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P.O. Box 3563, Denver, Colorado, 80294, (303)

15881

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3 District of Oklahoma, and RANDAL SENDEL, Assistant U.S.  
4 Attorney for the Western District of Oklahoma, 210 West  
Park  
5 Avenue, Suite 400, Oklahoma City, Oklahoma, 73102,  
appearing  
6 for the plaintiff.  
7 LARRY MACKEY, SEAN CONNELLY, BETH WILKINSON,  
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Attorneys  
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10 Denver, Colorado, 80294, appearing for the plaintiff.  
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13 Street, Suite 1308, Denver, Colorado, 80203, appearing  
for  
14 Defendant Nichols.

15 \* \* \* \* \*

16 PROCEEDINGS

17 (In open court at 8:45 a.m.)

18 THE COURT: Be seated, please.

19 Good morning.

20 MR. MACKEY: May we approach?

21 THE COURT: Yes.

22 (At the bench:)

23 (Bench Conference 154B1 is not herein transcribed  
by court  
24 order. It is transcribed as a separate sealed  
transcript.)

25

15888

1 (In open court:)

2 (Jury in at 8:50 a.m.)

3 THE COURT: Members of the jury, good morning.

4 JURORS: Good morning.

5 THE COURT: As we indicated what our schedule  
would be  
6 when we recessed on Friday, we are now going forward

with the

7 closing arguments of counsel, after which I will  
instruct you  
8 with respect to the law. And again, the burden of  
proof here,  
9 generally speaking -- although I'll talk about the  
burden of  
10 proof in the instructions -- being on the Government,  
we first  
11 hear from Government's counsel, then defense counsel,  
and then  
12 Government counsel in rebuttal, just as we did at the  
other  
13 stage of the trial.

14 So at this time I will call on Miss Wilkinson.

15 CLOSING ARGUMENT

16 MS. WILKINSON: Thank you, your Honor.

17 Good morning, ladies and gentlemen.

18 JURORS: Good morning.

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

20 Well, it's almost over. You've been here for  
a very  
21 long time. Some of you, in fact one of you, since  
22 September 30, when we first began jury selection.  
You've  
23 listened to a lot of evidence, and you've made some  
very  
24 difficult decisions, and you found Mr. Terry Nichols  
guilty of  
25 Count One of the conspiracy. You found him guilty of

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1 participating in that conspiracy, and now you spent the  
last  
2 week listening to some very difficult evidence in what  
we call  
3 the penalty phase of this proceeding. I want to spend  
this  
4 morning -- and I'm going to talk to you for about an  
hour this  
5 morning -- talking about choices, choices that Terry  
Nichols  
6 made and choices that you will have to make this week.  
7 Terry Nichols made choices starting back in  
September  
8 of 1994 when he was with Timothy McVeigh and Timothy  
McVeigh  
9 asked him to join the conspiracy to bomb the Murrah  
Building  
10 and the people inside of it. Everyone else said no to  
Timothy  
11 McVeigh. Terry Nichols said yes. He made a choice  
that day.  
12 He made a knowing and willing choice, and you found  
that he  
13 made that choice to participate in the conspiracy.  
14 He made that choice not only to make that  
agreement to  
15 bomb that building and the people inside of it, but he  
made a

a 16 choice to assist Timothy McVeigh and to make their goal

17 reality.

18 If Terry Nichols had said no to Timothy  
McVeigh, we

19 might never be here, we might have never been here. No  
one

20 else had said yes to Timothy McVeigh but Terry Nichols;  
and

21 because of that, because of the choices that Terry  
Nichols

22 made, there are 168 consequences to his choices. 168  
dead

23 people in Oklahoma City within seconds of 9:02 a.m. It  
is

24 because of Terry Nichols' choices that those 168 people  
were

25 killed.

15890

1 Your final decision that you will make when  
the

2 lawyers are finished talking and the Judge instructs  
you on the

3 law will be one that you make as the conscience of this

4 community. You must decide what the appropriate  
punishment is

5 for someone who knowingly and intentionally agreed to  
use a

6 weapon of mass destruction against the Murrah Building  
and the  
7 people inside of it. You must decide what the  
appropriate  
8 punishment is for someone who knew that the deaths were  
9 foreseeable and for someone who participated in a crime  
where  
10 168 deaths resulted. You must decide what should  
happen to  
11 Terry Nichols.

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

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

25  
one and a

This decision is obviously a very important

15891

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

11 But you will get there. And when you get  
there, you  
12 will have to make a final decision as the Judge has  
instructed  
13 you previously. You must make a moral judgment about  
the worth  
14 of a specific life balanced against the societal value



of a

15 deserved punishment. That is your duty and your  
obligation as 16 jurors representing the conscience of our community.

17 But this decision that you make is not one  
that you 18 will make in a vacuum. The citizens of this country  
have

19 already spoken. The citizens that you represent as the  
20 conscience of the community have already said that the  
death

21 penalty is appropriate in certain admitted  
circumstances, and

22 our community has already spoken about the potential  
penalties

23 for this specific crime. They have provided for the  
24 possibility of a death sentence when someone knowingly  
and

25 intentionally conspires to use a weapon of mass  
destruction

15892

1 where deaths resulted. That is what you found already  
in this 2 case.

3 Anyone who participates in a conspiracy to use  
a 4 weapon of mass destruction and against the people  
inside of it

5 faces the possibility of the death penalty. Therefore,  
it's  
6 your obligation to consider all of the possible  
penalties with  
7 an open mind. You took an oath at the beginning of  
this case  
8 to have an open mind throughout the entire guilt phase  
and the  
9 penalty phase, and that is still your obligation today.  
10 You must carry out your duty in making the  
findings on  
11 the special verdict form and weighing the sentence of  
life or  
12 death consistent with that oath. It would be wrong for  
you to  
13 eliminate any of the possible penalties based only on  
your  
14 verdict.  
15 The Court has repeatedly told you that you  
have  
16 received the penalty-phase information because you  
found Terry  
17 Nichols guilty of knowingly and voluntarily agreeing to  
use an  
18 explosive bomb in a truck as a weapon of mass  
destruction  
19 against a federal building and the people inside of it.  
You  
20 were the ones that found that deaths were foreseeable  
and that  
21 deaths resulted. That is the verdict that you rendered  
based  
22 on the law as the Court instructed you. No one can

question

because 23 that verdict, nor can any of you change it. And it is  
24 of those findings that we argue to you today that the  
death 25 penalty is a just punishment for Terry Nichols.

15893

doubt 1 With your verdict of guilt beyond a reasonable  
2 for Count One, the conspiracy to use the weapon of mass  
3 destruction against the Alfred P. Murrah Building and  
the 4 people inside of it, you had to make several findings.  
You had 5 to make several findings that were set forth for you in  
the 6 Court's instructions.

and 7 First, you found that Terry Nichols knowingly  
8 deliberately agreed to use a weapon of mass destruction  
against 9 the Alfred P. Murrah Building in Oklahoma City and the  
persons 10 inside of it. The Judge instructed you that you had to  
make 11 that finding beyond a reasonable doubt before you could  
convict 12 Terry Nichols of Count One, and you did that. Terry  
Nichols

P. 13 knew what the agreement was. It was to bomb the Alfred  
Timothy 14 Murrah Building and the people inside of it. He and  
15 McVeigh agreed to do that.

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

original 18 THE COURT: Well, the jury will have the  
19 instructions.

of you 20 You'll have the original instructions in front  
21 in your deliberations.

22 So you may proceed.

23 MS. WILKINSON: Thank you.

purpose 24 Second, you found that Terry Nichols knew the  
entered 25 or the goal of the agreement and that he deliberately

15894

the 1 into that agreement intending in some way to accomplish  
make 2 goal. The Judge instructed you on that, and you had to  
find 3 that finding beyond a reasonable doubt before you could  
4 Terry Nichols guilty of Count One.

5  
substantially

Third, you had to find that the crime

6 affected interstate commerce.

7  
you had to

If there is any question about the law that

8  
doubt,

apply to find Terry Nichols guilty beyond a reasonable

9  
instructions,

as the Court said, you will have a copy of the

10  
deliberations

and you can refer to them at any time during your

11 in this phase.

12  
returned

You made two additional findings when you

13  
this case

your verdict. And you said, one, that the deaths in

14  
from

were foreseeable; two, that the deaths in fact resulted

15 the crime of conspiracy.

16  
is

We know that the foreseeability of the deaths

17  
people

obvious from the agreement to bomb the building and the

18  
no one

inside of it. We submit to you, ladies and gentlemen,

19  
people

could not have contemplated the possible deaths of the

20  
mass

inside the building when they agreed to use a weapon of

21  
McVeigh

destruction. You found that Terry Nichols and Timothy

22 agreed to use that weapon of mass destruction. It

wasn't a

23 cherry bomb. It wasn't a bottle rocket. This was a  
24 4,000-pound bomb of -- weapon of mass destruction. And  
it was  
25 intended for use against the Murrah Building and the  
people

15895

1 that worked there. That is the agreement that you  
found, and  
2 Terry Nichols knew that deaths could result from that  
3 agreement.

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

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

15896

1 transporting explosives over state lines, even though  
we did  
2 not present any of that evidence during the penalty

phase.

3 I say this just so you know there's no  
confusion --

4 all of the evidence that you've already considered in  
the guilt  
5 phase, you can apply to your decisions in sentencing.

6 But before you all get to consider the  
aggravating and

7 the mitigating factors that you must balance and decide  
what

8 the just punishment is, there are findings that you  
must make

9 and findings that I want to review with you. You must  
make

10 findings about the intent, the intent of Terry Nichols.  
And in

11 this case, there are two different intent findings that  
you

12 must review.

13 The first -- and you can find either one or  
both --

14 the first is that Terry Nichols intentionally  
participated in

15 an act. You will hear from his Honor, I believe, that  
an act

16 is a conspiracy, and of course that makes sense because  
someone

17 makes an agreement and we punish someone for a  
conspiracy, so a

18 conspiracy is an act. And you know that Terry Nichols

19 intentionally participated in the conspiracy, so you  
can find



act. 20 that Terry Nichols intentionally participated in an

contemplating 21 The next requirement is that he did that

already 22 that the life of a person would be taken. You have

sufficient 23 found that the deaths were foreseeable. That is a

life of 24 basis to find that Terry Nichols contemplated that the

common 25 a person would be taken. But you can also use your

15897

agreed to use 1 sense. You found that he knowingly and willingly

inside 2 that bomb against not only the building but the people

do to 3 of it. What in the world did he think that bomb would

4 the people inside of the Murrah Building?

didn't 5 He knew that death was a possibility, and he

6 care.

which 7 The second portion of that intent requirement,

lethal force 8 you can find, is that Terry Nichols intended that

died as a 9 would be used against a person and that the victims

10 result. Again, you've already found that Terry Nichols  
agreed  
11 to use a weapon of mass destruction. Your common sense  
tells  
12 you that a weapon of mass destruction is lethal force.  
He knew  
13 that would be used against a person because he agreed  
to use  
14 that weapon of mass destruction against the Murrah  
Building and  
15 the people inside of it. And you have already found  
that the  
16 victims died as a result of that act, that act being  
the  
17 conspiracy.

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

23 The second intent requirement or finding that  
you can  
24 make is that Terry Nichols intentionally and  
specifically  
25 engaged in an act of violence. Well, you know he  
intentionally

1 and specifically agreed to conspire with Timothy  
McVeigh. You  
2 already made that finding. The question is: What is  
an act of  
3 violence? The Court will give you instructions on this  
also  
4 and tell you that an act of violence can be a  
conspiracy.  
5 We ask you to find that a conspiracy to use a  
bomb  
6 against a building and people is an act of violence.  
If that  
7 is not a violent conspiracy, then what is? The only  
purpose of  
8 Terry Nichols' conspiracy with Timothy McVeigh was to  
destroy  
9 the Murrah Building and the people inside of it. That  
was what  
10 they intended to do. That was why they agreed to work  
11 together. Terry Nichols engaged in an act of violence  
on the  
12 day that he and Timothy McVeigh agreed to bomb the  
Murrah  
13 Building.  
14 Once you find that, you must find that he knew  
that  
15 the act -- that is, the conspiracy -- created a grave  
risk of  
16 death to a person other than the person who is  
participating in  
17 the event, or the offense, such that that constituted  
what we

died as 18 call a reckless disregard for human life, and a victim  
19 a result.

20 A grave risk of death. Did the conspiracy  
create a 21 grave risk of death? You know from all of the evidence  
that we 22 presented to you in the guilt phase and the penalty  
phase, and 23 from the evidence that Mr. Nichols presented, that he  
knew that 24 a mass -- a weapon of mass destruction used against the  
Murrah 25 Building could create a grave risk of death. He  
admitted to

15899

1 the FBI that he knew how to build bombs. He admitted  
that he 2 knew what ammonium nitrate and fuel oil could do. And  
he had 3 agreed to use that weapon against the Alfred P. Murrah  
Building 4 and the people inside of it.

5 But if there was anything that showed you that  
he knew 6 the grave risk of death that would be created, it was  
his own 7 brother Les Nichols. He saw his own brother almost die  
as a

and 8 result of a fuel blast. Les Nichols suffered horribly  
Nichols 9 almost died as a result of those blast injuries. Terry  
the 10 was there by his side. He knew up close and personal  
explosion. A 11 horrors that one suffers as a result of a fuel  
only be 12 bomb of ammonium nitrate and fuel of 4,000 pounds could  
the 13 worse. You will recall the scars on Les Nichols' face,  
saw those 14 burns and the skin grafts that he had. Terry Nichols  
15 scars.

16 How can he tell Royia Sims who looked like  
this before 17 the blast and looked like this after that he had no  
idea that 18 placing a weapon of mass destruction in front of the  
Alfred P. 19 Murrah Building would make her go from this to this?  
He knew 20 the grave risk of death. Royia Sims almost died that  
day.

21 You heard from Melissa Webster that she  
literally 22 saved Royia Sims' life by putting her in the ambulance  
instead 23 of tagging her for dead as everyone else had instructed  
her to 24 do. Royia Sims suffered the grave risk of death.

25 Terry Nichols cannot say that he did not know  
that a

15900

1 massive truck bomb used against the Alfred P. Murrah  
Building  
2 would create a grave risk of harm and death for anyone  
in the  
3 vicinity of that truck bomb.

4 You must also find that he did this with a  
reckless  
5 disregard for human life. Well, I submit to you that  
knowing

6 what he knew about his own brother, knowing what he  
knew about  
7 bombs, Terry Nichols' picture should be in the  
dictionary next

8 to the words "reckless disregard." He did not care  
about the  
9 consequences of his choices. He did not care who lived  
and who  
10 died.

11 And as you found, victims did die as a result  
of his  
12 conspiracy. So when you go back and you review the  
special  
13 verdict form, find Terry Nichols had the intent as set  
forth by  
14 his Honor in each and every instance. The findings  
that you've

15 already made in this case make it easy for you to find  
that  
16 Terry Nichols specifically engaged in a conspiracy --  
violent  
17 conspiracy; that he created the grave risk of death;  
and that  
18 he had reckless disregard for human life.

19           Once you make those findings, your next step  
will be  
20 to analyze what we call the statutory aggravating  
factors, and  
21 those are the factors that the Government presents to  
you to  
22 show you why Terry Nichols' sentence should be death.  
All of  
23 those factors, we submit to you, have been proven  
beyond a  
24 reasonable doubt. The first one is that death or  
injuries  
25 resulting in death occurred during the commission of  
the

15901

1 offense of transporting explosives in interstate  
commerce,  
2 which really just means transporting explosives over  
state  
3 line.

4           As we review the evidence for that, we must  
look back

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

11 He knew in the fall of 1994 what the goal of  
the  
12 conspiracy was, and you found that he joined that  
conspiracy to  
13 help accomplish the goal. So what did he do knowing  
that's  
14 what he and Timothy McVeigh intended to do? He bought  
15 4,000 pounds of ammonium nitrate. He stole explosives  
from the  
16 quarry. He transported those explosives to Arizona.  
He  
17 transported those explosives later back from Arizona to  
Kansas.  
18 And finally, just three days before the bombing, he  
drove to  
19 Oklahoma City to stash the getaway car with Timothy  
McVeigh.  
20 Three days before the bombing, he was in the city in  
which he  
21 knew was the target of the bombing.

22 Your findings show that Terry Nichols agreed  
to bomb



23 the Alfred P. Murrah Building, not just the federal  
building,  
24 but the Alfred P. Murrah Building. So he was in that  
city  
25 three days before the bombing, knowing exactly what  
Timothy

15902

1 McVeigh intended to do.  
2 When he left that getaway car there with  
Timothy  
3 McVeigh and drove McVeigh back to Kansas, he was  
assisting  
4 Timothy McVeigh in the most basic way in transporting  
those  
5 explosives on April 19. Timothy McVeigh was able to  
drive that  
6 Ryder truck from Kansas to Oklahoma City on April 19  
because  
7 his car, his getaway car, was left there. He was able  
to cross  
8 state lines with 4,000 -- with a 4,000-pound truck bomb  
because  
9 Terry Nichols helped him just three days before.  
10 Now, the Judge will instruct you that you do  
not have  
11 to find that Terry Nichols himself transported the  
explosives.  
12 He could have done something to assist Timothy McVeigh,  
and

13 that is enough to find this aggravating factor beyond a  
14 reasonable doubt. But you can also find that he  
transported  
15 explosives in the fall of 1994 with the knowledge and  
intent  
16 that they would be used unlawfully to damage or destroy  
any  
17 building or property. Well, you know Terry Nichols did  
that  
18 because you found that he knew what the goal of the  
conspiracy  
19 was. The goal was to bomb the Alfred P. Murrah  
Building and  
20 the people inside of it. So in the fall of 1994 when  
he  
21 transported explosives for Terry Nichols -- for Timothy  
22 McVeigh, he knew that those explosives would be used  
for an  
23 unlawful purpose and for destroying a building.  
24 So you can find either. You can find that  
Terry  
25 Nichols, just days before the bombing, assisted Timothy  
McVeigh

15903

1 with the transportation of the explosives by helping  
him stash  
2 the getaway car, or you can find that he transported  
explosives

3 himself in the fall of 1994 in furtherance of the  
conspiracy.

4           The second statutory aggravating factor that  
you'll

5 have to look at is that in the commission of the  
conspiracy

6 offense, Terry Nichols knowingly created a grave risk  
of death

7 to one or more persons in addition to the actual  
victims; that

8 is, that people who weren't killed were faced with the  
grave

9 risk of death. You know that Terry Nichols didn't  
create this

10 grave risk of death by accident or mistake. He knew  
there was

11 a grave risk of death just by virtue of the size of the  
bomb.

12           He purchased 4,000 pounds of ammonium nitrate.  
He

13 assisted Timothy McVeigh in obtaining 1500 pounds of

14 nitromethane. Now, knowingly creating that grave risk  
of death

15 is not the same as intending the deaths of the  
individuals.

16 Terry Nichols doesn't need to intend to kill the  
victims to

17 create that grave risk of harm. Terry Nichols did  
create that

18 grave risk of harm when he participated in the  
conspiracy, and

19 that grave risk of harm actually occurred when Timothy  
McVeigh

20 detonated that bomb outside the Alfred P. Murrah  
Building at  
21 9:02 a.m.  
22 You heard from numerous survivors during this  
penalty  
23 phase as well as Sue Mallonee from the Oklahoma  
Department of  
24 Public Health who told you about the grave risk of  
death that  
25 hundreds of people faced on the day of the explosion.

15904

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

and the 10 they wanted to destroy the Alfred P. Murrah Building  
11 people inside of it.

12            Luckily for Daina Bradley, Dr. Andrew Sullivan  
was a 13 hero that day. He stayed in that little hole, and he  
described 14 to you quite graphically, was able to amputate Miss  
Bradley's 15 leg and remove her from the building. She survived the  
grave 16 risk of death, but her family did not. She lost her  
two 17 children and her mother, and her sister suffered  
serious 18 injuries, all because Terry Nichols created the grave  
risk of 19 death when he agreed with Timothy McVeigh to bomb the  
Alfred P. 20 Murrah Building.

21            That aggravating factor, we submit to you,  
ladies and 22 gentlemen, was proven beyond any doubt.

23            The final statutory aggravating factor that  
you will 24 review when you deliberate together is that Terry  
Nichols 25 committed the conspiracy offense of a substantial  
planning and

1 premeditation to create an act of terrorism. Again,  
this one  
2 is almost self-explanatory. Terry Nichols and Timothy  
McVeigh  
3 agreed to bomb a federal building and to use a weapon  
of mass  
4 destruction against the people inside of it. That is  
plain and  
5 simple an act of terrorism, indiscriminate bombing and  
killing  
6 against not only men and women of the federal  
government, but  
7 against innocent civilians, children, and babies.

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

16 But you know that Terry Nichols engaged in  
substantial  
17 planning and premeditation during the conspiracy  
because of the

18 letter that he wrote on November 5 to his cohort in  
crime,  
19 Timothy McVeigh. Terry Nichols was so concerned about  
the  
20 planning and the plotting of this crime that he let --  
he set  
21 forth the circumstances for the continuation of that  
plot even  
22 in the event of his own death. You can't get much more  
23 planning and premeditation than that.

24 And when you hear the testimony of the  
mitigating  
25 factors of Mr. Nichols, that he was a good father, that  
he

15906

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

8 about reading, writing, and arithmetic.

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

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

21           Once you analyze those three, as I said,  
statutory  
22 factors, there are three additional non-statutory  
aggravating  
23 factors that we present to you. And I suggest that  
these three  
24 factors will not be disputed. The first one is that  
the  
25 conspiracy offense in question was committed by Terry



Nichols

15907

no doubt 1 and it resulted in the deaths of 168 people. There's  
of 168 2 whatsoever that the conspiracy resulted in the deaths  
crime to 3 people. And that is the true horror of Terry Nichols'  
McVeigh 4 plot the bombing of the Murrah Building. His plot, his  
in the 5 criminal agreement, and his actions with Timothy  
6 resulted in the largest number of deaths from any crime  
7 history of America.

beyond 8 Not only can you find that aggravating factor  
that very 9 any possible doubt, we submit that you should weigh  
mitigating 10 heavily when you consider all of the aggravating and  
sentence. 11 factors you must analyze in determining Mr. Nichols'  
use the 12 Terry Nichols agreed to and participated in the plot to  
that 168 13 weapon of mass destruction, and whether he intended  
he 14 people die is irrelevant to this factor. The point is  
15 participated in the offense, the deaths resulted.

16                    You have already found in the guilt phase that  
deaths                17                    resulted from the conspiracy. This is why we have the  
18                    possibility of a death sentence for a crime such as  
this one.             19                    Terry Nichols conspired to do something that can only  
be                     20                    described as evil. He agreed to use a truck bomb  
against a             21                    building and against people who had no idea; and he  
didn't                22                    care, based on that agreement, whether those people  
lived or              23                    died.

24                    I ask you, isn't 168 incidents of reckless  
disregard            25                    for another person's life enough? If Terry Nichols  
didn't know

15908

1                    that there was a day-care center in the building and he  
agreed                2                    to bomb that building, he should have known. If he did  
not                    3                    care enough to find out who the targets were, should he  
somehow             4                    be rewarded with his life? No. He didn't have to  
agree with            5                    Timothy McVeigh to bomb the Alfred P. Murrah Building  
and the

6 people inside of it. Others said no to Timothy  
McVeigh. Terry  
7 Nichols said yes.  
8 In the end when you weigh these factors, ask  
9 yourselves if as the conscience of the community you  
want to  
10 tell Terry Nichols and others that his reckless  
disregard for  
11 168 human lives somehow makes his participation in this  
crime  
12 any less heinous.  
13 Terry Nichols didn't care who his victims  
were, and he  
14 did not take one step to ensure that the results of his  
15 criminal conspiracy would not total 168 deaths and 500  
wounded  
16 and injured. He didn't care. The results of his acts  
are not  
17 disputed. You found the 168 deaths resulted -- or you  
found  
18 that deaths resulted from his conspiracy. His  
responsibility  
19 is not diminished in any way, and you should find that  
this  
20 factor weighs heavy on the scales of justice when you  
decide  
21 what the just and reasoned and moral punishment is for  
a man  
22 who commits this crime.  
23 The second factor, the non-statutory  
aggravating

24 factor, you must weigh is that the committing of this  
25 conspiracy offense, Terry Nichols caused serious  
physical and

15909

1 emotional injury, including maiming, disfigurement, and  
Terry 2 permanent disability, to numerous individuals. Again,  
3 Nichols' actions caused all of these injuries. And the  
key 4 word here is "caused." That word does not mean  
specific intent 5 to do so. It is just like the deaths that resulted  
from the 6 conspiracy.

7 The injuries of Sue Walton, who two-and-a-half  
years 8 ago -- who -- excuse me, who two-and-a-half years later  
still 9 wears that contraption on her leg that looks like a  
torture 10 device, the injuries suffered by Captain Randy Norfleet  
that 11 ended his career as a Marine pilot were the result of  
Terry 12 Nichols' agreement and actions to bomb the Murrah  
Building and 13 the people inside of it.

14 And the scars on Sergeant Titsworth's face and  
heart

15 that he will carry with him as he lives with the  
reality that  
16 not only did he suffer serious injuries during his  
first day at  
17 the Murrah Building, but that he lost his youngest  
daughter,  
18 Kayla, four, even the emotional injuries to families,  
friends,  
19 rescuers, and survivors described for you were caused  
by Terry  
20 Nichols' choices and by Terry Nichols' actions.

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

25 The emotional injuries to people like John  
Youngblood,

15910

1 Jr., and Megan Allen who lost their fathers and go on  
in life  
2 without the guidance and love that only parents can  
give them,  
3 those are the results of Terry Nichols' choices.  
4 You heard information on this aggravating  
factor not

families and 5 to generate any undue sadness or sympathy for the  
from 6 the survivors but to give you the facts that resulted  
to hear 7 Terry Nichols' actions. As difficult as it was for you  
must rely 8 some of these stories, it's not the emotion that you  
9 on to make your decision.

10 But in some way, it is the facts of this case  
that are 11 the most tragic and long-lasting results of Terry  
Nichols' 12 conspiracy. The facts are that 168 people were killed.  
The 13 facts are that mothers and fathers were taken from  
their 14 children. The reality is sisters and brothers lost  
their 15 siblings in the blast. And the grim and unbelievable  
fact of 16 scores of parents who lost a total of 19 children from  
the age 17 of four months to five years in the bombing, that is  
not 18 emotion, unfortunately, that is not a nightmare. Those  
are 19 facts, facts you must consider when you determine if  
Terry 20 Nichols should be sentenced to life or death.

21 When you go back to deliberate and you put the  
emotion 22 aside, what you will be left with are all of those

facts, all

23 of those facts that were presented to you, as we are  
permitted  
24 to do, to prove those aggravating factors beyond any  
possible  
25 doubt.

15911

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

12 But amazingly enough, after all you heard  
during the

13 three days of the Government's penalty-phase  
information, it  
14 was just a glimpse into the pain and suffering these  
families  
15 have experienced. At times I'm sure it was more than  
you  
16 thought you could hear. Each story was sad and  
poignant in its  
17 own way. But the fact is the losses these families  
suffered  
18 are realities of this kind of horrible crime. There  
are so  
19 many terrible effects of a crime to bomb a federal  
building and  
20 the people inside of it. These are the consequences of  
Terry  
21 Nichols' choices.  
22 As one of you has said during jury selection,  
whoever  
23 participated in this crime played judge, jury, and  
executioner  
24 and had to know about the devastation it would cause.  
25 MR. TIGAR: Objection, your Honor.

15912

1 THE COURT: Yes, we'll strike that reference.  
2 MS. WILKINSON: The devastation began -- or  
the actual  
3 devastation began on April 19, 1995, but it continues



today.

years to 4 And it will be in the hearts of all Americans for many  
our 5 come. The impact on the families, the community, and  
6 country cannot be underestimated.

days 7 A few of the stories you heard in the past few

citizens, the 8 represent the impact of this crime on all of our

when 9 youngest ones like Don Ferrell's granddaughter who says

City 10 she plays with her dolls that they're going to Oklahoma

11 and they'll be killed by a bomb, or Glen Westberry's

light so he 12 five-year-old son who asked his mother to run a red

older 13 could die and go to heaven to be with his Paw Paw,

the loss 14 children like Karla Wade who described the effect of

the 15 of her father with so many eloquent words and also with

year-old 16 sadness of feeling like a 40-year-old woman in a 23-

the death 17 body, parents like Constance Favourite who felt like

when she 18 of her daughter, Lakesha Levy, happened twice, once

be 19 died in the bombing and the second time when she had to

Carl Brown 20 exhumed and buried again, and even grandparents like

Cooper, 21 who lost his daughter Dana and his grandson, Anthony  
22 and he also lost that day his will and desire to carve  
toys for 23 the only grandchild he had.

24 The impact on these people was quite personal,  
but  
25 there's also been an impact on every mother or father  
who

15913

1 thinks about sending their child to day care. It  
causes us to 2 look twice when we see an unattended Ryder truck  
outside a 3 building, and it makes us all wonder about the security  
of our 4 own citizens who were never before the victims of an  
act of 5 terrorism by our fellow Americans.

6 These are all the results of Terry Nichols'  
crime.

7 Sometimes it seems almost too hard to imagine and  
comprehend 8 the full extent of the damage, death, and destruction  
that  
9 occurred. The three days of testimony gave you a  
glimpse. But  
10 don't forget, it was only a glimpse of the suffering  
and loss

11 that resulted from Terry Nichols' actions. This was a  
crime so  
12 grave, so far-reaching that we could not bring you  
every  
13 victim, every survivor, and every family member that  
was  
14 affected by this tragedy. You saw just a few,  
unfortunately,  
15 who described for you in their own words the impact of  
this  
16 crime on them, a legitimate factor for you to consider  
when you  
17 determine Terry Nichols' sentence.

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

1 that the defense has presented to you.

2 You will see when you look at the special  
verdict form

3 that the defense has presented 14 mitigating factors  
for you to

4 consider, but these mitigating factors are different  
from

5 aggravating factors. Unlike the aggravating factors,  
you and

6 your fellow jurors do not have to agree that the  
defendant

7 proved each factor. The standard is that the defense  
has the

8 burden of proof to show by a preponderance of the  
evidence that

9 the mitigating factors have been proven. And some of  
these

10 factors we do not dispute. Terry Nichols has no  
criminal

11 record, and all 12 of you should so find. But there is  
a

12 serious dispute about some of the factors, and I wanted  
to

13 spend a few minutes addressing some of those factors  
that we do

14 not think Terry Nichols has proved.

15 The Judge will tell you that the burden is on  
the

16 defendant to proof by a preponderance of the evidence  
each of

17 the mitigating factors has been established. Some of  
you may

18 agree. Some of you may disagree. The special findings  
form  
19 allows you to record the number of jurors that agree  
that that  
20 factor was found. Of course that does not mean that  
every  
21 mitigating factor has to be given any particular  
weight. One  
22 of you may believe one factor was proven but may decide  
that it  
23 doesn't carry much weight when you balance those  
factors  
24 against the aggravating ones.  
25 No one in this courtroom will ever tell you  
that you

15915

1 must weigh the factors evenly, and that is the  
difficult part  
2 about your decision. You all must decide together and  
3 individually the weight you will give those factors and  
then  
4 how you weigh one factor against another.  
5 For example, if you find that Terry Nichols  
had no  
6 criminal record, that doesn't mean it has to be a  
significant  
7 factor in your weighing process. You all will decide  
what

8 weight to give each factor that is proven. But I want  
to  
9 discuss the factors we believe have not been proven and  
that  
10 none of you should find.

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

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

22 He agreed almost seven months before to bomb  
the  
23 Alfred P. Murrah Building and the people inside of it.  
He  
24 bought 4,000 pounds of ammonium nitrate almost six  
months  
25 before. He stole explosives around that time and  
assisted with

15916

1 the purchase of 1500 pounds of nitromethane. He wrote  
the  
2 letter five months before. He robbed Roger Moore and  
kept  
3 stolen property in his house. But perhaps most  
importantly, he  
4 knew about the plan for months and months. He had  
plenty of  
5 time to change his mind. And he didn't.

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

16 In fact, he did everything to cover his  
tracks. You  
17 know -- and it's not been disputed because Marife  
Nichols told  
18 you -- he lied to his own family about where he was  
going.  
19 That shows you he knew what he was doing was wrong. He  
didn't  
20 forget that he and Timothy McVeigh had agreed to bomb  
the  
21 Murrah Building in April of 1995. He knew that was the  
target  
22 of destruction. And so he didn't want his wife to have  
any  
23 idea that he had been in that city in the days before  
the  
24 bombing. So he lied to his wife that he now tells you  
he's  
25 such a loving husband to. And he lied to his son Josh  
and told

15917

1 him that even though it was the day before Josh was  
leaving to  
2 go home, he couldn't ride with him to Omaha because he  
didn't  
3 know if there would be enough room and what kind of  
trouble  
4 Timothy McVeigh was in.

5 His state of mind based on your findings is



clear that

6 day. He knew that he was going to help Timothy McVeigh  
leave

7 the getaway car in Oklahoma City, and he didn't care.

But even

8 up to 24 hours before the bombing, he helped Timothy  
McVeigh.

9 We proved to you that Terry Nichols built the  
bomb at

10 Geary Lake with Timothy McVeigh and that he lied about  
his

11 whereabouts that morning on April 18. Terry Nichols  
told the

12 FBI that he loaned Timothy McVeigh his car. At this  
point, it

13 doesn't matter which one you believe. Either way,  
based on

14 your finding that he knew the goal of the conspiracy,  
he was

15 assisting Timothy McVeigh with the plot. He knew that  
Timothy

16 McVeigh was going to bomb the Alfred P. Murrah  
Building, and it

17 didn't matter if he knew when or at what time. He knew  
that

18 was a goal; and on April 18, he built the bomb, or  
according to

19 Mr. Nichols, loaned his truck to Timothy McVeigh.

20 The months of the agreement, the actions that  
he took,

21 and all of the waiting show you that Terry Nichols was  
a

22 substantial player in this conspiracy. Terry Nichols

did many

23 things throughout the fall and spring of 1995. Do not  
say in  
24 your verdict that Terry Nichols had a relatively minor  
role in  
25 this conspiracy.

15918

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

12 But don't get me wrong. Michael Fortier did

an

bombing 13 unforgivable thing. When he failed to report the  
14 before it occurred, he did something that no one should  
ever 15 do. But that is not the crime that we are here to  
discuss. We 16 are here to discuss the conspiracy, the agreement, and  
the 17 actions to plot the bombing of the Murrah Building.

18 What Terry Nichols did that Michael Fortier  
did not do 19 was agree to bomb the building and the people inside of  
it and 20 then take action to participate in that conspiracy.  
The 21 defense has not met its burden of proving that anyone  
was 22 equally culpable of the crime, not Michael Fortier and  
23 certainly not any of the John Doe 2 suspects.

24 First, you should not find that any other  
suspect has 25 been proven because there is no evidence as to the  
actual

15919

1 identity of any John Doe 2 sighting. That would be  
pure 2 speculation on your part and inappropriate. And there  
has been

3 no evidence that if this John Doe 2 were ever  
identified that

4 he would not get the death penalty, so it would be  
wrong for

5 you to find that someone who was equally culpable for  
this

6 crime was not going to receive the death penalty.

7           The final factor or mitigating factor that I  
want to

8 discuss with you this morning is the one that says  
Terry

9 Nichols was under unusual and substantial duress.  
There is no

10 basis for that finding. The crime we are discussing  
here is

11 conspiracy. No one forced Terry Nichols to agree to  
bomb the

12 building and the people inside of it; and in the fall  
of 1994,

13 Terry Nichols wasn't under any duress. Terry Nichols  
had a

14 good job. He had a wife and a family. He chose, he  
made the

15 choice, to quit his job, send his family away, and  
conspire

16 with Timothy McVeigh. That is not duress. Where is  
the

17 evidence that Terry Nichols was under this supposed  
unusual and

18 substantial duress? Not just duress, but unusual and  
19 substantial duress. No one held a gun to his head and  
said:

20 Agree to bomb the building, or we'll kill you. He  
agreed in  
21 the fall on his own. You found that he knowingly and  
22 deliberately entered that conspiracy. That defies a  
finding of  
23 duress.

24 He also spent the fall and the spring  
participating in  
25 that conspiracy. Do not tell the community that you  
represent

15920

1 that Terry Nichols was forced to commit the crime of  
conspiracy  
2 to bomb the Murrah Building and the people inside of  
it. No  
3 one could have forced Terry Nichols to agree to that  
plan.

4 Terry Nichols could have done what everyone  
else did  
5 when Tim McVeigh discussed taking action against the  
6 government. They said no. Terry Nichols said yes.

And if  
7 there was any evidence that Terry Nichols was under  
unusual and  
8 substantial duress, he had every opportunity to do two  
things:  
9 He could have called the police and reported the crime.  
He  
10 could have told the police where Timothy McVeigh was,

where the

11 bomb components were, and he could have stopped this  
crime from

12 ever happening. And that would have ended any supposed  
duress  
13 that he was under.

14 But he got a second opportunity. On April 21,  
he knew

15 that Timothy McVeigh was in custody. He spoke to the  
FBI for

16 nine-and-a-half hours, and he didn't mention one word  
about

17 unusual or substantial duress. He didn't say that he  
was

18 forced to do anything. In fact, he lied about what he  
did, and

19 he lied about Timothy McVeigh. He said he trusted  
Timothy

20 McVeigh to live up to his agreements. If there had  
been any

21 duress, any force used on Terry Nichols to agree to  
bomb the

22 Murrah Building and the people inside of it, he could  
have

23 reported it when he knew Timothy McVeigh was safely in  
federal

24 custody, and he did not.

25 How can you permit a defendant who had every

commit 1 opportunity to tell the police that he was forced to  
that he 2 this crime to now claim, two-and-a-half years later,  
what those 3 was under unusual and substantial duress? You know  
mean. There 4 words mean. They mean exactly what you think they  
Terry 5 was no evidence that Timothy McVeigh held a gun to  
opportunity 6 Nichols' head for seven months. Terry Nichols had  
report the 7 after opportunity to get out of the conspiracy and  
8 crime to the authorities.

duress, 9 He never did it because he wasn't under any  
Terry 10 either usual or unusual, substantial or insubstantial.  
entered this 11 Nichols, as you found, knowingly and deliberately  
12 conspiracy.

forth by 13 Now, many of the other factors that are set  
you. 14 the defense are debatable, but I will leave those up to

findings 15 You all can decide among yourselves who believes those  
just 16 or those factors were proven and who does not. But  
and son 17 remember: As you review what kind of father, husband,

about 18 Terry Nichols was that he deceived everyone around him  
with 19 his plan to bomb the Murrah Building and his activities  
20 Timothy McVeigh.

what 21 Once you go through the process of determining  
the 22 factors have been proven, then you must sit down and do  
Some of 23 most difficult task. You must weigh those factors.  
matters is 24 you may disagree on the mitigating factors, but what  
just, moral 25 how you weigh those factors and how you determine a

15922

1 sentence for Terry Nichols.  
2 You were chosen as a body of 12 to make this  
decision.  
3 Each and every one of you must make a moral judgment.  
But you 4 are not alone responsible for the decision. Our  
citizens have 5 decided that 12 people are to the make this decision,  
not one.  
6 As one unanimous body, you must decide if a punishment  
of life 7 or death is warranted for Terry Nichols' crimes and for  
his



will 8 life. That is the simple but difficult question you  
speak as 9 confront. Confront it together, and remember that you  
10 the conscience of the community.

11 As such, you have the responsibility, the  
important 12 responsibility, to tell Terry Nichols and the citizens  
of this 13 country what a just sentence is. You must make that  
moral 14 judgment about the worth of Terry Nichols' life,  
balanced 15 against the societal value of the deserved punishment  
for this 16 crime. And your reasoned judgment must not be  
arbitrary. You 17 all know that this crime was heinous. You all know  
that this 18 was a crime against the American citizens, and you all  
know 19 that the impact of this crime was felt in every corner  
of our 20 country.

21 With that in mind, you must look at Terry  
Nichols, you 22 must look at his life and the actions that he took. We  
know 23 that what we're asking you to do is very difficult.  
But your 24 emotion, your sadness, your sympathy, or your  
preconceived 25 notions should not affect your moral, reasoned

judgment.

15923

1           Terry Nichols said yes. He made a choice, a  
knowing,  
2 informed choice. He chose with Timothy McVeigh to bomb  
the  
3 Alfred P. Murrah Building with a weapon of mass  
destruction and  
4 use it against the people inside. The consequences of  
his  
5 choices and his actions are 168 dead people and  
hundreds and  
6 thousands of injured. That is the crime that Terry  
Nichols is  
7 guilty of. When you look at that crime and you look at  
Terry  
8 Nichols, you will see that the just sentence, the  
sentence  
9 based on a moral, reasoned decision, is death.  
10           THE COURT: Members of the jury, we're going  
to take  
11 the recess before hearing from defense counsel. It is  
a little  
12 earlier than our normal time but a more appropriate  
time to  
13 break in. I don't want to interrupt counsel. And  
we'll be  
14 taking our recess for the usual 20-minute period.  
15           But before you go, I just want to explain

something

16 with respect to an objection made and sustained by me  
and the

17 requirement that you disregard the statement, which was  
when

18 Ms. Wilkinson made a reference to what she remembers  
one of you

19 may have said in the course of the jury selection.  
And, of

20 course, we ask each one of you separately and  
individually a

21 lot of things about what you thought with respect to  
penalty

22 and sentencing. And I just want to explain that I  
sustained

23 that objection and you must disregard. It isn't what  
you said

24 you thought before you came in here. That was a part  
of the

25 jury selection process. But what is the -- what are  
the

15924

1 important words for each of you on the jury is what you  
said in

2 the oath and agreeing in the oath not to go according  
to what

3 you think the law ought to be but what it is, as I  
explained it

4 to you and as I will explain it to you in more detail  
at the

5 conclusion of the arguments.

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

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

22 to avoid things outside the evidence.

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

24 You're excused.

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

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20 1 THE COURT: All right. We'll be in recess.

2 minutes.

3 (Recess at 9:53 a.m.)

4 (Reconvened at 10:11 a.m.)

5 THE COURT: Please be seated.

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

7 THE COURT: All right. Members of the jury,  
we're

8 ready to hear from defense counsel.

9 Mr. Tigar . . .

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

11 THE COURT: Counsel.

12 CLOSING ARGUMENT

13 MR. TIGAR: . . . Counsel, Mr. Nichols,  
members of the

14 jury, just shy of two weeks ago -- it was in the  
afternoon --

15 you came in and you rendered a verdict in this case.  
And since

16 that time, it would come as no surprise to you to know  
that  
17 pundits and hired lawyers and TV-talk-show hosts and  
lawyers  
18 and everybody has tried to figure it out. But the  
Judge is  
19 going to tell you in a few minutes when we're all done  
that all  
20 of that figuring and all of that posturing and all of  
that  
21 parading can't change a fact and it can't change the  
law. The  
22 verdict that you rendered is your verdict. It is  
final. It is  
23 binding on everybody in this courtroom, including the  
jurors  
24 who reached it.  
25 And I am not going to spend any time at all  
trying to

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1 tell you what you decided. I think that would be  
arrogance for  
2 me to tell you what you decided. Rather, I'm going to  
talk  
3 about the things that the Judge will when we're all  
done here  
4 tell you that are yet to be decided, keeping in mind  
that there  
5 is no going back on what's been done.

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

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

disgrace

24 to lawyers who do that.

25 So when I'm done, the prosecutors will get a  
chance to

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1 rebut. We won't have any chance to respond to that.  
But let

2 me talk about this process.

3 Your verdict was that Mr. Nichols was guilty  
of the

4 crime of conspiracy to carry out -- use a weapon of  
mass

5 destruction; that he was not guilty of use of the  
weapon of

6 mass destruction; that he was not guilty on Count  
Three, and

7 then with respect to those eight counts, an acquittal  
on the

8 first-degree and second-degree murder charges and a  
conviction

9 on the involuntary manslaughter.

10 Now, the Judge gave instructions at that time.  
And as

11 I say, I can't describe for you what it is that you  
decided,

12 and I don't think it's right for anybody to try to tell  
you

13 what it is that you decided. The Judge did permit you  
to



14 convict Mr. Nichols of the crime of conspiracy even if  
he did

15 not know all the details of the agreement or  
understanding or

16 even if he played only a minor role so long as he  
understood

17 the unlawful nature of the plan and voluntarily and

18 intentionally participated in it.

19 I ask you when you look at the effect of what  
you

20 decided on what you're going to do now to look back at  
the

21 instructions that the Court gave you at that time  
because it

22 was clear to us, although we might be wrong, that you  
had read

23 those instructions with extraordinary care and  
discussed

24 amongst yourselves what those words meant as you were  
making a

25 decision.

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1 Well, as you discussed what the words meant  
and then

2 applied them in your decision, that's the decision you  
made.

3 So you'll have them again so that you can go back and  
refresh

4 your mind about what it is that was involved in the  
things that

5 you did and what was involved in the things that you  
didn't do.

6 And if you do that, I suggest that you will  
avoid an

7 error such as the one made no doubt unintentionally by  
the

8 prosecutor in summing up: The crime he agreed to  
commit

9 happened. Well, the happening of it, I had always  
thought, was

10 Count Two and the agreeing part was Count One. But  
that, as I

11 say, will be before you to decide.

12 Now, why does the Government want you to reach  
a

13 verdict of death in this case? Well, they say it is to

14 vindicate some vision of the law. They say it is  
because of

15 certain facts that they have shown to you.

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

17 The process that you'll get into when you go  
back into

18 the jury room to deliberate is in three stages. The  
first

19 stage, as Counsel said, requires you to look at two  
findings.

20 And unless you are unanimous beyond a reasonable doubt  
as to

21 these, the process is over -- if you answer no; that  
is, there

22 is a reasonable doubt. You come back and the Judge  
sentences  
23 on Counts One as he will on Counts Four through Eleven  
in  
24 accordance with the law.

25 The first of these is "The defendant  
intentionally

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1 participated in an act contemplating that the life of a  
person  
2 or lives of persons would be taken or intending that  
lethal  
3 force would be used against a person."

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

9 The Government has spent a great deal of time  
this  
10 morning going back over the evidence in the earlier  
phase of  
11 the trial. Well, I'm not going to go back over it with  
them,

12 but I heard an extraordinary thing. I heard that  
Government  
13 urging you to find beyond a reasonable doubt that this  
happened  
14 based on the assertion which was repeated here that Mr.  
Nichols  
15 helped Mr. McVeigh build a bomb at Geary Lake on April  
18,  
16 1995. That assertion, I suggest, is like the 13th  
stroke of a  
17 grandfather clock in the night: It casts doubt not  
only on  
18 itself but upon everything you heard up to that point,  
because  
19 the evidence was initially from Mr. Wahl -- and you'll  
recall  
20 this and you'll have the chance to talk it over -- that  
there  
21 was a blue or a brown pickup out there; that it was  
parked next  
22 to a Ryder truck, and that was -- and Mr. Wahl had  
plenty of  
23 opportunity to observe. And then all of a sudden, that  
theory  
24 of the case that that -- those two trucks had been  
parked  
25 together to build a bomb came crashing down around the

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1 prosecutors' ears when it turned out that the  
description of

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

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

11 Then the Government spent some time in talking  
about  
12 these issues, telling you about Oklahoma City. Well,  
most of  
13 that evidence did come in in the trial of the earlier  
phase.

14 But you remember at this phase Mr. Norfleet, Randy  
Norfleet,  
15 the Marine. He had been to a prayer breakfast at the  
Myriad  
16 Convention Center near the federal building. He has a  
1992  
17 black Ranger pickup truck, a picture of which you saw;  
and he  
18 was in a hurry to get to the office and so he parked in  
front  
19 of the Murrah Building shortly before 9:00 and took the

20 elevator up. And he said he was amazed to find a  
parking place

21 in front of the Murrah Building at that hour of the  
morning.

22 Well, here we are again: How did the Ryder  
truck that

23 Timothy McVeigh was driving get a place to pull in that  
wasn't

24 already occupied in front of the Murrah Building at  
9:00 in the

25 morning? Well, two witnesses told you that they saw  
somebody

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1 with that Mercury before and shortly after the event so  
that

2 somebody could go in there and reserve or help to make  
sure

3 that that parking place would be available.

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

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

6 Well, then the second one: "The defendant  
7 intentionally and specifically engaged in an act of  
violence."

8 The Judge will tell that you a conspiracy can be an act  
of

9 violence but it need not be. That's for you to decide  
whether

doubt. That 10 you think that's satisfied and beyond a reasonable

11 lies within your discretion.

12 "Knowing that the act created a grave risk of death

13 such that participation constituted a reckless disregard for

14 human life." And there again, you'll go back to the verdicts

15 that you've already reached with respect to resulting death in

16 Counts Four through Eleven and you'll look at the evidence in

17 this case and you'll make a decision.

18 And, members of the jury, let me be clear again about

19 this: That at that point, if you -- unless you're satisfied

20 beyond a reasonable doubt that the Government has met that

21 burden, the process of deliberation is finished and the Judge

22 is the one that sentenced -- who does the sentencing.

23 Now, we did not hear in oral argument here -- maybe

24 we'll hear it on rebuttal -- but, you know, you heard 55

25 witnesses, and the Judge repeatedly cautioned you about those

1 things. And the only one that you heard that had  
anything to  
2 do with Mr. Nichols' intent was Mr. Dilly, William  
Dilly, who  
3 had been with him in the Army. And you remember Mr.  
Dilly. He  
4 came and said, well, everybody looked up to Terry  
Nichols,  
5 including Timothy McVeigh, although that was proof that  
somehow  
6 that Terry Nichols must have controlled Timothy McVeigh  
and not  
7 the other way around.

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

18 I do think it's important in considering these



first

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

24 I want also to emphasize a distinction that  
the  
25 prosecutors made. Lana Padilla was asked when she was  
here:

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1 Isn't it a fact that Terry Nichols and his son Josh  
built  
2 explosive things together? Yeah, they built pop bottle  
things,  
3 is what that turned out to be, to use on the farm  
during the  
4 time that they were together. To attribute that or to  
make  
5 that equivalent to some plan to blow up a building, we  
suggest,  
6 loses all sense of proportion.

7 If there had been any more to it than that,  
believe  
8 me, with 30,000 interviews and thousands of agents to

conduct

9       them, you would have heard about it. And the burden is  
theirs,  
10       not ours. The burden is theirs and it's beyond a  
reasonable  
11       doubt.

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

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

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1                   Then if you did get past that and say yes, you  
come to           2           Part 2; and if they don't make it past Part 2, once  
again it           3           goes back to the Judge.

4                   What's this first aggravator? What's the  
first one           5           they want you to find beyond a reasonable doubt?  
During the           6           commission of an offense under 18 U.S.C. Section  
844(d),           7           transportation of explosives in interstate commerce for  
certain           8           purposes. And the Judge will give you detailed  
instructions           9           about what that means, the intent with which one must  
act.           10           That's an aggravating circumstance that the Government  
must           11           either prove Mr. Nichols did directly or that he aided  
and           12           abetted. The definition of "aiding and abetting" is  
the same           13           one that you had in Counts Two and Three and Eight and  
Four,           14           Five, Six, on through Eleven in the first part of your  
15           deliberations. So it's exactly the same definition.

16                   What is the transportation of explosives that

is

17 alleged here? Well, is it from Kansas to Arizona? Oh,  
yes,

18 says the Government. That's Kansas to Arizona. And  
what is

19 the evidence of that? Why, Michael Fortier, of course.

20 Or it's from Arizona back to Kansas? And what  
is the

21 evidence of that? Michael Fortier, of course -- but

22 contradicted by the phone records because the  
Government's

23 theory was that Mr. Nichols came, got a key from  
Michael

24 Fortier, got the explosives, and met Tim McVeigh  
somewhere.

25 And the timing Michael Fortier described was absolutely

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1 contradicted by the phone records that show that Mr.  
Nichols

2 had, at the time Mr. Fortier said he was handing him a  
key,

3 been calling from Las Vegas, Nevada, which is 90 miles  
away.

4 The other evidence: transportation of  
nitromethane.

5 You heard the evidence, and I'm not going to tell you  
what to

6 think about it. That was, as I said in opening  
statement, the

7 man who didn't recognize a pickup truck and said that  
he sold

8 nitromethane to someone who looked like a possum.

9 With respect to the events shortly before  
April 19 --

10 that is, the three days -- again, you're going to have  
to

11 consider the relationship between that and the findings  
you've

12 already made with respect to Counts Two and Three.

13 Let's look at Michael Fortier for a minute,  
because

14 it's going to be relevant to some of the things we're  
talking

15 about here. Did Michael Fortier say no? The Judge  
instructed

16 you that one can become a member of the conspiracy  
without any

17 formal kind of agreement or a handshake. Michael  
Fortier

18 stored explosives, discussed the use of explosives,  
helped find

19 a storage shed, had explosives, wrapped up explosives  
in

20 Christmas paper, went to Oklahoma City, cased the  
building,

21 helped make a false ID, transported stolen weapons,  
committed

22 theft, had plastic barrels -- I mean, you remember that  
even on

23 redirect examination Government counsel said, "Well,  
you didn't

24 have any plastic barrels, did you?"

had for 25 "I had three of them, three 55-gallon ones I

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1 my trash."

Michael 2 We're not here to judge Michael Fortier.

3 Fortier will be sentenced to a term of imprisonment by  
a

4 federal judge, not Judge Matsch, not a judge in  
Oklahoma, for

5 the things that the Government asked him and required  
him to

6 plead guilty to. That's what's going to happen to him.

7 But for the Government to come in here and  
suggest

8 that beyond a reasonable doubt you should find that Mr.  
Nichols

9 committed some other crime or aided and abetted it  
based on the

10 testimony of Michael Fortier is subject, we suggest, to  
all of

11 the objections that we made the last time that I stood  
before

12 you and made a closing argument.

13 Then the second: "The defendant in the  
commission of

14 the offense knowingly created a grave risk of death";  
that is

15 to say that this defendant specifically knowingly  
wanted --  
16 knowingly created this grave risk of death to others.  
It isn't  
17 simply the risk of death was created -- and let me stop  
here  
18 and say again what I've said, I think, since the first  
time I  
19 stood here: We know what happened in Oklahoma City.  
We know  
20 the devastation that it caused. We were always and  
have always  
21 been prepared to acknowledge that fact to you. There  
isn't any  
22 question about that. And if you happened to look over  
at us  
23 while we were watching this evidence and think that  
maybe our  
24 reactions weren't what you would have expected, we've  
seen all  
25 the tapes. We've seen all the photographs. We've read  
all the

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1 victims' interviews. For two-and-a-half years, we have  
dealt  
2 on a daily basis with that reality and understood it.  
3 That is not the issue. Anytime you get to an  
issue in  
4 this case that requires you to find that there was

devastation,

5 that there was harm, that there was injury, I don't  
think the

6 evidence permits you to hesitate. But that is not the  
finding

7 you're being asked to make here. You're being asked to  
make a

8 finding about Mr. Nichols' relationship to that harm  
that we

9 all concede existed.

10 And then the third: "The defendant committed  
the

11 offense after substantial planning and premeditation to  
cause

12 the death." The word "premeditation" has been before  
you

13 before. You have confronted it in your verdict on  
Counts Four

14 through Eleven.

15 I'm not going to suggest to you that there is  
any

16 particular result that is required by your verdict.  
You know

17 what you decided, and I'm not going to insult you by  
telling

18 you what you decided. But the Government is asking you  
to find

19 that beyond a reasonable doubt, and we say to you that  
there is

20 at least a reasonable doubt as to that.

21 And so if you do not answer yes unanimously to  
these



22 three, once again, the matter comes back to Judge  
Matsch, who  
23 sentences Mr. Nichols along with his sentence on Counts  
Four  
24 through Eleven in accordance with the law.

25 Well, then we get to Part 3. Suppose that you  
did

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

6 Well, Judge Matsch will tell you that although  
we  
7 sometimes call it weighing, that's probably a mistake,  
because  
8 as I said in opening statement, you will be asked to  
make some  
9 decisions and then to reach inside yourselves to go to  
a place  
10 that you have never been, perhaps, and to make a  
decision. And  
11 because it's a place that is so deep inside you, it's  
not one  
12 that I or anyone else is permitted to be. Because it

is a

13 decision described as one of morals and conscience,  
it's one in

14 which I don't think that I or anyone else is permitted  
to try

15 to instruct you or to guide you or to suggest to you.

16                   These are decisions that you will make. And  
the

17 interesting thing about them is that when you look at  
these

18 things, this is something that with respect to  
mitigating

19 factors, if one juror finds a mitigating factor to have  
been

20 shown, for that juror, for that one of you, you'd say,  
I find

21 that and I vote it and I weigh it and that's going to  
be part

22 of my decision. So unlike this process of looking for  
some

23 sort of unanimity or uniformity, individual decision is  
the

24 watchword. And you'll see that on the form.

25                   And if you get that far, it will be clear that  
there

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-- that 1 were 168 people that died. Whether you find causation

2 is to say that his actions caused it or resulted in it

--

3 that's for you to find.

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

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

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

19 And then even if you thought that it was  
important or  
20 relevant for those, it only goes to the question of

what harm

21 was caused and not on the question of what Mr. Nichols'  
role or  
22 responsibility or participation was.

23 I feel now when I think about that evidence as  
though  
24 I'm standing before you and trying to sweep back a tide  
of  
25 anger and grief and vengeance. And I'm given pause by  
the fact

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1 that I feel that way, and I wonder if sometimes you  
might feel  
2 that way. But when I think that, then I think also of  
the  
3 instructions that the Judge is going to give you,  
because those  
4 instructions, as we contemplate this tide of anger and  
grief  
5 and vengeance, can get us all to higher ground, because  
the  
6 instructions will tell you that neither anger nor grief  
nor  
7 vengeance can ever be a part of a decision reached in a  
case of  
8 this kind.

9 I am, when I say this, not attacking these  
victims.

10 We know their sacrifice. But we know that with the

centuries

11 of our civilization piled so high that we have come a  
very long

12 way from justice based on vengeance and blood feuds.

13 This trial was moved from Oklahoma City  
because, I

14 submit to you, it was thought that even the neighbors  
of those

15 who lost so much would not do to sit in judgment. And  
to them,

16 therefore, we can only say when we hear their grief and  
their

17 anger and their desire for vengeance, "Bless those in  
need of

18 healing."

19 But when I talk about this process, I want to  
say that

20 I believe something else. And I don't want to say it  
in an

21 effort to reach into a place that I'm not entitled to  
be but to

22 share with you some thoughts about a concept of  
justice, to

23 share with you some thoughts that suggest that if you  
come to

24 this point you would turn your face towards the future  
and not

25 towards the past.

1                   We presented to you only nine witnesses. We  
could, as  
2                   I suppose the other side could for theirs, have  
presented to  
3                   you many, many more. But they told you about Terry  
Nichols,  
4                   the son of Robert and Joyce, the brother of Susie and  
James and  
5                   Les, the father of Christian and Nicole and Joshua, the  
husband  
6                   of Marife, the friend who had helped save the farm of  
Lyle  
7                   Rauh. Each of these witnesses lives in a community.  
And we  
8                   were trying to give you a picture of what Terry Nichols  
was  
9                   like, this -- his life that we're presenting to you.  
10                  And I was interested to see the reaction of  
the  
11                  prosecutors to that, because I respectfully submit to  
you that  
12                  it really wasn't fair. You remember when Donna Carino  
13                  testified, the midwife, about the home birth, and the  
14                  prosecutor took out an exhibit that the defense had but  
didn't  
15                  offer about whether or not the midwife had signed a  
form saying  
16                  there was no chromosomal damage, suggesting to you that  
maybe  
17                  there is something irresponsible about having a home  
birth with  
18                  a midwife because how could she know that.

ago 19 Well, I submit that that's not fair. 35 years  
I didn't 20 when my son was born at home and the midwife attended,  
tried for 21 think I was doing anything wrong; and if I was ever  
that ought 22 anything, I wouldn't suggest that that is something  
23 to be held against one.  
object to 24 MR. MACKEY: Judge, let me interject and  
25 personal rendition.

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1 THE COURT: Overruled.  
2 MR. TIGAR: Of course, my son did turn out to  
be a 3 public defender, and maybe that's something other than  
what one 4 would hope.  
5 MR. MACKEY: Same objection.  
6 THE COURT: Proceed.  
7 MR. TIGAR: I don't think that's fair.  
8 Letters: The prosecutor tells you he went  
away to the 9 Philippines and he didn't even think about Josh; all he  
thought 10 about was Tim McVeigh. Nonsense. Nonsense. You heard

the

11 evidence. You heard the evidence that early in  
November, Lana

12 Padilla wrote him a letter and said, "There is a  
problem with

13 Josh," and he dropped everything, he went home, he took  
Josh,

14 they went camping, he spent all that time with him.

15 You heard that he had been away from Marife  
for less

16 than two months, and he couldn't stand the fact that he  
was

17 away from her, so he changed the power of attorney on  
his

18 stock, changed the life insurance, put everything in  
storage,

19 went to the Philippines, and surprised her. You heard  
the

20 evidence.

21 And then they say that even in the letters he  
left

22 behind there was no concern for Josh. Well, members of  
the

23 jury, you'll have the letters. You just have to ask  
for them.

24 They won't all be in the room again for you to look at,  
but you

25 can get them. But you remember them.



1                   What does he say to Tim? The storage sheds  
are going

2                   to be -- the rent was up in February, not April,  
nothing to do

3                   with April. The pickup truck -- that's for Josh. Make  
sure

4                   that Marife gets the money. Give Josh this money.  
Give Josh

5                   that money. Here's the money I left behind the  
counter. I

6                   mean on and on for pages, members of the jury.

7                   Why is it necessary if you're going to ask 12  
people

8                   to sign a piece of paper that says go get him someday  
and take

9                   him and put him on a gurney and put poison in his veins  
-- why

10                  do they have to exaggerate? Why do they have to do  
that?

11                  Terry Nichols: Did he trust too much? Did  
Terry

12                  Nichols trust too much? Did he make that mistake? On  
the 4th

13                  of May, 1995 -- M621 -- the first letter he wrote after  
he was

14                  in jail. Now, mind you, all of this has happened.  
Here he is,

15                  he goes in, he talks to the FBI, they've recorded -- he  
doesn't

16                  know it -- they've recorded his conversation with his  
momma,

17                  they've got him in jail, and he writes a letter:  
"Mother --"

of. And 18 and he asks her to make sure that Marife is taken care

"See if 19 who does he ask her to turn to even at that moment?

Crabtree, FBI, 20 you can help her out by talking to Agent Scott

Nichols still 21 Salina, Kansas." On the 4th of May, 1995, Terry

least so far 22 thinks that Scott Crabtree could be his friend, at

23 as helping Marife Nichols.

moral 24 Well, I cannot instruct you, as I say, on the

25 choice. I can remind you that every one of the Judge's

15944

including the 1 instructions from the prior phase applies here,

the fact 2 one about no inference being drawn, no discussion of

something that 3 that Mr. Nichols did not take the stand. That's

with 4 is between Mr. Nichols and his counsel, a decision that

reasonably make. 5 further proceedings hanging over him, he might

6 MR. MACKEY: Objection.

7 THE COURT: Overruled.

8 MR. TIGAR: But it is something about which

the Judge

9 is going to instruct you.

list of 10 Now, if you get there, you're going to find a

that, a 11 mitigators at page 5 of your jury form and then after

individually, and 12 place to consider all of these things, each

life 13 then a place to sign that says do you think it's death,

to be 14 without possibility of parole, or some lesser sentence

Matsch to 15 decided by the Court, which sends it back to Judge

here, 16 consider in accordance with the law which binds us all

guilty of 17 and along with those counts on which you found him

18 involuntary manslaughter.

participation in the 19 Mitigator 1: That Terry Nichols'

for you 20 offense was relatively minor. The term "relatively" is

Judge's 21 to define. I've already read out the excerpt from the

him 22 instruction on Count One, which permitted you to find

minor 23 guilty of conspiracy even if you found he only played a

24 role. That's for you.

equally 25 Second, that another defendant or defendants

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Michael 1 culpable in the crime will not be punished by death.  
2 Fortier -- Michael Fortier was not asked to take a  
count that 3 would carry a death sentence. He wasn't even asked to  
do that. 4 His wife, Lori, is home with the kids. You heard what  
Michael 5 Fortier did. You heard his relationship with Timothy  
McVeigh; 6 and without suggesting for a moment that you should  
decide, try 7 to dictate to you one way or another, because again  
this is 8 bound up with what you did before -- you know what you  
thought 9 about that. That mitigator is in there for your  
consideration. 10 Duress. Why is that in there? Well, that's  
in there 11 because at one time Michael Fortier (sic) said, "I'm  
going to 12 force Terry Nichols to do it." I don't know what you  
thought 13 about that statement of Michael Fortier's made at a  
time when 14 he himself was carrying a gun because he was  
frightened, but 15 it's in there for your consideration.

16 No prior criminal record. Of course.  
17 A concerned and loving son.  
18 A concerned and loving father.  
19 A devoted and loving husband.  
20 These are by a preponderance, by the way. No  
one is  
21 requiring you to find or asking you to find that he was  
a  
22 perfect any of these. That is a standard, I suggest,  
that none  
23 of us could meet.  
24 Concern for the welfare of his family, even in  
25 difficult circumstances, to the point where when his  
mother

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1 would send him money to buy things that they don't give  
you  
2 when you're in the prison, his commissary money, he  
would turn  
3 right around and send that to Marife in the  
Philippines.  
4 That he's a caretaker for others including  
those not  
5 related to him by blood: Lyle Rauh, Simpson, Walsh.  
6 A creative person, who has tried to use his  
creativity  
7 for the benefit of others.

8 A positive impact on the lives of many people.  
9 Committed to self-improvement.  
10 Served honorably in the United States Army.  
11 And then one that may give you pause, if you  
get  
12 there, No. 14: That Terry Nichols is a human being.  
Well,  
13 you'll find it, I suggest; but this emphasizes the  
14 individuality of the decision that you're to reach, the  
15 decision that says that for each individual  
deliberating juror,  
16 the weighing, how much of it goes into this process of  
decision  
17 is for you; that ultimately, when the matter is in your  
hands,  
18 you're going to decide what feels for you to be this  
19 conscientious response, this reasoned moral response.  
20 Now, what if you get back there and somebody  
says: An  
21 eye for an eye? Well, you could start by saying: Wait  
a  
22 minute. Let's read the instructions. Shall we?  
Because there  
23 is no place for vengeance of that character in the  
decision  
24 that all of us here took an oath to administer.  
25 You took an oath with respect to the  
questionnaire,

and forth 1 another oath when we had you here to talk to you back  
well and 2 and asked all of those questions, and another oath to  
necessity and 3 truly try. And all of those oaths dealt with the  
4 importance of following the Judge's instructions.

5 But, of course, even then, an eye for an eye,  
appear, I 6 conscience of the community? Well, the words do  
God is 7 know, in the Old Testament. They appear at a time when  
blood feud 8 instructing the people of Israel about a system of  
court was 9 and vengeance. But later on even at that time when a  
called a 10 convened to decide who should live and who should die,  
could only 11 Sanhedrin, it was decided that a judgment of death  
stopped 12 be pronounced in the Temple. And so the Sanhedrin  
earliest 13 meeting in the Temple. And why? Because in the  
was 14 stages of the development of our cultural tradition, it  
directs that 15 recognized that when the law in its solemn majesty  
vengeance 16 life be taken, that can be crueler than deliberate

17 because it teaches, because it is a voice that comes  
from a  
18 place that is at war with a reasoned and compassionate  
system  
19 of social organization.

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

15948

1 to think about.

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

5 Nobody knows the depths of human suffering  
more than  
6 those who have been the systematic victims of terror;  
and yet  
7 in country after country, judicial systems are saying



that in

8 each case, the individual decision must triumph over  
our sense  
9 of anger. Even the Supreme Court of Israel freed from  
a death  
10 sentence a man found to have no direct participation in  
the  
11 deaths of people that he had been accused of killing.

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

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

23 The last time I spoke to you in a closing  
argument, I  
24 said some things. Let me finish now by noting: The  
25 recommendation you're going to make, if you get to the

point of

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1 choosing one of those three things, is binding on the  
Judge.

2 If you get to that point, you've got those three  
choices and

3 that's what's going to happen: death, life without  
parole, some

4 other sentence.

5 When I concluded my earlier summation, I  
walked over

6 to Terry Nichols and said, "This is my brother." And  
the

7 prosecutor got up and reminded all of us, thinking that  
he

8 would remind me, that there were brothers and sisters  
and

9 mothers and fathers all killed in Oklahoma City. Of  
course,

10 when I said, "This is my brother," I wasn't denying the  
reality

11 of that. I hope I was saying something else. I was  
talking

12 about a tradition that goes back thousands of years,  
talking

13 about a particular incident, as a matter of fact. You  
may

14 remember -- most of us learned it I think when we were  
young --

15 the story of Joseph's older brothers, Joseph of the  
16 many-colored coat, now the "Technicolor Dream Coat" in  
the MTV  
17 version. And they were jealous of him, cast him into a  
pit  
18 thinking he would die, and then sold him into slavery.  
And  
19 years later, Joseph turns out to become a judicial  
officer of  
20 the pharaoh, and it happens that he is in a position to  
judge  
21 his brothers. And his brother Judah is pleading for  
the life  
22 or for the liberty of the younger brother, Benjamin;  
and Joseph  
23 sends all the other people out of the room and  
announces, "I am  
24 Joseph, your brother." That was the story, that was  
the idea  
25 that I was trying to get across; that in that moment,  
in that

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1 moment of judgment, addressing the very human being,  
his older  
2 brother Judah, who had put his life at risk and then  
sold him  
3 into slavery, he reached out, because even in that  
moment of  
4 judgment he could understand that this is a human  
process and

5 that what we all share looks to the future and not to  
the past.

6 Members of the jury, we ask you, we suggest to  
you,

7 that under the law, your judgment should be that this  
case go

8 back to Judge Matsch and that he reach the just and  
appropriate

9 sentence under the law and under the verdict that  
you've

10 already reached.

11 I won't have a chance to respond to what the  
12 prosecutor says, but I know that after your 41 hours of  
13 deliberations on the earlier phase, you're all very,  
very

14 accustomed to thinking up of everything that could be  
thought.

15 My brother is in your hands.

16 THE COURT: Mr. Ryan . . .

17 REBUTTAL ARGUMENT

18 MR. RYAN: Thank you, your Honor.

19 May it please the Court . . .

20 THE COURT: Counsel.

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

22 Nine weeks ago, we began this process. As  
23 Ms. Wilkinson told you earlier, you've heard a lot of  
evidence,  
24 seen a lot of witnesses, over 150, 160 witnesses, seen  
many

25 exhibits. You've deliberated. And I'm confident  
you've heard

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1 more about the Oklahoma City bombing and its effects  
than you  
2 really wanted to know, information that I told you when  
we  
3 began this process would be painful for you to hear.  
And  
4 finally, you've heard information about the defendant,  
Terry  
5 Nichols. In the months and years ahead, the witnesses,  
even  
6 the important witnesses, the exhibits, your memory will  
begin  
7 to fade.

8 But there is one thing that no one of us will  
ever  
9 forget, and that is that a tragedy befell Oklahoma City  
on  
10 April 19, 1995, a terrible, terrible tragedy. And  
unlike other  
11 tragedies in history, this was no act of God. This was  
not an  
12 earthquake or a flood. It was not a ship running into  
an  
13 iceberg. It was not a disease or a tornado or a  
plague. This  
14 was an act that resulted from the conspiracy of two

men,

15 Timothy McVeigh and Terry Nichols. It was an act of  
injustice.

16 Injustice.

17 Now, there is nothing you can do as a jury to  
bring

18 back to life those who died. There is nothing you can  
do to

19 make whole the bodies who were maimed --

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

22 THE COURT: Overruled. You may proceed.

23 MR. RYAN: -- or the injuries that so many  
people

24 received, and there is nothing you can do to mend the  
broken

25 spirits of those who remain. But it is your  
responsibility to

15952

1 write the final chapter in the history of the Oklahoma  
City

2 bombing. It's your duty. It is your responsibility.

3 And that chapter should read history -- should  
record

4 that history reflects that justice was done in this  
trial.

5 You've been selected by both the United States  
and the

6 defense to act as the conscience of the community in  
this case,  
7 and you've seen it. You've seen what occurred and  
you've seen  
8 the tragedy that resulted in Oklahoma like few people  
in this  
9 world will ever see.

10 If this had been a case involving a conspiracy  
to  
11 result in the death of a single person, you know, there  
is no  
12 question that that family member, family member from  
that  
13 deceased, should be brought before you to tell you  
about the  
14 impact of that crime. I hope we did not offend you by  
bringing  
15 you 39 members of 39 deceaseds' families. Please  
remember that  
16 129 families had to be told that they could have no one  
testify  
17 in this case.

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

21 Judge Matsch advised you early in this  
proceeding  
22 there were three choices that you have with respect to  
a  
23 sentence. The first was a choice of the death penalty,

a

24 choice to be made by the jury. The second option was  
life  
25 imprisonment, again an option only available as a  
sentence by

15953

1 the jury. And the third option is a lesser sentence,  
some  
2 lesser term of years than life to be decided by Judge  
Matsch.

3 MR. TIGAR: Objection, your Honor.

4 THE COURT: Overruled.

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

11 If you do, then the option is Judge Matsch.

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

14 MR. RYAN: I'm sorry, your Honor. I



misunderstood

15 your instructions to us last week.

16 THE COURT: Proceed.

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

18 me urge you that in a crime that resulted in the deaths  
of more

19 people that can fill this entire courtroom at this  
moment, a

20 sentence of less than life would be an unconscionable  
result.

21 It would be simply unconscionable.

22 MR. TIGAR: Object, your Honor.

23 THE COURT: The objection is overruled.

24 Let me just say now to you, members of jury,  
that I

25 will be telling you that if you choose to have as your  
decision

15954

1 in here a sentencing to be done by the Court, the Court  
would

2 sentence according to law and include all of the  
options that

3 are available, and there are certain guidelines that  
the Court

4 would follow. I'm not going to go through all of those

5 guidelines with you. But, of course, that can mean a  
sentence

6 of less than life.

7 jury, that

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

8 life

the only real choice in this case is the choice between

9 this

imprisonment and death. The facts and circumstances of

10 less

case simply do not warrant the option of a sentence of

11 results, a

than life. For a crime of this nature with these

12 moral

sentence of less than life would never, ever be the

13 conscience of the American community.

14 about these

Now, defense counsel spoke to you earlier

15 first

steps that the Court will instruct you upon. And the

16 step with

step that was discussed with you by Mr. Tigar was the

17 this

respect to the intent of the defendant in entering into

18 room after

conspiracy. Now, when you get a -- back in the jury

19 findings

the Court has instructed you, you'll receive a special

20 counsel

form for you to examine. And contrary to what defense

21 "murder"

said to you moments ago, you will not find the words

22 "malice"

or "kill" or "intent to murder" or "intent to kill" or

23 or "malice aforethought" anywhere in that verdict form.

24 And it's not like premeditation that you were

25 instructed on with respect to the murder counts.  
You're not

15955

1 being asked to respond with respect to the intent to  
commit

2 murder. You've already done that. And that's why  
those words

3 are not in this instruction.

4 These instructions deal with issues such as  
was it

5 contemplated when this conspiracy was entered into that  
death

6 would result. That's the intent element.

7 The second hurdle, according to the defense,  
is the

8 question of the statutory aggravating factors. Those  
were

9 discussed with you briefly this morning, and I won't  
repeat

10 that. I will simply note defense counsel gave short  
shrift of

11 that aggravating factor that deals with did this  
conspiracy

12 pose a grave risk of death to others.

13 I intend to speak to you some this morning  
about how

14 you might look at the mitigation that was offered in  
this case  
15 by the defense, the perspective that you might bring to  
that  
16 mitigation.

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

22 But please consider this: Don't think the  
fact that  
23 Terry Nichols is a human being or that he made  
Christmas  
24 pinatas or he drew pretty pictures while he's been in  
prison is  
25 some type of real mitigation, is some sort of  
justification for

15956

1 this crime. If you give that any weight, it should be  
very  
2 little, particularly when you place that up against --  
side by  
3 side with the aggravating factors shown in this case  
through

4 the evidence that you've heard.

5 The defense has put on a good deal of  
information

6 about the life of Terry Nichols, called several  
witnesses, told

7 you about that life; that he came from a good family,  
he had

8 loving parents, parents and a family that were so nice  
they set

9 aside what they were doing to go help a neighbor who  
was

10 needing his cows to be milked. A respected farm  
family,

11 according to his sister.

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

13 had loving parents, and he had supporting siblings,  
supportive

14 brothers and sisters.

15 This is not a reason or a justification for  
conspiring

16 with Tim McVeigh to use a weapon of mass destruction  
against

17 the Murrah Building.

18 They also presented information to you about  
the fact

19 that Terry Nichols is intelligent; that he was  
educated; that

20 he was creative; that he was artistic. They showed you  
a Terry

21 Nichols who had the financial means to take his family  
snow-

Terry 22 skiing, water-skiing, to vacation in Florida. Clearly,  
23 Nichols had all the advantages.

24 But when you think about this -- and the  
perspective

25 that I ask you to approach this information with is, is  
this

15957

1 information mitigation? Does it really mitigate the  
offense?

2 Terry Nichols did not grow up in a crime-  
ridden

3 neighborhood. He didn't have a mother who was on crack  
4 cocaine. He didn't have an absent father when he was a  
child.

5 He wasn't born with fetal alcohol syndrome. He wasn't  
taught

6 to hate. He wasn't deprived of moral guidance. He  
wasn't born

7 with some type of mental defect or learning disorder.

8 The facts I've just mentioned -- they might be  
real

9 mitigation for some crimes, but that's not the  
information that

10 you've heard.

11 If anything, the information you heard makes  
it more

12 difficult to comprehend and understand what would make  
someone

no 13 enter into this type of conspiracy, a conspiracy with  
14 parallel in American history.

okay to 15 Surely the defense is not suggesting that it's  
16 execute someone who comes from a ghetto or from a lower  
class 17 than to treat someone with all the advantages  
differently,  
18 better, to spare his life.

equal 19 In this country, we have, or we should have,  
20 treatment for all. And I urge you to reject this type  
of  
21 emotional bond that the defense has tried to build that  
Terry  
22 Nichols is like us, he's not so horrible, he's just  
like one of  
23 us.

Nichols 24 Terry Nichols is not like one of us. Terry  
25 conspired to use a weapon of mass destruction, a truck  
bomb,

15958

1 against a building in a downtown metropolitan  
community.

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

4                   The remaining mitigating factors that you  
heard about

5                   Mr. Tigar discussing this morning, or many of them,  
revolve

6                   around the notion that Terry Nichols was a loving son,  
a loving

7                   husband, and a loving father. Was he a loving son?

8                   You heard that Terry Nichols went to Michigan  
where

9                   his mother lives in April of '95 to attend gun shows.  
While he

10                  was in the area, he stopped by her house only to find  
that she

11                  was in Florida.

12                  You received a great deal of information,  
stacks and

13                  stacks, sheets, about phone records made by Terry  
Nichols.

14                  You'll not find a record there where Terry Nichols  
called his

15                  mother, Joyce Wilt.

16                  Was he a loving father? Mr. Tigar reminded  
you this

17                  morning about that call between Lana Padilla and Terry  
Nichols

18                  in November of 1994, a couple of days after the Roger  
Moore

19                  robbery. Lana Padilla didn't know how to find Terry  
Nichols.

20                  She had to write a mail drop in Manhattan, Kansas, to  
ask him

21                  to please call home so she could talk to him about



Josh.

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

15959

1                   The defense called Lana Padilla to say what  
you would  
2                   expect the mother of his child to say. And it wasn't  
moments  
3                   later they called witnesses to trash her.  
4                   And remember that one of the skills that Terry  
Nichols  
5                   taught his son, his 11-year-old son, was how to make an  
6                   explosive. It was belittled today as a small  
explosive. And  
7                   remember how Terry Nichols when he went to go to the  
8                   Philippines in November of '94 -- how he left 200 pages  
of  
9                   antigovernment rhetoric with Barry Osentoski with one  
request:  
10                  Please teach this information to Josh Nichols.  
11                  MR. TIGAR: Objection, your Honor. This  
misstates the  
12                  evidence.

and can 13 THE COURT: Well, the jury knows the evidence

14 consider whether it's a misstatement.

15 Proceed.

husband? 16 MR. RYAN: Remember -- was he a loving

to the 17 Remember how Terry Nichols sent Marife and his daughter

remember 18 Philippines so he could go be with Tim McVeigh? And

and 19 when defense counsel -- when Marife was on the stand

Nichols to 20 defense counsel said there is 117 calls from Terry

Philippines? 21 Marife during the six months she was in the  
They

those calls 22 neglected to tell you that only a tiny fraction of

time of 23 were ever completed. Five. Five calls for a total

24 less than an hour and a half.

Easter 25 This is a man, a husband, who got up from

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went to 1 dinner three days before the bombing, left his family,

lied to 2 Oklahoma City to be with his friend, Tim McVeigh, who

3 his wife about where he was going, lied to his wife  
about what  
4 he was doing the week before the bomb, a man who only  
now  
5 prepares Valentines and Easter cards knowing that one  
day they  
6 would be exhibits in a hearing.  
7           Would a loving son, husband and father commit  
an act  
8 of terrorism and leave his family to pick up the  
aftermath?  
9           You know, I say these things to you about him,  
Terry  
10 Nichols, as a son and a father and a husband not  
because he  
11 deserves the death penalty for the way he treated his  
family,  
12 simply to point out that that's not really mitigation.  
His  
13 actions towards his family are not mitigation. We're  
asking  
14 for the death penalty because of the crime he  
committed, an act  
15 of terrorism.  
16           The nine witnesses the defense called  
attempted to  
17 tell you the story of Terry Nichols; but you know they  
didn't  
18 tell you the whole story, not by any means. There were  
no  
19 photographs, there was no testimony about what occurred  
the  
20 year before the bombing, how he treated his family

during that

21 year. You know at some point in his life something  
went

22 terribly wrong; and when something went terribly wrong  
in his

23 life, it went terribly wrong for 168 people in Oklahoma  
City.

24 Terry Nichols is a product of his choices, as  
25 Ms. Wilkinson reminded you. He chose to leave the  
family farm

15961

1 in Michigan, he chose to leave the Donahue farm in  
Kansas to be

2 with Tim McVeigh, and he chose to enter into this  
conspiracy.

3 Now it's time -- it's time for Terry Nichols to accept  
4 responsibility for his actions.

5 One of the mitigating -- claimed mitigating  
factors

6 mentioned by the defense this morning was that there is  
another

7 defendant who is equally culpable to Terry Nichols who  
didn't

8 get the death penalty. As Ms. Wilkinson pointed out,  
we can't

9 charge someone that we can't identify, so you must  
disregard

10 all of that information about whether or not there is  
someone

found, 11 out there. If there is someone out there and they're  
12 they'll be prosecuted.

13 What he's referring to is Michael Fortier.  
But before

14 I respond to that argument, let me make one thing very  
clear:

15 We are not here to defend Michael Fortier. Michael  
Fortier, as

16 Ms. Wilkinson reminded you, could have picked up a  
telephone,

17 called the police, and most likely prevented this  
tragedy.

18 What he failed to do is indefensible. His omission is  
19 unforgivable.

20 But Michael Fortier is not as culpable as  
Terry

21 Nichols. Michael Fortier did not rent two storage  
lockers in

22 Council Grove, Kansas, to store bomb components. Terry  
Nichols

23 did that.

24 And Michael Fortier did not clean out Terry --  
Tim

25 McVeigh's locker in Herington the day after the  
Oklahoma City

15962

1 bombing. Terry Nichols did that.

in 2 And Michael Fortier did not steal explosives  
Nichols 3 Marion, Kansas, and transport them to Arizona. Terry  
4 did that.

5 And Michael Fortier did not go to Ennis,  
Texas, to buy 6 nitromethane with Tim McVeigh. Terry Nichols did that,  
too.

7 And Michael Fortier did not sell gold coins to  
finance 8 the purchase of the nitromethane. Those were the acts  
of Terry 9 Nichols.

10 And Michael Fortier did not buy 4,000 pounds  
of 11 ammonium nitrate, the main charge of this bomb. Terry  
Nichols 12 did that.

13 And Michael Fortier did not obtain the Bridges  
credit 14 card under an alias name and share it with Tim McVeigh,  
a 15 call -- a card that was used to make telephone calls to  
acquire 16 bomb components. That was a card that Tim McVeigh  
shared with 17 Terry Nichols.

18 Michael Fortier did not rob Roger Moore, and  
Michael 19 Fortier did not knowingly and intentionally drive five  
hours

20 each way on Easter Sunday to help Tim McVeigh stash the  
getaway  
21 car. And central Kansas is a place that Michael  
Fortier was  
22 nowhere near in April of '95. That was Terry Nichols'  
23 backyard.

24 The next factor, mitigating factor, the  
defense claims  
25 is that Terry Nichols' role in the conspiracy was a  
minor one.

15963

1 I want to remind you with respect to this that this  
burden,  
2 unlike the other burdens in this case, is on the  
defense. They  
3 must prove to you by a preponderance of the evidence  
that Terry  
4 Nichols had a minor role in the conspiracy.

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

9 You are not -- and I emphasize not --  
analyzing what  
10 his role was in taking the truck bomb to Oklahoma City

and

will 11 igniting the bomb. That's not the crime. The Court

12 instruct you on this. It's the role in the conspiracy.

13 And, you know, who is to say how this  
conspiracy got

14 started, who influenced who. Whose idea was it: Was  
it Terry

15 Nichols', or Tim McVeigh's to bomb the Murrah Building?

16 The evidence is that both of these men were  
upset with

17 the government. And you remember the testimony of  
Marife. She

18 was so concerned about Terry Nichols' antigovernment  
views that

19 she called Terry Nichols' mother to ask for guidance.

20 Both these men were upset over Waco, both had  
21 antigovernment material, both shared antigovernment  
feelings.

22 And remember, please, when you deliberate that Terry  
Nichols is

23 12 years older than Tim McVeigh. You heard from Dave  
Dilly.

24 Mr. Tigar talked about him this morning. The one thing  
that

25 came out clear from his testimony is that as between  
the two



1 men, Terry Nichols was the leader, Tim McVeigh the  
follower.

2 You've heard how intelligent Terry Nichols is. You've  
heard

3 how he was the platoon leader the entire time these  
men's

4 company was being in Army training.

5 And you heard how Tim Mc -- excuse me -- and  
you heard

6 how Terry Nichols knew how to make an ammonium nitrate  
bomb

7 well before he ever met Tim McVeigh. By your verdict,  
you've

8 already found that Terry Nichols knowingly and  
deliberately

9 entered into this conspiracy. You have found that it  
was

10 foreseeable that death would result from this  
conspiracy. And

11 you know all of the actions that Terry Nichols took  
right up

12 until the end. These were not minor actions.

13 You know, minor role might be someone who gave  
the

14 plans of the Murrah Building to his co-conspirators or

15 suggested a place to rent a truck where they wouldn't  
ask for

16 identification. But a minor role is not someone who

17 deliberately and knowingly planned the attack,  
purchased and

18 stole the components and stored them in lockers and  
stashed a

not met 19 getaway car days before the bombing. The defense has  
role. 20 its burden of proving that Terry Nichols had a minor

21 The final mitigating factor raised by the  
defense was 22 that Terry Nichols was under some sort of unusual or  
23 substantial duress. Defense counsel didn't talk long  
about 24 that and for good reason. There is not much to say.  
He picked 25 out a line that Michael Fortier told you about where  
Tim

15965

1 McVeigh said, "I think I can make Terry do it." This  
is the 2 same Michael Fortier that just two weeks ago the  
defense was 3 calling this crazed methamphetamine user. Either  
accept his 4 testimony or don't, but don't allow the defense to pick  
and 5 choose what they like.

6 The burden of duress -- proving this is upon  
the 7 defense. And they haven't met that burden. They  
called no 8 witnesses, introduced no exhibits. Who knows what Tim  
McVeigh

9 meant when he said that to Michael Fortier? Was he  
bragging?

10 Was he trying to sound like a tough guy? Was it some  
ploy to

11 recruit Michael Fortier? Who knows? But one thing is  
clear:

12 The statement that we're talking about was made in  
March of

13 1995, a time frame after which Terry Nichols had  
already done

14 quite a number of things. And you recall those things,  
and I

15 won't discuss them further with you. But the bomb  
components

16 were already in storage under aliases of Ted Parker and  
Joe

17 Kyle.

18 You've not heard any evidence at all, not a  
shred,

19 that Terry Nichols was ever afraid of Tim McVeigh or  
that Terry

20 Nichols was ever threatened by Tim McVeigh. And as  
21 Ms. Wilkinson pointed out, Terry Nichols spent nine  
hours with

22 the FBI at a point in time that Tim McVeigh was well in  
custody

23 and of no possible threat, and he mentioned not a word  
of

24 duress. And he didn't mention it for a reason: There  
was no

25 duress. These were his voluntary actions.

15966

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

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

12                  As you deliberate in this case and you  
consider these  
13                  matters of mitigation and aggravation, I ask you to  
think of  
14                  the lady of justice with the blindfold across her eyes  
and a  
15                  scale on each side. And when you think about the scale  
that  
16                  holds the aggravation and aggravating circumstances of  
this

17 case, think about 4,000 pounds of weight that causes  
that scale  
18 to fall. And when you think about the mitigation, the  
19 justification you've heard, think about grains of sand  
softly  
20 falling on the plate of mitigation.

21 This trial has almost come to a close. And an  
irony  
22 struck me this morning as I was preparing to come here  
today.  
23 From April, 1995, until January, 1998, over two-and-a-  
half  
24 years, Terry Nichols has received due process. The  
United  
25 States is such a remarkable country. He has had a full  
and

15967

1 complete trial. He's had extremely competent counsel.  
He's  
2 been afforded every right guaranteed by our  
constitution. He  
3 and his counsel participated in the selection of you,  
the jury.  
4 He's had numerous counsel including paralegals,  
investigators.

5 And I ask you: Where was the due process for the men,  
women  
6 and children of Oklahoma City, of the Murrah Building?

7 MR. TIGAR: Objection, your Honor.

had a 8 MR. RYAN: They never had a trial. They never  
They 9 team of lawyers. They never had a moment's warning.  
so 10 never had a chance to beg for mercy, as Mr. Tigar has  
11 eloquently done for Mr. Nichols today.

don't 12 And the mothers and fathers of the 19 children  
13 hold their babies, as Terry Nichols does every week.

this 14 I've talked to you -- I've spoken to you some  
What I'd 15 morning about what has not been proven in mitigation.

is what 16 like to talk to you in the few minutes I have remaining  
raised by 17 has been proven. You learned that Terry Nichols was

Nichols and 18 his family on a farm. You saw a picture of Terry  
never sit 19 his mother sitting on a tractor. Blake Kennedy will  
Oklahoma. 20 with his mother on a tractor on their farm in Amber,

the Boy 21 You saw -- and you heard about Terry Nichols,  
scouting. 22 Scout. Elijah and Aaron Coverdale will never enjoy

climb 23 You heard about Terry Nichols who liked to  
world from 24 trees. Jaci Rae Coyne died before she ever saw the

25 the top of a tree.

15968

1           You learned that Terry Nichols enjoyed walking  
on his           2           hands when he was a boy. You remember the video of  
Brandon       3           Denny, the child that you saw limping in the office of  
his           4           physical therapist. He can't even hold a bag of Animal  
              5           Crackers in his hand.

6           You saw a picture of Terry Nichols and his  
Christmas     7           pinatas. Antonio Cooper, Little Tone: He'll never  
take a       8           swing at a Christmas pinata. He'll never take a swing  
at a         9           ball.

10           You saw a picture of Terry Nichols holding his  
newborn     11          son -- excuse me -- newborn daughter. Mike Lenz will  
never       12          have a chance to coach his wife while she's pregnant,  
help her    13          in her delivery, be with that child and its mother when  
the         14          child is born; and he will never hold his son in his  
arms.

15           When you go back to deliberate and talk about  
the

16 case, consider first, if you will, please, the  
voluntary acts  
17 of Terry Nichols that led to the attack on the Murrah  
Building;  
18 second, consider the extreme consequences of those  
voluntary  
19 acts; and third, consider the excuses that were offered  
to you  
20 as justification for this crime.

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

25 And I thank you.

15969

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

4 JURY INSTRUCTIONS

5 THE COURT: Now, of course as I tell you in  
these  
6 instructions -- and you will have a copy of the  
original  
7 instructions that I gave you in detail at the close of



the

8 evidence in the case when it was given for you to  
decide on the

9 charges in the case, and I'm not going to repeat all of  
them

10 now. You'll have that in writing. But before I begin  
with

11 these instructions, I just remind you of two things  
said then.

12 One is, of course, that these arguments of counsel are  
just

13 that. They're arguments in the case and they are not a  
part of

14 the evidence or the information to be considered.  
That's what

15 came from the witness stand and the testimony of the  
witnesses

16 and the exhibits that were received.

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

18 appropriate for counsel in the case to state in their  
arguments

19 what they believe the law may be -- and there has been  
some

20 dispute about that and I've made some quick rulings  
here, but I

21 just want to remind you that if any difference appears  
to you

22 between the law as stated by any of the lawyers in the  
case and

23 the law as I give it to you in the instructions, you  
are, of

24 course, to be bound by the law as given to you by the

Court in

25 the instructions.

15970

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

11 Your prior verdict acquitted Mr. Nichols of  
Counts Two  
12 and Three and acquitted him of first-degree murder and  
13 second-degree murder on Counts Four through Eleven. I  
instruct  
14 you that these verdicts represent final and binding

15 determinations as to the issues that you necessarily  
decided in  
16 reaching your decisions; that is, as I have said, no  
party is  
17 entitled to ask you to change your verdict at this  
stage, nor  
18 are you entitled to do so under the law.

19           The statute defining the Count One offense, 18  
United  
20 States Code Section 2332(a), provides that if death  
results  
21 from the conspiracy, the punishment may be death,  
imprisonment  
22 for life without any possibility of being released, or  
any  
23 lesser sentence provided by law and decided upon by the  
Court.  
24 The selection among these three choices must be made by  
the  
25 jury. Even though you have found Mr. Nichols guilty of  
this

15971

1 charge carrying a possible death sentence, the law  
requires  
2 that you approach this sentencing decision with an open  
mind,  
3 able to give meaningful consideration to all possible  
4 sentences.

5           A copy of the indictment, a copy of your

completed

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

11 As I have told you previously, you must decide  
whether

12 the appropriate sentence for the defendant is: (1)  
death, (2)  
13 life in prison without possibility of release, or (3)  
some  
14 other lesser sentence to be decided by the Court. Your  
15 recommendation that the defendant be sentenced either  
to death  
16 or to life in prison without possibility of release  
will be  
17 binding on this court, and I will sentence the  
defendant  
18 according to your recommendation. In the event you  
choose the  
19 third option and recommend that the defendant receive  
some  
20 lesser sentence, I will impose some other lesser  
sentence than  
21 death or life in prison without the possibility of  
release in  
22 accordance with applicable law.

23 As I mentioned during arguments here, that  
will be

24 done according to certain guidelines, which I'm not  
going to go  
25 into you -- into detail with you now; but, of course, a

15972

1 sentence to a number of years -- and there is no parole  
in the  
2 federal system of sentencing. Under federal  
sentencing, the  
3 sentence of whatever number of years is the number of  
years the  
4 person serves. There is no parole board to release  
anyone  
5 early. So, of course, given the defendant's age, a  
sentence to  
6 a specific number of years could be a sufficient number  
of  
7 years as to be the equivalent of a life sentence for  
that  
8 person.

9 Now, before deciding on the appropriate  
punishment,  
10 you must consider additional information about the  
crime and  
11 about the uniqueness of the defendant as an individual  
human  
12 being. The parties have presented information  
pertaining to  
13 aggravating and mitigating factors at this sentencing  
hearing.

evidence 14 The information you may consider also includes the  
arriving 15 presented at trial and any fact findings you made in  
16 at your verdict. Thus, you may consider the testimony,  
17 exhibits, and stipulations offered by both sides during  
the 18 guilt phase and the parties were not required to  
reoffer that.

19 Based on your consideration of evidence  
presented at 20 trial and the information presented at this sentencing  
hearing, 21 you must make a series of findings to guide you in  
arriving at 22 a reasoned moral response to Mr. Nichols' crime,  
background, 23 character, and circumstances of the crime. These  
findings are 24 to be entered on the special findings form, and you  
will have 25 this form, each one of you, a draft copy of it. And it  
is in

15973

1 sections.  
2 Section 1 of the special findings form asks  
you to 3 decide what the evidence and information provided to  
you at the

Nichols' 4 trial and at the sentencing hearing proved as to Mr.  
Nichols 5 intentions. The Government has alleged that Terry Lynn  
6 engaged in the conspiracy with two types of intent:  
7 (1) That Mr. Nichols intentionally  
participated in an 8 act contemplating that the life of a person or persons  
would be 9 taken or intending that lethal force would be used  
against a 10 person or persons and the victim or victims died as a  
result of 11 that act;  
12 Second, that Mr. Nichols intentionally and  
13 specifically engaged in an act of violence knowing that  
the act 14 created a grave risk of death to a person or persons  
other than 15 a participant in the offense, such that participation  
in the 16 act constituted a reckless disregard for human life and  
the 17 victim or victims died as a direct result of the act.  
18 Participation in a conspiracy involves the act  
of 19 conspiring or agreeing with one or more other persons  
to commit 20 a crime. The act of conspiracy or agreeing to use a  
weapon of 21 mass destruction against persons and property may but  
need not

22 be considered to be an act of violence.

23 There can be no sentence to death or  
imprisonment for

24 life without release unless all of the jurors agree  
that the

25 Government has proven at least one of these intentions  
beyond a

15974

1 reasonable doubt. You will recall that the  
instructions given

2 at the close of the trial informed you that a  
reasonable doubt

3 is the kind of doubt that would make a reasonable  
person

4 hesitate to act in the most important of his own or her  
own

5 affairs. When you have unanimously agreed on your  
answers to

6 these two questions, the foreperson will write "yes" or  
"no" on

7 the appropriate lines on Section 1 of the special  
finding --

8 findings form for each of these two intent elements.  
If you

9 answer "no" with respect to both elements, then  
conclude your

10 deliberations, sign the certification in Section 6 of  
this form

11 and advise the Court that you have reached a decision.



If you  
intent  
to  
whether  
three  
is some  
death  
specifically  
three such  
death  
of an  
that is,  
certain

12 answer "yes" with respect to either or both of these  
13 elements, then continue your deliberations and proceed  
14 Section 2 of the form.  
15 Section 2 of the special findings form asks  
16 the Government has proved beyond a reasonable doubt  
17 statutory aggravating factors. An "aggravating factor"  
18 circumstance that tends to support imposition of the  
19 penalty. A "statutory aggravating factor" is one  
20 prescribed by Congress. The Government has alleged  
21 statutory aggravating factors:  
22 (1) That the deaths or injuries resulting in  
23 occurred during the commission -- during the commission  
24 offense under 18 United States Code Section 844(d);  
25 transportation of explosives in interstate commerce for

15975

1 purposes.

the  
death to  
offense.

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

conspiracy  
commit

5 (3) That the defendant committed the  
6 offense after substantial planning and premeditation to  
7 an act of terrorism.

established  
three

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

is that  
during the  
intent  
destroy  
aggravating  
doubt  
forth in

11 The first statutory aggravating factor alleged  
12 the deaths or injuries resulting in death occurred  
13 defendant's commission of another crime, the interstate  
14 transportation of an explosive with the knowledge and  
15 that the explosive will be used unlawfully to damage or  
16 any building or property. To establish this  
17 factor, the Government must prove beyond a reasonable  
18 each of the essential elements of that crime as set  
19 Title 18 United States Code Section 844(d). This was

not one

20 of the crimes charged in the indictment.

that:

21 That section provides, in pertinent part,

any

22 "Whoever transports . . . in interstate . . . commerce

used

23 explosive with the knowledge or intent that it will be

or other

24 unlawfully to damage or destroy any building, vehicle,

felony.

25 real or personal property shall be guilty of a federal

15976

the

1 There are two essential elements to this crime: First,

or

2 defendant must knowingly and willfully have transported

from

3 aided and abetted in the transportation of an explosive

done so

4 one state to another. Second, the defendant must have

be used

5 with the knowledge or intent that the explosive would

or other

6 unlawfully to damage or destroy any building, vehicle,

7 real property.

must have

8 To act knowingly and willfully, a defendant

9 been conscious and aware of his action, must have

realized what

10 he was doing, and must not have acted because of  
ignorance,  
11 mistake or accident. The defendant must also be shown  
to have  
12 acted with a bad purpose or evil intent; that is, he  
must have  
13 transported or aided and abetted in the transportation  
of the  
14 explosive with the knowledge or intent that it would be  
used  
15 unlawfully to damage or destroy any building, vehicle,  
or other  
16 real or personal property.

17 The term "explosive" means gunpowders, powders  
used  
18 for blasting, all forms of high explosives, blasting  
materials,  
19 detonators, and other detonating agents, smokeless  
powders, and  
20 any chemical compounds, mechanical mixture, or device  
that  
21 contains any oxidizing and combustible units, or other  
22 ingredients, in such proportions, quantities, or  
packing that  
23 ignition by fire, by friction, by concussion, by  
percussion, or  
24 by detonation of the compound, mixture, or device or  
any part  
25 thereof may cause an explosion.

1                   The second statutory aggravating factor  
alleged is 2  
3                   that the defendant, in the commission of the conspiracy  
offense 4  
5                   in the indictment, knowingly created a grave risk of  
death to 6  
7                   one or more persons in addition to the dead victims of  
the 8  
9                   offense. This aggravating factor requires the  
Government to 10  
11                  prove the defendant's conduct not only resulted in  
death but 12  
13                  also posed a significant risk of death to other persons  
who 14  
15                  were in close proximity to those who died in terms of  
time and 16  
17                  location. The defendant must have acted knowingly in  
creating 18  
19                  this grave risk of death to other persons, which means  
that he 20  
21                  must have been conscious and aware of the grave risk of  
death, 22  
23                  must have realized what he was doing, and must not have  
acted 24  
25                  because of ignorance, mistake or accident.

26                   The third statutory aggravating factor alleged  
is that 27  
28                  the defendant participated in the conspiracy offense  
after 29  
30                  substantial planning and premeditation to commit an act  
of 31

17 terrorism. "Premeditation" means that the defendant  
must have  
18 considered and reflected upon the plan at least long  
enough to  
19 give it a second thought. "Substantial" means that the  
20 planning and premeditation must be more than the  
minimum  
21 required for the commission of the offense. An "act of  
22 terrorism" means an activity that involves: (a) a  
violent act  
23 or an act dangerous to human life that violates federal  
law;  
24 and (b) appears to be intended to intimidate or coerce  
a  
25 civilian population or to influence the policy of a  
government

15978

1 by intimidation or coercion.  
2           The Government must prove at least one of  
these  
3 statutory aggravating factors beyond a reasonable  
doubt. You  
4 should write "Yes" or "No" on the appropriate lines on  
Section  
5 II of the special findings form to indicate your  
unanimous  
6 answers to the question of whether the Government  
proved the

doubt. 7 existence of such particular factor beyond a reasonable  
8 If you answer "No" with respect to all three factors,  
then 9 conclude your deliberations, sign the certification in  
Section 10 VI of the form, and advise the Court you have reached a  
11 decision. If you answer "Yes" with respect to one or  
more of 12 these three factors, then continue your deliberations  
and 13 proceed to Section III of the form.

14 Section III of the special findings form asks  
you to 15 find whether the Government has proved beyond a  
reasonable 16 doubt three additional aggravating factors, called  
17 non-statutory aggravating factors, it has alleged.  
Again, an 18 "aggravating factor" is a circumstance that tends to  
support 19 imposition of the death penalty. A non-statutory  
aggravating 20 factor is one that Congress has not specifically  
prescribed.

21 The three non-statutory aggravating factors alleged  
are:

22 (1) That the offense committed by the  
defendant 23 resulted in the deaths of 168 persons.

24 (2) That in committing the offense, the  
defendant

25 caused serious physical and emotional injury, including

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numerous 1 maiming, disfigurement, and permanent disability to  
2 individuals.

defendant 3 (3) That by committing the offense, the  
4 caused severe injuries and losses suffered by the  
victims' 5 families.

6 These non-statutory factors are self-  
explanatory and  
7 do not require further instruction. You should write  
"Yes" or  
8 "No" on the appropriate lines on Section III of the  
special  
9 findings form for each of these three non-statutory  
aggravating  
10 factors to indicate whether you unanimously find that  
the  
11 Government proved each factor beyond a reasonable  
doubt.

12 Regardless of your findings as to any non-statutory  
aggravating  
13 factors, you should continue your deliberations and  
proceed to  
14 Section IV.

15 Section IV of the special findings form asks  
you to



16 find whether the defendant has proved any mitigating  
factors by  
17 a preponderance of the evidence. Mitigating factors  
are not  
18 limited by statute. The law permits you to consider  
any  
19 relevant mitigating information presented by the  
defendant.  
20 "Relevant mitigating information" include -- includes  
anything  
21 in the defendant's background, record, or character, or  
any  
22 circumstances of the offense which suggests to you that  
a  
23 sentence other than death should be imposed. The  
defendant  
24 must prove the existence of mitigating factors by a  
25 preponderance of the evidence or information.

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1 A "preponderance of the evidence" or  
information means  
2 an amount of evidence or information sufficient to  
persuade you  
3 that a contention is more likely true than not true or  
that a  
4 factor is more likely present than not present.  
5 Not only is the burden of persuasion different  
for

6        aggravating and mitigating factors, the unanimity  
requirement  
7        that exists for aggravating factors does not exist with  
respect  
8        to mitigating factors. Any one or more jurors may find  
the  
9        existence of a mitigating factor and may then consider  
that  
10       factor in weighing the aggravating and mitigating  
factors even  
11       though other jurors may not agree that the particular  
12       mitigating factor has been established. This weighing  
decision  
13       must be made by each juror giving individual  
consideration to  
14       the aggravating factors unanimously found by all of the  
jurors  
15       and such mitigating factors as may be found by that  
juror.

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

23                                Because the findings of mitigating factors are

must 24 individual to each juror, the weighing that each of you  
each 25 engage in is necessarily an individual process. After

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the jury 1 juror has performed that individual weighing process,  
proven 2 as a whole must determine by unanimous vote whether the  
proven 3 aggravating factor or factors sufficiently outweigh any  
death. 4 mitigating factor or factors to justify a sentence of

mitigating 5 The process of weighing aggravating and  
simply 6 factors is not a mechanical process. You should not  
and 7 count the number of aggravating and mitigating factors  
consider 8 decide which number is greater, but instead you must  
you 9 the weight and value of each factor. Whatever findings  
factors, the 10 make with respect to aggravating and mitigating  
11 jury is never required to impose a death sentence.

conscience 12 Your role in this proceeding is to be the  
13 of the community in making a moral judgment about the

worth of

14 a specific life balanced against the societal value of  
what the  
15 Government contends is the deserved punishment for this  
16 particular crime. Your decision must be a reasoned  
one, free  
17 from the influence of passion, prejudice, or any other  
18 arbitrary factor. In this regard, I repeat the  
cautions that I  
19 gave you during the hearing with respect to particular  
20 witnesses.

21 After engaging in the process described above,  
the  
22 jury must record the moral judgment as to the  
appropriate  
23 sentence. The place for recording the sentence is  
Section V of  
24 the special findings form. The jury must write in on  
the line  
25 one of three possible sentences: (1) "Death"; (2)  
"Life in

15982

1 Prison -- Imprisonment Without Possibility of Release";  
or (3)  
2 "Some Other Lesser Sentence." Each member of the jury  
then  
3 should sign his or her name at the bottom of Section V.  
4 The jury, in considering whether a sentence of

death

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

13 So again, you will have, each of you, a  
working copy  
14 of the special findings form; and, of course, it simply  
goes  
15 step by step with these instructions and compares with  
the  
16 instructions that I have given to you; and each of you,  
of  
17 course, will have a copy of these instructions. And it  
simply  
18 has beside each -- or below each question the words  
"Yes" or  
19 "No" and a space provided and where the foreperson  
would write  
20 in your answers to these questions, be they "Yes" or  
"No," and

21 proceeds in the manner that I have instructed; and with  
respect  
22 to the mitigating factors, you will see them listed.  
And with  
23 respect to them, rather than a "Yes" or "No" finding,  
it simply  
24 describes the factor -- for example, that Terry  
Nichols'  
25 participation in the offense was relatively minor --  
and then

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1 it has number of jurors who so find. These are  
individual  
2 findings, as I've said, in these instructions; so the  
3 foreperson would simply write numerically the number of  
persons  
4 finding that, if it be zero, zero; if it be 12, 12, or  
of  
5 course any number in between.  
6 And then the form, as I say, tracks along with  
the  
7 instructions; and as I said in the instruction, it  
begins,  
8 Section I, with these two questions about intent and  
says that  
9 if you answered "No" with respect to both of the above,  
then  
10 you conclude your deliberations and you don't do the  
rest of

on that 11 it, you go directly to Section VI of the form and sign  
in the 12 if it be true, and you've arrived at a decision because  
the 13 absence of a finding of either of these intents, then  
Court for 14 matter is the equivalent of returning the case to the  
15 decision.

possibility 16 And the same is true with respect to the  
should 17 that on the statutory aggravating factors if the jury  
reasonable 18 determine that none of them has been proven beyond a  
because the 19 doubt, then again, you conclude your deliberations  
that's what 20 law requires at least one of those to be found. So  
and why 21 this means with respect to the sections in which you go  
22 this is a process that goes through those sections.

23 Then, of course, if one -- at least one of the  
is 24 intentions is found and one of the aggravating factors  
25 found, then you do complete all of the verdict form and

15984

statutory 1 including each of the -- consider each of the non-

factors 2 aggravating factors and consider each of the mitigating

3 that are set out on this special findings form.

4 And then, of course, ultimately, under the  
5 recommendations section, it simply has this "defendant,  
Terry

6 Lynn Nichols, shall be sentenced to," and there is a  
line upon

7 which the foreperson would write that decision, be it  
death,

8 life imprisonment without possibility of release, some  
other

9 lesser sentence to be decided by the Court. And then  
again

10 different from the original verdict form, each of the  
jurors

11 signs. And there is a space provided for the signature  
of each

12 juror; and finally the certification with respect to  
that no

13 discriminatory basis was applied here.

14 Now, if you'll excuse us for just a moment,  
I'm going

15 to have one last conference at the bench with counsel.

16 (At the bench:)

17 (Bench Conference 154B2 is not herein transcribed  
by court

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

19

20



21  
22  
23  
24  
25

15988

1 (In open court:)

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

8 Now, it is time to turn this matter to the  
jury for  
9 decision. And, of course, we've had 18 people in the  
jury box  
10 throughout this trial so that we would have alternate  
jurors to  
11 be available if need should arise.

12 12 of you in the first 12 chairs here are the  
ones who

13 deliberated and decided on the verdict in this case;  
and unless  
14 there be some reason or illness or something like that  
15 affecting any of you now, it will be the 12 of you who  
will  
16 decide.

17           Everybody ready on the deliberating jury to  
proceed?

18           All right. Then the six alternate jurors are  
now

19 excused in the case. We're not going to have you wait  
20 somewhere, because your job is now done. And of  
course, I know

21 you -- as was the case when I told you you weren't  
going to

22 participate in deliberations on the counts of the case,  
you may

23 have mixed feelings with respect to that; but I want  
you to

24 know that all of us involved in this case genuinely and  
25 sincerely appreciate the commitment that you have made,  
the

15989

1 time that you have invested, your attention to this  
case, and

2 your being a part of this trial. It is simply,  
however, the

3 law that 12 people make the decision; and as I've said,

there

that 4 is always -- and there always has been the possibility

And of 5 some person or persons would be unable to continue.

could 6 course, we wanted to be sure that we had 12 people who

7 decide in the case.

jurors 8 So what I am going to now ask of the alternate

counts 9 is, as was the case when I turned the decision on the

room and 10 over to the jury -- we'll ask you to go to the jury

stand by for 11 get your things and then go to a different room to

minutes 12 a few minutes, because I'll just visit with you a few

you're 13 before asking you to -- or discharging you. As I said,

from 14 not going to be standing by now. You'll be discharged

please 15 your duty in this case. So if the alternates would

16 proceed to the jury room and get your things.

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

discuss 18 THE COURT: And, of course, what I'm going to

talking 19 with the alternate jurors is that they're not to be

we're going 20 about this case while the jury is deliberating. So

the 21 to at this time, as soon as we get the clearance from  
to the 22 alternate jurors, members of the jury, have you retire  
until 23 jury room to begin your deliberations. But we'll wait  
to talk 24 those folks clear the area. So, of course, you're not  
jury. And 25 to them or to anybody other than the members of the

15990

you've 1 of course, in your deliberations, now, again the person  
deliberations 2 selected as the foreperson will preside over your  
3 in the manner previously followed.

look at 4 I've mentioned, I think, that if you want to  
your 5 any of the original exhibits, they can be provided at  
set up 6 request. We don't intend, unless it's necessary, to  
7 that exhibits room again but simply provide any other  
came in 8 exhibits -- from the trial, I mean. The exhibits that  
hearing, will 9 during this information, sentencing phase of the  
10 of course be provided to you now.

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

prepared?

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

13 THE COURT: Yes.

14 MR. TIGAR: Yes, your Honor.

15 THE COURT: Okay. We'll provide that to you;  
and

16 we'll also, of course, provide you with some lunch.

17 So, members of the jury, at this time, you  
will retire

18 to deliberate on the issues before you.

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

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

21 call.

22 (Recess at 12:10 p.m.)

23 \* \* \* \* \*

24

25

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9 \* \* \* \* \*

10 REPORTERS' CERTIFICATE

11 We certify that the foregoing is a correct  
transcript from

Dated 12 the record of proceedings in the above-entitled matter.

13 at Denver, Colorado, this 5th day of January, 1998.

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Paul Zuckerman

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Kara Spitler

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