and again, we can

present

23 scientific evidence to show the meaning and the  
applicability

24 of these factors in this particular case to the Court.

25 The next witness who testified was Mr.  
Donahue.

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1 Mr. Donahue perhaps -- his testimony to the suggestive  
power of

2 the perp. walk was a prime example of how people have  
come to

3 shape their memories to come in line with the person  
the FBI

4 paraded on television. His description of Mr. -- of  
the person

5 he saw at Terry Nichols' house is completely  
inaccurate. He

6 changes his statement on the very same day. On April  
21, prior

7 to the time he saw the perp. walk or any images of Mr.  
McVeigh,

8 he describes the individual he saw at Terry Nichols'  
house, not

9 the week before but a long time before, back in  
October, 1994,

10 so over six months before; and he describes him as  
having

11 midlength -- mid-ear-length hair, dark brown -- not  
even light

a beard 12 brown, but dark hair -- and he describes him as having  
13 and he describes him as having -- as being sloppy in  
14 appearance.

the 15 Later that day, Mr. McVeigh is paraded out of  
Donahue 16 Noble County Jail. After that point in time, Mr.  
beard, 17 changes his testimony to say, Well, it wasn't really a  
18 it was maybe two or three days' growth. He changes his  
19 testimony to conform to the description that he saw on  
20 television.

light of the 21 His level of certainty is an absurdity in  
the 22 amount of discrepancies in his original description and  
he 23 amount of time that passed between October, 1994, when  
24 encountered the person, and the time that he made his  
25 identification in April of 1995. He has -- there is no

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high degree 1 reasonable basis for this witness to express such a  
2 of certainty.

Government 3 With respect to Mr. Tipton, again, the

4 argues that because this individual was trying to buy  
5 components for a bomb that Mr. Tipton had a high degree  
of  
6 attention. The problem with that argument is that  
under Neil  
7 vs. Biggers, it's the degree of attention at the time  
of the  
8 encounter; and the testimony presented in court of Mr.  
Tipton  
9 was at the time of his encounter with this individual  
named  
10 John, John came up to him, asked to buy something. He  
said,  
11 Okay, I'll check it out, I'll check with my supplier,  
I'll get  
12 back to you tomorrow.

13 It wasn't until later, after maybe even the  
same day  
14 or the next day, but it was after his initial encounter  
with  
15 the individual that he learned that this individual  
could want  
16 these chemicals to make a bomb. At that point, he says  
he  
17 became focused.

18 Well, the problem is that's not the time of  
the  
19 encounter. That is still something later.

20 Mr. Tipton gave no prior description of this  
21 individual because he had never seen him before. He  
had seen  
22 him on television. The passage of time in this case is

23 critical. It was October of '94 to May of 1995.  
That's seven  
24 months for an individual he witnessed on one occasion  
for a  
25 period of a few minutes at a time when he did not have  
any

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1 particular reason to pay attention.  
2  
level of 3 Moreover, at the time with respect to his  
4 certainty, it's level of certainty at the time you make  
the 5 identification, not level of certainty now. At the  
time 6

7 Mr. Tipton made his identification, he told the  
Government it 8 looked like him but he couldn't be positive.

9 In court he says he's 90 percent certain.  
That 10  
11 90 percent isn't the number that counts. It's the fact  
that he 12 wasn't positive; it just looked like him. That's the  
certainty 13 that counts.

14  
15 Again, there is more problems with Mr. Tipton.  
With 16  
17 Mr. Tipton, we have an additional suggestive procedure  
at play 18

13 here, and that is the fact that the two photographs  
that were  
14 displayed to Mr. Tipton were the functional equivalent  
of a  
15 show-up. I can't think of any other example where an  
16 interviewing agent showed only two photographs to an  
individual  
17 to make an identification and the individuals were both  
18 suspects in the crime. That is clearly suggestive, and  
that's  
19 clearly what the Supreme Court warned against in  
Simmons,  
20 although in Simmons it was one image that they were  
complaining  
21 about; and again, our experts would testify that two  
22 photographs in this instance is a show-up. No question  
about  
23 it.

24 Further, the procedures were tainted in this  
case  
25 because the agent that displayed the photographs to Mr.  
Tipton

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1 advised that he did not give him any admonition about  
2 disregarding anything he saw in the media and he didn't  
give  
3 him the admonition that is supposed to be Rule No. 1,  
which is

4 you must tell the person who you are asking to make an  
5 identification that the suspect may or may not be in  
the  
6 spread. I believe that's even in the FBI agent  
handbook. And  
7 this agent testified he did neither of those.

8 With respect to Mr. Ogden, we would also  
submit that  
9 his testimony is problematic; and here we come into an  
10 additional factor as well. We were advised by the  
Government  
11 after we advised them that we were contesting the  
12 identification of Mr. Donahue that in view of our  
decision to  
13 challenge that identification, they were now going to  
seek to  
14 introduce the testimony of Marion Ogden. Why? Because  
Marion  
15 Ogden says he saw somebody at Terry Nichols' house that  
he now  
16 believes a year and a half later to be Timothy McVeigh.

17 They are using the testimony of Mr. Ogden not  
because  
18 it's relevant to this case but to bolster the  
credibility of  
19 Mr. Donahue.

20 And while other evidence can be considered of  
guilt,  
21 can be considered by the Court in determining the  
reliability  
22 of eyewitness testimony under a totality of the  
circumstances,

23 it can't be the identification of someone else in a  
different

24 time and place unrelated to the crime.

25 Further, you can't pin Mr. Ogden down any  
closer than

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1 fall, September, October, November. Mr. Donahue's  
2 identification was on a date specific, September 30,  
1994. The

3 Government chose a picture of Mr. McVeigh now  
conforming to one

4 of the images of Mr. Donahue, but we don't know when  
that image

5 was taken. We don't know who took it. We don't know  
whether

6 that's an image that Mr. Ogden would have seen.

7 Mr. Ogden was pretty much unable to even give  
a

8 description of the individual now; and he said that he  
-- at

9 the time he was interviewed by the police in November  
of 1995,

10 he did not give any great interview. He wasn't even  
asked to

11 look at a photograph and try and identify the person  
that he

12 saw there.

13 Another factor that the experts would testify

to is

14 that post-event information has a greater detrimental  
effect

15 with an old memory than with a recent memory. This  
memory of

16 Mr. Ogden was from the fall of 1994. He was not even

17 approached by the Government until the fall of 1995.  
We're now

18 at the spring of 1996. And this is a person whose  
claim of

19 identifying Mr. McVeigh is consistent with his own  
financial

20 interests. He claims to have seen him at a time when  
he was

21 out purchasing items at a garage sale; and he states  
that he

22 owns a shop to sell antiques, obviously not a shop that  
makes a

23 huge amount of money, or it wouldn't be called "Barely  
Making

24 It Antiques"; and he claims that the night he bought  
this lamp

25 for \$2, he took it home and put a price tag on it.

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1 Clearly, his claim is consistent with his own  
2 financial interest, because he later sold that lamp for  
\$40 and

3 told the person he sold it to he got it from Timothy  
McVeigh.

4                   With respect to Mr. Skrdla, Mr. Skrdla had a  
very poor  
5                   opportunity to view. He was in a cashier booth, and he  
claims  
6                   that a Ryder truck pulled up and went to a gasoline  
island. He  
7                   also states that the store was very busy at that time.  
Not  
8                   only was he ringing up gasoline sales, but it's in an  
area  
9                   where there is like a little convenience store, too, so  
people  
10                  are wanting to buy things. And at the time the truck  
pulled  
11                  up, the store was busy. So his opportunity to view was  
poor.  
12                  His degree of attention because of all the activity  
going on in  
13                  the store is poor. And we would submit that his -- his  
14                  testimony now that the reason he paid attention is  
because it  
15                  pulled up to a gas island instead of a diesel island is  
nothing  
16                  more than a post hoc justification of his  
identification.

17                  And in fact, there is also scientific studies,  
one  
18                  that was done by Jack Brigham -- and Ms. Loftus -- Dr.  
Loftus  
19                  would testify to this -- which had to do with a study  
of  
20                  convenience store clerks and their ability to remember  
and

hour 21 recollect customers. And even in the space of a 24-  
22 period, it was difficult; and most times, more often  
than not, 23 they couldn't do it.

24 In this case, we have from April 19 on for a  
period of 25 time before Mr. Skrdla was contacted by the FBI and  
asked for

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1 his impressions of this person he said bought gas from  
him in 2 the early morning hours of April 19.

3 Again, he's far more certain on the witness  
stand 4 today than he has been in prior reports with the  
Government. 5 He's moved from fairly certain to certain. And what  
happened 6 in between? He saw the perp. walk and he saw news  
accounts of 7 this event.

8 What Mr. Skrdla is trying to do is fit a  
square peg in 9 a round hole, and the round hole are the Neil vs.  
Biggers 10 factors.

11 Another psychological principle at work here

that

12 Dr. Loftus would testify to is that when you get  
information,  
13 you have a tendency to believe that you knew it all  
along; so  
14 when Mr. Skrdla saw the composite and saw the  
television  
15 portrayal of Mr. McVeigh, he believed he always knew  
it; but  
16 yet he didn't contact the FBI prior to that time.

17 Another psychological principle that Dr.  
Loftus would  
18 testify to is independent study she performed for this  
case,  
19 and this is on the effect of media publicity on the  
ability of  
20 an individual to make a correct identification. And  
what she  
21 found was that individuals who were exposed to media  
coverage,  
22 including photographs and other representations of  
Timothy  
23 McVeigh, can pick his photo out from the photo spread  
24 constructed by the FBI; and we would like the  
opportunity to  
25 present those findings to the Court.

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1 I also want to point out to the Court that  
again,

2 regardless of whether the Government played any part or  
didn't  
3 play any part in the publicity of this image from the  
walk-out  
4 under Department of Justice regulations, which I've  
submitted  
5 to the Court, they had a duty to avoid it. They had a  
duty to  
6 avoid assisting in any manner or encouraging the public  
7 portrayal of the image of a defendant in custody.

8 And I think the Court may be able to recollect  
back to  
9 when Terry Nichols was brought out in Kansas: They  
rushed him  
10 into a car, they picked -- they put something over him  
so  
11 nobody could identify him. It stands in stark contrast  
to what  
12 was done with Mr. McVeigh in this case.

13 Why couldn't they have pulled a van up to the  
door and  
14 put something over his head and rushed him into it?  
They  
15 didn't care.

16 And as to the agent who said that he was  
concerned  
17 about the safety and well-being of Mr. McVeigh, how  
could he be  
18 so concerned when he wouldn't even provide him or  
didn't think  
19 to provide him with a bulletproof vest, when he was  
going to be

shouting 20 walking out through that throng of people who were  
21 horrible things to him?  
22 It's negligent. It's negligent control over  
the --  
23 over its prisoner, and it is a causation factor with  
respect to  
24 the walk-out; and the walk-out is what is indelibly  
imprinted  
25 on the mind of almost every American in this country.  
It has

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1 rendered any possible identification of Mr. McVeigh  
unfair; and  
2 unless the Court can find by a totality of the  
circumstances  
3 that these witnesses that the Government has put on  
today, the  
4 few in its sea of sightings that it believes fits its  
theory,  
5 that testimony should not be allowed.  
6 And the reason that we're doing it now as  
opposed to  
7 at the trial is because of that phrase we use so often  
in this  
8 case: You can't put the toothpaste back in the tube.  
Once  
9 these witnesses testify at trial, if the Court at that  
point

10 determines their testimony is unreliable and the jury  
shouldn't

11 hear it, they've heard it. Telling the jury to  
disregard it is

12 not going to help, and neither will a cautionary  
instruction.

13 And that's why we're bringing these issues up now.

14 I just want to mention some of the other  
psychological

15 principles our experts would testify to if allowed by  
the

16 Court. There is won called hindsight bias, and that  
pertains

17 to Mr. Kessinger.

18 There is uncommon transference and source  
monitoring

19 errors. That would pertain to thinking you had seen  
one person

20 and confusing with someone you saw on another occasion.

21 Photo biased identification: That clearly  
occurred in

22 this case, because what photo bias identification is  
that

23 studies have shown that when you ask an individual to  
make an

24 identification and -- from a photo spread and that  
person has

25 already seen a mug shot or a likeness of the  
individual, they

spread. 1 are much more apt to pick that individual in the photo

shown 2 Well, in this case, all of the people who were

not a 3 photo spreads had seen the image of Mr. McVeigh, maybe

that 4 mug shot but certainly a walk-out from the jail; and

5 tainted their subsequent identification.

shared 6 We have the pooling and contamination issue of

of how 7 information. We have again the confidence malleability

time can 8 numerous meetings with the Government over a period of

with 9 change and alter a witness' perception, like it did

10 Mr. Kessinger, and how witnesses once they make an

they were 11 identification don't like to back off it and say that

12 wrong.

submit that 13 So for these reasons, your Honor, we would

suggestive 14 we have more than met the test of showing overly

15 procedures in this case. It doesn't matter whether the

didn't 16 Government caused them or not; but we feel that if they

them. 17 cause them, they certainly didn't do anything to avoid

18 And they were avoidable; that in the case of other  
witnesses,  
19 we have other suggestive procedures such as the two-  
photo  
20 show-up and that when the Court considers, if the Court  
finds  
21 these procedures suggestive -- that the evidence has  
been that  
22 it does not overcome the tendency for unreliability in  
this  
23 case when the Court considers the Neil vs. Biggers  
factors  
24 under a totality of the circumstances.

25 THE COURT: Thank you.

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1 I'll hear argument in support of the motion  
for Terry  
2 Nichols, also with respect to Mr. Schlender, before  
hearing  
3 from the Government.

4 MR. WOODS: I'm perfectly willing to let  
5 Mr. Mendeloff --

6 THE COURT: No, I want to hear from you now,  
and he'll  
7 answer both.

8 DEFENDANT NICHOLS' ARGUMENT RE EYEWITNESS  
IDENTIFICATION

9 MR. WOODS: Thank you.

10 Your Honor, may it please the Court, we're  
asking the

11 Court to exclude the testimony of Mr. Schlender.

12 THE COURT: All of it?

13 MR. WOODS: Well, let me get into that.

14 THE COURT: Yeah, I'm not sure --

15 MR. WOODS: That's a good point.

16 THE COURT: -- just what you're moving to  
exclude.

17 MR. WOODS: That's a good point.

18 I do want to say I agree with and adopt all  
the legal

19 arguments Ms. Merritt made, and I don't intend to  
repeat them

20 here.

21 I want to divide our challenge into two parts,  
because

22 I think because of the way this happened, it is  
divisible into

23 two parts.

24 Using the Neil vs. Biggers standard, the five  
25 incidents set out in Neil vs. Biggers, in challenging  
the

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1 identification testimony, if you could charitably call  
it that,

FBI in 2 of Mr. Schlender when he was first interviewed by the  
grand 3 April 30, May 2 and then his testimony in front of the  
he's 4 jury -- I want to focus in on that. The factors where  
factors is 5 very weak on out of the three -- out of the five  
6 No. 3, the accuracy of the witness' prior description.

ask him 7 When they approach him on September 30, they  
8 to remember an event seven months ago, and he describes  
40's. 9 Mr. Havens as being 6-foot tall, no glasses, 30's to  
10 That is not a description of Terry Nichols.

the 11 He describes a vehicle. The FBI has woven in  
12 identity of Mr. Havens with the vehicle. It's  
inextricably 13 interwoven. It can't be separated. He gives a  
description of 14 a 1970's three-quarter-ton Dodge pickup truck, four-  
wheel 15 drive, along with this trailer, which is totally  
inaccurate as 16 to Mr. Nichols' pickup truck.

of 17 The fourth factor in Neil vs. Biggers, level  
18 certainty demonstrated by the witness at the  
confrontation:  
grand 19 That's the grand jury testimony. When he gets to the

on page 20 jury and they ask him what's the description, he says

level of 21 9, "I cannot identify the individual." That's his

22 certainty.

between the 23 And then the fifth factor, length of time

grand jury 24 event. Just focusing on that time, up through the

the 25 testimony, we could accept that. He's been asked about

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individual. 1 event of seven months ago, has been asked about the

when 2 He's uncertain about it, he gives a misdescription; and

3 confronted under oath, he says, "I cannot identify the

4 individual."

wouldn't 5 I think we can challenge his testimony. They

6 even be offering it, No. 1, had he stopped there. They

proving up the 7 wouldn't even be offering it, except for perhaps

testifying 8 two receipts. We don't have any problem with him

it. And 9 proving up the two receipts, since he's the manager of

as a 10 the Court brought out a good point: They can call him

11 witness. What we're asking the Court to exclude is his  
now  
12 testimony where he says he's over 50 percent sure that  
the  
13 individual is Terry Nichols, because we have a dramatic  
change  
14 from his grand jury testimony in July, '95, in  
September, '96,  
15 two years after the event, we then have Mr. Mendeloff  
and  
16 Mr. Hersley begin to work with him.

17 And this goes into our other argument, which  
is in two  
18 parts. This is what the courts were saying when they  
coined  
19 the phrase, "impermissibly suggestive." This case is  
what they  
20 were looking at and talking about. This fits all the  
four  
21 corners.

22 And I'm not comfortable in making allegations  
against  
23 the other side, and I don't like doing it; but I think  
the  
24 facts of this case compel me to on behalf of my client.

25 I expect this behavior out of the FBI. I look  
for it

1 and I expect it. That's the culture of the  
organization that's  
2 run by people that are trained in the military rather  
than in  
3 law school. That's what's become the FBI.  
4 But I don't expect that type of behavior out  
of a  
5 federal prosecutor, whose duty is much higher. What we  
have  
6 here is, quote, witness preparation, beginning in  
September of  
7 '96, October, '96, January, '97, and unknown how many  
days here  
8 in February, '97. But all of a sudden he goes from his  
9 testimony, "I cannot identify the individual." He's  
now over  
10 50 percent certain, and all of a sudden everything that  
causes  
11 them problems with the theory of their case; to wit,  
the  
12 description of the truck -- that goes away. The  
13 three-quarter-ton Dodge 1970's truck, four-wheel drive,  
now  
14 becomes Terry Nichols' vehicle. That's the '84 GMC  
half-ton,  
15 two-wheel drive; so that fits with the theory of the  
case.

16 The 6-foot description: That sort of  
disappeared. We  
17 don't know where that is.

18 The accurate description of the trailer, which  
if

19 anybody is familiar with pickups and trailers, it's  
this  
20 individual. He gave a very accurate description of a  
Ford,  
21 1960's three-quarter-ton truck, Ford pickup, cutoff-bed  
22 trailer. All of a sudden it now becomes a flatbed  
Donahue  
23 truck. Why? Because that fits the Government's theory  
of the  
24 case, because Mr. Nichols worked at the Donahue farm.

25 That's not reasonable to go from that  
description of

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1 that truck and that trailer to where we are now.  
That's not  
2 witness preparation. That's witness manipulation.  
3 We also have the changing of his grand jury  
testimony  
4 where he went for two pages explaining this is not an  
unusual  
5 transaction. They now have him to say it is an unusual  
6 transaction. The reason they've done that is because a  
jury  
7 wouldn't believe a person who says, Oh, yes, seven  
months later  
8 when asked about it, I remember that event. They've  
got to  
9 have him say it was an unusual event and that's why he  
recalls

10 it, yet he went to great length under oath to say it  
wasn't an  
11 unusual event.

12 So there are things that are changing. He  
testified

13 under oath that Mike Havens never told him where he  
farmed; yet

14 his now -- and he says -- he was asked specifically,  
"Did you

15 ask him where he farmed?"

16 "No, I didn't."

17 His now testimony is that, Yes, Mike Havens  
told me he

18 farmed at Durham. Well, the reason they're going to  
use Durham

19 is because that's where Donahue has the trailer  
manufacturing

20 and that's in an area of the large Donahue ranch.

21 This is made-up testimony. This was a  
malleable

22 witness who the Government got a hold of and molded  
their

23 testimony to fit their theory. There were too many  
facts that

24 he had already testified to that didn't fit their  
theory; and

25 because of this behavior, which is shameless in itself,  
we feel

1 that the remedy is that his testimony of any  
identification of

2 an individual, the truck, and the trailer be excluded.

3 I have no problem with him testifying as to  
being the

4 manager of the co-op, being the record custodian of the  
two

5 receipts, and even if he limits his testimony back to  
what it

6 was in the grand jury, I don't have any problem of  
going up

7 through the grand jury. But when they got a hold of  
him and

8 changed his testimony, I do have a problem of anything  
that

9 developed after July, '95; and we ask the Court to  
exclude that

10 testimony, your Honor.

11 Thank you.

12 THE COURT: Mr. Mendeloff, are you going to  
argue

13 these motions?

14 PLAINTIFF'S ARGUMENT RE EYEWITNESS  
IDENTIFICATION

15 MR. MENDELOFF: Yes, I am.

16 Your Honor, given that attack, I think that  
it's

17 appropriate for me to begin this argument by inquiring  
of the

18 Court if there are any questions you need to ask me on  
behalf

19 of the Government as a result of that attack, because  
there is  
20 no evidence in the record for that and that is not what  
21 happened. I am prepared to describe to you the entire  
22 procedures involved. I will tell you step by step what  
23 happened. This witness was not manipulated, he was not  
led.

24 When he comes up with new information later due to  
questioning  
25 in a fairly limited number of pretrial sessions --  
three, he

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1 said -- before preparation for this hearing, the  
allegation is  
2 that it's been manipulation.

3 THE COURT: Well, I'll just ask you: Was  
there  
4 anything about the witness' answer to Mr. Woods'  
questions

5 about his, the witness', meetings with you and the FBI  
agent  
6 that you would correct?

7 MR. MENDELOFF: The only thing I would  
correct, your

8 Honor, or add to is that the witness was here -- and he  
wasn't  
9 asked this, but in the spirit of being -- of complete

me one 10 disclosure, the witness was here last week and met with  
with me 11 time last week and was here earlier in the week and met  
meeting 12 one time earlier in the week. Last week was probably a  
meeting of 13 of about an hour. Earlier this week was probably a  
present 14 about I would say an hour and a half. Mr. Hersley was  
of this 15 for the first one, not for the second, in anticipation  
16 hearing, and there was another agent there.

17 That is the extent of it. And in terms of the  
18 witness' presentation of what was asked of him and how  
he 19 answered it, it is exactly the way it happened.

20 THE COURT: All right.

witness' 21 MR. MENDELOFF: The fact is, Judge, that the  
22 original description of this vehicle was loose. He  
remembered  
it as 23 it as being loose. The interviewing agent remembered  
and what 24 being loose and when we started asking him about it;  
25 he remembered, we got the information that was  
presented in

1 court, your Honor.

2 THE COURT: Well, of course, we're getting  
ready for

3 the trial of Timothy McVeigh --

4 MR. MENDELOFF: Yes, your Honor.

5 THE COURT: -- as a separate trial; and I  
agreed and

6 you agreed, the Government, to proceed to hear this  
motion on

7 behalf of Mr. Nichols, even though it isn't his trial  
that

8 we're going to be proceeding with soon. But that was  
out of a

9 concern that if the testimony is given at Mr. McVeigh's  
trial,

10 first of all, the witness tends to -- may tend,  
depending upon

11 the studies, of course, suggesting to us what people do  
in the

12 view of those who are considered social scientists; but  
the

13 concern was that he becomes fixed on his testimony,  
whatever it

14 is, at the trial.

15 What -- do you expect to ask this witness,  
16 Mr. Schlender, to identify the person with whom he  
dealt at the

17 co-op?

18 MR. MENDELOFF: We would, your Honor. We  
would; but

19 the identification would be limited to what he has to

say. And

20 I might add, your Honor, that he hasn't changed the way  
he  
21 describes this from the beginning. He said at the  
beginning  
22 that it may have been Terry Nichols. The only thing  
that he's  
23 added, and as a result of one question and one answer  
in  
24 pretrial: Mr. Schlender, what do you mean by may have  
been  
25 him?

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1 THE COURT: Well, we won't have Mr. Nichols in  
court  
2 in Mr. McVeigh's trial.

3 MR. MENDELOFF: That's right, your Honor.

4 THE COURT: And of course, the normal question  
asked  
5 of an identifying witness is if you see the person in  
court. I  
6 mean, Do you see the person in court, and describe  
where he or  
7 she is and what he or she is wearing.

8 What do you intend to do here? Do you intend  
to use a  
9 picture?

10 MR. MENDELOFF: We were going to offer that,

your

11 Honor, yes. We intend to use a picture, or we can even  
take a  
12 different step, which would be even less suggestive,  
and ask  
13 him has he seen the person anywhere before, where did  
he see  
14 him, and who was it, without showing him a picture.  
And then  
15 we wouldn't have to display another photo to him. He  
could  
16 just describe his process of identification; but we  
feel it's  
17 necessary, your Honor, for him to at least put that  
into the  
18 record because this is a conspiracy.

19 Now, I might add, Judge, that -- and I don't  
know if  
20 this is necessary, but I'd like to add it into the  
record at  
21 the very least: If we wanted to manipulate this  
witness, we  
22 would have told him about the license plate, we would  
have told  
23 him about the vehicle. We didn't tell him any of those  
things.  
24 We didn't lead him that way. We asked him questions  
about what  
25 he had said before, and that was the extent of it.

argument 1 Now, if I can, your Honor, I'll turn to the  
2 regarding Mr. McVeigh.

3 THE COURT: Proceed.

in 4 MR. MENDELOFF: Your Honor, the Tenth Circuit

due 5 Sanchez, Messer and Makowski have set forth a two-step

procedures 6 process inquiry to determine whether identification

lead 7 were so unnecessarily suggestive and unreliable as to

And 8 immutably to an impermissible erroneous identification.

out in 9 the test that the courts -- that the Tenth Circuit set

the burden 10 those cases is twofold, in which the defendants bear

11 on each prong.

cases 12 First, what the threshold question in those

unduly 13 state is whether the identification procedures were

cases 14 suggestive. To the extent that they were not, those

second 15 state that that is the end of our inquiry; but the

be 16 prong, separate, completely independent analysis, would

17 whether the identification was unreliable. Again, the

18 defendants have the burden.

19 THE COURT: Well, a suggestive identification  
is not  
20 the only basis upon which a court may have the duty to  
exclude  
21 evidence. There are cases, as you know -- and they've  
been in  
22 the papers filed here -- where a court has held that  
there  
23 is -- the testimony is unbelievable on its face, as,  
for  
24 example, this Seventh Circuit case that I'm sure you're  
aware  
25 of, United States vs. Alcantar, where the court  
describes the

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1 possibility that it may be unbelievable because it was  
2 physically impossible for the witness to perceive, or  
that  
3 simply under the laws of nature, it's impossible. So  
there is  
4 that prong as well -- or not prong, but that basis upon  
which  
5 there could be an exclusion.

6 MR. MENDELOFF: We agree, your Honor; but the  
fact is  
7 that we don't have any kind of extreme conduct like  
that or  
8 circumstances like that in this case. All the  
witnesses

their 9 testified to their ability to observe, the nature of  
the 10 observations. In fact, we had detailed testimony about  
what 11 type of encounter including in most cases a glimpse of  
conversation that 12 their trial testimony would be regarding the  
13 was had.

14 This is not a case in which there is physical  
15 impossibility.

in 16 Now, Judge, I'd like to address the two prongs  
being 17 part, separate analysis, step by step, the first prong  
to that 18 whether the procedures were unduly suggestive; and as  
in, or 19 prong, Judge, the first inquiry as we see it is which  
20 identification process, one the Government was involved  
21 another one one the Government was not involved in.

the 22 And as your Honor knows, a large portion of  
notion that 23 defendant's argument and brief has to do with the  
cause 24 the media can influence an identification sufficient to  
Elliott, 25 suppression. This is the crux of their attack: Eldon

1 Tim Donahue, Rick Schlender, Fred Skrdla and Marion  
Ogden; but  
2 there is no reported case, none, that breathes life  
into this  
3 moribund concept. The defense would have you believe  
that the  
4 Green case provides a basis; but in that case, there  
was  
5 negligence on behalf of the Government, not -- that is  
not a  
6 case in which there is no Government action at all.  
7 And in fact, Judge, there is a case directly  
on point  
8 in the Ninth Circuit which addresses the issue of media  
9 exposure, and we describe that in our brief. And  
that's the  
10 Peele case. But I think it's worthy of revisiting the  
Peele  
11 case, now that we've had our hearing, because now that  
we've  
12 had the witnesses testify, we can see that,  
notwithstanding the  
13 sea of publicity in this case, our case fits much more  
squarely  
14 within Peele than I think our brief even explored.  
15 In Peele, Judge, the eyewitness had seen a  
newspaper  
16 photo, one newspaper photo identifying the defendant as  
a bank  
17 robber and told the prosecutor that that photo aided

her in

18 making her identification.

Supreme 19 Then Judge Kennedy carefully reviewed the

sources of 20 Court case law and determined that non-Governmental

21 witness influence do not provide an adequate basis for

22 suppression. He went on to explain that the extent of

examination at 23 influence by these sources is proper for cross-

24 trial, and that's exactly the position we take.

that 25 Now, here's the reason, Judge, that we think

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our 1 Peele is much more appropriate than even was clear in

its 2 brief. Twofold: (1) Peele cannot be distinguished on

media in 3 facts notwithstanding this case, notwithstanding the

contrary 4 this case; and secondly, any other standard would be

5 to public policy.

Peele, what 6 Judge, the defendants would argue that in

than a 7 they had was a single article in a newspaper rather

8 media shower of publicity as in this case. But, Judge,

that is

9 not the relevant consideration. The relevant  
consideration is

10 the number of articles that the witnesses saw. That's  
the sole  
11 relevance. That's it.

12 And in this case, we have a series of  
witnesses who

13 have testified that their exposure to media was very  
limited.

14 In Peele was one. In our case, Tom Kessinger testified  
he had

15 no exposure. Eldon Elliott testified he was exposed to  
one

16 article, as in the Peele case; Rick Schlender testified  
he was

17 exposed to two; Skrdla testified he was exposed to  
limited

18 numbers, and Glynn Tipton also testified that he was  
exposed to

19 one or two.

20 And the fact that there is a lot of other  
reporting

21 about this case is not really relevant. The question  
is did

22 that reporting help the witness in any way make the

23 identification and what is the extent to which it did.

24 So all of our -- all our testimony --  
testimony by

25 many of our witnesses draw their identification  
squarely within

1 Peele.

2                   Now, Judge, on the second point, the point  
that any

3 other -- any standard other than Peele would be  
contrary to

4 public policy applies particularly in notorious cases  
like

5 this. As your Honor knows, evidence exclusion is a  
radical

6 remedy and is designed to deter Government misconduct.  
In this

7 case, the media exposure, as we established, was not  
based on

8 Government misconduct. To extend it beyond cases of  
alleged

9 media influenced -- excuse me -- to extend it to cases  
of

10 alleged media influenced identification exclusive of  
Government

11 misconduct would not serve a deterrent purpose but,  
more

12 importantly, would render an investigation of  
historical cases

13 like this one where there is, you know, a substantial  
amount of

14 media exposure next to impossible.

15                   The men are arrested within -- and this would  
be the

16 scenario: The men are arrested within days of the

offense.

17 The agents set out and try to piece together the  
history of the  
18 conspiracy. To the extent the men are in the media, it  
is  
19 often absolutely unavoidable. If there wasn't a perp.  
walk, as  
20 the defendants allege, the media would have gotten a  
hold of  
21 photographs of these defendants and that would have  
been in the  
22 media. And by the time we contact the people, they  
would have  
23 been tainted. And it's -- we would be met with a  
vicious  
24 circle. There is no reason why cross-examination can't  
25 accomplish that same purpose.

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1 Now, Judge, that brings us to the related  
issue of  
2 whether the media was propagated by the Government.  
And I  
3 think I heard Ms. Merritt concede that it was not.  
4 THE COURT: Negligence, is what she said.  
5 MR. MENDELOFF: I'm sorry, your Honor?  
6 THE COURT: Negligence.  
7 MR. MENDELOFF: And I believe, your Honor,  
that the

8 testimony was clear that it was not even negligence.  
And, your

9 Honor, to review this part of the record, I'd ask your  
Honor to

10 recall for purposes of this question some of the  
testimony that

11 was developed during the suppression hearing, because I  
think

12 that is somewhat relevant here.

13 The delay in removing Mr. McVeigh from the  
prison was

14 obviously, from the suppression hearing, not based on  
any

15 intentional misconduct or intentional foot-dragging to  
get this

16 in front of the media but rather because this was days  
after

17 the bombing. The people in Oklahoma City were  
interfacing with

18 the people in Washington. They were producing six  
different

19 warrants that day. Mr. McVeigh only had been  
identified the

20 day before. He is only found that morning.

21 And producing a search warrant in that period  
of time

22 in a normal case is not unreasonable -- excuse me -- an  
arrest

23 warrant in a normal case in that amount of time is not

24 unreasonable; but certainly in this case there can be  
no

25 allegation of intentional foot-dragging.

1           Then we see that once the warrant is issued,  
2           Mr. McVeigh is not released, not from any fault of the  
FBI but  
3           because of local entanglements.

4           That brings us to the question of the removal  
of  
5           Mr. McVeigh from the building. They could not take him  
out  
6           with a helicopter and they couldn't take him out with a  
car in  
7           the basement, because there was none. The testimony  
was that  
8           the most accessible entrance was the one that they were  
9           addressing -- that they were using; and I don't hear  
any  
10          allegation that that is not accurate.

11          The only allegation we hear now is why didn't  
the  
12          agents back the van up the sidewalk? Well, Judge,  
their  
13          determination was that the quickest way to get the man  
out of  
14          the building in a safe manner so that they could join a  
chase  
15          car and a lead car would be to do it the way they did  
it.

16          And this issue of the bulletproof vest, Judge,

seems

17 to be specious, because, Judge, if there was any  
concern or if  
18 they thought that there was any danger of sniper  
attacks, the  
19 agents certainly would have had bulletproof vests on  
20 themselves; and the testimony was that they didn't.  
21 Besides that, your Honor, this issue of  
timing, this  
22 walk-out for media purposes is particularly  
disingenuous. No  
23 matter when Mr. McVeigh would have walked out of that  
building,  
24 it would have been displayed on the evening news,  
whether he  
25 walked out at 5:00 or 2:00 in the afternoon. If there  
were

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1 cameras there to capture it, it would have been on the  
evening  
2 news; and it wouldn't have mattered whether or not he  
left  
3 later in the day.

4 The evidence is absolutely clear that there  
was no  
5 planned perp. walk, there was no negligence, and the  
agents  
6 operated in a highly professional manner considering  
the

7 architectural limitation of the building.

8                   Now, Judge, turning to the actual witnesses,  
the  
9 witnesses show that there is no basis for media  
challenge as a  
10 factual matter. Most of the Government's witnesses had  
either  
11 limited media coverage or events, affirmative signs  
that the  
12 media had not effected them. Elliott, Kessinger,  
Schlender,  
13 Tipton and Skrdla had little or no exposure. And the  
witnesses  
14 that evinced affirmative signs that the media had not  
affected  
15 them include Tipton and Donahue; and that, is, Judge,  
in our  
16 view striking testimony. The image of Tim McVeigh on  
the news  
17 was one of a clean-shaven, fresh-faced man; but these  
18 witnesses, notwithstanding that media depiction,  
described Tim  
19 McVeigh as having a scraggly beard. And we produced  
evidence,  
20 Judge, that during that rough time frame, August and  
September  
21 of 1994, Mr. McVeigh was sporting whiskers and was  
dressed in a  
22 slovenly manner.

23                   There is no way those witnesses could have  
known that  
24 through media. In fact, there is no way they could

have known

25 it except from their own experiences with Mr. McVeigh;  
and that

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1 testimony dispels any notion of media taint and in  
fact, Judge,

2 speaks volumes about the reliability of those  
witnesses'

3 testimony.

4 Now, in terms of Government procedures,  
whether or not

5 there was any suggestivity through Government  
procedures,

6 Judge, where the Government was involved in the actual  
ID

7 procedures here as opposed to the media aspect, the  
record is

8 replete with examples of entirely proper and  
responsible

9 conduct. And I need to look -- we need to start no  
further

10 than with that photo spread.

11 Judge, the photo spread was the crux of the

12 identification of the two Elliott's witnesses, and this  
is a

13 case due to able and aggressive defense attorneys in  
which a

14 misplaced staple on a pleading draws howls of dismay.  
In this

photo 15 instance, there was not a single challenge to that  
shows the 16 spread. It is an outstanding photo spread, and it  
17 good faith of the Government.

were 18 When the witnesses were located in time, steps  
Both 19 taken to assure that they did not watch media coverage.  
told them 20 witnesses testified, as did Agent Crabtree, that he  
and 21 early -- this was before Mr. McVeigh was ever located  
media. 22 arrested, on the morning of April 20, not to watch

witnesses were 23 When the photo spreads were done, both  
24 told to disregard the media.

photo 25 In addition, during the Elliott and Kessinger

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rely on 1 spreads, other steps were taken. They were told to  
you 2 their own memory, they were told people -- that person  
both 3 recall may or may not be in the photo spread, and they  
talked to 4 said, as did all the agents involved -- and we've

5 almost every actor in these events -- that no comment  
was made  
6 after the selection was made.

7 Now, the question was put by Ms. Merritt, Why  
didn't  
8 the Government do a lineup on April 22 with these  
witnesses?

9 Well, Judge, first of all, the failure of the  
10 Government to do a lineup is, of course, no ground for  
11 suppression of this evidence. There is no basis --  
there is no  
12 law that requires the Government to use one  
identification  
13 procedure, one valid identification procedure vs.  
another.

14 But, your Honor, the question of why lineups weren't  
done is  
15 highly understandable when you consider what was  
happening in  
16 context. This was April 22. It was days after the  
bombing.  
17 Oklahoma was still in ruin -- Oklahoma City was still  
in ruins.

18 They did do a lineup of local people down in  
Oklahoma  
19 City, but the defense would have the Government bring  
people in  
20 from other parts of the country.

21 And the context is absolutely essential:  
People were  
22 still -- bodies were still being removed from the  
rubble. The

23 agents and assistant U.S. attorneys working on this  
case were  
24 working only on all different aspects of the case at  
that time.

25 Now, one point I would like to make regarding  
the

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1 witness contact, Judge, is that the defendants have  
alleged  
2 inconsistent theories. When a witness doesn't contact  
the  
3 Government in connection with this -- one of these  
eyewitnesses  
4 doesn't contact the Government, the defense approach is  
to  
5 question their certainty. When a witness does contact  
the  
6 Government, the defense approach is to allege that the  
witness  
7 is interested in a reward.

8 But, Judge, I point out that when Elliott and  
9 Kessinger made their identification, there was no  
reward  
10 announcement.

11 Turning to reliability, your Honor the  
defendants have  
12 the burden of establishing that the identifications  
were

13 unreliable, and they have not done it. Neil vs.  
Biggers is  
14 still the law in this country and enumerates five  
factors, and  
15 I'd like to address them in a moment.  
16 THE COURT: I understand the five factors.  
17 MR. MENDELOFF: Well, Judge, recall -- and I  
just  
18 wanted to point out one thing regarding the case; and I  
won't  
19 get into the factors other than to summarize what our  
view is  
20 of the witnesses' testimony.  
21 But, Judge, the facts of Neil vs. Biggers --  
and I  
22 won't recount them now -- found no suppression in a  
case far  
23 more suggestive and no more reliable than ours.  
24 Now, as to the degree of certainty, we've  
heard  
25 Ms. Merritt already concede that fact. As to  
opportunity to

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1 observe, all of the witnesses in this case had exposure  
of five  
2 to ten minutes at the very least with Mr. McVeigh.  
That is  
3 well within the outer confines of the opportunities --

which 4 opportunity-to-observe cases, like Williams and Kerby,  
5 authorize two-minute exposures.

6 All of --

7 THE COURT: I don't think you need to go  
through the 8 facts here.

9 MR. MENDELOFF: All right, Judge.

10 Let me clarify one fact in the record, and  
then I'll

11 sit down, your Honor; and that is, Ms. Merritt  
testified --

12 Ms. Merritt alleged that Mr. Tipton had no reason to  
recall the

13 encounter when it occurred because the encounter  
involved

14 rocket fuel and he found out about that later. But I  
would

15 remind the Court that at the time of the transaction,  
Mr. -- or

16 the encounter, Mr. Tipton stated that his attention was  
drawn

17 to it even before he learned of the bomb information  
several

18 days later because of the mixture of anhydrous  
hydrazine with

19 nitromethane, which he knew was improper.

20 Other than that, your Honor, we would argue  
that the

21 Court should rely on cross-examination in this case and  
not

22 suppress this testimony.

23 Thank you, Judge.

24 THE COURT: Do you have any rejoinder?

25 DEFENDANT MCVEIGH'S REBUTTAL ARGUMENT

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1 RE EYEWITNESS IDENTIFICATION

2 MS. MERRITT: Yes, your Honor.

3 Your Honor, I seriously disagree with Mr.  
Mendeloff

4 about the law in this case, particularly with respect  
to Peele

5 and with respect to Green vs. Loggins. First of all,  
the facts

6 of this case are far more indicative of Green than of  
Peele.

7 And I would also point out that Green and Peele were  
both

8 decided by the Ninth Circuit. Green was decided two  
years

9 later, and the Ninth Circuit has in subsequent years in  
the

10 Field case reaffirmed its holding in Green, and the  
Sixth

11 Circuit has also adopted it.

12 But the court concluded that three aspects of  
the

13 encounter in the Green case made it unnecessarily  
suggestive.

14 One was that the setting strongly suggested to the  
witness that  
15 the defendant had been accused of a crime. Certainly,  
we have  
16 this in this case with the Noble County walk-out.

17 The mention of the defendant's name  
immediately  
18 identified the --

19 THE COURT: Well, that's where they planted a  
guy in  
20 the jail cell.

21 MS. MERRITT: Correct.

22 THE COURT: Quite different.

23 MS. MERRITT: Next, the Sixth Circuit, when it  
24 discussed that case, went out of its way to point out  
that only  
25 the effects of, rather than the causes for  
preidentification

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1 encounters should be determinative of whether the  
2 confrontations were unduly suggestive.

3 It is not the Fourth Amendment exclusionary  
rule where

4 we try and deter unlawful police conduct. What we are  
dealing

5 with here is a due process claim and the Court's  
obligation to

6 make sure that evidence of an identification is  
reliable before

7 it gets submitted to a jury.

8           And in the Green case, the court stated, "The  
9 deterrence of such conduct is not the primary purpose  
behind  
10 judicial review of a tainted identification testimony;  
rather,  
11 a court reviews a challenged in-court identification  
12 essentially to determine whether the witness' testimony  
retains  
13 sufficient indicia of reliability."

14           And what is reliability but reliability is  
when the  
15 witness remembers from what he saw, as opposed to from  
what he  
16 subsequently came to learn; and that is the problem  
with the  
17 identification testimony in this case.

18           It doesn't matter how many times any of these  
people  
19 saw the Noble County walk-out. What matters is that  
they saw  
20 it; and with most of them, it was upon seeing that they  
said to  
21 themselves, That's the guy I encountered, in some cases  
a year  
22 and a half before, when the encounter only lasted five  
or ten  
23 minutes.

24           That media portrayal was suggestive. It  
doesn't

that 25 matter the Government caused it. I did not concede

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negligence 1 negligence is required. I submitted that there was

an 2 here. I stated that it is not required. I stated that

that 3 accidental encounter would be sufficient, so I believe

4 Mr. Mendeloff misrepresented my argument on that point.

about 5 And again, I dispute what Mr. Mendeloff said

Court 6 Mr. Tipton's reasons to pay attention at the time. The

testimony was 7 can read the transcript. My recollection of his

substance 8 that he intended to inquire about the purchase of the

bad to 9 he asked for, and he didn't even know about that it was

supplier days 10 mix the two until he subsequently talked to his

11 later.

12 At the time, he received the request from the

reason to pay 13 individual named John at the racetrack, he had no

14 attention.

15 Your Honor, we would submit that the

procedures in

16 this case were suggestive; and not only were they  
suggestive,

17 they were unduly suggestive and they were likely to  
lead to

18 misidentification and a substantial risk of  
misidentification.

19 The test to for the Court now is to move onto the  
totality of

20 the circumstances and decide whether, notwithstanding  
the

21 suggestiveness of the procedures, the identification  
testimony

22 has sufficient indicia of reliability to allow the jury  
to hear

23 it.

24 And we submit for the reasons we have stated  
in our

25 pleadings, for the testimony that came out in the  
hearing, for

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1 the arguments heard today, that the testimony of these  
2 witnesses, every single one of them, is not reliable  
and should

3 be excluded from trial as to their identification of  
4 Mr. McVeigh, not in their entirety but as to their  
5 identification of Mr. McVeigh.

6 THE COURT: All right. Mr. Woods, do you have

7 anything further?

8 MR. WOODS: No, your Honor.

9 RULING ON MOTIONS TO SUPPRESS EYEWITNESS  
IDENTIFICATION

10 THE COURT: All right. I'm ready to rule in  
the  
11 matter.

12 The motions are denied, and the reasoning is  
that --  
13 let me say first, in terms of what the defendants argue  
as the  
14 "perp. walk," or which is also referred to as the walk-  
out of

15 Mr. McVeigh from the Noble County Jail in Perry,  
Oklahoma, I  
16 have included here in my analysis of this -- these  
motions what  
17 was seen on the videotape in the earlier hearings with  
respect  
18 to the motion to change venue and also the motion to  
suppress;  
19 and I'm also well aware of not only of that television  
footage  
20 but also the context of it, including statements that  
had been  
21 made by the Attorney General of the United States and  
the  
22 President of the United States and the impact within  
that  
23 context. I mean the impact on the public generally.  
So that's  
24 also part of this record, although we have not gone

back to

25 repeat all of that and lengthen this process.

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and I 1 The question presented by this motion is --  
whether this 2 agree with the defense counsel -- not an issue of  
these 3 court should impose as some kind of sanction to deter  
question is 4 Government misconduct the exclusion of the testimony of  
due 5 witnesses regarding their identifications. The  
6 whether fundamental fairness requires it. That's the  
7 process clause.

Counsel 8 Now, in the many cases that have been cited by  
of 9 in the briefing with respect to these motions, we have,  
of 10 course, again usually a retrospective view of the issue  
testimony. And 11 identification within the context of full trial  
single 12 most of those cases, of course, are cases that involve  
something 13 criminal events: a bank robbery, a rape, an assault,  
to 14 where the issue is who did it and the witnesses attempt

15 identify. And they usually are, of course, the persons  
present  
16 at the scene of the event which gives rise to the  
criminal  
17 charge.

18 I mention that because the five factors that  
are --  
19 have been discussed by the Supreme Court of the United  
States  
20 in Neil vs. Biggers and repeated again in Manson vs.  
21 Brathwaite. And the ones we're all familiar with refer  
to the  
22 opportunity to view at the time of the event and the  
degree of  
23 attention, the accuracy of the prior description by the  
24 witness, the level of certainty at confrontation or  
25 identification in the comparisons, and the length of  
time

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1 between the event and the confrontation.  
2 Now -- and those often refer to the lineup  
procedures  
3 or the photo arrays or these efforts subsequent to the  
event to  
4 get the witness present at the event to identify the  
5 perpetrator.

6 This is not determinative of the issues, but

this case

7 is quite different. None of these witnesses is -- has  
8 testified to or is expected to testify to the presence  
of  
9 Mr. McVeigh or Mr. Nichols at the Murrah Building in  
Oklahoma  
10 City on April 19, the claimed liability-producing event  
here.

11 All of them are testifying to events which the  
Government is  
12 relying upon in developing a chain of circumstantial  
evidence  
13 to support the charges.

14 Now, I think that's significant. It makes it  
more

15 difficult to apply these five factors; but the five  
factors are  
16 not in themselves descriptive of the legal principle.

17 we're talking about here is really something that has  
to be  
18 considered, recognizing the relative role of the jury  
and the

19 judge in the criminal justice system. The jury, of  
course, is  
20 called upon to judge the credibility of all witnesses  
who

21 testify in a criminal trial; and identification  
witnesses are,

22 you know -- identification testimony is given by  
witnesses, and

23 it's based on the perception of the witness and the

witness 24 recollection of the witness, just as all other fact  
25 testimony.

712

witness to 1 The question has to be whether to permit a  
2 testify to an identification must be excluded for a  
fair trial;  
3 and as I mentioned in the argument being made by Mr.  
Mendeloff,  
4 we do have cases -- and this U.S. vs. Alcantar case out  
of the  
5 Seventh Circuit is one where there may be a situation  
where the  
6 testimony is unbelievable on its face, it just is so  
7 implausible or physically impossible that it cannot be  
accepted  
8 as evidence and heard by a jury.

because 9 That has not been shown in this case, either  
10 it was physically impossible for any of these witnesses  
to be  
11 able to see and recall or because there is some law of  
nature  
12 or other basis that would make it inherently  
implausible or  
13 impossible to accept the witness -- the testimony of  
the  
14 witness.

15                    Now, the other aspect is has the witness been  
subject  
16                    to something which impermissibly suggests the  
identification of  
17                    the defendant and therefore the testimony cannot be  
reliable.  
18                    And here, of course, is where we do get the suggestive  
19                    identification procedures followed by law enforcement  
agencies.  
20                    We don't have that in this case. What we have in this  
case is  
21                    the question whether the -- what's been described as  
the media  
22                    coverage and particularly the walk-out of Mr. McVeigh  
has so  
23                    tainted the witnesses' both perception and recollection  
as to  
24                    make it unfair in a fundamental sense, constitutional  
sense,  
25                    for them to be able to testify here.

713

1                    And, you know, I don't find, and there is no  
basis for  
2                    finding, that this media event was staged by the  
Government/law  
3                    enforcement people. Here again, I do recognize the  
context in  
4                    which this event occurred. It was testified to also by  
the FBI

5 agent who testified to yesterday, the special agent in  
charge  
6 from Dallas, who was in charge at the time and the time  
7 imperatives and all of the other things that were going  
on on  
8 that day; so there is no basis for finding that this  
was staged  
9 and -- or even negligent. But that isn't the  
determinative  
10 issue. I agree with Ms. Merritt with respect to that.  
11 The question is what is the effect of it and  
has it  
12 had so pervasive an effect on these people that the  
Court has  
13 to say, Wait a minute, that's so unfair that they can't  
give  
14 testimony in front of this jury. And it isn't.  
15 What I heard in these arguments just made  
really is  
16 what the jury, I'm sure, will hear as to why they  
shouldn't  
17 believe the testimony of these witnesses; but that's  
the  
18 question that the jury will have to decide, as it will  
all of  
19 the other testimony that will be presented to them.  
20 And with respect to Dr. Loftus and the other  
21 scientific information which the defense wishes to  
offer, I'm  
22 rejecting it for this hearing. I don't need it. I've  
read

in the 23 their materials, part of which has been provided here  
been and 24 briefing. I understand what some of these tests have  
the 25 what conclusions have been reached by those who are in

714

analyze 1 discipline of psychology or sociology and attempting to  
and 2 what we as human beings do when we attempt to perceive  
witnesses 3 remember. I've also seen a couple generations of  
talking 4 myself, which I think is a factor, because what we're  
that 5 about is whether there is anything here that would say  
jurors, Tell 6 it's unfair in a constitutional sense to say to 12  
these people 7 us what you think with respect to the testimony of  
and 8 and whether it's reliable and whether it's believable,  
totality of 9 consider that, of course, as the jury will in the  
have now 10 the circumstances which they will have, which I don't  
testimony 11 but which I can anticipate in part because of this  
12 where, you know, there will be some physical evidence

and

13 documentary evidence which may be found to be  
corroborating

14 some of that testimony.

15 So bottom line is that I do not find that  
there is

16 such a suggestivity or any other impermissible  
influence on the

17 testimony of the persons we've heard from in the course  
of

18 these hearings on motions that would require me to say  
this is

19 incredible as a matter of law. It's really saying, you  
know,

20 would it be -- and this, I think, is the test, really;  
and that

21 is would it be unreasonable for fair-minded jurors to  
believe

22 their testimony. That's the test. And I cannot say  
that it

23 would be, so the motions are denied.

24 We'll resume at 1:40 for argument on Daubert,  
second

25 prong.

715

1 Court is in recess.

2 (Recess at 12:10 p.m.)

3 \* \* \* \* \*



23  
24  
25

\* \* \* \* \*

716

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REPORTERS' CERTIFICATE

transcript

2

We certify that the foregoing is a correct

matter.

3

from the record of proceedings in the above-entitled

February,

4

Dated at Denver, Colorado, this 20th day of

5

1997.

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Paul Zuckerman

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Kara Spitler

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