IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 91-01057 CW

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

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.
_____/

JURY INSTRUCTIONS

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

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

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

Use of Notes

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

What Is Evidence

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

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

What Is Not Evidence

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

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

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

2. Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

3. Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered. In addition some testimony and exhibits have been received only for a limited purpose; where I have given a limiting instruction, you must follow it.

4. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

Direct and Circumstantial Evidence

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

Credibility of Witnesses

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

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

1. the opportunity and ability of the witness to see or hear or know the things testified to;
2. the witness' memory;
3. the witness' manner while testifying;
4. the witness' interest in the outcome of the case and any bias or prejudice;
5. whether other evidence contradicted the witness' testimony;
6. the reasonableness of the witness' testimony in light of all the evidence; and
7. any other factors that bear on believability.

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

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

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

and FBI agents, whatever their rank or title.

Impeachment-Inconsistent Statements or Conduct

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

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

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

Opinion Testimony (Expert Witnesses)

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

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

Charts and Summaries in Evidence

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

underlying evidence deserves.

Two or More Parties

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

Violations of Federal Civil Rights-Elements and Burden of Proof

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

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

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

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

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

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

Burden of Proof-Preponderance of the Evidence

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

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

Unlawful Arrest

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

1. that the particular defendant participated in the arrest of

the plaintiff;

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

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

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

Reasonable Belief in Lawfulness of Conduct

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

What Constitutes an Arrest

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

Unlawful Arrest-Probable Cause

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

Unlawful Arrest-Participation of Defendants

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

Unreasonable Search

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

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

1. that, in an affidavit in support of the application for a search warrant, the particular defendant directly or indirectly made a false statement, or omitted information indicating that evidence of a crime would not be found in the place to be searched;
2. that the defendant made the false statement knowing that it was false or with a reckless disregard for the truth, or knowingly or recklessly omitted information indicating that evidence of a crime would not be found;
3. that if the defendant had not made the false statement or 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

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

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

Reasonable Belief in Lawfulness of Conduct

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

Unreasonable Search-Probable Cause

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

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

Unreasonable Search-Participation of Defendants

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

First Amendment Rights

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

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

1. that the plaintiff made public statements on a matter of public concern;

2. that the protected speech was a substantial or motivating factor in a particular defendant's taking action against the plaintiff; and

3. that the particular defendant's action would chill or silence a person of ordinary firmness from participating in activities protected by the First Amendment, even if the action did not actually silence the plaintiff.

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

Conspiracy Claim

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

1. that two or more of the defendants agreed to violate the plaintiff's First Amendment rights;

2. that one or more of the defendants whom you find were members of the conspiracy performed an overt act in

furtherance of the conspiracy; and

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

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

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

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

Damages-Proof

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

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

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

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

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

Apportionment

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

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

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

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

Punitive Damages

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

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

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

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

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

Communication with Court

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

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

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

Duty to Deliberate

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

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

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

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

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

Return of Verdict

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