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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JUDI BARI, by DARLENE COMINGORE,
Executor of the Estate of JUDI BARI,
and DARRYL CHERNEY,

No. C 91-01057 CW
JURY INSTRUCTIONS

Plaintiffs,

v.

FBI Agents STOCKTON BUCK, FRANK
DOYLE, JOHN REIKES, and PHILIP SENA,
and Oakland Police Officers CLYDE M.
SIMS, ROBERT CHENAULT, and MICHAEL
SITTERUD,

Defendants.

Duties of Jury to Find Facts and Follow Law

Members of the jury, now that you have heard all the evidence,
it is my duty to instruct you on the law which applies to this
case. A copy of these instructions will be available in the jury
room for you to consult if you find it necessary.

It is your duty to find the facts from all the evidence in the
case. To those facts you will apply the law as I give it to you.
You must follow the law as I give it to you whether you agree with
it or not. You must not be influenced by any personal likes or

1 dislikes, opinions, prejudices, or sympathy. That means that you
2 must decide the case solely on the evidence before you. You will
3 recall that you took an oath promising to do so at the beginning of
4 the case.

5 In following my instructions, you must follow all of them and
6 not single out some and ignore others; they are all equally
7 important. You must not read into these instructions or into
8 anything the court may have said or done any suggestion as to what
9 verdict you should return--that is a matter entirely up to you.

10 Use of Notes

11 You may use notes taken during trial to assist your memory.
12 Notes, however, should not be substituted for your memory, and you
13 should not be overly influenced by the notes.

14 What Is Evidence

15 The evidence from which you are to decide what the facts are
16 consists of:

- 17 1. the sworn testimony of witnesses, on both direct and
- 18 cross-examination, regardless of who called the witness;
- 19 2. the exhibits which have been received into evidence; and
- 20 3. any facts to which all the lawyers have agreed or
- 21 stipulated.

22 What Is Not Evidence

23 In reaching your verdict, you may consider only the testimony
24 and exhibits received into evidence. Certain things are not
25 evidence, and you may not consider them in deciding what the facts
26 are. I will list them for you:

- 27 1. Arguments and statements by lawyers are not evidence.
- 28 The lawyers are not witnesses. What they have said in

1 their opening statements, closing arguments, and at other
2 times is intended to help you interpret the evidence, but
3 it is not evidence. If the facts as you remember them
4 differ from the way the lawyers have stated them, your
5 memory of them controls.

- 6 2. Questions and objections by lawyers are not evidence.
7 Attorneys have a duty to their clients to object when
8 they believe a question is improper under the rules of
9 evidence. You should not be influenced by the objection
10 or by the court's ruling on it.
- 11 3. Testimony that has been excluded or stricken, or that you
12 have been instructed to disregard, is not evidence and
13 must not be considered. In addition some testimony and
14 exhibits have been received only for a limited purpose;
15 where I have given a limiting instruction, you must
16 follow it.
- 17 4. Anything you may have seen or heard when the court was
18 not in session is not evidence. You are to decide the
19 case solely on the evidence received at the trial.

20 **Direct and Circumstantial Evidence**

21 Evidence may be direct or circumstantial. Direct evidence is
22 direct proof of a fact, such as testimony by a witness about what
23 the witness personally saw or heard or did. Circumstantial evidence
24 is proof of one or more facts from which you could find another
25 fact. You should consider both kinds of evidence. The law makes
26 no distinction between the weight to be given to either direct or
27 circumstantial evidence. It is for you to decide how much weight
28 to give to any evidence.

1 **Credibility of Witnesses**

2 In deciding the facts in this case, you may have to decide
3 which testimony to believe and which testimony not to believe. You
4 may believe everything a witness says, or part of it, or none of
5 it.

6 In considering the testimony of any witness, you may take into
7 account:

- 8 1. the opportunity and ability of the witness to see or hear
9 or know the things testified to;
- 10 2. the witness' memory;
- 11 3. the witness' manner while testifying;
- 12 4. the witness' interest in the outcome of the case and any
13 bias or prejudice;
- 14 5. whether other evidence contradicted the witness'
15 testimony;
- 16 6. the reasonableness of the witness' testimony in light of
17 all the evidence; and
- 18 7. any other factors that bear on believability.

19 The weight of the evidence as to a fact does not necessarily
20 depend on the number of witnesses who testify.

21 You have heard the testimony of witnesses who are civilians and
22 the testimony of witnesses who are law enforcement officers. In
23 evaluating this testimony, you are to apply the same standards of
24 evaluation to each witness. You shall not give any greater or lesser
25 weight to the testimony of a witness solely because of his occupation
26 as a law enforcement officer.

27 Unless stated otherwise, the word "officer" or "law enforcement
28 officer," as used in these instructions, means both police officers

1 and FBI agents, whatever their rank or title.

2 **Impeachment-Inconsistent Statements or Conduct**

3 A witness may be discredited or impeached by contradictory
4 evidence; or by evidence that at some other time the witness has said
5 or done something, or has failed to say or do something which is
6 inconsistent with the witness' present testimony.

7 If you believe any witness has been impeached and thus
8 discredited, it is your exclusive province to give the testimony of
9 that witness such credibility, if any, as you may think it deserves.

10 If a witness is shown knowingly to have testified falsely
11 concerning any material matter, you have a right to distrust such
12 witness' testimony in other particulars and you may reject all the
13 testimony of that witness or give it such credibility as you may
14 think it deserves.

15 **Opinion Testimony (Expert Witnesses)**

16 You have heard testimony from persons who, because of education
17 or experience, are permitted to state opinions and the reasons for
18 their opinions.

19 Opinion testimony should be judged just like any other
20 testimony. You may accept it or reject it, and give it as much
21 weight as you think it deserves, considering the witness' education
22 and experience, the reasons given for the opinion, and all the other
23 evidence in the case.

24 **Charts and Summaries in Evidence**

25 Certain charts and summaries have been received into evidence to
26 illustrate information brought out in the trial. Charts and summaries
27 are only as good as the underlying evidence that supports them. You
28 should, therefore, give them only such weight as you think the

1 underlying evidence deserves.

2 **Two or More Parties**

3 You should decide the case as to each party separately. Unless
4 otherwise stated, the instructions apply to all parties. Each party,
5 whether plaintiff or defendant, is entitled to a fair consideration
6 of that party's own claims and defenses, and is not to be prejudiced
7 by the fact, if it should become a fact, that you find for or against
8 any other party. There is one exception to this rule. The
9 plaintiffs claim that there was a conspiracy to violate their rights.
10 If you find that there was such a conspiracy, each person you find
11 was a member of the conspiracy can be held liable for all the damage
12 you find was caused by any act of the conspiracy.

13 **Violations of Federal Civil Rights-Elements and Burden of Proof**

14 The plaintiffs bring a number of claims that the defendants
15 violated their constitutional rights. On each of the plaintiffs'
16 claims, each plaintiff has the burden of proving each of the
17 following elements by a preponderance of the evidence against each
18 defendant:

- 19 1. The acts or omissions of the defendant were intentional;
- 20 2. The defendant acted under color of law; and
- 21 3. The acts or omissions of the defendant were the cause of
22 the deprivation of the plaintiff's rights protected by the
23 Constitution of the United States.

24 On each of the plaintiffs' claims, if you find that each of the
25 elements on which the plaintiff has the burden of proof has been
26 proved, your verdict should be for the plaintiff. If, on the other
27 hand, the plaintiff has failed to prove any of these elements, your
28 verdict should be for the defendant.

1 An act is intentional if the defendant intended to commit the
2 act. You may infer that a person intends the natural and probable
3 consequences of acts knowingly done or knowingly omitted.

4 A defendant's acts or omissions cause a constitutional violation
5 if his actions or omissions were a substantial factor, even if not
6 the sole factor, in bringing about the violation.

7 The defendants--both Oakland and federal--have stipulated that
8 each of the defendants was acting under color of law at the time of
9 the events giving rise to the plaintiffs' claims.

10 Burden of Proof-Preponderance of the Evidence

11 When a party has the burden of proof on any claim by a
12 preponderance of the evidence, it means you must be persuaded by the
13 evidence that the claim is more probably true than not true.

14 You should base your decision on all of the evidence, regardless
15 of which party presented it.

16 Unlawful Arrest

17 The plaintiffs claim that federal defendants Frank Doyle, John
18 Reikes and Philip Sena, and Oakland defendants Clyde M. Sims, Robert
19 Chenault, and Michael Sitterud participated in arresting them
20 unlawfully. Under the Fourth Amendment to the United States
21 Constitution, people have the right to be free from unreasonable
22 search or seizure by police of their "persons, houses, papers and
23 effects." The Fourth Amendment prevents law enforcement officers
24 from seizing, that is, arresting, individuals without probable cause.
25 In order to prove a violation of the Fourth Amendment as a result of
26 their arrest, each plaintiff must prove that each of the following is
27 more probably true than not true, as to each defendant:

- 28 1. that the particular defendant participated in the arrest of

1 the plaintiff; ..

2 2. that probable cause to believe that the plaintiff was
3 guilty of possessing and transporting an explosive device
4 was lacking;

5 3. that the plaintiff suffered loss or harm as a result of the
6 arrest; and

7 4. that the wrongful conduct of the particular defendant was
8 the cause of the plaintiff's loss or harm.

9 **Reasonable Belief in Lawfulness of Conduct**

10 Even if you find that a plaintiff's rights were violated by a
11 defendant's participation in the arrest of that plaintiff without
12 probable cause, that defendant is not liable if a reasonable officer
13 could believe that his conduct was lawful under the circumstances.

14 **What Constitutes an Arrest**

15 Whether and when a person is arrested for purposes of the Fourth
16 Amendment depends on the totality of the circumstances. A person is
17 arrested when, in view of all of the circumstances, a reasonable
18 person would have believed that he or she was not free to leave. Law
19 enforcement officers may detain a person for a brief period of time
20 and conduct limited questioning based on a mere reasonable suspicion
21 of criminal activity, so long as they work diligently during this
22 time to confirm or dispel their suspicions, using the least intrusive
23 means reasonably available. Otherwise, the detention becomes an
24 arrest requiring probable cause. Where a person is involuntarily
25 transported to a police station and placed in a cell or interrogation
26 room, he or she has been arrested and probable cause is required,
27 even if the purpose of the seizure is investigatory rather than
28 accusatory.

Unlawful Arrest-Probable Cause

1
2 Probable cause exists to arrest an individual if the facts and
3 circumstances known to the law enforcement officers at the moment the
4 arrest was made are sufficient to cause a prudent person to believe
5 that there is a fair probability that the individual committed a
6 crime. Suspicion or rumor is insufficient to give rise to probable
7 cause to arrest. The facts and circumstances must be reasonably
8 trustworthy. A law enforcement officer does not need to possess
9 facts sufficient to convict an individual in order to establish
10 probable cause. Probable cause must be judged at the point at which
11 the arrest is made. Information discovered subsequent to the arrest
12 must not be considered in determining whether there was probable
13 cause at the time of the arrest. A law enforcement officer is
14 entitled to rely on information obtained from fellow law enforcement
15 officers, but this in no way negates an officer's duty reasonably to
16 inquire or investigate facts reported by other officers, if the
17 circumstances are such that a reasonable officer would inquire
18 further. In other words, an officer's reliance on information
19 obtained from a fellow law enforcement officer, or failure to make an
20 independent inquiry, must be reasonable.

Unlawful Arrest-Participation of Defendants

21
22 An officer may only be liable for acts in which he participated
23 or which he directed. As to each plaintiff and each defendant, you
24 may find in favor of that plaintiff as to that defendant on that
25 plaintiff's Fourth Amendment claim for unlawful arrest if you find
26 that the defendant knowingly or recklessly caused the arrest of that
27 plaintiff without probable cause.

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3 **Unreasonable Search**

4 The plaintiffs also claim that federal defendants Frank Doyle
5 and John Reikes, and Oakland defendants Clyde M. Sims, Robert
6 Chenault, and Michael Sitterud violated their rights under the Fourth
7 Amendment by conducting illegal searches of their homes--namely, the
8 searches of both plaintiffs' homes on the night after the bombing and
9 arrests, May 25, 1990, and the later, second search of Ms. Bari's
10 home on June 26, 1990. The plaintiffs claim that the search warrants
11 the defendants used as authorization for the searches of their
12 residences were not legally valid because the affidavits on which the
13 Court relied included false statements and misleading omissions.

14 In order to prove a violation of the Fourth Amendment based on
15 false statements or misleading omissions in an application for a
16 search warrant, each plaintiff must prove that each of the following
17 is more probably true than not true, as to each defendant:

- 18 1. that, in an affidavit in support of the application for a
19 search warrant, the particular defendant directly or
20 indirectly made a false statement, or omitted information
21 indicating that evidence of a crime would not be found in
22 the place to be searched;
- 23 2. that the defendant made the false statement knowing that it
24 was false or with a reckless disregard for the truth, or
25 knowingly or recklessly omitted information indicating that
26 evidence of a crime would not be found;
- 27 3. that if the defendant had not made the false statement or
28 had included the omitted information in the search warrant
 affidavit, the affidavit would not have contained probable
 cause to conduct the search in question; and

1 4. that the plaintiff suffered loss or harm as a result of the
2 false statement or omission.

3 A defendant acts with reckless disregard for the truth if he has
4 knowledge of a high degree of probability that his statement is false
5 and acts with deliberate disregard for that probability. Minor
6 errors or discrepancies in the affidavit which reflect mere
7 negligence on the part of a law enforcement officer do not constitute
8 deliberate falsehoods or reckless disregard for the truth sufficient
9 to demonstrate a violation of the Fourth Amendment.

10 **Reasonable Belief in Lawfulness of Conduct**

11 Even if you find that a plaintiff's rights were violated by a
12 defendant's false statements or misleading omissions in a search
13 warrant affidavit, that defendant is not liable if a reasonable
14 officer could believe that, had he presented the truth in the search
15 warrant affidavit, the affidavit would still have contained probable
16 cause for the search in question.

17 **Unreasonable Search-Probable Cause**

18 Probable cause exists to search an individual's residence if the
19 facts and circumstances known to the law enforcement officer at the
20 time of the search are sufficient to cause a prudent person to
21 believe that there is a fair probability that contraband or evidence
22 of a crime will be found at that residence. Suspicion or rumor is
23 insufficient to give rise to probable cause to search. The facts and
24 circumstances must be reasonably trustworthy. Whether the affidavit
25 contains probable cause must be determined at the time at which the
26 warrant is issued. Information discovered subsequent to the search
27 must not be considered in determining whether there was probable
28 cause at the time of the search. A law enforcement officer is

1 entitled to rely on information obtained from fellow law enforcement
2 officers, but this in no way negates an officer's duty reasonably to
3 inquire or investigate facts reported by other officers, if the
4 circumstances are such that a reasonable officer would inquire
5 further. In other words, an officer's reliance on information
6 obtained from a fellow law enforcement officer, or failure to make an
7 independent inquiry, must be reasonable.

8 **Unreasonable Search-Participation of Defendants**

9 An officer may only be liable for acts in which he participated
10 or which he directed. As to each plaintiff and each defendant, and
11 as to each search warrant, you may find in favor of that plaintiff
12 against that defendant on that plaintiff's Fourth Amendment claim for
13 unreasonable search if you find that the defendant knowingly or
14 recklessly caused false statements or misleading omissions to be
15 included in the affidavit in support of the search warrant at issue.

16 **First Amendment Rights**

17 The plaintiffs also claim that, in carrying out the arrests and
18 the searches, seeking high bails, making and repeating the public
19 accusation that the plaintiffs were transporting the bomb, and
20 conducting a bad faith investigation, the defendants were motivated
21 by a desire to defame and discredit the plaintiffs, and to disrupt
22 and neutralize their free speech and organizing work on behalf of the
23 environment, in violation of their rights under the First Amendment.
24 The First Amendment guarantees the rights of free speech, freedom of
25 association, and freedom of assembly.

26 In order to prove a violation of their First Amendment rights,
27 each plaintiff must prove that each of the following is more probably
28 true than not true, as to each defendant:

- 1 1. that the plaintiff made public statements on a matter of
- 2 public concern;
- 3 2. that the protected speech was a substantial or motivating
- 4 factor in a particular defendant's taking action against
- 5 the plaintiff; and
- 6 3. that the particular defendant's action would chill or
- 7 silence a person of ordinary firmness from participating in
- 8 activities protected by the First Amendment, even if the
- 9 action did not actually silence the plaintiff.

10 Speech and other activities such as organizing and protesting in
11 favor of stronger environmental protection are protected by the First
12 Amendment to the Constitution. However criminal actions, even if
13 done from admirable motives, are not protected by the First
14 Amendment. You may only find a particular defendant liable for a
15 First Amendment violation if you find that he committed one or more
16 of the acts complained of with the intention of disrupting or
17 discrediting the plaintiff's activities protected by the First
18 Amendment, as opposed to activities not protected by the First
19 Amendment.

20 **Conspiracy Claim**

21 Finally, the plaintiffs claim that the defendants conspired
22 among themselves in order to violate the plaintiffs' First Amendment
23 rights. In order to prove the conspiracy claim, each plaintiff must
24 prove that each of the following is more probably true than not true:

- 25 1. that two or more of the defendants agreed to violate the
- 26 plaintiff's First Amendment rights;
- 27 2. that one or more of the defendants whom you find were
- 28 members of the conspiracy performed an overt act in

1 furtherance of the conspiracy; and

2 3. that the plaintiff's First Amendment rights were violated,
3 causing the plaintiff loss or harm.

4 To establish a defendant's liability for conspiracy, the
5 plaintiff must demonstrate the existence of an agreement, or meeting
6 of the minds, between two or more of the defendants to violate the
7 plaintiff's First Amendment rights. The defendant must have, by some
8 concerted action, intended to violate the plaintiff's First Amendment
9 rights for the purpose of harming the plaintiff, resulting in loss or
10 harm to the plaintiff.

11 Such an agreement need not be express, and may be inferred on
12 the basis of circumstantial evidence such as the actions of the
13 defendants. For example, you may infer the existence of a conspiracy
14 from a showing that the alleged conspirators have committed acts that
15 are unlikely to have been undertaken without an agreement.

16 To be liable, each participant in the conspiracy need not know
17 the exact details of the plan, but each participant must at least
18 share the common unlawful objective of the conspiracy.

19 **Damages-Proof**

20 It is the duty of the court to instruct you about the measure of
21 damages. By instructing you on damages, the court does not mean to
22 suggest for which party your verdict should be rendered.

23 As to each plaintiff, if you find for that plaintiff on one or
24 more of that plaintiff's claims of First and/or Fourth Amendment
25 violations, you must determine that plaintiff's damages. Each
26 plaintiff has the burden of proving damages by a preponderance of the
27 evidence. Damages means the amount of money which will reasonably
28 and fairly compensate the plaintiff for any loss or harm you find was

1 caused by the First and/or Fourth Amendment violations. You should
2 consider the mental and emotional pain and suffering which was
3 experienced, and which with reasonable probability will be
4 experienced in the future.

5 Each plaintiff has the burden of proving damages by a
6 preponderance of the evidence, and it is for you to determine what
7 damages, if any, have been proved.

8 Your award must be based upon evidence and not upon speculation,
9 guesswork or conjecture.

10 **Apportionment**

11 If you find in favor of one or both of the plaintiffs on their
12 claims under either the First or Fourth Amendment, and you award one
13 or both of the plaintiffs damages, you must determine the amount of
14 damages suffered by each plaintiff for each violation and apportion
15 the damages you award among the defendant or defendants you find
16 liable; that is, you must determine for what portion of those actual
17 damages each defendant is responsible.

18 If you find for one or both of the plaintiffs on their
19 conspiracy cause of action, however, all of the defendants you find
20 liable for conspiracy will be jointly liable for all of the damages
21 resulting from the conspiracy.

22 **Measure of Damages Based Solely on the Plaintiffs' Loss or Harm**

23 You must determine the amount of damages you award to each
24 plaintiff, if any, without considering the defendants' financial
25 circumstances.

26 **Punitive Damages**

27 If you find for one or both plaintiffs, you may, but are not
28 required to, award punitive damages. The purposes of punitive

1 damages are to punish a defendant and to deter a defendant and others
2 from committing similar acts in the future.

3 Each plaintiff has the burden of proving that punitive damages
4 should be awarded, and the amount, by a preponderance of the
5 evidence. You may award punitive damages only if you find that a
6 defendant's conduct was malicious, or in reckless disregard of the
7 plaintiff's rights. Conduct is malicious if it is accompanied by ill
8 will, or spite, or if it is for the purpose of injuring another.
9 Conduct is in reckless disregard of the plaintiff's rights if, under
10 the circumstances, it reflects a complete indifference to the rights
11 of others.

12 If you find that punitive damages are appropriate, you must use
13 reason in setting the amount. Punitive damages, if any, should be in
14 an amount sufficient to fulfill their purposes but should not reflect
15 bias, prejudice or sympathy toward any party. In considering
16 punitive damages, you may consider the degree of reprehensibility of
17 a defendant's conduct and the relationship of any award of punitive
18 damages to any actual harm inflicted on the plaintiff.

19 You may impose punitive damages against one or more of the
20 defendants and not others, and may award different amounts against
21 different defendants.

22 **Communication with Court**

23 If it becomes necessary to communicate with me during
24 deliberations, you may send a folded note through the marshal, signed
25 by a juror. Do not disclose the content of your note to the marshal.

26 Do not communicate with the court about the case except by a
27 signed note. I will only communicate with you regarding the case in
28 writing or in open court.

1 Do not disclose any vote count in any note to the court.

2 **Duty to Deliberate**

3 When you retire, you should elect one member of the jury as your
4 foreperson. That person will preside over the deliberations and
5 speak for you here in court.

6 You will then discuss the case with your fellow jurors to reach
7 agreement if you can do so. Your verdict must be unanimous.

8 Each of you must decide the case for yourself, but you should do
9 so only after you have considered all the evidence, discussed it
10 fully with the other jurors, and listened to the views of your fellow
11 jurors.

12 Do not be afraid to change your opinion if the discussion
13 persuades you that you should. Do not come to a decision simply
14 because other jurors think it is right.

15 It is important that you attempt to reach a unanimous verdict
16 but, of course, only if each of you can do so after having made your
17 own conscientious decision. Do not change an honest belief about the
18 weight and effect of the evidence simply to reach a verdict.

19 **Return of Verdict**

20 After you have reached unanimous agreement on a verdict, your
21 foreperson will fill in, date, and sign the verdict form or forms and
22 advise the court that you have reached a verdict.

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