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UNITED STATES V. MCVEIGH: DEFENDING THE "MOST HATED MAN IN AMERICA"

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I. Introduction

Windows shattered, buildings collapsed, and the lives of Americans were changed forever on April 19, 1995, at approximately 9:02 a.m., when an explosion destroyed the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma.[1] At least 168 men, women, and children were killed by the blast that injured over 500 others.[2] Some eighty minutes after the blast, outside of Perry, Oklahoma, state authorities arrested Timothy James McVeigh for weapons and traffic violations.[3] McVeigh was held on suspicion of his involvement with the bombing, and within days, a criminal complaint was issued alleging McVeigh's violation of 18 U.S.C. § 844(f), which

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1. *See* Nichols v. Alley, 71 F.3d 347, 349 (10th Cir. 1995) (noting that the explosion caused over $1,000,000 worth of damage and shattered over 100 windows). For a detailed description of the damage caused by the blast, see City of Oklahoma City Document Management Team, Final Report, Alfred P. Murrah Building Bombing April 19, 1995 (Apr. 16, 1996) (obtained by writing to Fire Protection Publications, Oklahoma State University, Stillwater, Oklahoma 74078-8045).

2. *See Nichols*, 71 F.3d at 349. The number is at least 168 because in addition to the identified 168, there was an unidentified left leg found in the debris caused by the bomb. *See* Jo Thomas, *McVeigh Defense Team Suggests Real Bomber Was Killed in Blast*, N.Y. TIMES, May 23, 1997, at A1. The McVeigh defense team advanced the theory at trial that the unidentified left leg belonged to the bomber. *See id.*

3. *See In re* Material Witness Warrant Terry Lynn Nichols, 77 F.3d 1277, 1278 (10th Cir. 1996) (finding appeal of material witness warrant moot upon filing of new arrest warrant).

makes it a crime "to maliciously damage or destroy by means of an explosive any building or real property, in whole or in part owned, possessed or used by the United States, or any agency or department thereof."[4]

The trial that followed McVeigh's arrest involved issues never before presented to the courts of the United States.[5] Each of these issues carries legal significance. Although some of the decisions were made in favor of the prosecution and some in favor of the defense, all carry import. While we all hope there is not another crime of this magnitude committed on American soil, there is much to be learned from an evaluation of what it took to convict those thought to be guilty of committing it. This article traces the matters involved and the decisions made in the *McVeigh* trial from the initial charging complaint to my withdrawal as counsel after the verdict and sentencing phase.[6]

II. Setting Forth the Complaint

As stated in the introduction, the initial charging complaint alleged a violation of 18 U.S.C. § 844(f). The information relied upon in the complaint stemmed from composite drawings of individuals thought to be involved in the bombing.[7] A former co-worker of McVeigh identified him as one of the individuals in the composites that were shown on television.[8] At that time, authorities learned that McVeigh was being held in Perry, Oklahoma, in relation to firearm and traffic violations, and issued the complaint.[9]

After the State dismissed its charges, McVeigh was transferred, in front of a mob of people booing and shouting "murderer" and "baby killer" at him, from the Noble County Jail to Tinker Air Force Base.[10] McVeigh was forced to wear a protective

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4. Criminal Complaint at 1, United States v. McVeigh, Case No. M-95-98-H (Apr. 21, 1995).

5. *See Nichols*, 71 F.3d at 352 (mandating recusal of Federal Western District Judge Wayne E. Alley and stating that "there is no case with similar facts to which we can look for guidance in our application of the law to the facts in this case").

6. Although this article is co-authored, any use of first-person singular herein refers to Stephen Jones.

7. *See* Criminal Complaint at 5, *McVeigh* (Case No. M-95-98-H).

8. *See id.*

9. *See id.* Within two hours of the bombing, McVeigh had been arrested by Oklahoma State Trooper Charles Hanger north of Oklahoma City, one mile south of the Billings, Oklahoma exit on Interstate 35. McVeigh was charged with a series of misdemeanor offenses that included carrying a concealed weapon, not having proper insurance verification, and not having license tags. On April 21, he was being held in the Noble County Jail because no bail had been set when the FBI located him and subsequently arrested him on the federal complaint. The state charges were dismissed that same day. Royce Hobbs, a Perry, Oklahoma attorney, attempted to see McVeigh after he had been called several times, but either jail officials or the FBI prevented Hobbs from seeing McVeigh. Hobbs then filed a formal motion with the Noble County District Court demanding access, which the Associate District Judge granted. Hobbs' actions were in the highest tradition of the Bar. *See In re* Ades, 6 F. Supp. 467 (D. Md. 1934). He simply refused to be put off or blocked from seeing someone in custody who wished to consult with an attorney. Petition for Access to Prisoner McVeigh (on file with author).

10. *See Bomb Suspect Charged; Man Upset by '93 Raid Near Waco*, DAILY OKLAHOMAN (Oklahoma City), Apr. 22, 1995, at 1.

vest and shield for fear that someone would injure him as he was being transferred.[11]

McVeigh made his initial appearance regarding the federal complaint at Tinker Air Force Base on April 21, 1995. At that time, Susan Otto from the Federal Public Defender's office was appointed to represent McVeigh. Otto successfully petitioned, in accordance with 18 U.S.C. § 3005, to have John Coyle, an Oklahoma City lawyer, appointed as co-counsel.

III. Withdrawal of Appointed Counsel Due to Conflicts of Interests

On Monday, April 24, 1995, both Otto and Coyle sought leave to withdraw as court-appointed counsel for McVeigh.[12] Coyle argued in his Motion that he was in downtown Oklahoma City on the day of the bombing and personally witnessed the scene immediately following the blast.[13] His law partner had been both physically and psychologically damaged by the blast, and all of his employees were upset by the subsequent evacuation.[14] Coyle lost several friends in the bombing.[15] Coyle argued that the personal effect of the bomb rendered the possible appearance of impropriety on his involvement as counsel for the defendant.[16] He further argued that no lawyer from Oklahoma City should represent McVeigh because the accused deserves fair, impartial, and objective consideration.[17]

Otto urged that she be allowed to withdraw not only because of the personal effect the bombing had on her, but because of the right afforded to McVeigh to have a fair trial with the impartial assistance of an attorney.[18] The explosion substantially damaged Otto's offices.[19] Her staff had to evacuate the area and knew individuals who died as a result of the bomb.[20] The close proximity of the Federal Public Defender's office to the bombing site impacted the ability of anyone from that office to represent the accused.[21]

U.S. Magistrate Ronald L. Howland denied both motions without prejudice on April 26, 1995.[22] Howland cited his confidence in the ability of appointed counsel

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11. *See id.*

12. *See* Motion to Withdraw and for Appointment of Substitute Counsel, *McVeigh* (No. M-95-98-H); Application for Appointment of Substitute Counsel and Concomitant Motion to Withdraw, *McVeigh* (No. M-95-98-H).

13. *See* Application for Appointment of Substitute Counsel and Concomitant Motion to Withdraw, *McVeigh* (No. M-95-98-H).

14. *See id.*

15. *See id.*

16. *See id.*

17. *See* Motion to Withdraw and for Appointment of Substitute Counsel at 2, *McVeigh* (No. M-95-98-H).

18. *See* Application for Appointment of Substitute Counsel and Concomitant Motion to Withdraw at 2, *McVeigh* (No. M-95-98-H).

19. *See id.*

20. *See id.*

21. *See id.*

22. *See* Order Entered April 26, 1995, at 5, *McVeigh* (No. M-95-98-H).

to remain professional.[23] However, at the preliminary hearing on April 27, 1995, both Otto and Coyle renewed their requests for withdrawal.[24] Howland stated that the motions were temporarily denied and that the court was conducting a search to find possible alternative counsel, should that be necessary.[25]

On May 8, 1995, both Otto and Coyle filed petitions renewing their motions to withdraw as court-appointed counsel.[26] On the evening of May 5, 1995, I was contacted by Chief Judge Russell on behalf of the United States District Court and asked whether, if requested, I would agree to defend an individual "who has been, or would be, charged in the Oklahoma City bombing." The next day, I agreed to represent Timothy James McVeigh. Chief District Court Judge David L. Russell granted Otto's and Coyle's motions, and I was appointed as lead counsel in accordance with the provisions of the Criminal Justice Act.[27]

With this appointment, I had a clear appreciation of my responsibility and of that "individual sense of duty which should . . . accompany the appointment of a selected member of the bar . . . to defend" such a case as this.[28] In accepting, I recognized that in my position as McVeigh's defense counsel, it would be impossible to satisfy everyone. I ultimately decided that I could satisfy only my professional conscience.

I was to try and defend McVeigh in the face of an overwhelming public condemnation — a demonization of McVeigh in which the presumption of innocence was replaced by the assumption of guilt. I was to defend McVeigh in a community in which literally thousands of lives had been adversely affected, indeed ruined, by the act with which my client was charged.

I also recognized that no matter how severe the public criticism might be, how damning of me, I had to subordinate my self interest to that which was best for McVeigh. Regardless of how severe the public criticism might be,[29] I could never

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23. *See id.*

24. *See* Preliminary Hearing Transcript, *McVeigh* (No. M-95-98-H).

25. *See id.*

26. *See* Renewed Motion to Withdraw and for Appointment of Substitute Counsel, *McVeigh* (No. M-95-98-H); Brief in Support of Motion Renewing Application for Appointment of Substitute Counsel and Concomitant Motion to Withdraw, *McVeigh* (No. M-95-98-H).

27. *See* Order Entered May 8, 1995, *McVeigh* (No. M-95-98-H). The Criminal Justice Act is codified at 18 U.S.C. §§ 3005, 3006A.

28. Powell v. Alabama, 287 U.S. 45, 56 (1932).

29. *See, e.g.*, Editorial, *One More for the Lawyers*, DAILY OKLAHOMAN (Oklahoma City), Dec. 5, 1995, at 4, *reprinted in* Transcript, Dec. 13, 1995, at 19-21 (calling defense lawyer's change of venue motions "[b]ogus," "[s]tupid," "[a] waste of time," and "[a]n insult to law-abiding Oklahomans"). Judge Matsch obviously disagreed. Indeed, Patrick McGuigan's editorials were prime examples of defense exhibits used to support the change of venue. For other critical comments, see Mark Eddy, *Phony Confession Broke Ethics Rule*, DENVER POST, Mar. 10, 1997, at A1; *Stephen Jones' Tangled Web*, ROCKY MOUNTAIN NEWS (Denver), Mar. 5, 1997, at 36A (editorial following *Dallas Morning News* article controversy). *But see* Lois Romano & Tom Kenworthy, *Bomb 'Confession' Hoax Assertion Gains Backing: Document May Have Been Part of Witness Ploy*, WASH. POST, Mar. 5, 1997, at A10; Karen Abbot, *Going All Out to Save McVeigh*, ROCKY MOUNTAIN NEWS (Denver), Mar. 9, 1997, at 5A; David R. Dow, *Dallas News' Action Mocks First Amendment*, HOUSTON CHRON., Mar. 5, 1997, at 23; *Why We Should Salute Work of Stephen Jones*, ATLANTA J., Apr. 8, 1997. The "*Dallas Morning News*

fully explain why I had or had not done a certain thing, because professional honor dictated that I could never tell anyone all that I knew. I was grateful for Judge Matsch's written Order of March 17, 1997, which said in relevant part:

> The Supreme Court has recognized that in circumstances such as those surrounding this case, the function of defense counsel includes representation "in the court of public opinion."
>
> There can be no doubt about the foundational fairness provided for the defendant in this case. He has lead counsel who has consistently demonstrated his skill and experience as an advocate with a complete and dedicated commitment to his professional responsibility in the representation of Timothy McVeigh. Mr. Jones has the assistance of other capable and responsible lawyers, selected by him for particular assignments.[30]

At the conclusion of the trial, Judge Matsch said, addressing me, "I think that you and the other lawyers on your team in the courtroom conducted the defense of Timothy McVeigh with honor and dignity and with a due regard for your role as officers of the Court."[31]

As McVeigh's principal defense attorney, I was charged with the responsibility of presenting his defense. He was described often as "the most hated man in America." My job was to do and say for him what he could not do and say for himself, and to see that neither his life nor his liberty was taken from him except in accordance with due process of law.[32] I told Judge Russell when I accepted the appointment that I would not defend McVeigh with one hand tied behind my back, and that I viewed my role as his defense counsel as one requiring me to be zealous in his defense.[33]

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controversy" stemmed from an article printed by the newspaper that alleged McVeigh had confessed to bombing the Murrah Building. The article was alleged to have quite an effect on the jury, resulting in prejudice to the defendant. *See* United States v. McVeigh, 153 F.3d 1166, 1180 (10th Cir. 1998). Once the *Dallas Morning News* story appeared, McVeigh's defense was beyond redemption by even the most skilled of our craft.

30. Order Dated Mar. 17, 1997, Document No. 3429, United States v. McVeigh, 955 F. Supp 1281, 1282 (D. Colo. 1997) (No. 3429) (citations omitted).

31. Transcript at 15, United States v. McVeigh, Case No. 96-CR-68-M (June 13, 1997).

32. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1996).

33. Rule 1.3 substitutes "reasonable diligence and promptness" for "zeal." *Id.*; *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1969) (stating that a lawyer should "represent a client zealously within the bounds of law"). I believe that a criminal defense lawyer is required to be zealous on a client's behalf. *But see* State v. Richardson, 514 N.W.2d 573 (Minn. Ct. App. 1994); *see also* HOWARD SACKS, DEFENDING THE UNPOPULAR CLIENT (Nat'l Council on Legal Clinics, Chicago 1961); WILLIAM KUNSTLER, THE CASE FOR COURAGE (1962); Leon Jaworski, *The Unpopular Cause*, 47 A.B.A. J. 714 (1961). The American Trial Lawyers Association Code Rule 2.1 provides that "in a matter entrusted to a lawyer by a client, the lawyer shall give undivided fidelity to the client's interest as perceived by the client, unaffected by any interest of the lawyer or of any other person, or by the lawyer's perception of the public interest." AMERICAN TRIAL LAWYERS ASSOCIATION CODE Rule 2.1 (1991), *reprinted in* JOHN BURKOFF, CRIMINAL DEFENSE ETHICS, LAW, AND LIABILITY C-3 (1986). Rule 3.1 provides that "a lawyer shall use all legal means that are consistent with the retainer agreement, and

There are many reasons for my acceptance of McVeigh's defense. He needed a lawyer and I thought it was important that he be defended by an Oklahoma trial lawyer. I took the case because, as I viewed my oath of obligation as a lawyer, I had a duty to accept.[34] Once I accepted, it was my duty to see that the legal system established by our Constitution worked and that nothing was taken from McVeigh except in accordance with the due process of law guaranteed by the Constitution.

My representation of McVeigh was made easier by the personal support from my family and my friends in Enid, and by the wonderful staff we assembled. These individuals did not share the public focus with me, but each was in his or her own way a part of the zealous defense of Tim McVeigh.

IV. Criminal Justice Act

A. The Origin of the Act

The Criminal Justice Act, 18 U.S.C. § 3006A, provides that:

> Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with this section. Representation under each plan shall include counsel and investigative, expert, and other services necessary for adequate representation.[35]

House Report 874 states:

> The Criminal Justice Act of 1964 required the Federal judiciary to provide for the legal representation of eligible Federal criminal defendants who were financially unable to afford their own attorneys. In response, the Federal judiciary created the Federal Defender Services program. This program provides legal services for eligible defendants through a mixed system, which includes 45 Federal Public Defender Organizations (FPF's), 10 Community Defender Organizations (CDO's), private "panel" attorneys chosen from a list or maintained by the district courts.[36]

B. The Result of the Act's Application

The number of defendants requiring assistance in federal cases has risen each year. In hearings to determine the amount each agency should receive under the 1999 fiscal year Appropriations Act, the Senate noted that the number of defendants

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reasonably available, to advance a client's interests as the client perceives them." *Id.* Rule 3.1, *available in* BURKOFF, *supra*, at C-4.

34. *See* U.S. CONST. amend. V; MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2(c) (1996); *see also* ABA CODE, EC 2-28, 2-29 (1969); Peter Applebome, *The Pariah as Client: Bombing Case Rekindles Debate for Lawyers*, N.Y. TIMES, Apr. 28, 1995, at A1.

35. 18 U.S.C. § 3006A (Supp. IV 1998).

36. H.R. REP. No. 104-874, at 1481 (1997).

who receive appointed counsel under the Criminal Justice Act "has risen from 82 percent in fiscal year 1996 to an estimated 93 percent in the fiscal year 1999 appropriation."[37]

Another issue concerning a defendant using public funds to aid in his defense is whether the records of the cost of his defense should be open to the public. Recognizing the conflict inherent in this determination, Judge Matsch stated:

> The attorney-client privilege and the work product doctrine protect some information from opposing counsel. . . .
>
> A defendant unable to pay for his defense is in very different circumstances. He must rely on the court's authority under the Criminal Justice Act, 18 U.S.C. § 3006A, for payment for counsel, investigators, experts and any other services necessary for adequate representation pursuant to plans approved by the judicial council of each circuit under the supervision of the Director of the Administrative Office of the United States Courts within guidelines promulgated by the Judicial Conference of the United States.[38]

These documents may be placed under seal by petition to the court or on the court's own motion.[39]

Judge Matsch held that the privacy owed McVeigh outweighed any interests that the public might have in learning of the cost of the defense prior to the conclusion of the proceedings.[40] He stated "[a]ccordingly, this court finds and concludes that the request for the amounts of expenditures made for defense services before trial must be denied for the protection of the interests identified in this opinion."[41]

C. Defense Costs

Newspaper and magazine reports indicate that the defense of McVeigh cost somewhere between $10 and $15 million. I do not know the precise figure because some of the accounting went directly to the court, but I suspect that the figure is fairly accurate. The Department of Justice said in a public press statement that the cost of the investigation, arrest, and prosecution of the two defendants cost the government approximately $82.6 million.

Judges Russell and Alley were generally consistent in their support of our applications for defense authorization, but Judge Matsch was fully committed to an adequate funding for the defense, and did not "second guess" defense counsel's strategy. In some instances, he informed me that he doubted the admissibility of some evidence we sought to develop but allowed us the funds to develop it. He stated that funding for investigation and the defense and admissibility of evidence developed from those investigative efforts involve two different standards.

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37. H.R. REP. No. 105-636, at 224 (1998).
38. United States v. McVeigh, 918 F. Supp. 1452, 1459, 1460 (W.D. Okla. 1996).
39. *See id.*
40. *See id.* at 1460.
41. *Id.* at 1466.

Although some who were unfamiliar with the facts in the case criticized defense travel overseas, Judge Matsch fully authorized the trips to find expert witnesses, interview fact witnesses, or pursue investigative leads. Defense counsel submitted *detailed* statements to justify all expenditures. All costs in excess of $300 had to be approved in advance by a judge, though there were certain standing orders and authorizations for travel expenses. Some of those standing orders involved travel between Oklahoma City and Denver, equipment rental, and leases for apartment and office space. Each month vouchers were submitted to the court by counsel, expert witnesses, and third party vendors. I would estimate that approximately 99% or more of the defense authorizations were approved by the court.

These requested authorizations were made by written motion unless permission and authorization were sought on an emergency basis. On a rare occasion, we felt comfortable incurring the expenses in advance if necessity demanded, and the court always approved the expenditure afterwards.[42] Defense counsel were generally paid within thirty (30) days after the vouchers were submitted, though there were some frustrations in 1995 with being paid promptly and timely because of the "government shutdown" and the unique features of defending so massive a case. I signed a personal note for a substantial line of credit to tide the defense over until the payment from the government became more dependable.

The defense expenditures were appropriate and necessary. As Chief Judge Matsch himself wrote on March 17, 1997:

> A fair trial has its origin in foundational fairness provided by legal rules governing the investigation, arrest and preparation of charges. Foundational fairness requires that the person accused has legal counsel with the skill, competence, experience and courage to provide him with effective representation of his interests at all stages of the proceedings. When counsel are appointed, they must be given adequate resources to support a separate and independent investigation, including technological tools and the expertise of those who have relevant knowledge and experience to assist in preparing to challenge the charges made against the defendant.[43]

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42. One such occasion was a trip to Israel by two defense team members to locate an expert witness and to interview members of the Israeli National Police. The invitation for the trip came with almost no advance notice while members of the team were in the United Kingdom interviewing witnesses. The tickets were purchased with cash, and the team members arrived at Heathrow Airport within minutes of the scheduled departure of the El Al 747. Because of these circumstances, plus the contents of counsel's briefcase (material and text concerning explosive trace analysis), Israeli security conducted a thorough examination of the luggage and the defense team members were closely questioned while the departure of the plane was delayed. Eventually, they were allowed to board. Lead counsel and occasionally others carried certain papers, the exact description of which should not be disclosed, which facilitated transportation and VISA arrangements in unusual circumstances such as these.

43. Order and Memorandum Opinion Denying Motion to Dismiss or In the Alternative, Request for Abatement or Other Relief Entered March 17, 1997, United States v. McVeigh, 955 F. Supp 1281, 1282 (D. Colo. 1997) (No. 3429).

There were substantial, indeed compelling, reasons for such extraordinary expenses. For one, the crime was unprecedented. The bombing of the Murrah Building was the largest act of domestic terrorism and revolutionary terror in the United States. It was, not to put too fine a point on it, the largest mass murder in American history. McVeigh's defense lawyers had to examine 168 files of the State Medical Examiner's Office and all other files concerning human remains. We reviewed more than 30,000 interviews of witnesses taken by the FBI and other government agencies. More than 100,000 photographs were provided by the government and examined by the defense. We reviewed records of 156 million telephone calls and over one million hotel and motel registrations, together with over 500 hours of audio tape and over 400 hours of video tape. About 25,000 pages of lab reports and worksheets were provided for the defense after their production was ordered by the court.

As McVeigh's counsel, we had to defend against perhaps one hundred ancillary actions filed in the case by victims, organizations claiming to speak for victims, the collective media, individual media organizations, interlopers, and strangers to the case. In addition, we filed a number of motions that were vigorously contested by the government. Almost none of these issues was conceded by the government.

Because of the inordinate cost of the defense, we undertook various initiatives to hold down the cost to the taxpayers. Each of the senior lawyers on the team in the defense headquarters in Denver voluntarily paid a certain percentage of his or her billings into a common fund. These collective funds helped to pay law students and to provide additional office space, newspaper subscriptions, and other matters not paid for by the court. Judge Matsch was very considerate of the defense and arranged for housing of the defense lawyers at the Denver Place Apartments, located a block from the courthouse. We delayed our departure from Oklahoma to Denver until late December 1996. The government and Mike Tigar, on behalf of Terry Nichols, moved to Denver eight months ahead of us. By remaining longer in Oklahoma, we saved probably $100,000 a month in defense costs. Our view was that the crime was in Oklahoma and many of the most important witnesses were in Oklahoma and Kansas. We felt there was simply no reason to move to Denver until it became absolutely necessary.

V. The Indictment

A. Allowing the Government More Time

On June 12, 1995, Judge Russell granted the government extra time within which to file an indictment against McVeigh. We objected for several reasons. First, we argued that the government had not cooperated with McVeigh concerning discovery of the information uncovered during the grand jury proceedings.[44] Second, despite there being no conviction and indeed no formal charges, McVeigh was held in punitive conditions where he was under twenty-four-hour video surveillance, where he had no exercise facilities or access to a television or radio, and where he had

44. *See* Order Entered June 12, 1995, at 1-2, *McVeigh* (No. M-95-98-H).

limited opportunities for social interchange.[45] Finally, continued delay would allow the government additional time to abuse the grand jury discovery process.[46]

The court ruled that it was not prejudicial to withhold information from the defendant during the grand jury process, and any objections to discovery were premature.[47] The court did agree that the conditions of the defendant's detention were inadequate and ruled that the government meet with defense counsel to remedy some of the problems.[48]

In support of his holding allowing the government more time within which to return an indictment, the Judge stated that the bombing was unprecedented and the government had to sift through a large volume of evidentiary material.[49] The nature of the crime justified the continued delay in returning an indictment.[50]

B. A True Bill

On August 10, 1995, the government filed the indictments against Timothy James McVeigh, Terry Lynn Nichols,[51] and others unknown. The indictments charged them with one count of conspiracy[52] to use a weapon of mass destruction, 18 U.S.C. § 2332a; one count of use of a weapon of mass destruction (a "truck bomb"), 18 U.S.C. § 2332a; one count of destruction by explosives, 18 U.S.C. § 844(f); and eight counts of first degree murder, 18 U.S.C. §§ 1814 and 1111.[53] Pleas of not guilty were entered by McVeigh and Nichols on August 15, 1995.

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45. *See id.*
46. *See id.*
47. *See id.* at 5.
48. *See id.*
49. *See id.*
50. *See id.*

51. Nichols and McVeigh were charged together and their case went forward as one case until the court ordered that they be tried separately. Thus, while I discuss decisions with relevance to McVeigh, quite often challenges were brought by one party and then adopted by the other. The evidence with respect to each defendant was substantially different. The resulting court decision, however, impacted both parties.

52. The indictment identified 160 deceased. One hundred fifty-two were named in count 1, the "conspiracy count," and eight were named in counts 4 through 11. Six individuals, who allegedly died outside the Murrah Building, were not named in the indictment because it was assumed that they would be named in comparable Oklahoma state criminal prosecutions, the exact contours of which were not known.

53. The federal agents killed were Special Agent of the United States Secret Service Mickey Bryant Maroney, Special Agent of the United States Secret Service Donald R. Leonard, Assistant Special Agent in charge of the United States Secret Service Alan Gerald Whicher, Special Agent of the United States Secret Service Cynthia Lynn Campbell-Brown, Special Agent of the United States Drug Enforcement Administration Kenneth Glenn McCullough, Special Agent of the United States Customs Service Paul Douglass Ice, Special Agent of the United States Customs Service Claude Arthur Medearis, and Special Agent of the Department of Housing and Urban Development Office of Inspector General Paul G. Broxterman.

C. Challenges to the Indictment

Several challenges were raised by either McVeigh or Nichols and then adopted by the other. Primary among those were challenges to the indictment based on multiplicity, abatement, and violations of the Commerce Clause.[54] The constitutionality of the indictment was ultimately upheld.[55]

Multiplicity involves charging an individual with several counts for one single offense, which violates double jeopardy provisions by subjecting the individual to multiple punishments for one act.[56] We argued that charging McVeigh with multiple counts for the one act of detonating a single bomb violated McVeigh's protection against double jeopardy. The court held that each offense has an element that the other does not and that each intended target is an essential element of the crime.[57] The court ruled that each murder count is a separate count because the "killing of each of these eight victims is a separate 'unit of prosecution.'"[58]

The doctrine of abatement provides that by amending a statute, Congress expressly or impliedly repeals the statute for which prosecution is pending.[59] After McVeigh's indictment was issued, Congress amended §2332a(a)(2) by enacting §725 of the Anti-Terrorism and Effective Death Penalty Act of 1996 so that, with regard to weapons-crimes against persons, the result affects interstate commerce or threats of such use would have affected interstate or foreign commerce, justifying federal regulations.[60]

The court ruled that abatement did not apply with respect to McVeigh's case because an intent to abate by Congress must be express.[61] Congress amended the statute to make clear that in the future, jurisdiction is ensured when the prohibited conduct affects or will affect interstate commerce.[62] The court held that such a finding had been explicit with respect to McVeigh.[63]

With respect to the Commerce Clause of Article I of the United States Constitution, to enact laws that regulate activity affecting interstate commerce, Congress must make a finding that the regulated activity's effect is substantial.[64] The finding need not be explicit if it is discernible from the statutory language and if there is a rational basis for believing it affects interstate commerce.[65]

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54. *See* United States v. McVeigh, 940 F. Supp. 1571, 1574-75 (10th Cir. 1996).
55. *See id.* at 1578.
56. *See* McVeigh's Motion to Dismiss Counts Five Through Eleven and/or to Consolidate Counts Four Through Eleven and Brief in Support at 2, Sept. 29, 1995, United States v. McVeigh, 940 F. Supp. 1571 (10th Cir. 1996) (No. CR-95-110-A).
57. *See McVeigh*, 940 F. Supp. at 1583.
58. *Id.*
59. *See id.* at 1578.
60. *See id.*
61. *See id.*
62. *See id.*
63. *See id.*
64. *See id.* at 1576.
65. *See id.*

We based our argument on *United States v. Lopez*.[66] In *Lopez*, the United States Supreme Court invalidated the Gun Free Schools Act on the basis that it exceeded the power granted to regulate interstate commerce. *Lopez* contained no language in the statute or the legislative history demonstrating any effect on interstate commerce. As it applied to *McVeigh*, the court held that the impact of a truck bomb on interstate commerce is "both obvious and substantial."[67] In contrast, the statute involved in *Lopez* could, in no circumstances, be said to have a substantial effect on interstate commerce.[68]

However, the court held that the jury must make a specific finding that the effect of the behavior in each particular case has a substantial effect on interstate commerce.[69] The court stated that such a particularized finding ensures that application of the statute is constitutional.[70]

VI. Motion to Transfer

A. Initial Argument for Transfer

On April 24, 1995, in addition to filing their motions to withdraw as counsel, Otto and Coyle filed a Motion to Transfer and Brief in support thereof.[71] In support of the Motion to Transfer to another state, counsel cited the fact that the Federal District Courthouse for the Western District is located directly across the street from the Murrah Building.[72] Not only did the courthouse sustain damage, but several of the workers were injured as well.[73] The effects of the bomb rendered the federal judges percipient witnesses and, in their view, unable to render an unbiased probable cause determination.[74]

Counsel argued that impartiality is also needed of those who will possibly be chosen to sit on the grand jury to determine whether to issue an indictment against McVeigh.[75] For this, defense counsel relied upon the media coverage following the explosion, which included continuous coverage and the televising of the United States President's attendance at a prayer service for the victims on Sunday, April 23, 1995, in Oklahoma City.[76] Defense counsel cited *Murphy v. Florida*,[77] which stated that prejudice may be presumed where "the influence of the news media, either in the community at large or in the courtroom itself, pervaded the proceedings."

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66. 514 U.S. 549 (1995).
67. *McVeigh*, 940 F. Supp. at 1576.
68. *See id.*
69. *See id.* at 1578.
70. *See id.*
71. *See* Motion to Transfer, Apr. 24, 1995, *McVeigh* (No. M-95-98-H); Brief in Support of Motion to Transfer, Apr. 24, 1995, *McVeigh* (No. M-95-98-H).
72. *See* Brief in Support of Motion to Transfer at 2, *McVeigh* (No. M-95-98-H).
73. *See id.*
74. *See id.* at 4.
75. *See id.*
76. *See id.* at 11.
77. 421 U.S. 794, 798-99 (1975).

The government argued that there was no precedent for transfer prior to there being an indictment or information filed.[78] The indictment would not result until a grand jury proceeding returned a true bill after conducting an investigation.[79] Also, while McVeigh may waive his rights to a grand jury determination in a particular venue, he cannot waive the rights of others who may also be charged.[80] Additionally, the government argued that merely because a judge was acquainted with one or more of the victims did not mean that he or she could not preside in an unbiased manner, and if a conflict did emerge, the proper action was to bring in a judge from another district.[81] Magistrate Howland agreed and denied the motion to transfer, citing the filing of an indictment or information as a prerequisite to such a determination.[82]

B. Renewal of the Argument for Transfer

We renewed the argument for a transfer of venue in November of 1995.[83] Relying on Rule 21(a) of the Federal Rules of Criminal Procedure, we argued that McVeigh deserved a fair trial by impartial jurors.[84] In support of our argument that the media in Oklahoma was saturated with prejudicial pretrial publicity, we included 1087 pages from the *Daily Oklahoman*, 317 pages from the *Lawton Constitution*, 313 pages from the *Tulsa World*, and 926 pages of transcripts from local news broadcasts.[85]

While the district court had named Lawton, Oklahoma, as the place for trial pursuant to 28 U.S.C. § 116(c) and Local Court Rule 3(D), we argued that the pool of individuals from which the jury would be selected was also subjected to the media saturation and had already formed an opinion about McVeigh's guilt.[86] Thus, we urged that another metropolitan city within the Tenth Circuit be chosen as the place to hold the trial.[87] Chief Judge Matsch agreed.[88]

Matsch recognized that in most cases the effect of pre-trial publicity is determined during jury selection; however, waiting for that determination would only have caused undue delay.[89] Matsch was also concerned about the inability to select a jury in Lawton because he believed that "a failed attempt to select a jury would, itself, cause widespread public comment creating additional difficulty in beginning again at another place."[90]

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78. *See* Opposition to Motion to Transfer at 1, Apr. 26, 1995, *McVeigh* (No. M-98-95-H).
79. *See id.* at 2.
80. *See id.* at 3-4.
81. *See id.* at 4.
82. *See* Order Entered April 26, 1995, at 2, *McVeigh* (No. M-95-98-H).
83. *See* Defendant McVeigh's Brief in Support of Motion for Change of Venue, Nov. 21, 1995, United States v. McVeigh, 918 F. Supp. 1467 (10th Cir. 1996) (No. CR-95-110-MH).
84. *See id.* at 4.
85. *See id.* at 5.
86. *See id.* at 47.
87. *See id.* at 46.
88. *See* United States v. McVeigh, 918 F. Supp. 1467, 1474 (10th Cir. 1996).
89. *See id.* at 1470.
90. *Id.*

Matsch noted the differences in the media coverage that occurred within the state and that which occurred nationally, stating that Oklahoma's coverage was more personal and contained stories of the effects on individuals' daily lives.[91] He also noted that the majority of Oklahomans expressed in an opinion poll that upon finding McVeigh guilty, the only appropriate sentence would be a sentence of death.[92] Matsch stated that such a belief deprived the defendant of individualized sentencing as guaranteed by his due process rights.[93] For these reasons, Judge Matsch appropriately transferred venue to Denver, Colorado.[94]

VII. Recusal

A. Requests by All Parties to the Litigation

Both McVeigh and Nichols moved, pursuant to 28 U.S.C. §§ 144 and 145, to have all judges from the United States Western District Court of Oklahoma removed from the case.[95] The government agreed and urged the judges to recuse themselves voluntarily to ensure that the nation have complete confidence in the verdict rendered.[96] Judge Alley disagreed.[97] Relying on *United States v. Harrelson*,[98] Judge Alley ruled that neither he nor any of the judges needed to recuse themselves.[99]

B. Initial Denial of Requests for Recusal

Harrelson involved a judge who was not forced to recuse himself despite there being a strong friendship between the deceased individual whom the defendants were charged with killing and the fact that the courthouse in which the trial was held was named after the deceased.[100] Judge Alley used this case to support his ruling that he need not recuse himself from presiding over the case of *United States v. McVeigh*.[101] Also, Judge Alley stated that he did not know personally of facts that were in dispute, nor had any of the parties shown actual bias on his part.[102]

Judge Alley cited *United States v. Cooley*[103] as providing the test for determining the appearance of impartiality. The test is "whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impar-

91. *See id.* at 1471.
92. *See id.* at 1474.
93. *See id.*
94. *See id.* at 1475.
95. *See* Brief of the United States in Response to Defense Recusal Motions at 1 (Sept. 8, 1995), United States v. McVeigh, 918 F. Supp. 1452 (W.D. Okla. 1996) (No. CR-95-110-A).
96. *See id.*
97. *See* Order Entered Sep. 14, 1995, at 16, *McVeigh* (No. CR-95-110-A).
98. 754 F.2d 1153 (5th Cir. 1985), *cert. denied*, 474 U.S. 908 (1985).
99. *See* Order Entered Sep. 14, 1995, at 16, *McVeigh* (No. CR-95-110-A).
100. *See id.*
101. *See id.*
102. *See id.*
103. 1 F.3d 985 (10th Cir. 1993).

tiality."[104] Judge Alley did not believe that a reasonable person would harbor doubts about his impartiality.[105]

C. Granting of Recusal Requests

Defendant Nichols filed a writ of mandamus to the Tenth Circuit Court of Appeals seeking the disqualification of Judge Alley.[106] This writ was granted and the court held that there was a reasonable basis to question Judge Alley's impartiality.[107] Title 28 U.S.C. §§ 144 requires recusal when the appearance of impartiality exists.[108] An analysis under this statute requires an evaluation of the facts involved.[109] The court of appeals noted that there are no other cases with facts similar to *McVeigh*.[110] Citing the fact that Judge Alley's courtroom was damaged in the blast and was located less than one block from the blast's epicenter, the court ruled that recusal was necessary.[111]

It is important to note that no actual impartiality by Judge Alley was shown. In fact, the court noted, "[t]here is certainly no allegation here of judicial impropriety; Judge Alley has conducted himself with true professionalism. Were the standard by which we must judge this case a subjective one, we could end our discussion here."[112]

VIII. Trial in the Court of Public Opinion

Every aspect of the case attracted the widespread interest of the media. There was no "public affairs" spokesman for the defense other than myself. In fact, all members of the defense team were specifically prohibited from speaking with the press, except Rob Nigh, who dealt with the Tulsa media; my assistant, Ann Bradley; and others on the team when I specifically authorized contact. The purpose of these tight restrictions was to minimize the possibility of information being released that would injure our client or the defense, or violate the court's orders. These rules were rigidly enforced. Indeed, a particular member of the defense team who released one item of information without authorization was docked $2000 as an internal penalty and another was fired for such behavior. Of course, the materials released to *The Dallas Morning News* and to *Playboy* resulted in the dismissal of the individuals involved. Yet, aside from these incidents, media relations were reasonably cordial.

Our contacts with the media were completely consistent with our duties as McVeigh's counsel, as Judge Matsch found. During the course of the trial he wrote:

104. *Id.* at 993.
105. *See* Order Entered Sep. 14, 1995, at 16, *McVeigh* (No. CR-95-110-A).
106. *See* Nichols v. Alley, 71 F.3d 347, 350 (10th Cir. 1995) (per curiam).
107. *See id.* at 352.
108. *See id.* at 351 (referring to when application of the statute is mandated).
109. *See id.* at 351.
110. *See id.* at 352.
111. *See id.*
112. *Id.*

> Counsel for the accused do not have an institutional structure for investigation comparable to that of law enforcement agencies serving the prosecution. . . . Defense lawyers have a legitimate need to communicate with the news media in preparing for trial. It is not uncommon for lawyers on both sides of a criminal case to do a bit of bartering in the information market.[113]

On June 13, 1996, in a published order, Judge Matsch stated this about our efforts with respect to the press and the negative publicity:

> Defense counsel are understandably concerned that the pretrial publicity may predispose public opinion to guilt of the defendants. Mr. McVeigh's lawyers have been very sensitive to the possible effects of those pictures of him and reports about him that they characterize as condemnatory. Mr. Jones has been active in generating countervailing publicity by granting interviews and making public statements about the investigation that the McVeigh team has conducted, including leads to other suspects and theories about possible perpetrators. Mr. Jones has also helped Mr. McVeigh obtain personal publicity to dispel the demonization effects of the early camera coverage of his arrest and detention.[114]

Justice Kennedy, writing for the Supreme Court of the United States, made the following pertinent comment about the role of defense counsel in *Gentile v. State Bar of Nevada*:

> An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. Just as an attorney may recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives. A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.[115]

During the course of representing McVeigh, I dealt not only with representatives of the four major networks, but also with media from all over the world.[116] At the

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113. United States v. McVeigh, 964 F. Supp 313, 315 (D. Colo. 1997).

114. United States v. McVeigh, 931 F. Supp. 756, 758 (D. Colo. 1996).

115. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1043 (1991) (citation omitted).

116. These included *Fox, MSNBC, BBC, French Television, Australian Television, Israeli State Radio Network, Radio Colombia, Christian Broadcasting Company, Canadian Broadcasting Company,* and almost every major daily newspaper in this country from the *New York Times, Boston Globe, Washington Post, Los Angeles Times, Kansas City Star, Dallas Morning News, Tulsa World, Daily*

trial itself, more than 2500 reporters were accredited, and several hundred were present at any one time.

The defense kept a record of the number of defense interviews requested. The total number of requests exceeded 600, and the number granted over a two and a half year period was less than 225, with many of those being very short statements made on the street. As Justice Oliver Wendell Holmes is reported to have said, "A good catch word can escape analysis for 50 years"; so it is with the phrase "trying the case in the press." Though many judges and some lawyers are critical of lawyers who speak with the press about a case, the truth is that there is substantial latitude in allowing lawyers to speak with the media under the applicable Model Rules of Professional Responsibility,[117] the American Bar Association's Prosecutions and Defense Standards, and the Department of Justice guidelines. Media contact was permissible, indeed necessary in our judgment, under the Model Rules and Judge Matsch's orders. Judge Matsch himself recognized that representation of McVeigh included representation in the "Court of Public Opinion."[118] The velocity of coverage on the case, much of it based on false and misleading information, required a defense "truth squad" to slow down a rush to judgment before the first witness testified.

Generally, our office tried to follow the written guidelines of the Department of Justice regarding media contact. When necessary or appropriate, I discussed with the press the anticipated time frame or aspects of the defense preparation, issues related to staffing and expenditures except for those sealed by the court, and the basis of certain legal arguments over particular issues. I also discussed various elements of the statute authorizing my appointment and the role of defense counsel in particular.

During the course of the representation of McVeigh, the court's orders with respect to what could and could not be discussed were modified four times.[119] To the extent the matters were not under seal or covered by a prohibitory order, I explained the legal positions the defendant was taking, particularly when those issues became the subject of public debate. At no time was defense counsel sanctioned, censured, reprimanded, or criticized by the court for any violation of

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Oklahoman; to such other newspapers as the *Buffalo News*, the *Phoenix Gazette*, the *Arkansas Gazette Democrat* and the *McCurtain County Gazette*. Additionally, the *Sunday Times* of London, the *Independent*, the *Observer*, *Manchester Guardian*, *Irish Times*, (the French Daily) *Liberation*, *Le Monde Frankfurt Allegmaine*, and *Reuters* all presented inquiries, as did the *National Law Journal*, *American Lawyer*, *Legal Times*, *Time*, *Newsweek*, *U.S. News & World Report*, *New Yorker*, *Spin*, *George*, *Economist*, and the *Enid Morning News and Eagle*.

117. See an excellent article on the subject of media comment by attorneys written by the new Oklahoma City University Law School Dean. Lawrence K. Hellman, *The Oklahoma Supreme Court's New Rules on Attorney Trial Publicity: Realism and Aspiration*, 51 OKLA. L. REV. 1 (1998).

118. United States v. McVeigh, 955 F. Supp 1281, 1282 (D. Colo. 1997).

119. *See* United States v. McVeigh, 964 F. Supp. 313 (D. Colo. 1996) (Order of May 12, 1997); *id.* at 315-16 ("While this case was in Oklahoma, all counsel were subject to the limitations imposed by Rule 27 of the Local Rules Governing Proceedings in the Western District of Oklahoma."); *id.* at 316 (outline of Order of April 24, 1997); United States v. McVeigh, 931 F. Supp. 756 (D. Colo. 1996) (Order of June 13, 1996).

court orders, and to the extent that the government moved for any such sanctions, they were denied in their entirety.

IX. Organization of the Defense Team

A. Teamwork

Seventeen attorneys from this country represented McVeigh, plus the court authorized the retention of the London law firm of Kingsley Napley, arguably the most highly regarded British criminal defense solicitor firm.[120] Basically, the defense was organized into six teams with a leader for each. The deputy principal defense counsel was Rob Nigh, associated with me in private practice before he became a federal public defender.

Though attorneys shifted over time from team to team, generally Team One was organized to prepare for the first stage of the trial, the "guilt-innocence" phase and was led by Nigh. Joining him was Jim Hankins (who handled matters relating to the Classified Information Procedure Act and the international aspects of the investigation), Amber McLaughlin (who primarily oversaw the review of the evidence concerning the Daryl Bridges Telephone Debit Calling Card[121]), Robert Warren (principally responsible for supervision of the investigation of the so-called Roger Moore robbery[122]), Holly Hillerman, Christopher Tritico of Houston, Texas (forensic evidence), Cheryl Ramsey (telephone debit card), and Denver lawyer Jeralyn Merritt (eyewitness identification).

Team Two was led by Richard Burr, an attorney from Houston, Texas, who served for many years with the NAACP Legal Defense Fund and argued several death penalty cases before the United States Supreme Court. He was assisted by his wife, Mandy Welch, admitted to practice in Oklahoma and Texas, and Maurie Levin of Austin, Texas.

Team Three was headed by Robert L. Wyatt, IV, a member of my firm. This team was originally designed to control, record, receive, and examine evidence and other materials obtained from the government through discovery. As information concerning problems with the FBI laboratory became public, this team assumed the additional responsibility of carefully reviewing the forensic evidence and the claims the government made regarding the evidence and of organizing the defense counter

120. Sir David Napley, former President of the Law Society of England, was one of the founding partners of Kingsley Napley. He, along with Christopher Murray and George Carman, Q.C., successfully represented Jeremy Thorpe, the leader of the British Liberal Party, when he was charged with conspiracy to commit murder, and Sir David represented the individual charged with the attempted assassination of The Princess Royal, Princess Anne. *See* SIR DAVID NAPLEY, NOT WITHOUT PREJUDICE (Harrap, London 1982). Kingsley Napley was retained by the defense in order to assist us with a factual investigation in Europe and to obtain experts in bomb trace analysis in the United Kingdom. John Clitheroe and Christopher Murray of the firm provided invaluable counsel and advice.

121. The Daryl Bridges Pre-paid Calling Card was part of the government's evidence of McVeigh's involvement, placing calls to set up the requirements for the bombing.

122. The Roger Moore robbery was an alleged robbery in which McVeigh and Nichols stole weapons that were later sold. The proceeds were supposedly used to finance the bombing of the Murrah Building.

attack. Other members of the team were Mike Roberts, Chris Tritico, and Robert Warren.

Michael Roberts, an attorney with Jones, Wyatt & Roberts, headed Team Four. Team Four was the management or administrative branch of the defense, that supervised the preparation of motions to authorize expenses and handled all administrative management matters except personnel. I handled all personnel matters. Roberts was assisted by the office manager Ann Seim; Becky Blasier, the accounting and finance officer; the secretaries, Renae Elmenhorst, Shelly Hager, Kathryn Irons, Karen Olds and, Karen Warner; staff assistant Scott Anderson; Colorado attorney Steven England; John Jones, Desi Milacek, Trish Pierpoint, Nic Merritt, Daphne Burlingham, Kelly Cherry, Rebecca Winters, Leah Kling, and Chad Wold.

Team Five was the legal counsel office. It was led by Professor Randy Coyne of the University of Oklahoma College of Law, an academic expert on death penalty litigation and the author of a law school textbook on capital punishment.[123]

Team Six served as the litigation support team and was headed by Sam Guiberson, a Houston, Texas, attorney. In addition to supervising and operating our computer retrieval and screening system, Guiberson's office was also responsible for preparing transcripts of court-authorized electronic interceptions of conversations of the Fortiers and members of McVeigh's family. Sam Guiberson's team included Chuck Miller, a computer expert, and attorneys Margaret Vandenbrook, Maria Ryan, Francesca Castaldi, Kristan Tucker, Lorraine Derbes, and Michelle Mears. The last four team members were invaluable to us in analyzing and preparing for the cross-examination of Lori and Michael Fortier using the electronic interceptions of the telephone conversations.

Ann Bradley, a Georgetown University Law Student, served as our researcher and aide de camp and assisted me significantly with media inquiries and the collection of material for closing argument. Dr. Kent L. Tedin of the University of Houston Department of Political Science assisted in the change of venue motion. One of the most helpful members of the defense team was Linda S. Thomas, a lawyer in Anchorage, Alaska, whose specialty is "vetting" the other side's experts. As a result of a number of things that Thomas learned about government experts, many of them were not called to testify. Michael Stout, an attorney from Roswell, New Mexico, spent three days assisting us in preparation for the voir dire of the jury. Several law students served as interns. They included Michael Grote and Alicia Carpenter, both from the University of Missouri Law School, Trent Luckinbill and Hoss Paruizian from the University of Oklahoma, and Heidi McLemore.

Broadcast News of Mid-America, Inc. and its President, Joe Taylor, of Tulsa, Oklahoma, were retained to provide us transcripts of daily news programs which might furnish investigative leads and assist in the investigation and prosecution of a change of venue motion. J. Neil Hartley, an investigator from Austin, Texas, and Lee Norton and Associates from Tallahassee, Florida, were primarily responsible

123. *See* RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS (1994).

for the investigation of mitigating factors. In addition, Neil served as witness coordinator for the defense. Lee Norton was assisted by her associate, Lisa Moody. Ann Cole of New York and Sandy Marks of Miami, Florida, were our jury selection experts. On various occasions the internationally recognized and highly regarded law firm of Baker & McKenzie provided timely assistance to us on a professional basis without charge. British and Irish barristers and solicitors freely gave of their knowledge and experience in defense of bombing cases.

In representing McVeigh, the defense became familiar with some of the government's most advanced techniques for intelligence gathering in criminal investigations. I met the Attorney General of the United States and had a tour of the Murrah Building at 6:30 a.m. on the day following my appointment. One member of the defense team was authorized to carry a concealed weapon at all times. There were over a half-dozen serious security incidents at my home, precipitating the need for armed guards on our property for two-and-a-half years. The FBI investigated threats against my life.

The defense viewed the photographs of 168 men, women, and children taken where their bodies were found, recovered, and identified. I held in my hands the leg that cannot be matched to any of the victims. The defense was present at the disinterment of Ms. Levy's body in New Orleans.

We met most of the nation's leading media celebrities, as well as some very bizarre, paranoid, and fanatical people. I traveled to China, Hong Kong, Macau, and the Muslim areas of the South Philippines. We interviewed one of the world's leading terrorists who was in custody of law enforcement officials. I cross the Allenby Bridge over the Jordan River and entered the West Bank. I traveled to Damascus, Amman, and the Golan Heights from the Syrian side. We traveled by jumbo jet, airbus, automobiles, taxis, an occasional limousine (that we paid for our of our own pockets), foot, small aircraft, bicycles, and even by camel. We met with individuals, potential witnesses, and experts in the cloistered confines of King's College, London, the elegant Atheneum Club overlooking the Mall in London, a beautiful Scottish church, lean-to shacks in the Philippines, Bedouin tents in the West Bank, laboratories in the Weizmann Institute in Israel, and for four nights I was a guest in one of the most famous terrorist bombing sites in the world, the King David Hotel in Jerusalem. We met in secret locations with members of international Jewish organizations, both in the United States and abroad, who were as interested in American Neo-Nazis and their connection with the bombing as I was. Also, I met with representatives of the world's most successful terrorist organization, the Provisional Irish Republican Army. We traveled by rail to Wales, Edinburgh, and Northern Ireland.

We stopped and interviewed witnesses in small towns located in the deserts of Arizona and rural co-ops in Kansas. We reviewed satellite photographs of downtown Oklahoma City and rural Kansas.

B. Expert Assistance

Defense investigators were Blair Abbott and Christine Hoover of Arizona, David Fechheimer, Josiah Thompson, author of the bestseller *Six Seconds in Dallas*, and

John Bates, retired from the Scotland Yard Special Branch. Investigators in Hong Kong and the Philippines included Richard Reyna,[124] Roger Charles, John Pierce, Marty Reed, and Wilma Sparks. Ed Simonson of TeleDesign Management of Burlingame, California, and his staff were our consulting experts with respect to the Daryl Bridges Debit Calling Card. John Wootters, Jr., of Kerrville, Texas, served as a consulting expert on firearms and weapons.

Other experts for bomb trace analysis were Dr. Keith Borer of Durham, England, Dr. Brian Caddy of Glasgow, Scotland (appointed by the British Home Secretary, Sir Michael Howard, to investigate allegations concerning the forensic laboratory of the British Ministry of Defense),[125] and Dr. John Lloyd, retired Senior Pathologist from the British Home Office.[126] Finally, the defense was assisted by Dr. Jehuda Yinon, Senior Research Fellow at the Weizmann Institute of Science in Rehovot, Israel,[127] and Sid Woodcock of Kirkland, Washington, a well-known explosives expert. Dr. Roy Godson of Georgetown University agreed to serve without compensation as an expert for us with respect to matters concerning terrorism. Dr. Stephen Sloan of the University of Oklahoma, a world recognized expert on terrorists and terrorism,[128] and Seth Meisel, his assistant, from Berkeley, California, advised the defense on a consulting basis with respect to issues of terrorism. Retired San Francisco bomb squad detective, Donald L. Hansen, was retained as an expert witness with respect to the government's evidence concerning the bomb.

Michael Crawford, M.D., an Oklahoma City board certified internist, was employed as an expert to conduct certain physical examinations of our client. David Foster, M.D., a psychiatrist from Auburn, California, John Smith, M.D., a psychiatrist from Oklahoma City, and Seymour Halleck, M.D., a psychiatrist from the University of North Carolina, conducted examinations of McVeigh to determine his competency for trial. They were assisted by Anthony Semone, a clinical psychologist from Wyndmoor, Pennsylvania.

Peter Tytell,[129] one of the world's leading question document experts, gave

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124. For a description of Richard Reyna's work, see NICK DAVIES, WHITE LIES, RAPE, MURDER AND JUSTICE, TEXAS STYLE (1991).

125. *See* Brian Caddy, Assessment and Implications of Centrifuge Contamination in the Trace Explosive Section of the Forensic Explosive Laboratory at Ft. Halstead (Dec. 1996) (presented to Parliament by the Right Honorable Michael Howard, the Secretary of State for the Home Department by Command of Her Majesty) (on file with author). Professor Caddy's credentials include: B.Sc., Ph.D., CChem, MRSC, Director of the Forensic Science Unit, University of Strathclyde, Glasgow.

126. Lloyd gave evidence that led to the clearing of the so-called Birmingham Six who were accused of the largest terrorist act in Great Britain: the bombing of a public house in Birmingham, England, that killed 21 people. *See* BOB WOFFINDEN, MISCARRIAGES OF JUSTICE (1987); Ludovic Kennedy, *I Accuse*, SUNDAY TIMES (London), at C1 (Feb. 25, 1990); *A Terrible Truth Unfolds*, ECONOMIST, Mar. 2, 1991, at 58; *see also* IN THE NAME OF THE FATHER (Universal Pictures 1993) (highly popular British movie).

127. Dr. Yinon is the author of the only textbook on bomb trace analysis in the English speaking world. *See* JEHUDA YINON & SHMUEL ZITRIN, MODERN METHODS AND APPLICATIONS IN ANALYSIS OF EXPLOSIVES (1993).

128. *See* SEAN ANDERSON & STEPHEN SLOAN, HISTORICAL DICTIONARY OF TERRORISM (1995).

129. Tytell's father, Martin, was a consulting expert for Alger Hiss. *See* ALLEN WEINSTEIN,

invaluable consulting assistance, as did the psychologist Gary Wells from Iowa State University and Elizabeth Loftus from the University of Washington.[130] Professor M. Yasar Iscan of the Department of Anthropology of Florida Atlantic University was retained to provide consulting and expert testimony with respect to the "unidentified leg" issue.[131]

Some individuals providing invaluable assistance were Aaron Zelman (gun control), Peter DeForest (tool mark examiner), Mark Denbeaux (document examiner), Hammet Photography, Emricks Moving and Storage of Enid, Ikon LDS (coding and scanning), Tammy Krause (victim impact), George Krisvosta (tool mark examiner), Litidex (scanning and coding), Herbert MacDonnell (fingerprints), Peter McDonald (tire imprints), Patricia Matthews (filming), Mike McNulty (Waco), William McQuay (fingerprints), Richard Murray (venue), James Pate (Waco), Skip Palenik (hair and fiber), Donald Streufert (victim impact), Rimkus Consulting Group (chemist), Anthony Rockwood (weather), Jasa, Dahl Towland (venue), Richard Sanders (audio and video), Alan Scheflin, Howard Zehr (victim impact), Laird Wilcox (penalty phase), Wiss Janney Elster Associates (engineers), Kathy Roberts (still and video photography), and Laurie Mylroie, Ph.D. (Iraq).

To assist the defense in reviewing videotapes in something other than "real time" and also to provide magnification and enhancement, the court authorized us to retain Owl Investigation, Inc., and its President, Tom Owen, from New York. The well known sociologist, Stuart Wright,[132] and his research assistant, Dean Peet, and Dick Reavis, the author of *The Ashes of Waco*,[133] assisted us in understanding the issues concerning the Branch Davidians. Richard Post, a retired Central Intelligence Agency employee, helped us greatly on matters concerning intelligence, particularly in the Far East and in the Middle East. Art Reed of Enid and James D. Weiskopf of Clifton, Virginia, assisted the defense in reviewing military records.

Finally, the defense was assisted by Dr. T. K. Marshall, C.B.E. M.D. F.R.C. Path. of Belfast, Northern Ireland, who was the retired Chief State Pathologist for Northern Ireland and who has performed more autopsies and medical examinations of victims of ammonium nitrate bombs than any other person in the world. Dr. Marshall gave "very high marks" to the Oklahoma State Medical Examiner, Fred Jordan, and his staff. It was Dr. Marshall who gave compelling testimony concerning the unidentified leg.

It is important that I note my indebtedness to my old friend, D.C. Thomas, for his wise counsel and support when I needed it. I must also thank Gerry Spence and Richard Haynes, two outstanding lawyers, for their public support, and John D. McKenzie, senior editorial writer (legal issues) for the *New York Times*.

PERJURY, THE HISS-CHAMBERS CASE 571-75 (1975).

130. Both Drs. Loftus and Wells are well recognized experts on the question of eyewitness identification and have written and published widely.

131. The State Medical Examiner's Office reported that there were eight victims with traumatically amputated left legs but found nine left legs. The ninth leg could not be matched to any known victim. *See* Jim Killackey, *Leg Believed Part of 169th Bomb Victim*, DAILY OKLAHOMAN, Aug. 16, 1995, at 1.

132. *See* ARMAGEDDON AT WACO (Stuart Wright ed., 1995).

133. DICK REAVIS, THE ASHES OF WACO (1995).

X. Pre-trial Evidentiary Decisions

A. Handwriting Samples to the Grand Jury

On July 18, 1995, on our advice, McVeigh appeared before the grand jury and refused to comply with a grand jury subpoena ordering him to submit a writing exemplar.[134] That same day, we submitted a brief supporting his reasons for noncompliance.[135] Our first ground for objection was that handwriting exemplars are unnecessary to make an adequate probable cause determination supporting an indictment and were instead being sought as evidence for trial, a violation of the use of a grand jury indictment.[136] Second, we argued that the motion to compel compliance with the subpoena should be denied as an equitable remedy for alleged violations of grand jury secrecy.[137] Finally, we argued that providing the handwriting exemplars would violate McVeigh's Fifth Amendment privilege by revealing his thought processes.[138]

In response, the court conducted a hearing that allowed both us and the government to present oral arguments. We presented nine reasons for refusing compliance with the directive.[139] In addition to the three reasons put forth in the brief, we argued that the request for the exemplar was the result of illegal electronic surveillance, that the exemplars were being sought for use in another grand jury matter in a different district, that the subpoena was overly broad, that the request constituted an unreasonable search and seizure in violation of McVeigh's Fourth Amendment rights, and that the evidence would be used in trials in Michigan.[140] The court held that compliance with the directive did not violate McVeigh's constitutional rights and the other allegations did not relate to whether compliance was proper.[141]

McVeigh refused to comply with this court order and the court considered whether to charge civil or criminal contempt against him.[142] Finding that application of civil contempt proceedings would be a futile exercise and that criminal contempt proceedings were outweighed by the costs involved, the court did not charge McVeigh with contempt for his refusal to comply.[143]

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134. *See* United States v. McVeigh, 896 F. Supp. 1549, 1551 (W.D. Okla. 1995).

135. *See* Defendant McVeigh's Memorandum of Law Objecting to Entry of Order Memorializing Refusal to Provide Handwriting Exemplars in the Absence of a Due Process Hearing; Alternative Memorandum Why Contempt Is Not Appropriate, July 25, 1995, United States v. McVeigh, 896 F. Supp. 1549 (W.D. Okla. 1995) (No. M-95-98-H).

136. *See McVeigh*, 896 F. Supp at 1551.

137. *See id.*

138. *See id.* at 1551-52.

139. *See id.* at 1552.

140. *See id.*

141. *See id.*

142. *See id.* at 1553.

143. *See id.* at 1555-56. The court also noted that McVeigh's objection to the use as evidence at trial of an order memorializing his noncompliance must await notice of the government's intent to use such, and was thus premature at this point. *See id.* Additionally, the court reviewed the defendant's

B. Suppression of Evidence

1. McVeigh's Personal Effects

When McVeigh was initially arrested in Perry, Oklahoma, his clothes and personal effects were placed in custody where they were taken by an FBI investigator on April 21.[144] Though a warrant had been issued for those effects earlier in the day, it was not presented to the sheriff who held them and it was later returned to the issuing court as being unexecuted.[145] We issued a motion requesting that the evidence taken be suppressed, arguing that the transfer and removal of the property by the FBI to its laboratory without a warrant violated McVeigh's Fourth Amendment rights.[146]

The court held that the taking of the property without a warrant was supported by *United States v. Edwards*.[147] Characterizing the relevant inquiry as whether McVeigh had any privacy rights to deny access to his personal effects by the FBI when he was lawfully in jail, the court held that his property was lawfully taken.[148]

2. Nichols' Statements

When Nichols surrendered to local authorities on April 21, 1995, in response to hearing his name associated with the bombing, he made several statements to the FBI investigators.[149] Nichols sought to have those statements suppressed in his case.[150] They were was not.[151]

Perhaps more importantly, we sought to have the statements suppressed in the case against McVeigh.[152] The government argued that the statements were admissible as statements against interest under Rule 804(b)(3) of the Federal Rules of Evidence.[153] The first requirement under the rule is that the declarant be unavailable, and that includes being unavailable to testify because he is exempted based on privilege.[154] The second requirement is that a reasonable person would not have made the statement knowing that it would subject him to criminal liability absent a belief that it was true.[155]

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objections to compliance and found them to be without merit. *See id.* at 1562.

144. *See* United States v. McVeigh, 940 F. Supp. 1541, 1545 (D. Colo. 1996).

145. *See id.* at 1547.

146. *See id.* at 1555.

147. 415 U.S. 800 (1974).

148. *See McVeigh*, 940 F. Supp. at 1557.

149. *See id.* at 1558.

150. *See id.*

151. *See id.* at 1561.

152. *See id.* at 1566.

153. *See* Brief of the United States in Support of Motion in Limine Regarding Terry Nichols' Statements, Feb. 22, 1996, United States v. McVeigh, 940 F. Supp. 1541 (D. Colo. 1996) (No. CR-95-110-A).

154. *See id.* at 3.

155. *See id.*

The court held that the statements were inadmissible hearsay and did not fit within any of the defined exceptions to the hearsay rule.[156] The court held that while Nichols did fit within the declarant unavailable requirement, he did not fit within the second requirement.[157] The court held that even the agents interviewing Nichols knew that he was telling a story that the authorities wanted to hear and thus, Nichols could not believe that the statements he made were true.[158] For that reason, the statements were hearsay inadmissible against McVeigh.[159]

C. Production of Classified Information

The Classified Information Procedures Act (CIPA) enables the government to discover, prior to trial, the classified information possessed by the defendant so that there can be an evaluation of its effects on national security.[160] Then a hearing is held before the court so that it can rule on its admissibility.[161] That hearing may be held in camera if the Attorney General certifies that a public hearing may result in classified information being disclosed.[162] The government is required to provide any information it may use to rebut the classified information at trial, and failure to do so may result in the government being unable to admit the rebuttal evidence at trial.[163]

The government argued that the CIPA was not an expansion of the discovery rights already provided to a criminal defendant and was not an entitlement to seek classified information that is otherwise undiscoverable.[164] Instead it argued that the information sought by McVeigh was not discoverable and, therefore, the CIPA did not apply.[165]

We countered by arguing that the government was misapplying the test.[166] We argued that there must first be a showing that the material is discoverable, then a determination as to whether it is admissible under the CIPA.[167] We agreed that the CIPA did not expand the discovery rights of an individual, but it did not prevent discovery simply because the information is classified.[168] Rather, we argued that

156. *See McVeigh*, 940 F. Supp. at 1567-71.

157. *See id.*

158. *See id.* at 1570-71.

159. *See id.* at 1571.

160. *See* Defendant McVeigh's Memorandum to the Court Concerning Implementation of the Classified Information Procedures Act at 2 (Mar. 8, 1996), United States v. McVeigh, 923 F. Supp. 1310 (D. Colo. 1996) (No. 96-CR-68M).

161. *See id.* at 7.

162. *See id.*

163. *See id.* at 7-8.

164. *See* Brief of the United States in Response to Defendant McVeigh's Motions Seeking Discovery under the Classified Information Procedures Act at 1 (Mar. 26, 1996), United States v. McVeigh, 923 F. Supp. 1310 (D. Colo. 1996) (No. 96-CR-68M).

165. *See id.* at 6-13.

166. *See* Defendant McVeigh's Response to the Government's Reply to Defendant McVeigh's Motion Seeking Classified Information at 1-2 (Apr. 3, 1996), *McVeigh* (No. 96-CR-68-M).

167. *See id.*

168. *See id.* at 2-3.

material is discoverable if it is relevant and material to the defendant's case and that the information being sought by McVeigh fit both criteria.[169]

The court held that the request to mandate compliance with the CIPA guidelines was at that time premature.[170] However, it held that there "is a strong suggestion that classified information in these agency records would be helpful in pursuing the investigation of the defendant's suspicions."[171] Indeed, it stated that if the government must provide copies of classified information, it had the option of declassifying, redacting, or placing the information under a protective order.[172]

D. Complying with Rule 16 and Brady

In *Brady v. Maryland*,[173] the United States Supreme Court recognized a defendant's right to receive any exculpatory and impeaching evidence. Rule 16(a)(1)(C) of the Federal Rules of Criminal Procedure permits discovery of documents that are material to the preparation of the defense. The Jencks Act, 18 U.S.C. §3500, provides that witness statements are not to be turned over to the defense counsel until the witness testifies.

We argued repeatedly that the government was not complying with its duties under Rule 16 and *Brady*.[174] Additionally, we argued that the government had a duty to disclose witness statements pursuant to the Jencks Act.[175]

The court agreed and held that the government must turn over all of the exculpatory evidence relating to McVeigh.[176] The court held that the purpose of disclosing exculpatory evidence is to enable the defendant to prepare its defense for trial.[177] The court held that this entitlement to exculpatory evidence is not altered by the fact that the material may be contained in witness statements or grand jury testimony.[178] Thus, the government was ordered to turn over all the evidence, including grand jury testimony and witness statements, containing exculpatory or impeaching information.[179]

169. *See id.* at 3-4.
170. *See* United States v. McVeigh, 923 F. Supp. 1310, 1314 (D. Colo. 1996).
171. *Id.*
172. *See id.*
173. 373 U.S. 83 (1963).
174. *See McVeigh*, 923 F. Supp. at 1314-15.
175. *See id.*
176. *See id.* at 1316.
177. *See id.* at 1315.
178. *See id.*
179. *See id.* at 1316. It should be noted that a later *Brady* and Jencks request regarding the production of materials relating to a deposition of Thomas Manning was denied because the court felt that the witness' testimony was not impermissibly obtained and any notes of the attorney were not affirmed or adopted by the witness. *See* United States v. McVeigh, 954 F. Supp. 1454, 1456-57 (D. Colo. 1997).

E. A Daubert Hearing

Counsel for both Nichols and McVeigh argued that application of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[180] required a hearing outside the presence of the jury to determine the results from laboratory testing of chemical residue on clothing and personal property of McVeigh.[181] We suggested that the articles had been contaminated, that improper protocols had been followed, that improper methodologies were used, and that unqualified persons participated in the performance of the tests.[182] Thus, we argued that the government must prove to the court that the appropriate scientific methods were used prior to the conclusions and results being admitted as evidence.[183]

The court held that there is a substantial difference between admissibility of evidence and the reliability of it.[184] The court stated "*Daubert* does not substitute the judge for the jury as the factfinder for scientific issues. It requires only that the court protect the jury from the influence of opinion testimony that does not have a proper foundation in the methods of science."[185] The court then postponed any decisions as to the admission of the evidence until it was presented as such at trial.[186]

XI. Severance

We submitted a Motion for Severance and Brief in Support one day before Nichols. We argued that severance was necessary for several reasons.[187] Among those were that Nichols and McVeigh had antagonistic defenses and had made prejudicial statements against each other.[188] Also, we argued that the potential capital sentence and right to individualized sentencing prohibited trying the men jointly.[189] Finally, we argued that the possibility of harm caused by the government's intended use of statements made by Nichols against him at trial, but ruled inadmissible as to McVeigh, is too great in a capital case.[190]

The government argued in response that the defendants were co-conspirators and aiders/abettors, and a joint trial would result in administrative efficiency.[191] Also,

180. 509 U.S. 579 (1993).

181. *See* United States v. McVeigh, 955 F. Supp. 1278, 1279 (D. Colo. 1997).

182. *See id.*

183. *See id.*

184. *See id.* at 1280.

185. *Id.*

186. *See id.* at 1281.

187. *See* Defendant McVeigh's Motion for Severance of Defendants and Brief in Support at 1-3 (Sept. 4, 1996), United States v. McVeigh, 169 F.R.D. 362 (D. Colo. 1996) (No. 96-CR-68-M).

188. *See id.* at 27-46.

189. *See id.* at 46-87.

190. *See id.* Nichols' objections to a joint trial were similar except that he argued in the alternative that severance should occur for the penalty phase. *See* Motion of Defendant Terry Lynn Nichols for Severance at the Guilt and Penalty Phases of Trial and Memorandum of Law in Support Thereof at 87-88, Sept. 6, 1996, United States v. McVeigh, 169 F.R.D. 362 (D. Colo. 1996) (No. 96-CR-68-M).

191. *See* Brief of United States in Opposition to Severance at 21-23, Sept. 25, 1996, *McVeigh* (No.

the government argued that any prejudice could be reduced by a limiting instruction.[192] Urging the court to reject the defendants' motions, the government stated that considerations favoring joint trials in noncapital cases are equally applicable in capital cases.[193] The court disagreed.[194]

Judge Matsch stated that joinder is appropriate under Rule 8 of the Federal Rules of Criminal Procedure unless the risk of prejudice to the co-defendants outweighs the benefits.[195] "The presumed benefits of a joint trial must be weighed against the potential for harm to the integrity of the trial process."[196] Judge Matsch recognized the uniqueness of this specific capital trial, as is evidenced by his statements: "Even risk of a mistrial or reversible error may be acceptable under certain circumstances. This is not such a case. The nature and scope of the charges, the quantity of the evidence and the intensity of the public interest in all aspects of this criminal proceeding compel caution and restraint in ruling on these motions."[197] He identified the relevant inquiry as determining whether severance is necessary to ensure confidence in the outcome by providing fundamental fairness.[198] Ultimately deciding that the possibility of harm to McVeigh from admission of Nichols' statements outweighed the benefits derived from a joint trial, Judge Matsch ruled in favor of severance.[199]

XII. The Trial

A. The First Stage

The government's case against Tim McVeigh, as widely predicted in the press, centered around six main issues. The government's witness list identified over 327 potential witnesses.[200] The first issue was the testimony of Michael and Lori Fortier as cooperating witnesses for the government. The second point was the arrest of McVeigh by Oklahoma State Trooper Charles Hanger one mile south of the Billings, Oklahoma exit off Interstate 35 approximately an hour and a half after

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96-CR-68-M).

192. *See id.* at 52-53.

193. *See id.* at 69-70.

194. *See* United States v. McVeigh, 169 F.R.D. 362, 371 (1996).

195. *See id.* at 363-64.

196. *Id.* at 364.

197. *Id.*

198. *See id.*

199. *See id.* at 368. In fact, he stated:

> Timothy McVeigh will be profoundly prejudiced by a joint trial of this case. His lawyers cannot question Terry Nichols or cross-examine the FBI agents on what they say Terry Nichols said and they cannot control the cross-examination by Terry Nichols or follow up on any suggestions or inferences of guilt of Timothy McVeigh resulting from it. The latter may have the more severe prejudicial effect if Mr. Nichols' lawyers implicitly accuse Timothy McVeigh of lying to Terry Nichols. In short, Timothy McVeigh may be caught in cross-fire.

Id. at 369.

200. The government actually called a total of 141 witnesses in both stages. In contrast, the defense called 25 witnesses in the first stage and 26 witnesses in the second stage.

the bombing. The third issue centered around reports from the FBI forensic laboratory concerning the examination of certain tangible objects that allegedly tied McVeigh to the bomb. The fourth issue was the Darrell Bridges' Telephone Debit Calling Card, sometimes known as the "spotlight" calling card. The fifth issue was McVeigh's political opinions. The final issue was the purported identification of McVeigh as Robert Kling, the individual who rented the Ryder truck in Junction City, Kansas, on April 17, 1995. It was this truck that the government said carried the bomb that exploded outside the Murrah Building.

The defense could not dispute the second and fifth issues. That is to say, McVeigh's arrest by Trooper Hanger and McVeigh's political opinions were established facts. The defense did have significantly different interpretations than those offered by the government. McVeigh's political views, while in many cases extreme, were no different than perhaps the average Pat Buchanan supporter, and his views towards some aspects of federal law enforcement are probably shared by several million people, judging from the reaction of some to the incidents at Ruby Ridge and Waco. McVeigh's arrest near Billings, we contended, actually helped the defense. We argued that there was simply insufficient time, given the nature of McVeigh's automobile, for McVeigh to have traveled from Oklahoma City at the time of the bombing to the place where Trooper Hanger arrested him. The other four contentions were all hotly disputed.

Michael and Lori Fortier received significant benefits from the government in return for testimony that was now 180 degrees from what they had said in the several weeks following the bombing. In addition, their exposure to drug charges made them eligible for greater prison sentences than Michael Fortier could or would receive for pleading guilty to the charges in connection with the bombing. Also, we attempted to demonstrate the inconsistency and lack of credibility of Michael and Lori Fortier, and heavily cross-examined them regarding their tape recorded statements about making a million dollars off the case. We attempted to demonstrate that almost every "fact" to which they testified was available in newspapers and other media sources available to them before they began to "correct" their stories.

We challenged the Darrell Bridges Debit Card on several grounds, including the fact that it was impossible to prove who actually made the calls in question. We also pointed out that a debit card, unlike a credit card, does not have an electronic chain of billing. The billing instead must be recreated out of millions of telephone records, greatly increasing the possibility of error.

The testimony of the so-called eye witnesses was offered at only minimal levels by the government. I believe that cross-examination at the hearing to suppress eye witness identification testimony destroyed the credibility of several of those witnesses and hence the government did not call them at trial. The witnesses gave conflicting statements about McVeigh's-Kling's physical appearance. Some of the descriptions were inconsistent with obvious features of McVeigh's face, weight, and clothing.

Of particular assistance to the defense was a video tape of McVeigh at the McDonald's in Junction City approximately twenty minutes before the Ryder truck

was rented. The tape showed him wearing clothing remarkably different from that described as being worn by Kling when the truck was rented a few minutes later.

The defense was assisted in the cross-examination of the FBI witnesses as a result of access to the Inspector General's report of its investigation into the FBI lab. The report was shocking in its revelation of shoddy scientific work. It described the work of the lab in many high profile cases as nothing more than working backwards to support the field agent's hypothesis of guilt. The laboratory was engaged in forensic prostitution. Its most capable and outstanding bomb trace analyst (as certified by his boss and his boss' superior) was purposely left out of the Oklahoma City investigation. Judge Matsch ordered depositions to be taken of key FBI laboratory personnel by the defense.

B. The Second Stage

The government relied in the second stage, much as it did in the first stage, on victim witnesses' testimony. The testimony was emotionally drenching and gut wrenching. The defense called numerous witnesses, friends and neighbors of McVeigh, co-workers, family members, school teachers, military buddies, and others who painted a dramatically different picture of McVeigh than that to which the nation had been exposed by the unfair and prejudicial news coverage.

The defense also wanted to prove as a matter of fact and law that the government committed murder against the Branch Davidians at Waco. Judge Matsch, however, restricted the defense to evidence of sources that McVeigh had used. Since many of these sources were themselves inflammatory, lacking objectivity, and containing demonstratively false statements, the defense was not likely assisted by this limited evidence. Had the jury heard the complete evidence concerning Waco, the verdict in the second stage may well have been different. We argued to the court that since the government said the motive for the bombing was McVeigh's hatred of the government for what it did at Waco, we were entitled to show what the government did at Waco.

XIII. The Death Penalty

A. Attempted Disqualification of Attorney General Janet Reno

The government is required under the Federal Death Penalty Act of 1994, in advance of a trial for a capital charge, to give notice to the defendant of its intention to seek the death penalty.[201] The *United States Attorneys' Manual* mandates that a three-step analysis will occur before a decision is made to seek the death penalty.[202] On the day of the bombing, April 19, 1995, Attorney General Janet

201. *See* 18 U.S.C. §§ 3591-3598 (1994).

202. *See* Motion to Disqualify Attorney Janet Reno and All Other Officers and Employees of the Department of Justice from Participation in Decision Whether to Seek the Death Penalty, and to Preclude Seeking the Death Penalty Until a Lawful Prosecutorial Decision Can Be Made Whether to Seek It, July 25, 1995, United States v. McVeigh, 890 F. Supp. 1549 (W.D. Okla. 1995) (No. M-95-98-H).

Reno announced her intention to seek the death penalty against the individual who committed the crime.[203]

After McVeigh became a suspect, President Bill Clinton announced that the government would seek the death penalty.[204] The government then feigned compliance with the three-step analysis.[205] We argued that because the decision to seek the death penalty was not given proper consideration, application of it would be improper.[206]

We argued that the U.S. Attorney guidelines created a liberty interest, and failure to comply with them results in the violation of an individual's due process rights under the Fifth Amendment.[207] Also, failure to comply with guidelines deprived McVeigh of a meaningful determination of his sentence.[208]

The government disagreed and argued that the motion constituted an "unprecedented intrusion into the exercise of prosecutorial discretion."[209] Additionally, the government urged that the guidelines did not create a liberty interest but are instead internal guidance protocols.[210]

B. Notice of Intent to Seek the Death Penalty

On October 20, 1995, the government filed its Notice of Intention to Seek the Death Penalty as to Defendant Timothy James McVeigh.[211] Therein the government listed various statutory and nonstatutory aggravating factors that would enhance and make a sentence eligible for the death penalty by providing individualized sentencing.[212]

We moved to strike the notice under the Fifth and Eighth Amendments and Rule Seven of the Federal Rules of Criminal Procedure.[213] We argued that the decision to seek the death penalty was made arbitrarily and irrationally.[214] Then we attacked each of the proposed aggravating factors separately.[215] Finally, we argued

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203. *See id.* at 3.

204. *See id.*

205. *See id.* at 4.

206. *See id.* at 9-10 (stating that this failure denied McVeigh his due process rights).

207. *See* Memorandum of Law in Support of Motion to Disqualify Attorney Janet Reno and All Other Officers and Employees of the Department of Justice from Participation in Decision Whether to Seek the Death Penalty, and to Preclude Seeking the Death Penalty Until a Lawful Prosecutorial Decision Can Be Made Whether to Seek It at 6-12, July 25, 1995, *McVeigh* (No. M-95-98-H).

208. *See id.* at 16.

209. Brief of the United States in Opposition to Motion to Disqualify the Attorney General and All Officers of the Department of Justice and to Preclude the Government from Seeking the Death Penalty at 1, Aug. 9, 1995, *McVeigh* (No. M-95-98-H).

210. *See id.* at 3-7.

211. *See* Notice of Intention to Seek the Death Penalty as to Defendant Timothy James Mcveigh, Oct. 20, 1995, *McVeigh* (No. M-95-98-H).

212. *See id.* at 2-4.

213. *See* Motion to Strike Notice of Intention to Seek the Death Penalty as to Defendant Timothy James McVeigh, Nov. 20, 1995, *McVeigh* (No. M-95-98-H).

214. *See id.*

215. *See id.*

that under any and all circumstances, the death penalty constitutes cruel and unusual punishment and should therefore be precluded.[216]

The court upheld the government's right to seek the death penalty.[217] First, the court took notice that the requests for disqualification of Attorney General Janet Reno were rendered moot by the filing of the notice of intent to seek the death penalty.[218] While Judge Matsch agreed that the arguments contained therein were relevant to a determination of whether application of the death penalty was proper, he held that the decision was one of prosecutorial discretion.[219] As to the contention by McVeigh that allowing the death penalty violated his Sixth and Eighth Amendment rights, Judge Matsch held that there was no evidence suggesting the notices were filed because of any discriminatory motive, invidious classification, or improper motive.[220] Despite the fact that there is language that appears to limit consideration of the death penalty under 18 U.S.C. §3592 to those specific aggravating factors included therein, other courts have read similar statutes to include nonstatutory aggravators.[221] Thus, said the court, application of the death penalty is appropriate.[222] Finally, the court stated that the United States Supreme Court's decision in *McKlesky v. Kemp*[223] foreclosed any argument that the death penalty is per se unconstitutional. On June 13, the jury returned a verdict of death.

XIV. Appeal

Following imposition of judgment and sentence against McVeigh on August 14, I filed a timely Notice of Appeal with the Tenth Circuit Court of Appeals. The appeal included nine main issues:

> [1] pre-trial publicity unfairly prejudiced [McVeigh], [2] juror misconduct precluded his right to a fair trial, [3] the district court erred by excluding evidence that someone else may have been guilty, [4] the district court improperly instructed the jury on the charged offenses, [5] the district court erred by admitting victim impact testimony during the guilt phase of trial, [6] the district court did not allow [McVeigh] to conduct adequate voir dire to discover juror bias as to sentencing, [7] the district court erred by excluding during the penalty phase mitigating evidence that someone else may have been involved in the bombing, [8] the district court erred by excluding during the penalty phase mitigating evidence showing the reasonableness of McVeigh's beliefs with regard to events at the Branch Davidian compound in Waco, Texas, and [9] the

216. *See id.*
217. *See* United States v. McVeigh, 944 F. Supp. 1478 (D. Colo. 1996).
218. *See id.*
219. *See id.*
220. *See id.*
221. *See id.*
222. *See id.*
223. 481 U.S. 279, 300-03 (1987) (finding the death penalty constitutional).

> victim impact testimony admitted during the penalty phase produced a sentence based on emotion rather than reason.[224]

On September 8, 1998, The Tenth Circuit Court of Appeals affirmed the district court's decision.[225]

Regarding the first issue, McVeigh claimed that his right to due process of law under the Fifth Amendment of the United States Constitution and his right to an impartial jury under the Sixth Amendment was denied.[226] The reason for these violations of his constitutional rights was that the effect of the negative pretrial publicity on the jury caused both presumed and actual prejudice.[227] The two types of prejudice are subject to different standards of review.[228]

A. Presumed Prejudice

Presumed prejudice requires the reviewing court to examine the specific publicity, the surrounding circumstances, and to determine whether the reasonable juror subjected to this publicity could render an impartial decision.[229] The reviewing court evaluates all circumstances of the publicity de novo.[230]

The negative publicity involves the media exposure McVeigh received upon his arrest and alleged confession stories that ran in the *Dallas Morning News* and *Playboy*, first in their online publications and then in their printed publications.[231] To counter the widespread media attention, the district court transferred venue to Denver, Colorado, where it immediately notified potential jurors of their involvement in the case and warned them against reading any materials that might carry news about the case.[232] Regarding the alleged confessions, the jurors were asked specifically if they read them.[233] Only four had read them, and those four expressed doubt about the validity of the alleged confessions.[234]

In denying McVeigh relief on this issue, the Tenth Circuit noted that the defendant bears the burden of showing that the publicity displaced the judicial process and in doing so, denied the defendant his constitutional rights.[235] The court held that McVeigh failed to meet his burden because he received a change of venue, and television images of him in custody failed to inflame the public to the extent required for a finding of prejudice.[236] With respect to the articles containing the alleged confession, the court stated that defense counsel's strong denial of their

224. United States v. McVeigh, 153 F.3d 1166, 1176 (10th Cir. 1998).
225. *See id.*
226. *See id.* at 1179.
227. *See id.*
228. *See id.*
229. *See id.*
230. *See id.*
231. *See id.* at 1180.
232. *See id.*
233. *See id.* at 1180-81.
234. *See id.* at 1181.
235. *See id.*
236. *See id.* at 1182.

validity weakened their prejudicial effects.[237] Additionally, the articles contained only second- or third-hand accounts of the events in the alleged confessions, thus lessening their impact.[238] Finally, the district court issued to the jurors strong admonitions to disregard anything they might read or hear about in the media.[239] For these reasons, the Tenth Circuit held that McVeigh received no presumption of prejudice from the jury.[240]

B. Actual Prejudice

Actual prejudice is examined with great deference to the trial court.[241] The "determination of whether the seated jury could remain impartial in the face of negative pretrial publicity, and the measures that may be taken to ensure such impartiality, lay squarely within the domain of the trial court."[242] The reviewing court looks at whether the trial court abused its discretion regarding the specific circumstances of the publicity and the voir dire that was conducted.[243]

McVeigh argued that the jury admonitions served to heighten the jurors' interest in the publicity surrounding the trial.[244] The Tenth Circuit held that evidence of that fact would result if a large number of jurors admitted they had read the articles, and that was not the case.[245] Additionally, the circuit court stated that the seated jury was thoroughly examined during voir dire regarding any preconceived ideas formed as a result of the media.[246] Each juror filled out two questionnaires and underwent questioning for approximately an hour per juror.[247] "Questioning by the court and the parties goes a long way towards ensuring that any prejudice, no matter how well hidden, will be revealed."[248] Finally, the jurors who had read something about the alleged confessions stated that they could remain impartial, and their verity was determined by the trial court.[249] The Tenth Circuit held that for these reasons, there was no actual prejudice toward McVeigh, and thus his first claim failed.[250]

C. Juror Misconduct

The second issue raised by McVeigh on appeal was that a juror committed misconduct by deciding McVeigh's guilt before the jury began deliberations, and that the district court erred by failing to hold a hearing regarding this allegation and

237. *See id.*
238. *See id.*
239. *See id.* at 1183.
240. *See id.*
241. *See id.* at 1179.
242. *Id.*
243. *See id.*
244. *See id.* at 1183-84.
245. *See id.* at 1184.
246. *See id.*
247. *See id.*
248. *Id.*
249. *See id.*
250. *See id.*

by not dismissing the juror.[251] The reviewing court utilized an "abuse of discretion" standard of review.[252]

The allegations regarding misconduct stemmed from a conversation in the jury room that was overheard and reported by an alternate juror.[253] One of the seated jurors said when discussing whether the decision would be difficult, "It wouldn't be very hard. I think we all know what the verdict should be."[254] Upon hearing this, the district court sternly admonished the jurors, telling them to keep an open mind and not to discuss the case.[255] At a conference with counsel, the trial judge refused to hold a hearing and denied the defense's motion to dismiss the juror.[256]

The Tenth Circuit held that the district court's decision not to hold a hearing was not an abuse of discretion.[257] The court stated that the most serious examples of juror misconduct involve outside influences on the jury and these instances mandate a hearing.[258] The court held that intra-jury misconduct is less prejudicial and thus does not mandate a hearing.[259] The decision to hold a hearing was within the trial court's discretion.[260] The district court already knew much of the information that would have been revealed during a hearing: what was said, who said it, and who overheard it.[261] Thus, the Tenth Circuit held that the court's admonitions to the jury were sufficient to cure any error the statement may have caused.[262] Though the circuit court did state that "holding a hearing would have been preferable so that the record would be clear,"[263] it declined to find reversible error.

D. Evidence of Alleged Alternative Perpetrators

McVeigh's third issue involved the exclusion of evidence that suggested there were other individuals involved in the bombing.[264] The evidence was excluded at the trial court because, although the evidence was relevant, the relevance was not sufficient to meet the standard mandated by Rule 403 of the Federal Rules of Evidence.[265] The standard of review used when evaluating an exclusion of relevant evidence claim is whether the trial court committed an abuse of discretion.[266] The problem created by the trial court is that it failed to make on the record findings as

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251. *See id.* at 1185.
252. *See id.*
253. *See id.*
254. *Id.*
255. *See id.* at 1185-86.
256. *See id.* at 1186.
257. *See id.*
258. *See id.*
259. *See id.*
260. *See id.*
261. *See id.* at 1187.
262. *See id.* at 1188.
263. *Id.*
264. *See id.*
265. *See id.*
266. *See id.*

to why the evidence should be excluded.[267] Because of this failure, the appellate court must conduct a de novo review.[268]

The appellate court held that the evidence was properly excluded because any relevance it might have was outweighed by its prejudicial effects.[269] The evidence was deemed prejudicial because it was generalized and speculative in that the person who would have testified could only testify to the fact that another group of individuals shared McVeigh's feelings about the government and also discussed bombing a federal building in Oklahoma City, Oklahoma.[270] There was no evidence that these individuals were involved in the bombing of the Murrah Building.[271] The court held that admission of this evidence would "have led the jury astray, turning the focus away from whether McVeigh — the only person whose actions were on trial — bombed the Murrah Building."[272]

E. Criminal Intent and Lesser-Included Offenses

The fourth issue argued in McVeigh's appeal was that the district court erred in refusing to instruct the jury on lesser-included offenses found within the mass destruction offenses and first-degree murder charges, and that the court improperly instructed the jury on the intent required for commission of the mass destruction offenses.[273] These allegations are reviewed de novo.[274]

McVeigh argued that the government should have been required to prove that McVeigh possessed a specific intent to kill.[275] The Tenth Circuit stated that although Congress failed to specify the intent required for commission of the mass destruction offenses, a "knowingly" standard is sufficient to impose the death penalty as a result of the conviction.[276] The fact that the phrase "if death results" is included does not mean that it is an element of the offense, but it is instead a sentencing factor.[277]

With respect to the lesser-included offenses, McVeigh argued that because of the graduated levels of intent for multiple offenses, the instructions should be similar to those given for first- and second-degree murder.[278] The Tenth Circuit rejected the argument that the mass destruction offenses contained graduated levels of intent and therefore this argument failed because its premise failed.[279] McVeigh also argued that the jury should have received instructions on second-degree murder

267. *See id.* at 1189.
268. *See id.*
269. *See id.*
270. *See id.* at 1191.
271. *See id.*
272. *Id.*
273. *See id.* at 1192-93.
274. *See id.* at 1193.
275. *See id.*
276. *See id.* at 1194.
277. *See id.* at 1194.
278. *See id.* at 1197.
279. *See id.* at 1198.

being a lesser-included offense of first-degree murder.[280] The district court refused to so instruct the jury because it believed that for the jury to find McVeigh guilty of murder of a federal employee, it would have to find premeditation, which is the only difference between the two degrees.[281] The Tenth Circuit agreed with the district court's ruling and therefore denied McVeigh relief on this issue.[282]

F. Victim Impact Testimony Admitted During the Guilt Phase

The next issue raised by McVeigh was that the district court erred by admitting testimony identifying deceased victims, describing the impact of the blast, and discussing the damage caused by the bombing.[283] McVeigh argued that this testimony was overly prejudicial and should not have been admitted.[284] The reviewing court utilized an abuse of discretion standard of review.[285] However, four witnesses testified before McVeigh objected to the testimony and the court reviewed that testimony for plain error.[286] The objection to the testimony was that it exceeded that related to the immediate effects of the bombing.[287]

Upon reviewing the testimony for plain error, the Tenth Circuit held that any error that resulted from testimony of the long range impact of the explosion was harmless.[288] The circuit court held that the testimony relating to victims' personal histories was allowed and indeed was asked of defense witnesses who testified.[289] The testimony given of victims' pre-explosion activities related to the reasons that they were at the bomb site and thus supported their other testimony.[290] The graphic testimony that described the immediate after-effects of the explosion helped the government prove the element of the offense requiring the destruction to be massive, and was therefore admissible.[291] The remaining evidence that spoke to long-term effects of the bombing was harmless error and therefore not reversible.[292] The error was harmless because the circuit court found sufficient evidence to support McVeigh's guilt and had the testimony been excluded, the result would have been the same.[293] Finally, the court ruled that there was no error in allowing the testimony, despite its cumulative effect of overwhelming the emotions of the jury, because the government was allowed to introduce testimony reflecting the magnitude of the crime.[294]

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280. *See id.*
281. *See id.*
282. *See id.*
283. *See id.* at 1198-99.
284. *See id.* at 1199.
285. *See id.*
286. *See id.* at 1199-1200.
287. *See id.* at 1200.
288. *See id.* at 1203.
289. *See id.* at 1204.
290. *See id.*
291. *See id.*
292. *See id.*
293. *See id.*
294. *See id.* at 1204-05.

G. Death Penalty Voir Dire

McVeigh argued that he was not allowed to voir dire potential jurors properly concerning their proclivity to vote automatically for the death penalty.[295] Also, McVeigh was not allowed to determine whether media exposure improperly biased the jurors' ability to set punishment.[296] The appellate court reviews the district court's decisions regarding voir dire to determine whether an abuse of discretion occurred.[297]

The district court refused to allow the defense to ask what is generally referred to as a "reverse-*Witherspoon*" question.[298] The reverse-*Witherspoon* question, which arose from a line of cases exemplified by *Witherspoon v. Illinois*,[299] seeks to elicit those jurors who would vote to impose the death penalty automatically upon finding a defendant guilty of a capital crime.[300]

The Tenth Circuit held that the denial was not an abuse of discretion because the questions were not properly phrased and thus did not fall under the protection the United States Supreme Court has afforded during voir dire. Indeed, the circuit court determined that McVeigh's question was much broader in scope because it "is susceptible of an interpretation asking the juror how she would vote on the evidence presented at trial."[301]

With respect to the questions that sought to highlight those jurors who were so influenced by the media that they would automatically vote for the death penalty, the circuit court held that the defense was seeking to determine what jurors thought of the death penalty in light of the specifics of this case.[302] The defense is only allowed to ask those questions which illustrate the jurors' moral disposition with respect to the death penalty.[303] Therefore, the Tenth Circuit held that excluding them was not an abuse of discretion.[304]

The circuit court held that the defense was able to use other ways to "life-qualify" the jury.[305] Those ways include extensive written questions, extensive questioning by the judge, extensive questioning by both parties regarding the impartiality of prospective jurors, and questioning of some jurors by defense counsel utilizing appropriately phrased reverse-*Witherspoon* questions.[306]

295. *See id.* at 1205.
296. *See id.*
297. *See id.*
298. *See id.* at 1206.
299. 391 U.S. 510 (1968).
300. *See McVeigh*, 153 F.3d at 1206.
301. *Id.*
302. *See id.* at 1207.
303. *See id.* at 1208.
304. *See id.*
305. *See id.* at 1209.
306. *See id.*

H. Improper Exclusion of Mitigating Evidence

McVeigh argued that the district court improperly excluded from the penalty phase evidence that someone else may have been involved in the bombing.[307] This is the same evidence that was excluded on relevancy grounds from the guilt phase of the trial.[308] Despite McVeigh's argument that the exclusion violated his rights to individualized sentencing under the Eighth Amendment of the United States Constitution, the Tenth Circuit held that the evidence was properly excluded because McVeigh had already failed to establish its relevancy.[309]

I. Exclusion of Mitigating Evidence Establishing the Reasonableness of Beliefs

McVeigh was allowed to present evidence during the penalty phase of his trial that was relevant to his opinion regarding the standoff between the federal government and the Branch Davidians at Waco, Texas.[310] That testimony was limited to evidence illustrating his knowledge of the incident and his subjective perceptions of it on April 19, 1995.[311] He was not allowed to present evidence as to the objective wrongfulness of the actions taken by the government.[312] This, McVeigh argued, was reversible error.[313]

Upon review, the Tenth Circuit disagreed.[314] Using a de novo standard of review, the court held that specific evidence of how the government handled the events at Waco was not within McVeigh's knowledge at the time of the bombing and was properly excluded.[315] The court stated "McVeigh was not involved in the events at Waco; thus what actually happened there, and what experts think of what happened, is not part of his character."[316]

J. Victim Impact Testimony Admitted in Penalty Phase

The government presented thirty-eight witnesses who testified during the penalty phase of the trial.[317] Their testimony related to the impact of the bombing on their lives.[318] McVeigh argued that this testimony "injected a constitutionally intolerable level of emotion."[319] Also, he argued that the cumulative effect of the testimony rendered a verdict based on passion rather than reason.[320]

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307. *See id.* at 1211.
308. *See id.*
309. *See id.* at 1212.
310. *See id.* at 1213.
311. *See id.*
312. *See id.*
313. *See id.*
314. *See id.* at 1216.
315. *See id.*
316. *Id.*
317. *See id.*
318. *See id.*
319. *Id.*
320. *See id.*

Limiting its analysis to that testimony which exceeded the impact of victims' lives on the witnesses, the Tenth Circuit held that it was properly excluded.[321] The court also reviewed the cumulative impact of the testimony.[322] The court evaluated both using a de novo standard of review.[323]

The court stated that the impact of the victims' deaths on their families and loved ones is an obvious illustration of a devastating act.[324] Any testimony regarding specific instances in the victims' lives are "relevant to understanding the uniqueness of the life lost and the impact of the death on each victim's family."[325] As for the cumulative impact of the evidence, the court stated that the impact evidence was admissible to show the magnitude of the crime, and that the large number of victims comports with the severity of the act.[326] Thus, the court found "that the jury based its decision on a reasoned, moral judgement."[327]

XV. Conclusion

On August 14, 1997, Judge Matsch sentenced Timothy James McVeigh to the death penalty, over two months after the jury returned a finding of guilty for all counts.[328] After the court of appeals opinion was issued, a petition or a writ of certiorari was filed, on January, 4, 1999. As of this writing, no state charges have been filed.[329]

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321. *See id.* at 1218.

322. *See id.*

323. *See id.*

324. *See id.* at 1219.

325. *Id.* at 1221.

326. *See id.*

327. *Id.* at 1222.

328. *See* Judgment and Order, Aug. 14, 1997, *McVeigh* (No. 4877-96-CR-6814).

329. However, State Rep. Charles Key circulated a petition that called for a grand jury to be convened to address the public offenses related to the bombing of the Murrah Building. *See In re* Grand Jury, 935 P.2d 1189 (Okla. Ct. App. 1996). As a result, a grand jury was impaneled on June 30, 1997. The grand jury issued its final report on December 30, 1998. *See In re* Oklahoma County Grand Jury Final Report, No. CJ-95-7278 (District Ct. Okla. County Dec. 30, 1998). The report was read into open court by Oklahoma County District Judge William R. Burkett, who also read into the record a prepared statement of his own comments. The grand jury heard from 117 witnesses and received 1,109 exhibits. The jury was in session 133 working days. The jury recommended that the indictments be returned but stated the bombing "was an act that could have been carried out by one individual. We cannot affirmatively state that absolutely no one else was involved in the bombing of the Alfred P. Murrah Federal Building." *Id.*, slip op. at 20-21.

The grand jury had no power to subpoena witnesses who live outside of Oklahoma and could thus not compel the attendance of witnesses from Michigan, Kansas, and Arizona. Additionally, the jury initially was prevented from receiving assistance from federal agents. *See* United States v. McVeigh, 157 F.3d 809 (10th Cir. 1998). The likelihood that it was unable to view the copious amounts of evidence admitted at the federal trial of McVeigh is evidenced by the fact that it only received 1109 exhibits. The ban was not lifted until two months before the final report was issued. Therefore, one must conclude that the final report of the Oklahoma County grand jury is based on incomplete and inadequate information, a fact recognized in the final report by the careful language stating that the jury could not exclude the possibility of John Doe II or a broader conspiracy. Conversely, the federal grand jury found the existence of a broader conspiracy when it issued its indictments of McVeigh and Nichols.

On August 27, 1997, I withdrew as lead counsel for McVeigh, ending a very long two-and-a-half years. I asked the court of appeals to appoint Rob Nigh to handle the appeal, and it did so.

We made a maximum effort in defending McVeigh because our sense of professional obligation and temperament permitted nothing less. We never slackened and we never gave up. Yet our efforts failed in their ultimate purpose because the goal was unachievable. Once media coverage started in a particular direction, it became a journalistic juggernaut, hard to turn, harder to reverse. The media printed false statements and were negligent in some of the coverage. Prominence, with a few exceptions, was given to reporting which supported the FBI's view. The bombing in Oklahoma City makes it clear how tempting it is for journalists covering a highly visible investigation to adopt the investigator's theories as their own.

There is much to be learned from *United States v. McVeigh.* Issues were presented that have never before been confronted by the decision makers in our legal system, and that hopefully never will be again. Perhaps the greatest lesson to learn is that throughout our lives, we will be called to serve. We may not understand how we came to be there, assisting in the manner that we are. But hopefully we can say when we leave that we did the very best we could. In her wonderful novel *To Kill A Mockingbird,* Harper Lee's fictional lawyer, Atticus Finch, tells his daughter, Scout, "Simply by the nature of the work, every lawyer gets at least one case in his lifetime that affects him personally. This one is mine."[330] Well, this one was one of mine.

330. HARPER LEE, TO KILL A MOCKINGBIRD 73 (1960).