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Transcription
Street,
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629-9285

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Produced via Computer by Paul Zuckerman, 1929 Stout
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14593

1 APPEARANCES
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Oklahoma
4 City, Oklahoma, 73102, appearing for the plaintiff.
5 LARRY MACKEY, SEAN CONNELLY, BETH WILKINSON,
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6 MEARNS, JAMIE ORENSTEIN, and AITAN GOELMAN, Special
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7 to the U.S. Attorney General, 1961 Stout Street, Suite
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8 Denver, Colorado, 80294, appearing for the plaintiff.
9 MICHAEL TIGAR, RONALD WOODS, ADAM THURSCHELL,
REID
10 NEUREITER, and JANE TIGAR, Attorneys at Law, 1120
Lincoln
11 Street, Suite 1308, Denver, Colorado, 80203, appearing
for
12 Defendant Nichols.

13

* * * * *

14

PROCEEDINGS

15

(Reconvened at 12:45 p.m.)

16

THE COURT: Please be seated.

17

I'll have a short side bar after the instructions, as

18

we discussed.

19

MR. TIGAR: Yes, your Honor.

20

(Jury in at 12:46 p.m.)

21

JURY INSTRUCTIONS

22

THE COURT: Members of the jury, now that you have

23

heard the evidence and the arguments, the time has come to

24

instruct you as to the law governing you in this case. You

25

each will have a copy of these instructions for your reference

14594

1

during deliberations.

2

Although you as jurors are the sole judges of the

3

facts, you are duty bound to follow the law as stated in the

4

instructions of the Court and to apply the law so given to the

5 facts as you find them from the evidence before you.
6 Counsel have quite properly referred to some
of the
7 governing rules of law in their arguments. If,
however, any
8 difference appears to you between the law as stated by
counsel
9 and that stated by the Court in these instructions, you
are of
10 course to be governed by the instructions.
11 You're not to single out one instruction alone
as
12 stating the law, but you must consider the instructions
as a
13 whole.
14 Neither are you to be concerned with the
wisdom of any
15 rule of law. Regardless of any opinion you may have as
to what
16 the law ought to be, it would be a violation of your
sworn duty
17 to base a verdict upon any other view of the law than
that
18 given in the instructions of the Court. You have no
right to
19 disregard or give special attention to any one
instruction, or
20 to question the wisdom or correctness of any rule I may
state
21 to you. You must not substitute or follow your own
notion or
22 opinion as to what the law is or ought to be. It is
your duty

the 23 to apply the law as I explain it to you, regardless of
24 consequences.

this case 25 You have been chosen and sworn as jurors in

14595

perform 1 to try the issues of fact presented to you. You are to
law does 2 this duty without bias or prejudice as to anyone. The
or 3 not permit jurors to be governed by sympathy, prejudice
impartially 4 public opinion. You are expected to carefully and
by the 5 consider all of the evidence, follow the law as stated
6 Court and reach a just verdict.

your own 7 In determining the facts, you must rely upon
lawyers 8 recollections of the testimony heard by you. What the
9 have said in their opening statements, in their closing
is not 10 arguments, in their objections, or in their questions
witness is 11 evidence. Bear in mind that the question put to a
Nothing 12 not the evidence. It is the answer which is evidence.

these 13 that I may have said during this trial or may say in
comment 14 instructions should be considered as evidence or as any
you are 15 on the evidence. The stipulations which were read to
also part 16 included in the evidence. The exhibits received are
exhibits 17 of evidence. You will have access to all of the
for 18 during your deliberations, excepting those used only
testimony. 19 demonstrative purposes to illustrate some of the
be 20 Exhibits offered and refused are not evidence and must
21 disregarded.

22 You are the sole and exclusive judges of the
facts.

23 The rulings I have made, my comments and questions to
counsel,
24 and any questions I have asked of witnesses during the
trial
25 must not be taken as expressing any opinions about the
facts in

14596

has no 1 this case. You are expressly instructed that the Court
2 opinion as to what the verdict should be in this case.

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

17 As I told you before the trial began, the
attorneys
18 have the duty, as advocates for their respective sides,
to make
19 objections and ask for court rulings on the
admissibility of
20 evidence. You must not consider or discuss those
objections or

21 draw any inferences or conclusions from the Court's
comments
22 and rulings. The rules of evidence provide important
23 limitations on what the jury can fairly consider in
deciding
24 the facts in any case. The lawyers share with the
Court the
25 obligation to apply and enforce those rules by raising
issues

14597

1 of admissibility. The attorneys also have a duty to
prepare
2 for trial and it is common practice for them to
interview
3 witnesses and to provide discovery information to
opposing
4 counsel in advance of the trial. Witnesses have the
freedom to
5 choose whether to grant requests for interviews.

6 The charges in this case are contained in an
7 indictment returned by a federal grand jury in
Oklahoma. An
8 indictment is nothing more than a document that gives
notice of
9 the charges that the Government intends to prove. It
is not
10 evidence of any kind against the defendant.

11 The basic principle of our law is that the

defendant,

12 Terry Lynn Nichols, is presumed to be innocent of each
and

13 every charge brought against him in this indictment.

14 Mr. Nichols' pleas of not guilty put in dispute
everything that

15 is alleged in the indictment. The presumption of
innocence

16 stays with the defendant throughout the trial and
entitles him

17 to a verdict of not guilty, unless and until you, the
jury,

18 find that the evidence received during the trial has

19 established each and every essential element of the
crimes

20 charged beyond a reasonable doubt.

21 So the presumption of innocence means that
Terry Lynn

22 Nichols must be given the benefit of any reasonable
doubt of

23 his guilt that may remain in the minds of the jurors
after they

24 have given careful and impartial consideration to all
of the

25 evidence in the case.

14598

1 The burden is always upon the Government to
prove

2 guilt beyond a reasonable doubt. This burden never
shifts to a
3 defendant. The law never imposes on a defendant in a
criminal
4 case the burden or duty of calling any witnesses or
producing
5 any evidence. The defendant is not even obligated to
produce
6 evidence by cross-examining the witnesses for the
Government.

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

14 A reasonable doubt may arise not only from the
15 evidence produced, but also from the lack of evidence.
Since
16 the burden is always on the prosecution to prove the
accused
17 guilty beyond a reasonable doubt of every element of
the crime
18 charged, a defendant has the right to rely upon failure
of the
19 prosecution to establish such proof. A defendant may

also rely

20 upon evidence brought out on cross-examination of
witnesses for

21 the prosecution.

22 Unless the Government proves, beyond a
reasonable

23 doubt, that Terry Nichols has committed each and every

24 essential element of any offense charged in the
indictment, you

25 must find him not guilty of that offense. If the jury
views

14599

1 the evidence in the case as reasonably permitting
either of two

2 conclusions -- one of innocence, the other of guilt --
the jury

3 must, of course, adopt the conclusion of innocence.

4 A separate offense is charged in each count of
the

5 indictment. Each charge, and the evidence pertaining
to it,

6 should be considered separately by the jury. The fact
that you

7 may find Mr. Nichols guilty or not guilty as to one of
the

8 offenses charged should not control your verdict as to
any

9 other offense charged.

has 10 You are here to decide whether the Government
guilty 11 proved beyond a reasonable doubt that the defendant is
any 12 of the crimes charged. Mr. Nichols is not on trial for
13 act, conduct or offense not charged in the indictment.

conduct that 14 The first count of the indictment alleges
charged 15 may be criminal but is not one of the specific crimes
make such 16 against Mr. Nichols. The Government is permitted to
crimes 17 allegations in an indictment. However, it is only the
18 charged in the eleven counts that are on trial here.
allegations 19 Regardless of what you find with respect to these
Nichols 20 of criminal conduct in Count One, you must acquit Mr.
whether all 21 on any count if you have a reasonable doubt as to
charged in 22 of the essential elements of the particular crimes
23 that count have been proved.

or about 24 It is alleged in Count One that, beginning on
April 19, 25 September 13, 1994, and continuing until on or about

1 1995, at Oklahoma City, Oklahoma, and elsewhere,
defendant
2 Terry Lynn Nichols intentionally and willfully
conspired with
3 Timothy James McVeigh, and with others unknown, to use
a weapon
4 of mass destruction, namely an explosive bomb placed in
a truck
5 (a "truck bomb") against persons within the United
States and
6 against property that was owned and used by the United
States
7 and by a department and agency of the United States,
namely,
8 the Alfred P. Murrah Federal Building at 200 N.W. 5th
Street,
9 Oklahoma City, Oklahoma, and that the objects of the
conspiracy
10 were to kill and injure innocent persons and to damage
property
11 of the United States. The indictment goes on to allege
means
12 and methods used by Terry Nichols and Timothy McVeigh
to
13 further the objects of the conspiracy. You will have
copies of
14 the indictment with you during your deliberations.

15 United States

16 Code Section 2332a, provides, in pertinent part, that
"a person
17 who . . . conspires to use a weapon of mass

destruction . . .

18 against any person within the United States; or against
any
19 property that is owned, leased or used by the United
States"
20 shall be guilty of a crime.

21 The indictment alleges that the conspiracy
charged in

22 Count One began on or about September 13, 1994, and
continued

23 thereafter until on or about April 19, 1995. Although
it is

24 necessary for the Government to prove beyond a
reasonable doubt

25 that the offense of conspiracy was committed on dates

14601

1 reasonably near those alleged in Count One, it is not
necessary

2 for it to prove that the conspiracy offense was
committed

3 precisely on the dates charged.

4 A criminal conspiracy is an agreement to
violate a

5 federal law. It is an independent offense which is
separate

6 and distinct from the actual violation of any specific
federal

7 statute that may or may not have happened as a result
of the

8 conspiracy.

9
conspiring to

10
government

11
following

12 three elements beyond a reasonable doubt:

13
defendant,

14
truck as a

15
and the

16
17
knowingly

18
the

19

20 (3) That achievement of the objectives of the
21 conspiracy would have substantially affected interstate
22 commerce.

23
doubt of

24
acquit

25 Mr. Nichols of this charge in the indictment.

mutual
by at
common

1 A criminal conspiracy is an agreement or a
2 understanding knowingly made or knowingly entered into
3 least two people to violate the law by some joint or
4 plan or course of action.

like any
formal,

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

agreement, the
contract
express oral
prove
that
conspiracy set

8 To prove the existence of an illegal
9 Government is not required to produce a written
10 between the parties or even produce evidence of an
11 agreement spelling out all of the details of their
12 understanding. Nor is it required that the Government
13 the identity of all of the members of the conspiracy or
14 all of the means and methods of furthering the
15 out in the indictment were used or carried out.

defendant,

16 What the Government must prove is that the
17 Terry Lynn Nichols, and at least one other person, did

18 knowingly and deliberately arrive at some type of an
agreement
19 that they, and perhaps others, would use a weapon of
mass
20 destruction against the Alfred P. Murrah Federal
Building in
21 Oklahoma City and the persons in it by means of some
common
22 plan or course of action as alleged in Count One of the
23 indictment. Proof of such a common understanding and
24 deliberate agreement among two or more persons,
including the
25 defendant now on trial, is the key element of the
charge of

14603

1 criminal conspiracy.
2 Mere presence at the scene of alleged -- an
alleged
3 transaction or event, or mere similarity of conduct
among
4 various persons and the fact that they may have
associated with
5 each other and may have assembled together and
discussed common
6 aims or interests, do not necessarily establish proof
of the
7 existence of a conspiracy. Also, a person who has no
knowledge
8 of a conspiracy, but who happens -- happens to act in a

way

9 which advances some object or purpose of the conspiracy
does
10 not thereby become a conspirator.

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

22 Before you may find that Mr. Nichols became a
member
23 of the conspiracy charged in Count One of the
indictment, the
24 evidence in the case must show beyond a reasonable
doubt that
25 Mr. Nichols knew the purpose or goal of the agreement
or

14604

1 understanding and deliberately entered into the
agreement
2 intending, in some way, to accomplish the goal or
purpose by
3 this common plan or joint action. Merely associating
with
4 others and discussing common goals, mere similarity of
conduct
5 between or among such persons, merely being present at
the
6 place where a crime takes place or is discussed, or
even
7 knowing about criminal conduct does not, of itself,
make
8 someone a member of the conspiracy or a conspirator.
9 Individuals, including Mr. Nichols, have the
right
10 under the First Amendment to the Constitution to
assemble and
11 discuss even the most unpopular ideas, including
discussion of
12 unlawful acts, and such assembly and discussion does
not by
13 itself establish an unlawful agreement. Expressions of
14 sympathy and support for those who commit unlawful acts
do not,
15 without more, constitute entry into an unlawful
agreement, nor
16 does vigorous criticism of the government. One may
belong to a

17 group, knowing that some of its members commit illegal
acts,
18 without having entered into an agreement that these
unlawful
19 acts be committed. A frank expression or exchange of
political
20 views or opinions, no matter how vehement, radical or
21 unpopular, does not, without more, constitute an
unlawful
22 agreement.

23 Evidence has been received in this case that
Timothy
24 McVeigh, who is alleged in Count One of the indictment
to be a
25 co-conspirator of Terry Nichols, has done or said
things during

14605

1 the existence or life of the alleged conspiracy in
order to
2 further or advance its goal.

3 Such acts and statements of Mr. McVeigh may be
4 considered by you in determining whether or not the
Government
5 has proven its allegations in the indictment against
6 Mr. Nichols.

7 To the extent that these acts were performed
and these

8 statements made outside the presence of Mr. Nichols and
even
9 done or said without his knowledge, these acts or
statements
10 should be examined with particular care by you before
11 considering them against Mr. Nichols, who did not do
the
12 particular act or make the particular statement.

13 Count One alleges an illegal agreement to use
a
14 "weapon of mass destruction." That is a legal phrase
that is
15 also applicable to Count Two. A "weapon of mass
destruction"
16 means any "destructive device" that is designed or
redesigned
17 for use as a weapon. The term "destructive device"
includes
18 any explosive bomb. To determine whether it was
designed or
19 redesigned as a weapon, you may consider the physical
structure
20 of the device, the method of its normal operation, and
the
21 intent with which it was constructed.

22 The third and final element of Count One is
that the
23 objectives of the conspiracy would substantially have
affected
24 interstate commerce. A substantial effect on
interstate
25 commerce is also an element of Count Two. You're
instructed

14606

1 for purposes of Counts One and Two that a crime
substantially
2 affects interstate commerce if it substantially
interferes
3 with, changes, or alters the movement or transportation
or flow
4 of goods, merchandise, money, or other property between
one
5 state and another. The necessary connection with
interstate
6 commerce may be provided if you find there was a
substantial
7 disruption of the operations of federal government
agencies
8 caused by destruction of a building housing them.
9 Count Two alleges that, on or about April 19,
1995,
10 the defendant, Terry Lynn Nichols, "did knowingly,
11 intentionally, willfully and maliciously use, aid and
abet the
12 use of, and cause to be used a weapon of mass
destruction,
13 namely an explosive bomb placed in a truck, against
persons
14 within the United States"
15 The relevant statute, 18 United States Code
Section

16 2332(a), provides in pertinent part that "a person who
17 uses . . . a weapon of mass destruction . . . against
any
18 person within the United States" shall be guilty of a
crime.

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

22 (1) That the defendant, Terry Lynn Nichols,
used, or
23 aided an abetted the use of, a weapon of mass
destruction;

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

14607

1 (3) That the use of the weapon of mass
destruction
2 against persons within the United States substantially
affected
3 interstate commerce; and

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

6 Count Three alleges that, on or about April
19, 1995,

7 the defendant, Terry Lynn Nichols, "did knowingly,
8 intentionally, willfully and maliciously damage and
destroy,
9 aid and abet the damage and destruction of, and cause
to be
10 damaged and destroyed, by means of an explosive,
namely, an
11 explosive bomb placed in a truck, a building and other
personal
12 and real property in whole and in part owned, possessed
and
13 used by the United States, that is, the Alfred P.
Murrah
14 Federal Building, 200 N.W. 5th Street, Oklahoma City,
15 Oklahoma"

16 The relevant statute, 18 United States Code
Section
17 844(f), provides in pertinent part that: "Whoever
maliciously
18 damages or destroys . . . by means of fire or an
explosive, any
19 building . . . in whole or in part owned, possessed, or
used
20 by, or leased to, the United States" shall be guilty of
a
21 crime.

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

- 25 (1) That the defendant damaged or destroyed a

14608

1 building, or aided and abetted the damage or
destruction of a

2 building, by means of an explosive bomb;

3 (2) That the defendant acted knowingly,
intentionally,

4 willfully and maliciously; and

5 (3) That the building in whole or in part was
owned,

6 possessed, or used by or leased to the United States.

7 For purposes of Count Three, the term
"explosive"

8 means gun powders, powders used for blasting, all forms
of high

9 explosives, blasting materials, detonators, and other

10 detonating agents, smokeless powders, and any chemical

11 compounds, mechanical mixture, or device that contains
any

12 oxidizing and combustible units, or other ingredients,
in such

13 proportions, quantities, or packing that ignition by
fire, by

14 friction, by concussion, by percussion, or by
detonation of the

15 compound, mixture or device or any part thereof, may
cause an

16 explosion.

17 The term "intentionally," as used in these
18 instructions, means that the Government must have
proven to you
19 beyond a reasonable doubt that the act was done with
the
20 purpose to do the unlawful act or cause the unlawful
result.

21 The term "knowingly," as used in these
instructions,
22 means that the Government must have proven to you
beyond a
23 reasonable doubt that the act was done voluntarily and
24 intentionally, not because of mistake or accident.

25 The term "willfully," as used in these
instructions,

14609

1 means that the Government must have proven to you
beyond a
2 reasonable doubt that the act was done both with the
intent to
3 violate a known legal duty and with a criminal state of
mind.

4 The term "maliciously" means with evil intent.

5 If you find the defendant, Terry Lynn Nichols,
guilty
6 of one or more of the crimes charged in Counts One
through
7 Three, you must then make an additional finding as to
whether

8 the evidence proved beyond a reasonable doubt that the
crime
9 resulted in the death of one or more of the persons
named in
10 the indictment. These offenses are different from the
murder
11 counts because the defendant's responsibility for the
deaths of
12 persons killed as a result of the criminal acts charged
in
13 Counts One through Three does not depend upon proof
that he
14 intended to kill anyone. It is sufficient if the jury
finds,
15 beyond a reasonable doubt, that death of one or more of
these
16 persons was a foreseeable result of the criminal
conduct
17 charged in these counts.

18 Counts Four through Eleven are first-degree
murder
19 counts charging that, on or about April 19, 1995,
Defendant
20 Terry Lynn Nichols did unlawfully, willfully,
deliberately,
21 maliciously, and with premeditation and malice
aforethought,
22 kill, and aid, abet and cause the killing of eight
named
23 victims while those victims "were engaged in . . . the
24 performance of their official duties as law enforcement
25 officers." The victim named in Count Four is Mickey

Bryant

14610

United 1 Maroney, who was employed as a special agent of the
is 2 States Secret Service. The victim named in Count Five
of the 3 Donald R. Leonard, who was employed as a special agent
Count Six is 4 United States Secret Service. The victim named in
special 5 Alan Gerald Whicher, who was employed as an assistant
The 6 agent in charge of the United States Secret Service.
Brown, who 7 victim named in Count Seven is Cynthia Lynn Campbell
Secret 8 was employed as a special agent of the United States
Glenn 9 Service. The victim named in Count Eight is Kenneth
United 10 McCullough, who was employed as a special agent of the
named in 11 States Drug Enforcement Administration. The victim
special 12 Count Nine is Paul Douglas Ice, who was employed as a
named in 13 agent of the United States Custom Service. The victim
as a 14 Count Ten is Claude Arthur Medearis, who was employed

15 special agent of the United States Custom Service. The
victim
16 named in Count Eleven is Paul G. Broxterman, who was
employed
17 as a special agent of the Department of Housing and
Urban
18 Development, Office of Inspector General.

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

14611

1 To establish the Counts Four through Eleven
offenses
2 of first-degree murder, the Government must prove four
3 essential elements beyond a reasonable doubt:
4 (1) That the defendant, without lawful
justification,
5 killed or aided and abetted the killing of another

human being;

6 (2) That the victim was a federal employee
with law 7 enforcement functions who was killed while engaged in
the 8 performance of official duties;

9 (3) That the defendant committed or aided and
abetted 10 the killing with "malice aforethought"; and

11 (4) That the defendant committed or aided and
abetted 12 the killing in a "premeditated" and deliberate manner.

13 The second element requires that you find:
(a) that

14 the victim was a federal employee with law enforcement
engaged 15 functions; and (b) that the employee was killed while
16 in the performance of official duties.

17 Each of the persons named in Counts Four
through 18 Eleven was employed in a position having law
enforcement 19 functions.

20 Whether a federal employee was engaged in the
whether the 21 performance of his or her official duties turns on
or she 22 federal officer was acting within the scope of what he
was 23 was employed to do, or whether, instead, the employee
24 engaging in a purely personal frolic. If the employee

was at

25 his or her place of business during regular working
hours at

14612

1 the time of the killing, he or she may still be found
to have

2 been engaged in the performance of official duties even
though

3 the employee may have been on a temporary break
discussing some

4 personal matter or arranging for food or drink. You
should

5 consider all of the facts and circumstances of the case
in

6 deciding whether the Government has proven this
element.

7 "Malice aforethought" means that the defendant
must

8 have acted willfully and deliberately, intending to
kill

9 another person. Whether the defendant in a homicide
case acted

10 with malice at the time of the killing is an issue to
be

11 decided by inferences that may or may not be drawn from
all of

12 the surrounding facts and circumstances shown by the
evidence.

13 The law permits, but does not require, a jury to find
that the

14 defendant killed with malice aforethought if you find
that he
15 acted with callous and wanton disregard for human life.
16 Knowledge or awareness of a victim's identity
and
17 status as a federal law enforcement employee is not an
18 essential element of these murder counts. Thus, the
Government
19 is not required to prove that the defendant knew who
the
20 victims were or what duties they were performing in
their
21 respective positions as federal employees. What the
22 prosecution must show is that the defendant intended to
kill
23 someone and that these -- that these victims named in
these
24 counts died as a direct result of the defendant's
deliberate
25 acts.

14613

1 Premeditation requires not only that the
killing was
2 willful and with malice but also that the defendant
formed a
3 specific intent to kill after planning and
deliberation. This
4 means that the defendant must have considered and

reflected

5 upon a preconceived killing at least long enough to
give it a
6 second thought.

7 With respect to each of Counts Four through
Eleven, if
8 the jury should unanimously find that the Government
has proved
9 each of the essential elements beyond a reasonable
doubt, the
10 foreperson should write "guilty" in the space provided,
and the
11 jury's consideration of that count is concluded.

12 However, the law also permits the jury to
determine
13 whether the Government has proven the guilt of a
defendant for
14 any less serious offense which is, by its very nature,
15 necessarily included in the crime of first-degree
murder
16 charged in Counts Four through Eleven.

17 If the jury should determine unanimously that
the
18 Government has not proven each element of the offense
charged
19 in that count beyond a reasonable doubt, then the
foreperson
20 should write "not guilty" in the space provided and the
jury
21 should then consider the innocence of Mr. Nichols for
the less
22 serious offenses necessarily included in that count.

23 Furthermore, if, after reasonable efforts have
been
24 unsuccessful, the jury is unable to reach a verdict as
to
25 whether or not the Government has proven each element
of the

14614

1 offense beyond a reasonable doubt, the jury should then
2 consider whether or not Mr. Nichols is guilty or not
guilty of
3 the less serious offenses which are necessarily
included in
4 that count.

5 The crime of first-degree murder charged in
Counts
6 Four through Eleven of the indictment necessarily
includes two
7 less serious offenses: second-degree murder and
involuntary
8 manslaughter.

9 Title 18 United States Code Section 1111 sets
forth
10 the elements of second-degree murder as well as first-
degree
11 murder. After stating that premeditation is an
essential
12 element of first-degree murder, Section 1111 provides
that:

13 "Any other murder is a murder in the second degree."

14 Thus, to establish the crime of second-degree
murder,
15 the Government must prove three essential elements
beyond a
16 reasonable doubt:

17 (1) That the defendant, without lawful
justification,
18 killed or aided and abetted the killing of another
human being;

19 (2) That the victim was a federal employee
with law
20 enforcement functions who was killed while engaged in
the
21 performance of official duties; and

22 (3) That the defendant committed or aided and
abetted
23 the killing with malice aforethought.

24 If the jury should unanimously find that the
25 Government has proven each of the essential elements of

14615

1 second-degree murder beyond a reasonable doubt, the
foreperson
2 should write "guilty" in the space provided, and the
jury's
3 consideration of that count is concluded.

4 If the jury should determine unanimously that
the

5 Government has not proven each element of the lesser
offense of
6 second-degree murder beyond a reasonable doubt, then
the
7 foreperson should write "not guilty" in the space
provided, and
8 the jury should then consider the guilt or innocence of
9 Mr. Nichols for the second less serious offense
necessarily
10 included in that count, involuntary manslaughter.

11 Furthermore, if, after reasonable efforts have
been
12 unsuccessful, the jury is unable to reach a verdict as
to
13 whether or not the Government has proven each element
of
14 second-degree murder beyond a reasonable doubt, the
jury should
15 then consider whether or not Mr. Nichols is guilty or
not
16 guilty of involuntary manslaughter.

17 Title 18 United States Code Section 1112
provides
18 that: "Manslaughter is the unlawful killing of a human
being
19 without malice." To be guilty of involuntary
manslaughter
20 under this statute, the Government must prove three
essential
21 elements beyond a reasonable doubt:

22 (1) That a federal employee with law
enforcement

of 23 functions was killed while engaged in the performance
24 official duties;

an act 25 (2) That the victim was killed as a result of

14616

act, 1 done by the defendant during the commission of a lawful
2 done without due caution, which might produce death;

and

was a 3 (3) That the defendant knew that such conduct
4 threat to lives of others or knew of circumstances that
5 reasonably cause the defendant to foresee that such
6 might be a threat to the lives of others.

always

7 The jury will bear in mind that the burden is
8 upon the Government to prove beyond a reasonable doubt
9 every essential element of any lesser offense which is
10 necessarily included in Counts Four through Eleven.

The law

11 never imposes upon a defendant in a criminal case the
burden or
12 duty of calling any witnesses or producing any
evidence.

13 Terry Nichols has been charged as a principal
and also
14 as an aider and abettor in Counts Two through Eleven.
Title 18
15 United States Code Section 2 provides that a person may
be
16 found guilty if he aids, abets, counsels, commands,
induces, or
17 procures or willfully causes the commission of a
federal crime
18 by another person. Under this statute, a defendant is
guilty
19 as an aider and abettor if:
20 (1) He willfully associated himself with a
criminal
21 venture;
22 (2) He participated in it as something he
wished to
23 bring about;
24 (3) He sought by his actions to make it
succeed; and
25 (4) The offense was committed by someone else
and

14617

1 aided and abetted by the defendant.
2 A person may violate the law even though he or
she
3 does not personally do each and every act constituting
the

causes 4 offense if that person aided and abetted or willfully
5 the commission of the offense.

aiding 6 Before Mr. Nichols may be held responsible for
7 and abetting others in the commission of a crime, it is
doubt 8 necessary that the Government prove beyond a reasonable
9 that the crime was committed and that Mr. Nichols
knowingly, 10 intentionally, willfully, and maliciously associated
himself in 11 some way with the crime charged and participated in it
with the 12 intent to commit the crime.

merely 13 Mere presence at the scene of the crime or
14 knowing that a crime is being committed or is about to
be 15 committed is not sufficient conduct for the jury to
find that 16 Mr. Nichols aided or abetted the commission of that
crime.

knowingly, 17 The Government must prove that Mr. Nichols
18 intentionally, willfully, and maliciously associated
himself 19 with the crime in some way as a participant -- someone
who 20 wanted the crime to be committed -- not as a mere
spectator.

21 You are here to determine whether the

Government has

22 proven the guilt of the defendant, Terry Lynn Nichols,
for the
23 crimes charged in the indictment beyond a reasonable
doubt.
24 You are not called upon to return a verdict as to any
other
25 person. You should consider evidence about the acts,

14618

1 statements, and intentions of persons other than Terry
Lynn
2 Nichols only as that evidence may relate to these
charges
3 against the defendant now on trial.

4 So if the evidence in the case convinces you
beyond a
5 reasonable doubt of the guilt of Terry Lynn Nichols for
the
6 crimes charged in the indictment, you should so find,
even
7 though you may believe that one or more other persons
may also
8 be guilty. But if any reasonable doubt remains in your
minds
9 after impartial consideration of all of the evidence in
the
10 case, it is your duty to find Terry Nichols not guilty.

11 The evidence in this case consists of the
sworn

called 12 testimony of the witnesses, regardless of who may have
who may 13 them; all exhibits received in evidence, regardless of
agreed to 14 have produced them, and all facts which may have been
15 or stipulated.

agree to 16 When the attorneys on both sides stipulate or
as 17 the existence of a fact, you may accept the stipulation
because you 18 evidence and regard that fact as proved. However,
to do 19 are the sole judges of the facts, you are not required
20 so.

which an 21 Any proposed testimony or proposed exhibit to
testimony or 22 objection was sustained by me, the Court, and any
entirely. 23 exhibit ordered stricken by me must be disregarded

the 24 Anything you may have seen or heard outside
25 courtroom is not proper evidence in this case.

14619

generally 1 There are two types of evidence which are

2 presented during a trial: direct evidence and
circumstantial
3 evidence. Direct evidence is the testimony of a person
who
4 asserts or claims to have actual knowledge of a fact,
such as
5 an eyewitness. Circumstantial evidence is proof of a
chain of
6 facts and circumstances indicating the existence of a
fact.

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

12 You have heard evidence in this trial of
expressions
13 of opinions and beliefs held by the defendant, Terry
Nichols,
14 and of books and articles found in his home. The
defendant is
15 not on trial for any of his thoughts, beliefs, or
statements,
16 which are protected by the First Amendment to the
United States
17 Constitution. The First Amendment, however, does not
prevent
18 the prosecution in a criminal case from offering
evidence of

19 the defendant's beliefs in an attempt to prove that he
had some
20 motive, knowledge, or intent for committing the crimes
alleged
21 in the indictment. Proof of motive is not essential in
a case
22 such as this; but, when proved, motive may be an item
of
23 circumstantial evidence that may bear on whether or why
a
24 defendant may have committed a criminal act. Whether
you agree
25 or disagree with the defendant's expressed opinions and
beliefs

14620

1 is irrelevant. The defendant is on trial only for the
crimes
2 set forth in the 11 counts of the indictment, which the
3 Government must prove beyond a reasonable doubt. You
may no
4 more convict the defendant because you may disagree
with his
5 opinions and beliefs than you may acquit him because
you may
6 agree with his opinions and beliefs.

7 Under the First Amendment to the United States
8 Constitution, all individuals, including Mr. Nichols,
have the
9 right to assemble and discuss even the most unpopular

ideas,
support 10 including unlawful acts. Expressions of sympathy and
more, 11 for those who commit unlawful acts do not, without
vigorous 12 constitute entry into an unlawful agreement, nor does
knowing 13 criticism of the government. One may belong to a group
having 14 that some of its members commit unlawful acts without
15 entered into an agreement that these unlawful acts be
opinions, 16 committed. A frank exchange of political views and
not, 17 no matter how vehement, radical, or unpopular, does
evidence of a 18 without more, constitute an unlawful agreement or
19 crime.

solely 20 You must be careful to consider this evidence
failure 21 for the limited purpose for which it was admitted. A
limited 22 to restrict your consideration of this evidence to the
took. 23 purpose is a violation of your duty and the oath you
of the 24 Equally important, it is contrary to the Constitution
or 25 United States. No individual should ever be punished

14621

the 1 presumed guilty for exercising his or her rights under
2 Constitution of the United States.

judges of 3 You, as jurors, are the sole and exclusive
4 the credibility of each of the witnesses called to
testify in 5 this case, and only you determine the importance or the
weight 6 that their testimony deserves. After making your
assessment 7 concerning the credibility of a witness, you may decide
to 8 believe all of that witness' testimony, only a portion
of it, 9 or none of it.

carefully 10 In making your assessment, you should
11 scrutinize all of the testimony given, the
circumstances under 12 which each witness has testified, and every matter in
evidence 13 which tends to show whether a witness, in your opinion,
is 14 worthy of belief. Consider each witness' intelligence,
motive 15 to falsify, state of mind, and appearance and manner
while on 16 the witness stand. Consider the witness' ability to
observe

17 the matters as to which he or she has testified and
consider
18 whether he or she impresses you as having an accurate
memory or
19 recollection of these matters. Consider also any
relation a
20 witness may bear to either side of the case, the manner
in
21 which each witness might be affected by your verdict,
and the
22 extent to which, if at all, each witness is either
supported or
23 contradicted by other evidence in the case.
24 Inconsistencies or discrepancies in the
testimony of a
25 witness or between the testimony of different witnesses
may or

14622

1 may not cause you to disbelieve or discredit such
testimony.

2 Two or more persons witnessing an incident or a
transaction may

3 simply see or hear it differently. Innocent
misrecollection,

4 like failure of recollection, is not an uncommon
experience.

5 In weighing the effect of a discrepancy, however,
always

6 consider whether it pertains to a matter of importance

or an

7 insignificant detail and consider whether the
discrepancy

8 results from innocent error or from intentional
falsehood.

9 The reliability of eyewitness identification
has been

10 raised as an issue in this case and deserves your
attention.

11 Identification testimony is an expression of belief or
12 impression by the witness. Its value depends upon the
13 opportunity the witness had to observe the offender at
the time

14 of the offense and later to make a reliable
identification, and

15 upon the influence and circumstances under which the
witness

16 made the identification.

17 You are not required to accept testimony, even
though

18 the testimony is uncontradicted and the witness is not
19 impeached. You may decide because of the witness's
bearing or

20 demeanor, or because of the inherent improbability of
his or

21 her testimony, or for other reasons sufficient to you
that such

22 testimony is not worthy of belief.

23 After making your own judgment or assessment
24 concerning the believability of a witness, you can then
attach

25 some importance or weight to that testimony, if any,
that you

14623

1 feel it deserves. You will then be in a position to
decide
2 whether the Government has proven the charges beyond a
3 reasonable doubt.

4 The rules of evidence ordinarily do not permit
5 witnesses to testify as to their own opinions or their
6 conclusions about issues in the case. An exception to
this

7 rule exists as to those witnesses who are described as
"expert

8 witnesses." An "expert witness" is someone who by
education or

9 experience, may have become knowledgeable in some
technical,

10 scientific, or very specialized area. If such
knowledge or

11 experience may be of assistance to you in understanding
some of

12 the evidence or in determining a fact, an "expert
witness" in

13 that area may state an opinion as to relevant and
material

14 matter in which he or she claims to be an expert. Thus
an

15 "expert witness" is more accurately an opinion witness.

16 You should consider the testimony of each
opinion
17 witness received in evidence in this case and give it
such
18 weight as you may think it deserves. You should
consider the
19 testimony of opinion witnesses just as you consider
other
20 evidence in this case. If you should decide that the
opinion
21 of such a witness is not based upon sufficient
education or
22 experience, or if you should conclude that the reasons
given in
23 support of the opinion are not sound, or if you should
conclude
24 that the opinion is outweighed by other evidence
including that
25 of other opinion witnesses, you may disregard the
opinion in

14624

1 part or in its entirety.
2 You must also remember that an opinion witness
can be
3 influenced by various motivations just as an ordinary
witness.
4 You the jury are the experts in the end -- you are the
sole
5 judges of the facts in this case.

6 You have heard testimony from Michael Fortier,
who
7 pleaded guilty to certain charges after entering into a
plea
8 agreement with the Government to testify. There is
evidence
9 that the Government agreed not to prosecute this
witness on
10 other charges in exchange for the witness's agreement
to plead
11 guilty and testify at this trial against the defendant.
The
12 Government also promised to bring the witness's
cooperation to
13 the attention of the sentencing court.

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

find it

24 deserves.

25 You are instructed that you are to draw no
conclusions

14625

1 or inferences of any kind about the guilt of the
defendant on
2 trial from the fact that a prosecution witness pleaded
guilty
3 to charges that may relate to this case. That
witness's
4 decision to plead guilty was a personal decision about
his own
5 guilt. It may not be used by you in any way as
evidence
6 against or unfavorable to the defendant on trial here.

7 Certain witnesses in this case admitted under
oath to
8 drug and alcohol abuse. The testimony of drug and
alcohol
9 abusers must be examined and weighed by the jury with
greater
10 care than the testimony of a witness who does not abuse
drugs
11 or alcohol. The jury must determine whether the
testimony of
12 the drug or alcohol abuser has been affected by drug or
alcohol
13 use, the need for drugs or alcohol, or the threat of

14 prosecution for drug use and possession.

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

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

23 You may also consider any bias, prejudice, or
24 hostility of a witness toward or against Mr. Nichols or
the
25 Government in determining the weight to be accorded to
the

14626

1 testimony of that witness.

2 You have heard testimony from several law
enforcement
3 officials. The fact that a witness may be employed by
the
4 federal government or a state or local government as a
law

5 enforcement official does not mean that his or her
testimony is
6 necessarily deserving of more or less consideration or
greater
7 or lesser weight than that of an ordinary witness. At
the same
8 time, it is quite legitimate for defense counsel to try
to
9 attack the credibility of a law enforcement witness on
the
10 grounds that his or her testimony may be colored by a
personal
11 or professional interest in the outcome of the case.
It is
12 your decision, after reviewing all of the evidence,
whether to
13 accept the testimony of a law enforcement witness and
to give
14 that testimony whatever weight, if any, you find it
deserves.

15 Charts or summaries have been prepared by the
16 Government and the defense and shown to you during the
trial
17 for the purpose of explaining facts that are allegedly
18 contained in books, records, and other documents which
are in
19 evidence in the case. Such charts or summaries are not
20 evidence in this trial or proof of any fact. If you
find that
21 these charts or summaries do not correctly reflect
facts or
22 figures shown by the evidence in the case, the jury
should

23 disregard the charts or summaries.

24 In other words, such charts or summaries are
used only
25 as a matter of convenience for you, and the extent to
-- and to

14627

1 the extent that you find that they are not, in truth,
summaries
2 of facts or figures shown by evidence in the case, you
can
3 disregard them entirely.

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

12 A witness may be discredited or impeached by
13 contradictory evidence or by evidence that at some
other time

14 the witness has made statements which are inconsistent
with the
15 witness's present testimony. The testimony of a
witness may be
16 discredited, or, as we sometimes say, impeached by
showing that
17 he or she previously made statements which are
different from
18 or inconsistent with his or her testimony here in
court. The
19 earlier inconsistent or contradictory statements are
admissible
20 only to discredit or impeach the credibility of the
witness and
21 not to establish the truth of these earlier statements
made
22 somewhere other than here during trial. It is the
province of
23 the jury to determine the credibility, if any, to be
given the
24 testimony of a witness who has made prior inconsistent
or
25 contradictory statements. If you believe that any
witness has

14628

1 been impeached and thus discredited, it is your
exclusive
2 province to give the testimony of that witness such
3 credibility, if any, as you may think it deserves.

falsely 4 If any witness is shown to have testified
distrust 5 concerning any material matter, you have the right to
may 6 such witness's testimony in other particulars and you
such 7 reject all of the testimony of that witness or give it
8 credibility as you may think it deserves.

a 9 Evidence relating to any alleged statement by
considered 10 defendant to law enforcement agents should always be
care. 11 by the jury with great caution and weighed with great

entirely 12 All such alleged statements should be disregarded
jury that 13 unless the other evidence in the case convinces the
voluntarily. 14 the statement was made or done knowingly and

to have 15 In determining whether any statement alleged
16 been made by a defendant to law enforcement agents was
17 knowingly and voluntarily made or done, the jury should
alleged 18 consider all of the circumstances surrounding the
consider can 19 making of the statement. Such factors you should
his 20 include, but are not limited to, the defendant's age,
21 training, education, occupation, and physical and

mental

22 condition while in custody or other interrogation as
shown by
23 the evidence in the case. You should consider the
totality of
24 the circumstances under which the alleged statement was
made in
25 making your decisions about its worth or value, if any.

14629

1 If after considering the evidence you
determine that a
2 statement was made or done knowingly and voluntarily,
you may
3 give it such weight as you feel it deserves under the
4 circumstances.

5 Statements knowingly and voluntary made by any
person
6 upon being informed or learning that a crime has been
committed
7 or upon being accused of a criminal charge may be
considered by
8 the jury.

9 When a person voluntarily offers an
explanation or
10 voluntarily makes some statement tending to show his
innocence
11 or lack of knowledge and it is later shown that the
person knew

12 that the statement or explanation was false, the jury
may, but
13 need not, consider this as a showing of consciousness
of guilt
14 since it is reasonable to infer that an innocent person
does
15 not usually find it necessary to invent or fabricate an
16 explanation or statement tending to establish his
innocence or
17 lack of knowledge.

18 Whether or not evidence as to a person's
explanation
19 or statement points to a consciousness of guilt on his
part and
20 the significance, if any, to be attached to such
evidence are
21 matters exclusively within the province of the jury as
the sole
22 judges of the facts of this case.

23 In your evaluation of evidence of an
exculpatory
24 statement shown to be false, you may be -- you may
consider
25 that there may be reasons -- fully consistent with
innocence --

14630

1 that could cause a person to give a false statement
showing
2 their innocence. Fear of law enforcement, reluctance

to become

3 involved, and simple mistake may cause a person who has
4 committed no crime to give such a statement or
explanation.

5 When a person voluntarily agrees to meet about
FBI
6 agents, and, after being informed of his constitutional
right
7 to remain silent, answers their questions, the agents
are not
8 required by law to stop their questioning and arrest
the
9 person, or inform him immediately upon the issuance of
a
10 warrant for his arrest as a material witness.

11 You are cautioned that because the right to
remain
12 silent when being questioned by the FBI or any other
law
13 enforcement officials is a fundamental right under the
United
14 States Constitution, the failure of a person being
questioned
15 to answer any question may not be considered.

Accordingly,
16 with respect to any testimony that Mr. Nichols did not
answer
17 questions put to him by FBI -- FBI agents, you are
instructed
18 that you must draw -- excuse me -- that you must not
draw any
19 inferences or conclusions as to what the answers might
have

20 been or why he did not answer those questions.

21 Under your oath as jurors you are not to be
swayed by
22 sympathy. You are to be guided solely by the evidence
in this
23 case, and the crucial, hard-core question that you must
ask
24 yourselves as you sift through the evidence is: Has
the
25 Government proven the guilt of the defendant beyond a

14631

1 reasonable doubt?

2 It is for you alone to decide whether the
Government
3 has proven that the defendant is guilty of the crimes
charged
4 solely on the basis of the evidence and subject to the
law as I
5 give it to you in these instructions. It must be clear
to you
6 that once you let fear or prejudice, or bias or
sympathy
7 interfere with your thinking there is a risk that you
will not
8 arrive at a true and just verdict according to the law
and the
9 evidence.

10 If you have a reasonable doubt as to a

defendant's

11 guilt, you should not hesitate for any reason to return
a
12 verdict of not guilty. But on the other hand, if you
should
13 find that the Government has met its burden of proving
the
14 defendant's guilt beyond a reasonable doubt, you should
not
15 hesitate because of sympathy or any other reason to
return a
16 verdict of guilty.

17 Remember that the question before you can
never be:
18 Will the Government win or lose the case? The
Government
19 always wins when justice is done regardless of whether
the
20 verdict is guilty or not guilty.

21 The law does not compel Mr. Nichols or any
defendant
22 in a criminal case to take the witness stand and
testify and
23 you must not draw any inference from the fact that Mr.
Nichols
24 did not testify. It is up to the Government to prove
25 Mr. Nichols guilty beyond a reasonable doubt. It is
not up to

1 Mr. Nichols to prove that he is not guilty. The fact
that
2 Mr. Nichols did not testify should not be discussed by
you in
3 any way or play any part in your deliberations.
4 I explained to you individually at the time
that you
5 were being questioned for possible service as jurors in
this
6 case the various possible stages, including jury
sentencing in
7 a capital case. Your function at this stage of the
trial is to
8 weigh the evidence in the case and to determine whether
or not
9 the defendant is guilty beyond a reasonable doubt,
solely upon
10 the basis of such evidence. Under your oath as jurors,
you
11 cannot allow a consideration of the punishment which
may be
12 imposed upon the defendant, if he is convicted, to
influence
13 your verdict or even to enter into your deliberations.
14 Upon retiring to the jury room, you will
select one of
15 your number to act as the foreperson. The foreperson
will
16 preside over your deliberations and speak for you in
court.
17 A form of verdict has been prepared for your
18 convenience.

19 You understand that your verdict must be
unanimous.

20 All of you must be in agreement. Until you all have
agreed,
21 you have not reached a verdict.

22 You will take this form with you to the jury
room and

23 when you have reached unanimous agreement as to your
verdict,

24 the foreperson will fill in and sign the form to state
the

25 verdict upon which you have agreed and then you will
return

14633

1 with your verdict to the courtroom.

2 Now, the verdict form looks like this.
Actually you

3 will have, in addition to the verdict form, work copies
that

4 each of you will have. I think that the verdict form
is

5 self-explanatory, but let me go over it briefly with
you to

6 make sure.

7 It says -- has of course the title of the
court and

8 case. Verdict form says, "We the jury, upon our oaths,

9 unanimously find as follows." And then separately for

each

10 count, as you must consider separately each count under
the law
11 and the evidence, it says, "Count One," and reminds
that is
12 conspiracy to use a weapon of mass destruction. There
is a
13 blank line under which are the words "not guilty or
guilty."
14 When you have reached unanimous agreement with respect
to that
15 count, then the person whom you have selected as
foreperson
16 will write in on the line the words that describe your
verdict,
17 be they not guilty or guilty.

18 With respect to Count Two, it reminds that's
use of a
19 weapon of mass destruction. Again, the space to fill
in the
20 verdict.

21 Count Three, destruction by explosive; again,
the line
22 upon which the foreperson will write in your decision.

23 Then it has this on page 2: "If you find the
24 defendant guilty of one or more of the crimes charged
in these
25 three counts, then answer the following question."

1 There is then written this question: "Do you
find
2 that the Government proved beyond a reasonable doubt
that the
3 crime or crimes committed by the defendant, Terry Lynn
Nichols,
4 as found above --" that is, with respect to the first
three
5 counts "-- resulted in the death of one or more of the
persons
6 named in the indictment?"

7 Here there is a line under it, the words "yes
or no,"
8 and the foreperson would fill in the word "yes" or "no"
9 depending upon your unanimous finding.

10 Then it asks this additional question: "Was
the death
11 of such person or persons a foreseeable result of the
12 defendant's criminal conduct?"

13 Again, "Yes or no." That's with respect to
the first
14 three counts or charges of the indictment.

15 The verdict form then goes on, separately, to
ask with
16 respect to the murder counts, each of Counts Four
through
17 Eleven.

18 Count Four it says, "First-degree murder of
Mickey
19 Bryant Maroney." Again, guilty or not guilty.

serious
out only
murder

20 But then it goes on and says, "First less
21 offense," and reminds in parentheses, "(To be filled
22 if you find the defendant not guilty of first-degree
23 under Count Four or are unable to reach a verdict as to
24 first-degree murder under Count Four.)"

would

25 Then as these instructions have told you, you

14635

with
offense.

1 consider second-degree murder under the instructions
2 respect to the elements of that lesser included

less
only if
reach a
Count

3 The verdict form goes on and says: "Second
4 serious offense," and again reminds, "(To be filled out
5 you find the defendant not guilty of either first- or
6 second-degree murder under Count Four or are unable to
7 verdict as to first- or second-degree murder under
8 Four)."

has

9 So you would be down here only if the decision
10 been not guilty on first-degree murder and second-

degree

11 murder. Then you would consider involuntary
manslaughter as

12 these instructions have explained that offense to you.

13 Similarly with respect to each of the other of
the

14 first-degree murder counts, there is the same form so
that you

15 can consider the lesser included offenses if you find
that the

16 evidence does not prove the first-degree murder count
beyond a

17 reasonable doubt or if you're unable to reach a verdict
as to

18 that count.

19 Then after going through each of these murder
counts,

20 the last one being of course Count Eleven on page 7,
having

21 completed all of this, then the foreperson will sign
his or her

22 name over the word "foreperson" and fill in the date of
your

23 decision and advise that you have arrived at a
decision, and

24 you would then be returned to court for the return of
your

25 verdict and its announcement.

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

7 So as I have said before, as I explained to
you, I
8 think yesterday, we have set up the exhibits in this
case in a
9 separate room. It is an adjacent courtroom. The
deliberating
10 jurors will be the only persons having access to that
area and
11 will be free to go and come to that room to look at the
12 exhibits as you choose to see them and view them. How
you use
13 the exhibits in the case is of course a matter entirely
for
14 your choice.

15 All that has been received in evidence will be
there.
16 Things that have not been received in evidence will not
be
17 there and will not be provided at your request because,
for
18 example, you may as you deliberate and discuss the case

19 remember some document or object being discussed in the
20 testimony but not actually received in evidence. We
can't
21 change the evidence now, and it would not be provided
to you
22 even if you requested it.

23 Also, there have been these things, as I have
24 mentioned to you from time to time and as I did in
these
25 instructions refer to them as demonstrative or
illustrative

14637

1 exhibits, both with respect during the time of the
testimony of
2 witnesses and also at times in the argument of the
case. Those
3 will not be provided because they have not been
received in
4 evidence and are not therefore a part of the evidence.

5 One modification with respect to the actual
exhibits
6 have been made. There are, as you know, a number of
firearms
7 that have been received in evidence. Those firearms
are in the
8 exhibit room and available for your inspection there.
There
9 was also received in evidence ammunition. Some of that

10 ammunition fits in some of the firearms. Now, just as
a matter
11 of safety, we are withholding the ammunition and
substituting
12 for it photographs of that ammunition so that, you
know, the
13 guns are rendered safe. You don't have to in any way
feel
14 danger with respect to handling of firearms, if you
wish to do
15 so. There's no ammunition in them, and you will see
that
16 there's a device in there preventing it from being
used; but we
17 don't want any accidents, so we're keeping the
ammunition
18 separated and available, you know, as a matter of
photographs.

19 Now, if you will for just a moment bear with
us, I'm
20 going to ask counsel to approach the bench and have a
matter to
21 discuss with them. You can stand and stretch during
this time.
22 I'm going to turn on this noise machine, too, so you
can't hear
23 us.

24 (At the bench:)

25 (Bench Conference 128B1 is not herein transcribed
by court

1 order. It is transcribed as a separate sealed
transcript.)

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1 (In open court:)

2 THE COURT: Now with respect to the
deliberations

3 here, there are 18 of you seated here in the jury box.
The law

4 provides that the decision will be made by 12 people, a
jury of

5 12. We have had six more jurors here as to be
available as

6 alternate jurors, and they have of course been
available to

7 participate in the deliberations if that were
necessary.

8 The people who are seated here in the first
row,

9 counting from my left to your right Chair No. 1 through
6, and

10 also in the second row beginning again at my extreme
left, your

11 right, and for six seats in the second row are the 12
persons

12 who will serve as the jurors to decide this case and

13 deliberate. The other six of you are alternate jurors.

14 Now, the time of deliberation will of course
be a

going to 15 matter of the 12 people who are deliberating. They're
case, and 16 take whatever time they find necessary to decide the
and we 17 that's a matter for them to decide as they go along,
deliberation 18 will provide that time that is necessary for fair
remain 19 in the case. I'm going to ask the other six of you to
together 20 available; and in fact, we have arranged to keep you
case. 21 during the time that 12 people are deliberating in the

here. I 22 Once again, there's no sequestration order
day, 8:30 23 would expect the deliberations to run the usual court
different 24 to 5; in the absence of your request to do something
we'll 25 from that, that that would be the normal schedule. And

14643

together 1 arrange for those who are the alternate jurors to be
may be 2 at another suitable place so that in the event that it
the 3 necessary to go on with further hearing in the case,
4 alternate jurors will remain available to serve with us

in the

5 same fashion as through the trial here. Whether that
is or is

6 not necessary, of course, as you recognize, depends on
the

7 verdict in the case.

8 I want you, alternate jurors, first of all, to
accept

9 our thanks for your being with us and also in advance
thank you

10 for what I'm now going to tell you is required of you,
and that

11 is that you not deliberate among yourselves. You're
not a

12 shadow jury here. So in the same way as you have
complied with

13 my instructions throughout the trial, I'll ask of you
that you

14 not discuss the case among yourselves and of course not
with

15 any other person and that you continue to be extremely
careful;

16 that you avoid radio, television, news, magazines,
newspapers,

17 or whatever, and anything that may contain -- be
contained in

18 them that would relate to this case, recognizing that
it is

19 possible that you will have the responsibility to come
back and

20 rejoin us for another stage of the case, as I say, if
that

21 should be necessary.

will 22 So you're in a true standby situation. We
23 attempt so far as possible to provide you with some --
the time 24 something to do during that time that will be -- make
the 25 more passable to you; but again, I want to emphasize

14644

1 importance of your availability and our appreciation
for it.

2 I will ask now that the six alternate jurors
please go 3 to the jury room and pick up whatever you have there
that is 4 personal to you, and then you will be escorted to the
place 5 where we'll ask you to be in waiting. So if the
alternate 6 jurors will please leave at this time and remain
available.

7 (Alternate jurors out at 2:11 p.m.)

8 THE COURT: And for those now on the jury, as
we wait 9 for the alternate jurors to pick up their things and
leave the 10 area where you've all been together, I just want to
emphasize 11 again that the course of the deliberations is entirely
up to

select 12 you; that as I told you in these instructions, you will
be the 13 one of your number to act as the foreperson, and that
then 14 person that presides over your deliberations and will
15 speak for you here in court.

you will 16 As I mentioned in these instructions -- and
as well 17 have, each of you, a complete copy of the instructions
you don't 18 as copies of the indictment and the verdict forms so
have that 19 have to pass a paper around all the time. Each will
that 20 in front of you. And you will be free to use this area
where 21 you know all too well and also access to the courtroom
you can 22 only you will have access to the exhibits and so that
23 make such use of them as you see fit.

instructions 24 Again, I would remind you as I did in the
Court, you 25 that if you have some need to communicate with the

14645

1 may send a note. Do so only in writing. You will
communicate

note. 2 with the Court only in writing, and you will send the

3 I believe you have met Mr. Manspeaker here,
who is the

4 clerk of this court and who will be available to you.
There is

5 a buzzer system in the jury room that you may or may
not know

6 about. He can explain that to you quickly now; and if
you need

7 anything, you can buzz him and he will be available to
you.

8 Will you check.

9 We're just going to check to see if the others
are --

10 now, you know, also each time that I excuse you as
jurors in

11 this case and of course the time of your deliberation,
as I've

12 said earlier, is up to you. But we only anticipate
your

13 working up to 5:00, just as we have been throughout the
course

14 of the trial, because I think some of you may have
commitments

15 with child care and other things; and we'll try to keep
this so

16 that you can continue with that schedule. We'll always
bring

17 you back into the courtroom, however, before recessing
you to

18 of course remind you about your obligations as members
of the

19 jury.

20 So with these instructions, members of the
jury, you

21 will now retire to your jury room to select a
foreperson and

22 begin your deliberations in this case.

23 (Jury out at 2:14 p.m.)

24 THE COURT: As I advised the jury, we will --
our

25 practice will be to ask every one of counsel and the
defendant

14646

1 to be here at 10 minutes before 5, if you haven't heard
from us

2 before that, so that we may bring the jury in and give
them

3 cautionary instructions to recess their deliberations
and

4 probably to suggest that they have deliberations from
8:30 to 5

5 as the regular workday; and of course it's also my
practice to

6 take any questions or communications from the jury that
require

7 response by first meeting here in the courtroom and
discussing

8 them. So I need counsel to be available on about 10
minutes'

jury 9 notice so that we can deal with that without having the

10 wait for us.

further at 11 Now, with that, either side have anything

12 this time?

13 MR. TIGAR: No, your Honor, not from defense.

Thank 14 MR. MACKEY: Nothing at this time, your Honor.

15 you.

in 16 THE COURT: All right. Then the Court will be

17 recess subject to call.

18 (Recess at 2:15 p.m.)

19 * * * * *

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INDEX

2 Item

Page

