IN THE UNITED STATES DISTRICT COURT

Criminal Action No. 96-CR-68

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TIMOTHY JAMES McVEIGH and TERRY LYNN NICHOLS,

Defendants.

REPORTER'S TRANSCRIPT
(Hearing on Motion to Suppress Manning Deposition)

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Judge, United States District Court for the District of Colorado, commencing at 9:00 a.m., on the 9th day of January, 1997, in Courtroom C-203, United States Courthouse, Denver, Colorado.

Proceeding Recorded by Mechanical Stenography, Transcription Produced via Computer by Paul Zuckerman, 1929 Stout Street, P.O. Box 3563, Denver, Colorado, 80294, (303) 629-9285

APPEARANCES

PATRICK M. RYAN, United States Attorney for the District of Oklahoma, 210 West Park Avenue, Suite 400, Oklahoma City, Oklahoma, 73102, appearing for the plaintiff.

JOSEPH H. HARTZLER, SEAN CONNELLY, LARRY A. MACKEY,

BETH WILKINSON, and SCOTT MENDELOFF, Special Attorneys to the U.S. Attorney General, 1961 Stout Street, Suite 1200, Denver, Colorado, 80294, appearing for the plaintiff.

STEPHEN JONES and ROBERT NIGH, JR., Attorneys at Law, Jones, Wyatt & Roberts, 114 East Broadway, Suite 100, Post Office Box 472, Enid, Oklahoma, 73702-0472, and JERALYN MERRITT, 303 East 17th Avenue, Suite 400, Denver, Colorado, 80203.

MICHAEL E. TIGAR, RONALD G. WOODS, ADAM THURSCHWELL, REID NEUREITER, and JANE TIGAR, Attorneys at Law, 1120 Lincoln Street, Suite 1308, Denver, Colorado, 80203, appearing for Defendant Nichols.

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PROCEEDINGS

(In open court at 9 a.m.)

THE COURT: Please be seated.

We're convened in 96-CR-68, United States vs. Timothy James McVeigh and Terry Lynn Nichols for hearing on a motion filed on behalf of Mr. McVeigh to suppress statements from a deposition of Thomas Manning and for discovery, the motion

partially joined by counsel for Mr. Nichols.

We'll, as usual, take the appearances.

Mr. Hartzler . . .

MR. HARTZLER: Good morning your Honor. On behalf of the United States, myself, Mr. Mackey, Mr. Connelly, Mr. Ryan, Ms. Wilkinson and Mr. Mendeloff.

THE COURT: And for Mr. McVeigh, who is present?

MR. JONES: Good morning, your Honor. Stephen Jones of Oklahoma for Mr. McVeigh, and Mr. Nigh to my right, and to

his right, Mrs. Merritt.

THE COURT: And for Mr. Nichols, who is present, Mr. Tigar?

MR. TIGAR: Good morning, your Honor. Michael Tigar Mr. Thurschwell, Mr. Neureiter, and Mrs. Tigar.

THE COURT: Thank you.

I think we need a clarification here with respect to your filing, Mr. Nichols -- I mean, Mr. Tigar for Mr. Nichols, in that the motion to partially join in Mr. McVeigh's motion also contained a request for some relief not contained within may, so that the focus this morning is with respect to the deposition.

MR. TIGAR: Yes, your Honor. I had not intended this morning to argue the portions of our pleading that dealt with

the timing of the grand jury production; that is to say, the cutoff date for the grand jury testimony, nor that portion that dealt with the meetings with Mr. Schlender and Mr. Kessinger,

The grand jury issue can be dealt with at some future time, and the Schlender, Beemer, Elliott and Kessinger matters, I had thought, would be dealt with at the time of the eyewitness identification motion, whenever your Honor had taken that up.

THE COURT: All right.

MR. TIGAR: Is that acceptable to your Honor?

THE COURT: And also the motion for other relief with respect to counsel.

MR. TIGAR: Yes, your Honor.

With respect to the motion for relief with respect to

counsel, the only Government lawyer who is involved in the preparation of Mr. Manning is Mr. Mackey. Now, Mr. Manning did meet once with Mr. Goelman, and we're going to discuss some aspects of that, because we believe that's related to the Manning relief that we seek; but I --

THE COURT: Of course.

MR. TIGAR: Yes, your Honor. I'm sorry.

THE COURT: Participation by counsel in Mr. Nichols' trial is a premature issue; and as I understand it, Mr. Jones, no such relief with respect to participation by counsel is

sought by you.

MR. JONES: That is correct, your Honor. With the Court's permission, I'll state what I stated in chambers, and we'll file an appropriate paper pleading; but we join Mr. Tigar's motion in all respects except the alternative relief of disqualifying Mr. Mackey and Mr. Mendeloff.

THE COURT: Yeah. Okay.

MR. TIGAR: As will become clear in my argument, your Honor, one of the things we're seeking here is guidance about what is the proper way for lawyers to interview witnesses. The issue has been fairly joined by the Government's pleading here, and so I will address it simply to that extent and get the guidance we seek.

THE COURT: I think that clarifies the focus for this hearing. Thank you.

Well, we'll begin with counsel for Mr. McVeigh, then, on the motion first filed.

Mr. Nigh?

DEFENDANT MCVEIGH'S ARGUMENT

MR. NIGH: Thank you, your Honor. May it please the Court, the motion to suppress Mr. Manning's deposition was filed because Mr. Manning's description of Tim McVeigh's activities on April 14, 1995, evolved dramatically over an 18-month period of time to neatly fit with the Government's theory of the case.

THE COURT: Now, I haven't read the transcript of the deposition because, of course, it was filed under seal by the court reporter, as is appropriate. I have, of course, seen the excerpts, the quotations that are in the briefing; but I don't know if it is necessary to review the entire transcript. It's

MR. NIGH: I don't think that the -- it is probably necessary to review the entire transcript unless the Court wants to get an overall flavor of the entire testimony and the impact.

THE COURT: Well, it occurs to me that, yeah, the matter of impact -- whether there has been prejudice or

suppose, can best be measured by looking at the whole transcript.

MR. NIGH: I think it may be necessary for that reason.

THE COURT: Would you have any objection to my doing that?

MR. NIGH: Absolutely not.

THE COURT: Of course, we'll keep the transcript sealed, because it is appropriately sealed, in that it would be a trial transcript if the totality of your motion were denied.

MR. NIGH: Yes, your Honor.

THE COURT: I mean you seek to suppress -- yeah, to

suppress the entire testimony.

MR. NIGH: No, your Honor, we do not.

THE COURT: Oh.

MR. NIGH: Only that -- in our motion, we only moved to suppress that aspect --

THE COURT: Oh, dealing with -- yeah.

MR. NIGH: -- the previously unrevealed evolution of Mr. Manning's statement.

THE COURT: Okay.

MR. NIGH: And as we have set forth in the motion, your Honor, what occurred was that Mr. Manning's statement concerning key aspects of his contact with Mr. McVeigh on April 14 of 1995 evolved dramatically over an 18-month period of time, and the specifics of that evolution or the fact that the evolution had occurred at all was not revealed to counsel for Mr. McVeigh until the actual deposition testimony was occurring.

It either occurred for one of two reasons, your Honor. It was either because the answer was suggested to Mr. Manning, what his testimony should be to fit the Government's theory, or because the Government's investigation in its initial stages, at critical stages concerning Mr. McVeigh's activities on April 14, 1995, was extremely shoddy; and either one of those scenarios makes the information exculpatory.

THE COURT: One thing that's not clear to me here is a

matter of timing, and that is the first interview of

Mr. Manning was before the telephone records were available or at least known. Is that right?

MR. NIGH: That is correct, your Honor.

THE COURT: Then there were a number of other interviews.

I don't know -- as I sit here, at least I'm not aware of when those records were, you know -- the importance of those records became known even to the persons questioning Mr. Manning. And I assume Mr. Manning didn't know of those records in these earlier interviews.

MR. NIGH: I would assume that to be true also, your Honor; and I can't tell you specifically when the Government became aware of the telephone records.

THE COURT: But there is no reason to believe, is there, that Mr. Manning knew the significance of the particular question?

MR. NIGH: There is no reason to believe that he knew that at the time of the initial interview, certainly.

THE COURT: Well, is there any reason to believe it before the sort of unreported interview by counsel?

MR. NIGH: Not any reason that I can point to, your Honor.

All I can -- in terms of what was done with Mr. Manning, I can tell you when Government agents spoke to him

and the information that he revealed on each of those occasions.

Where --

THE COURT: Based on the 302's.

MR. NIGH: Based upon the FBI 302's; and the first

interview occurred on April 22, 1995. And it was a very extensive interview. Like all FBI 302's, the 302 reporting of that interview does not indicate what questions were asked, but it does reveal the responses that were given, presumably not in a narrative form but in response to specific questions by the Government or by Government agents.

The first one specific fact would be the time of Mr. McVeigh's arrival at the Firestone dealership on the morning of April 14, the description of his car and the condition of his car, Mr. McVeigh's financial condition and the way that he paid for the Mercury Marquis, Mr. McVeigh's destination and his address, all of the possessions that Mr. McVeigh had with him, the conversation that Mr. McVeigh had with Mr. Manning on the morning of April 14, and Mr. McVeigh's time of departure.

And it is a detailed interview which clearly appears designed to find out everything there was to find out about what happened on the morning of April 14 of 1995.

The following day, April 22 of 1995, Mr. Manning provided the FBI with documents concerning the transaction.

Two days later, on April 25, Mr. Manning gave the FBI detailed description of every single person that had ever touched the car and every place that the car had been.

On April 28 of 1995, Mr. Manning provided more detail concerning where the car had been.

Two months later, approximately on June 13 of 1995, Mr. Manning made corrections to the statement that he had previously given to the FBI, and he indicated that he had been first called by the police on April 19 and not on April 18, as his previous statement had reflected. There is no indication

in that 302 that he corrected any other aspect of his statement or indicated that anything else had been omitted.

The following month, in July, specifically on July 14 of 1995, he accepted a grand jury subpoena. It is important to note in the context of this motion, your Honor, that Mr. Manning did not testify before the grand jury and counsel had none of the benefit of what his grand jury testimony would have been.

On August 9 of 1995, the following month, Mr. Manning gave additional details concerning his smoking habits, whether or not he might have left cigarette butts in the Mercury Marquis, other people at the Firestone dealership that smoked, and whether or not they would have left cigarette butts in the Mercury Marquis and whether the car had been cleaned.

On November 13 of 1995, he provided the FBI with

additional documents concerning the transaction.

The main thrust of the motion, your Honor, is that 18 months after the event, Mr. Manning for some reason provided detail that had never before been provided to any agent for the Government; and it is I think very reasonable to note that the Government knew of the telephone records long before November of 1996 or October of 1996.

The reason that it's exculpatory is delineated very precisely in Kyles vs. Whitley, a case that was decided on April 19 of 1995, just three days before Mr. Manning made his first statement to the FBI. In Kyles vs. Whitley, the Supreme Court made a number of rulings which are applicable to this motion. First, the court held that it is the cumulative effect

of the suppressed evidence which must be analyzed in determining whether or not a Brady violation has occurred.

The second thing that the Supreme Court said is that death is different in terms of Brady. The court said that "our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case," citing Berger vs. Kemp from 1994.

In terms of the facts of the case, in Kyles vs. Whitley, one of the items that was suppressed and one of the things which led to a finding of error based upon the cumulative suppression were the notes of the chief prosecutor.

Those notes contained statements of a witness

interview, and those notes revealed that for the first time during an interview with the prosecutor, the witness who was -- whose name in Kyles was "Beanie," had revealed details concerning the defendant's activities which had never been revealed in any statement to investigators; and it is precisely what occurred in the instant case in reference to Mr. Manning.

The fourth point from Kyles vs. Whitley that has a bearing upon this Court's determination of the motion is that the Supreme Court held that failure to conduct a comprehensive -- a comprehensive investigation is in and of itself exculpatory. In Kyles, the state did not turn over to the defense a list of cars in the parking lot of the crime scene which did not include the defendant's car. The state's response to the Supreme Court was that, well, the list was not meant to be comprehensive and so it's not exculpatory.

The Supreme Court said even if this agreement argument was accepted, it works against the state, not for it; and the

quote from the case is "If the police had testified that the list was incomplete, they would simply have underscored the unreliability of the investigation and complemented the defense attack. The jury was entitled to find that the lead police detective was either less than wholly candid or less than fully informed."

The withheld information concerning the evolution of Mr. Manning's statement is exculpatory in Mr. McVeigh's case

for precisely the same reason: Either the answer was suggested to Mr. Manning, or the investigation in this case at its very genesis concerning events five days before April 19, 1995, was shoddy, it was incomplete, and the questions that the FBI asked of Mr. Manning were not truly designed to find out everything that was possible to find out about Mr. McVeigh and his activities.

The notes from the interview with Mr. Manning in October of 1996 contain more details than any statement that Mr. Manning had previously provided to anyone. And in Kyles, the court held that evolution over time of a given eyewitness' description can be fatal to its reliability, citing Manson vs. Braithwaite.

And the point is, your Honor, that we were entitled to know in advance of Mr. Manning's deposition that his statement had in fact evolved so that we could fully develop the question of coaching and suggestion of evidence to the witness.

If, as the Government suggests, it was simply a failure to ask the right question, we were entitled to know that as well. If the FBI was serious in its belief that Mr. McVeigh was John Doe No. 1, they should have asked every conceivable question about Mr. McVeigh's activities on the

morning of April 14, 1995, that would have led to the identification of what the grand jury has termed, quote, "others unknown," end quote.

The FBI should have asked Mr. Manning if Mr. McVeigh was alone, whether he met anyone, whether he went anywhere else, where he could have met someone or where he could have telephoned someone; and we were exposed -- we were entitled to expose that aspect of the investigation through Mr. Manning's testimony at the time of the deposition.

Your Honor, I believe that the fact that the withheld information establishes evolution over time which could have been used to show that the statement was suggested to Mr. Manning or at a minimum that the investigation was shoddy under the doctrine of Kyles vs. Whitley can be classified in no other way than as exculpatory.

The question of when the exculpatory information should be revealed was resolved by this court in the order of April 29 of 1996, in ordering that the purpose of the Brady duty of disclosure is to give the defendants a fair opportunity to prepare their defenses well in advance of trial.

We were entitled to know about the evolution of Mr. Manning's statement in advance of the deposition.

THE COURT: Well, what would you have done differently at the deposition had you known that?

MR. NIGH: What I would have done differently, your Honor, would be to prepare a detailed cross-examination of Mr. Manning about every statement that he made that the FBI on his first interview with him on April 22 -- I would have said,

well, Mr. Manning you told the FBI precisely when Mr. McVeigh arrived at the Firestone dealership. You told Mr. --

THE COURT: Well, did you do that?

MR. NIGH: I did not. And the reason I did not, your Honor, is because I did not anticipate in any way, shape, or form that his testimony would be that Mr. McVeigh left, and the reason --

THE COURT: Well, now, it was, though -- right -- in the deposition?

MR. NIGH: At his deposition, that's what he said.

THE COURT: Right.

MR. NIGH: And --

THE COURT: So you knew it then.

MR. NIGH: I did know it then.

THE COURT: So why didn't you question about it?

MR. NIGH: I did question about it to the best of my ability, shooting from the hip and working on the fly.

I would have prepared for it --

THE COURT: That's how we used to try cases.

MR. JONES: Some of us are old enough to remember that, your Honor.

THE COURT: But not Mr. Nigh.

MR. NIGH: I did my best, your Honor; but the truth of the matter is that I would have been much more prepared and I would have been much more effective had I simply known of the

evolution of Mr. Manning's statement.

I would have focused upon each of the specifics that he gave to the FBI on April 22, and in every subsequent

interview; and I also would have prepared to show that if he was not asked the right question, it was because the investigation was shoddy. And it would have been a much more detailed cross-examination. As described by the Supreme Court in Kyles vs. Whitley, it would have been chipping away, it would have been a wholesale assault. And --

THE COURT: Is Mr. Manning still available?

MR. NIGH: As far as I know, he is, your Honor. As far as I know, he is.

THE COURT: Well, is a possible remedy for this problem to give you another opportunity to ask those questions?

MR. NIGH: That is certainly one possible remedy, your Honor. Of course, at that time he certainly is going to see it coming. But I mean faced with the question of whether I would accept that relief as opposed to no relief at all, I would certainly accept that relief.

THE COURT: All right.

MR. NIGH: The reason that the cross-examination of Mr. Manning was approached the way that it was is because counsel for Mr. McVeigh had been led to believe that we had all of Mr. Manning's statements: inculpatory, exculpatory, indifferent.

We have been led to believe that by the Government's letters concerning Mr. Manning and the Government's statements concerning Mr. Manning's expected testimony.

I would invite the Government in its response to tell the Court that which they did not address in the brief; and that would be that the October 18, 1996, letter which said, "We expect Mr. Manning to testify about the details of the

April 14, 1995, car sale," and then in the following sentence said, "We are enclosing copies of all of Mr. Manning's statements." Making no reference whatsoever to the evolution of Mr. Manning's statements did not (sic) mislead counsel for the defense.

I also invite the Government to explain to the Court how the defense can compare for inconsistencies that which we do not have.

In this context, your Honor, failure to reveal --

THE COURT: Well, yeah, technically, is the omission of this from prior statements and inconsistent statements if, as I understand it, the witness says he wasn't asked? I mean technically, that isn't an inconsistent statement, is it?

MR. NIGH: Technically -- technically, it may not be, your Honor --

THE COURT: I realize that I've said -- and you quoted it on an earlier occasion -- that Brady can include the sudden recollection or recollection that could have come not from the

witness' perception but from some other source, which, of course, in this case, it isn't necessarily an inference that the questioner suggested it. There is so much out there in news reports and publications and broadcast information and misinformation about the case that a witness can be affected by that. I mean, that's one of the reasons we've been trying to be careful with respect to what's sealed and what's not sealed and why discovery materials are sealed, because, you know, we're not just trying -- as you well know -- trying to protect a jury pool; we're also trying to protect the witnesses in the case and the integrity of their ability to testify based on what they perceive, rather than what they read or hear.

So I think that was something that is in all of our minds.

MR. NIGH: Certainly, your Honor. And that is one aspect of it, and it can give rise to the inference that there has been an external influence caused from somewhere else.

Under Kyles vs. Whitley, the evolution -- and specifically the one that the Supreme Court addressed, the evolution of Beanie's statement gave rise to the inference of coaching; and that's also one possibility.

THE COURT: Yeah, but I'm just pointing out, certainly, in this case, that's not the only inference.

MR. NIGH: No, it's not, your Honor. But I would have been able to develop that on cross-examination of Mr. Manning

and perhaps find out precisely what it was, had the evolution been revealed.

The other thing is that I could have developed a much stronger cross-examination in terms of the shoddiness or the ineffectiveness of the initial investigation and all subsequent investigation after that point in time. There is another impact that it would have had upon the cross-examination.

I understand, your Honor, the Brady analysis is usually conducted after a trial and that the appeals court has the benefit of the entire proceeding; but I would suggest that Mr. Manning's deposition was a microcosm of the trial.

The standard on review for a Brady violation at trial is whether the revelation of suppressed evidence would raise a reasonable probability of a different result; and what I would invite the Court to do in reference to Mr. Manning is to determine whether the timely revolution -- revelation of the

evolution in Mr. Manning's statement would raise a reasonable possibility of a different cross-examination and a different perception by the jury of the strength of Mr. Manning's statement.

I would like, if I may, now, your Honor, to focus upon the prospective relief that we've requested concerning discovery of other evidence of this kind.

I realize that part of cross-examination is to rely upon your witness, and you formulate questions at the time that

the witness gives his testimony. But we are also entitled to effectively prepare for those cross-examinations. And I would submit, your Honor, that withholding key differences in a witness statement is an effort to seriously curtail effective cross-examination and is something that continues to occur.

There is evidence in the Government's brief concerning 801(d)(2)(E) statements concerning key witnesses in this case, Michael and Laurie Fortier. I would submit, your Honor, that some information in the proffer which is attached to the Government's 801(d)(2)(E) submission is exculpatory and it is not contained with any 302 or in the grand jury transcript. And I won't tell the Court specifically in detail about what that information is, but it involves Mr. Fortier having access entirely independent from Mr. McVeigh of one of the key places alleged by the Government to have relevance to the April 19 explosion at the Murrah Building.

The other aspect of it is that it reveals that Mr. Fortier was engaged in criminal activity entirely independent of Mr. McVeigh, and that is not contained within any 302 or grand jury transcript. And we don't know the specifics of it at this time.

If the Court were to order the Government to disclose these things now, it would serve the purpose enunciated by the Supreme Court in Kyles vs. Whitley.

THE COURT: Well, how would you have the order read?

The motion, as filed, suggests that I should give specific direction; so what specific direction would you have me give?

MR. NIGH: Your Honor, I attached a proposed order to the motion originally. Actually, I attached two proposed orders.

THE COURT: Okay. All right.

MR. NIGH: Disclosure at this time, your Honor, would serve to justify trust in the prosecutor as the representative of the sovereignty whose interest in a criminal prosecution is just -- is not just that it shall win a case but that justice shall be done.

Finally, your Honor, in terms of whether or not the withheld information was exculpatory or Brady material, more properly, I would submit that the Government knew the timely production would allow the defense to diminish the Government's evidence and the credibility of its witnesses and the only reason not to reveal it was because the Government viewed it as exculpatory.

Thank you, your Honor.

THE COURT: All right.

Mr. Tigar?

DEFENDANT NICHOLS' ARGUMENT

MR. TIGAR: May it please the Court, in my presentation, I want to focus on three different rules of law that are, in our view, controlling here and then suggest to the

Court that those three rules of law dictate three different but related remedies to the problem posed by the Manning deposition.

Those three rules of law are the Jencks Act, the Brady principle as extended in Kyles vs. Whitley, and the disciplinary rules that govern the conduct of lawyers in preparing witnesses to testify.

The factual background is this: On November 7, 1996, Mr. Manning's deposition was taken. During his deposition, he revealed that he had met with Government counsel several times and that as a result of those meetings or as a part of those meetings had provided this additional information, this new information.

The information he provided about Mr. McVeigh leaving the Firestone store had not been embodied in any 302's received up to that time.

At page 84 of the deposition, going on to page 85, Mr. Manning was asked, "Did you go over the details with them at that time?" referring to before the deposition.

"Yes.

"Who was present?

"Answer: Larry Mackey.

"Question: Is he the only one you met with?

"Answer: Yes.

"Question: How many times have you met with

Mr. Mackey?

"Answer: I believe on three different occasions."

Now, that statement that Mr. Mackey was the only one he met with is somewhat confusing, because earlier in the deposition, at pages 65 and 66, Mr. Manning said that when he met with lawyers for the Government in person, there was an FBI agent present for those meetings.

Well, there is that ambiguity, your Honor.

As noted in the motion filed by Mr. McVeigh, the question of Mr. Manning's new recollection came up; and on redirect examination, Prosecutor Mackey, as quoted in our motion, asked Mr. Manning who he met with and who asked, quote, "that specific question," that is, the question about whether Mr. McVeigh left.

"Answer: I believe it was you."

So we have in the deposition transcript at pages 71 and 72 Mr. Mackey, the interrogating lawyer, asking the witness about a conversation between Mr. Mackey, the interrogator, and the witness; and this is trial testimony that's to go before a jury, presumably, while Mr. Mackey is seated at the counsel table.

The other background to all of this is provided in the transcript of the discovery hearing of November 13, 1996, in this court; that is, a week after the Manning deposition at page 143. At that page, at lines 9 and 10, the Court directs

the Government that when they've learned something new or different from what's in the reports that the defense already has, then you should provide it.

That direction from the Court follows up on a discussion between Mr. Woods and the Court at page 141, lines 17 through 23, in which Mr. Woods makes precise the request

that your Honor orders granted at that point.

It is apparently your Honor's theory -- which we have endorsed and, indeed, that we ask be expressed, that when a witness is interviewed by anyone connected with the Government and provides new or additional or different information, the defense is entitled to have that.

I said earlier this morning that the issue is fairly drawn by the Government's response. Apparently, the Government, having withheld information up until the Court's order of November 13, has not yet repented of its prior conduct. At page 5 of the response which we received by fax late last evening, the Government says that they -- that neither side's lawyers should share any notes of interviews with witnesses.

The difference is, says the Government, that prosecutors, unlike defense counsel, are obligated to share any exculpatory or materially impeaching information learned in their interviews.

That is a very much more restrictive standard than the

Court expressed by its order of November 13, and it is contained in a pleading filed just last night.

Moreover, that paragraph I've quoted fails to note that the Government's obligation is not exhausted by compliance with this court's interpretation of Brady but also extends to the Jencks Act.

In the discussions on November 13, the Court did restrict the Government's obligation to produce the results of government lawyer interviews with witnesses. We cited the Goldberg case; and this court quite properly pointed out that that case deals with classic Jencks material; that is, material

that fits the 18 United States Code Section 3500 standard for a statement. Goldberg follows Campbell, which we cite in our papers. That's this leading case on what is a statement.

The Government in this paper today doesn't acknowledge Jencks; and yet this court had said on November 13 that when a Government lawyer or any Government employee takes notes of an interview and if those notes reflect what the witness said in some verbatim way, that is a Jencks statement. And so we come to the first legal principle that we think governs here and how it should be applied.

Under the Jencks Act, if these interviews with counsel -- Government counsel -- resulted in notes being taken by anybody and if those notes captured word for word, even if it's two words, "left the store," "left at 10:15," or whatever,

that portion that reflects what the witness said word for word, in our submission, is a Jencks statement.

Now, I will concede to the Court that this interpretation of what is a Jencks statement has been the subject of litigation. The cases we cite in our brief, mostly Ninth Circuit cases, hold that Jencks statements include these snippets or excerpts that may be contained within larger documents that are not themselves producible.

It is, therefore, our respectful submission that the Court has -- and I'm sorry to say this, but I believe that the Court is obligated to look through this material and see what part of it constitutes a Jencks statement.

The first step would be that the Government should be required to turn the material over to the court. The Government can make representations about what portions of it

they believe to be statements; but it is a key ingredient of the Campbell/Goldberg line of cases that the in camera inspection process cannot be non-adversary. Jencks in camera inspection is a two-part process, as Campbell makes clear. With respect to relevance, of course, that's an in camera process, because the Court knows what's relevant to the issues.

With respect to what is a statement, we submit there has got to be some kind of quasi-adversary inquiry, some kind of discussion with the person taking the notes or perhaps with the witness.

Where does this lead us? What's clear is that the Government has never acknowledged that there is a Jencks obligation lurking in these witness interviews that Government counsel conduct. Because they have not acknowledged it, because the production process has never taken place, because the Government didn't produce anything they thought was Jencks, Mr. Manning's deposition, which is a trial deposition and therefore governed by 18 U.S.C. Section 3500, went forward without compliance with the Jencks Act.

If the Court's analysis of material turned over by the Government pursuant to our request determines that Jencks material that ought to have been produced was not, then the Jencks Act itself provides that such portions of the testimony as the Court determines to be appropriate should be stricken. And so the remedy would be to strike the offending portions of the Manning testimony and to deprive the Government of that benefit as a sanction for violation of the Act.

THE COURT: Now, what about the alternative in this case -- because this happens to be a trial deposition -- of reopening the deposition to permit additional

cross-examination?

MR. TIGAR: That is another sanction that is available under the Jencks Act, whether it's a trial deposition or not; but the Jencks Act permits, as I say, striking and depriving the Government.

It's our respectful submission, your Honor, that what the Government has done here merits the striking of the deposition; and the reason for that is not out of some desire to gain a procedural advantage to which we're not entitled. It is this: You can't rebag the cat. You can't put the feathers back in the pillow. As the article that we cite in our papers has it, witness memory is malleable; and once hammered into a particular shape under the persistent blows of these master artificers, you cannot easily regain the shape it had to begin with. And thus, the sanction of suppression, by analogy to the eyewitness cases, is the only effective one that we think should be considered here. I understand the Court's concern, and I freely concede that reopening the deposition is something that has been ordered in the past. That's what we called for as the appropriate remedy.

In the alternative and should the Court order over our objection -- our respectful objection that the deposition be reopened, we would cite to the Court at that time authority, when our trial comes along -- and I'm just signaling this to the Government -- asking the Court to instruct the jury that discovery misconduct by a party represents consciousness of a weak cause.

The Court knows the maxim of the law about the spoliator. The principle I announce is found in Wigmore. I

don't need to discuss it today, but that would be a remedy that

we would seek.

I turn then to the second part of this analysis, and that is the Brady analysis. As I say, the Government doesn't seem to have appreciated, even after the Court's November 13 order, what its obligations are in that respect; but we can be practical about this: The phone records of the Daryl Bridges' Spotlight calling card were originally compiled by Oklahoma Bureau of Investigation officers. A time line of those calls was first made available in the summer of 1995; and indeed, leaks of it began in the fall of 1995. This information has been around a long time.

The Government lawyers -- Mr. Goelman interviewed Mr. Manning, Mr. Mackey interviewed Mr. Manning, the FBI agents interviewed Mr. Manning. They knew the significance of this, your Honor.

THE COURT: When did the -- these records become the subject of some newspaper, magazine, or other publications?

MR. TIGAR: I have asked the paralegals, your Honor, for their best recollection; and our best recollection is sometime in the fall of 1995. Before the day is out, your Honor, I will go back to our office and pull the records and identify those dates with as much precision as we can.

There may be some disagreement between the parties about it; and if my recollection is wrong, I'll cop to it.

THE COURT: Mr. Manning lives in Kansas?

MR. TIGAR: He does, your Honor.

THE COURT: Okay.

MR. TIGAR: So that, at any rate, is a date that can be established, your Honor, by a pattern of discovery production, the records of which we have.

When we made our request that the FBI -- that if there is a change in witness testimony from what's in the FBI 302's, that wasn't some mystery; that is to say, we do not believe that on the 13th of November, your Honor invented a new legal principle that burst full-blown upon the assembled multitudes. Rather, we believe that your Honor was expressing an obligation that any sentient being, or at least any well-trained lawyer, should have been aware existed up to that point.

Therefore, your Honor, no lawyer -- no lawyer could be unaware of the significance of this material. From the first day we met with Government counsel, we pleaded with them: Have the FBI agents keep their notes; let's keep this process honorable.

We negotiated, your Honor, to get the 302's; and we agreed to give back every witness statement, with some limited exception, taken by our defense counsel. We gave up massive reciprocal discovery, your Honor, in reliance upon getting those 302's. To have that process of production become utterly meaningless, your Honor, it seems to us is a betrayal, a fundamental failure of the consideration that underlay that

carefully considered bargain, that bargain that could not have been reached without Mr. Nichols' personal and informed consent.

I come, then, to the final part of this puzzle. I am sorry that my words were interpreted as strident or baseless or

ad hominem. They were not so intended. Rather, I've sought from the Court guidance about the appropriate obligation of lawyers. We've all been around a long time, and this is not a new issue.

In 708 P.2d 800, Justice Erickson had to address it in the Colorado Supreme Court in Pease vs. District Court. Now there, two prosecution lawyers up in Pitkin County had interviewed a defendant and a victim. To be sure, they were inscribed as witnesses on a list, and the Government seems to have focused on that part of the disciplinary rules.

I don't want to call Mr. Mackey as a defense witness. I don't foresee him being called as a prosecution witness. Hence, all of the cases the Government cites are utterly irrelevant.

Let me trace the line of authority, though, that's here. The Government correctly cites the ABA standard for the administration of criminal justice: Don't interview witnesses alone if you're the lawyer; have somebody else there. And what's the purpose of it? And of course, if you're the Government lawyer interviewing them, there is a special and

extra obligation; that is, if the witnesses say something that's Brady or Jencks, or you write a note that's Jencks, or they say that's something that's Brady, you have to disclose it.

But the problem is not that somebody wants to call Mr. Mackey as a witness. The problem is that he already made himself one.

First case: I'd like to discuss these very briefly, your Honor. United States vs. McKeon, a very important case by Judge Winter in the Second Circuit. In that case, Mr. Bernard

McKeon, an IRS sympathizer, was tried three times. In his second trial, the opening statement by his lawyer, Michael Kennedy of New York, recounted that Mrs. McKeon had not touched certain documents that were going to be in evidence. Excuse me. My mistake, your Honor. In the second trial, the opening statement was that an expert witness would testify that documents were not Xeroxed on a certain machine. There was a mistrial in that second case. Opening of the third trial, Mr. Kennedy stands up again in front of Judge Pratt, and in opening statement he says, Well, we're going to show that Ms. McKeon never touched these documents.

So now there is an inconsistent -- inconsistency between his opening statement in Case 2 and his opening statement in Case 3. Government counsel moves to disqualify Kennedy. Motion granted. McKeon proceeds pro se and is

convicted.

At McKeon's trial where he proceeds pro se, the two Kennedy opening statements are introduced in evidence. Kennedy is never called as a witness. Indeed, he's never in the courtroom; he's forbidden to be there. But the credibility -- the reason that he had to be disqualified is that some statement he made not in the presence of the jury was going to be in evidence; that is to say, Kennedy had proposed to sit there while evidence was adduced by his adversary of something he had said some other time, and inevitably Kennedy would be having to comment, if only by his presence, on his own credibility.

Disqualification proper, says the Second Circuit, and he shouldn't -- and the prior statement admissible.

In United States vs. Iorizzo --

THE COURT: Well, to follow that along, that would prohibit any lawyer from questioning a witness before trial.

MR. TIGAR: No, indeed, your Honor; and here's the way we do it, here's the way it is done: The DR says if the lawyer ought to be a witness at trial -- and the new one sometimes say "a necessary witness at trial --" here's the way I've done it, your Honor, and the way that I submit is consistent with the disciplinary rules. Let us suppose I have interviewed a witness. I have someone else present, let's say Mr. Bodley or Mr. Killam or Mr. Leads, one of the people the Court has met.

The witness gets on the stand and says something different from what was said in the interview.

Cross-examination: Mr. Witness, do you recall -- do you remember having been interviewed when Mr. Killam was present?

Yes, I do.

And do you remember Mr. Killam was taking notes at that time?

Yes, I do.

And, sir, isn't it a fact that you told Mr. Killam such and such?

THE COURT: All right.

MR. TIGAR: In other words --

THE COURT: And redirect now is: And who asked you the question?

MR. TIGAR: Redirect by my opponent?

THE COURT: Yeah.

MR. TIGAR: Yes.

THE COURT: And then, What question was asked that

elicited that response? That puts the lawyer's name and conduct into evidence in the same manner that you are telling me is inappropriate under this case, doesn't it?

MR. TIGAR: No, it doesn't, your Honor, because if the issue arises on redirect -- let us suppose that it was Mr. Mackey that did it and I proposed on redirect to bring out

that he was there. It would be my obligation under the DR, so as not to provoke a disqualification or not to provoke the issue, to come to your Honor at side bar and say, your Honor, Mr. Mackey was also there when the witness testified. And I want to ask -- and I want to bring up Mr. Mackey's name.

And at that point, the order would be: Mr. Tigar, Is this necessary under the new DR, or are you saying Mr. Mackey ought to be a witness because of something he did?

And I'd say -- probably -- no, your Honor, we're not saying that he jiggled them or hammered them right this particular time. We're just saying that he was there and asked the questions.

THE COURT: But that's one of the suggestions made here; that is, that there were suggestive questions.

MR. TIGAR: Exactly right, your Honor. And that's the distinction we're drawing. That's why we say the matter has to be inquired into. If my conduct in interviewing the witnesses influenced them, causes them to change their testimony, or in an example that the Court has given, suppose I, as the lawyer, participate in a suggestive photo array, I present the photos in a suggestive way, I inject myself into it, then I will have fallen afoul of the DR.

My -- that's a part of my ethical obligation, is when

I interrogate witnesses, to have somebody there, have that somebody take notes, and to behave myself. If I don't behave

myself, then the sanction is that I've drawn my conduct into issue and I risk -- risk disqualification, because I, quote, ought to be, close quote, a witness. That's the issue here.

Now, how do we resolve it, Judge? I mean, in this case, the way we do it, the way we're supposed to do it, is we're supposed to have the notes so that if it comes up, we can show your Honor that we behaved ourselves. And if we're the Government, we're supposed to do it in a way so that if the notes -- so the notes can be produced to satisfy Jencks and Brady and to show that we behaved ourselves.

That's the inquiry I'm asking for. I'm asking for production of the notes.

When it comes to the eyewitness or the photo ID stuff, the material downrange, then, your Honor, we're going to really have a dispute about what these witnesses were shown and the circumstances, and so on. That's why I wanted to signal it now.

But the -- I believe that the case law teaches us that that is the lawful, ethical, practical way to proceed here.

The other cases we cite are to the same effect: In the Iorizzo case, the defendant is entitled to a new lawyer. Why? Because the lawyer he had at his trial put somebody -- the Government put someone on the stand at the trial, a Mr. Tietz. Mr. Iorizzo's lawyer wants to stand up and cross-examine Mr. Tietz. The problem is that the prior

inconsistent statement Mr. Tietz made was made while the defense was representing Mr. Tietz. Well, the lawyer for Iriozzo isn't going to be a witness. He's just inevitably putting his own conduct into issue.

I raise this issue, your Honor, I raise this question, not tendentiously, I hope, not stridently, but responsibly. It was and remains the obligation of Government counsel and the obligation of defense counsel to behave in a certain way towards the witnesses, to engage in representing their clients and preparing the witnesses personally. But it was and remains the obligation of Government counsel to do so in harmony with the Jencks Act, in harmony with their Brady obligation, and in harmony with these disciplinary rules.

The deposition of Mr. Manning reflects a failure to observe Jencks, a failure to observe Brady, and a question which if asked at trial would have triggered an objection which I respectfully submit should have been sustained. It's a question that never should have been asked.

And under those circumstances, your Honor, we have joined the motion filed by Mr. McVeigh's counsel.

THE COURT: Do you also join in suggesting the proposed order?

MR. TIGAR: No, your Honor. The relief that we have suggested -- and I do not have the proposed order immediately under my eyes. The relief that we have suggested is striking

the offending portions of the deposition, ordering the production to the Court of all Government lawyer and other notes of witness interviews so that the Jencks inquiry can be made -- excuse me, your Honor -- and ordering that in the

future, Government lawyers keep and produce notes of witness interviews that will permit compliance with this Court's November 13 order; that is, the details of these conversions that take place in the sanctity of the Government's quarters.

THE COURT: Should those notes include notes of the questions asked, as well as the answers received?

MR. TIGAR: Your Honor, I think that we've got to trust lawyers to do their job correctly. In a routine witness interview, I don't see any need particularly to have the questions asked and the answers, unless that's the pattern of the particular lawyer, to go into the interview with some proposed questions sketched out. However, there are interviews in which the questions asked and the answers received are going to be relevant. I think that has to be done case by case.

For example, these photo spread encounters that are detailed later on in the motion, where the malleability of witness recollection is particularly apparent, because witnesses are being shown photographs that this fragile memory can lock onto and thus their recollection be irretrievably changed.

THE COURT: Well, one of the things that's troublesome

in civil litigation, where depositions pre-trial are common, of course, and then at trial somebody moves for sequestration of the witness -- witnesses -- and of course we don't know -- the judge doesn't know till somebody brings it out, if they do, that a lawyer in preparing a witness for deposition tells that witness everything the other witnesses have said before the deposition or, indeed, gives the witness the opportunity to read other witnesses' transcripts of testimony. It happens, doesn't it?

MR. TIGAR: Your Honor, not only does it happen, but if you'll recall, there was a discussion of this in the context of the group meetings of the victims in Oklahoma City; and we talked about those sessions and the impact of the Tenth Circuit's view of Rule 615.

As I understand the order of the Court, that's not supposed to happen.

THE COURT: Well, I bring this up only because, you know, you say we have to trust lawyers; and of course, we like to be able to do that. But unless there is some recording of what the witness was given before the interview or what questions were asked of him, we don't know the impact on the witness of what a lawyer did in preparing the witness.

MR. TIGAR: In 1880, a New York judge said, "It's the lawyer's duty to extract the facts from the witness, not to pour them into him." I thought -- always thought that was an

apt characterization.

I say this, your Honor: I don't want to make the burden on the Court or the parties an intolerable one with respect to keeping and producing these records. I say this: There is a sanction; that is to say, if at trial it turns out that a lawyer has engaged in this sort of conduct -- I can assure the Court that I routinely cross-examine in an effort to probe that sort of thing -- and if it appears at trial, I'm sure that all of the lawyers know how to ask the Court for an appropriate remedy.

And I think personally the remedy is that the 12 jurors in the box think that sort of conduct simply bears out their worst fears about how lawyers behave, and they're going

to punish the advocate who does it.

So I am mindful that that sanction, that very practical one, lurks out there; and that's why we're limiting our request to what we believe to be compliance with what your Honor said on November 13 and what the Jencks Act unequivocally provides.

THE COURT: Okay.

MR. TIGAR: I thank your Honor.

THE COURT: Who is responding for the Government?

MR. HARTZLER: I am, your Honor.

THE COURT: All right.

MR. HARTZLER: Can you hear me?

THE COURT: Yes.

PLAINTIFF'S ARGUMENT

MR. HARTZLER: I would like to address all of these issues, but I would like to begin by reminding you that the discussion we had here in court on November 13 was in the context of this very matter. The Manning deposition was raised before your Honor.

So we heard from you at that time, and we're looking for additional guidance. As both parties -- as both defendants have indicated, we, as well -- we're looking for guidance on this whole area.

But I urge you not to fashion any remedy without reviewing the deposition. A lot of the questions that have come up today are answered by the deposition.

THE COURT: Yes. Your -- I already indicated to Mr. Nigh that I thought it was necessary to read the entire transcript, and you agreed.

MR. HARTZLER: Right.

THE COURT: Mr. Tigar, you have no objection to doing that, do you?

MR. TIGAR: I'm sorry, your Honor. I meant to adopt that suggestion. I believe the Court should do so.

THE COURT: All right. Thank you.

MR. HARTZLER: And I will not reveal the substantive testimony; but there is some testimony that relates to the very

issues, particularly the procedures of the predeposition interview, that you ought to know about today; and I hope that it might influence you as you think about how to fashion a remedy, if one is appropriate.

First of all, the question as to what refreshed Mr. Manning's memory was indeed asked by defense counsel. He was asked at page 76 of the deposition: "Did Mr. Mackey show you any documents or ask you about any particular events in reference to Mr. McVeigh leaving and coming back?"

And the answer is no.

"Question: Did he tell you that there was a reason he wanted to ask you that question?

The answer is: "No, nothing that I can remember. If I may add -- can I add something here?

"Question: Sure.

"Answer: I distinctly remember him being gone for a short time."

I was also a little surprised by the suggestion that we reopen the deposition to give Mr. Nigh an opportunity to fully explore how this all came about and the alleged change came about, because when you read the deposition, you'll find that the first five pages of cross-examination deal with the

very issue of this statement not having come out in the -- during the interviews by the FBI.

For example, he is asked at page 56:

"Question: On any of those occasions, did you tell Agent Rindt --" that's R-I-N-D-T "-- that Tim McVeigh had left the premises of Firestone on that morning that he purchased the Mercury Marquis?

"Answer: Not to my recollection."

And a little bit later:

"Question: And would it be fair to say that you've made at least eight statements to the FBI prior to giving this deposition today?

"Answer: Pretty close, yes."

The preceding questions relate in part to the various dates that he spoke to this particular agent; so the questions I just read to you are built up with the very questions that I imagine that Mr. Nigh is anticipating he would like to ask if the deposition was reopened.

You'll see those questions were asked. This cross-examination was developed.

I accept Mr. Nigh's characterization of the issue as being a question of the evolution of testimony, and I think that it's appropriate that it comes up in the Manning deposition, though I don't think that that's necessarily the best example that the defense might fashion; but fortunately, it has arisen before trial. And as all of us as trial lawyers know, there is a certain evolution of testimony. It's not always favorable to the Government, as we well know. There is

often information that is provided to the FBI agents that the witnesses simply can't recall on the witness stand, and it's not a subject that we necessarily would impeach them about. Something they said, they can't really recall when they're challenged by Government lawyers, and it never becomes testimony.

Those kind of changes, of course, are not the subject of complaints from the defense counsel. Really, what we're addressing here is a situation in which a witness has given information to the FBI; and that's all it is. The 302's, of course, are not verbatim statements, they're not adopted by the witness; and we all know that the 302's contain what I would characterize as the fabric of a witness' potential testimony.

There seems to be some suggestion here that the defendants should have or are entitled to really a script of the testimony. And none of us as trial lawyers really believe that the 302's constitute in any way a script of testimony. It inevitably happens, and part of the process is for the attorneys to meet the witness for the first time after they've already provided information to the FBI agents and to learn the testimony that that witness can often provide.

And it's that process in which the attorneys who are preparing the witnesses to testify at trial discover not the fabric of the testimony that's contained in the 302 but wrinkles and creases in the testimony, and sometimes there are

folds in the fabric because the witness doesn't recall.

That will inevitably happen in this trial. And that's why I would like you to, in considering whatever remedy you

would consider, imagine the witnesses at trial that provide what might be characterized as new or, I think Mr. Tigar referred to, additional information.

The fact that a witness takes the witness stand and provides some information that was not contained in the 302 is by no means exculpatory information. And so I think it's really truly unfair to characterize this situation or any of those situations as constituting Brady. We are pledged to reveal Brady information. When we interview witnesses and we come upon something that impeaches our theory or impeaches the witness, of course, we're going to disclose that. But that's not what we're talking about here, and I dare say that the defendants would not be seeking to suppress this information if it were exculpatory.

In fact, in my career and the career of the prosecutors here at the table, we have never had a situation in which defendants have moved to suppress exculpatory information; so if the truth be told, we're not really talking about exculpatory information here. This is inculpatory information, and the question is in what context should it be revealed. Is it a situation in which the Government can call witnesses to trial and have them testify as to details that are

not disclosed in the 302?

I pause --

THE COURT: Well, couldn't it be exculpatory if the fact were -- and I'm not suggesting it is the fact -- but if the fact were that someone talks to the witness and tells them, "Look, it's very important to match this up with these phone records, so, you know, isn't that the case? Don't you remember now," and that sort of thing, which I am saying, of course,

it's not -- I'm not suggesting that occurred here at all.

But I'm just talking about theoretically; and this goes back to my -- what's quoted in here in the papers about what I said is Brady, where there is sudden recollection, new recollection, which can also occur because somebody reads, you know, a newspaper account of the type that are out there in great multitudes.

MR. HARTZLER: I appreciate what you're saying.

THE COURT: And says, "Well, yeah," you know, and they get the suggestion as a result of reading this account of somebody else.

MR. HARTZLER: And that is the kind of information that should be explored both on direct and cross-examination. No question about it. In using the Manning example as our living model here that we're evaluating, though, we know from his statement, from his answer to Mr. Nigh's cross-examination, that that's not the case. We know at least that Mr. McVeigh --

Mr. Mackey did not provide him with any documents or any information. It was simply a question -- and I'll get to that in one second -- as to why that question would be asked. But I don't want to leave the subject of your inquiry without guaranteeing you that the men and women on this prosecution team are not doing the sort of thing that you are suggesting. You're going to have to take that as an article of faith.

I don't think there is anything or any remedy you can fashion that will somehow get at that kind of dishonorable practice; but I will tell you this: Our interviews are conducted in the presence of the FBI agents we work with. And the men and women of the FBI that we're working with, I have

found, in this case to be beyond reproach.

THE COURT: And it is the practice, though, of the FBI, generally speaking, that agents don't write 302's when they sit in on a prosecutor's interview? That's true, isn't it?

MR. HARTZLER: Absolutely. There are a couple of reasons for that.

THE COURT: I'm not saying there is anything wrong with that. That is the practice of the agency.

MR. HARTZLER: That's -- I can't speak for the FBI. I don't know that they have a policy. It is certainly the practice in not only this case but every case that I've prosecuted.

THE COURT: Okay.

MR. HARTZLER: I'm not aware that there is a written policy of the FBI.

The oddity about this case -- and I think we will not find this with other witnesses as they testify and provide new information, perhaps -- is that this is a witness who was interviewed very, very early on, on April 22. And I know that there have been representations that he was interviewed eight times. If you look at the attachments to the McVeigh motion, you'll see that one of the interviews is one sentence, I think, where there was picked up a receipt or an invoice of some sort. There is another 302, another contact, where all that was provided was the title to the car. And one of the contacts was when Mr. Manning was provided with the grand jury subpoena, and it's simply a representation. So several of these interview reports, you'll see, don't even contain McVeigh's name.

By the way, while I'm on the grand jury subpoena

issue, Mr. Manning was going on a honeymoon and it conflicted with his grand jury appearance, so he was excused. There was nothing -- I hope you will not think there was something nefarious about the fact that he got a subpoena but didn't appear. The man went on a honeymoon.

The Manning interview that really contains the substance or fabric of his potential testimony is the very first one, the one that was done on April 22; and as you,

yourself, recognized, no one knew about the Bridges calls at that time. But once the Bridges calls came to be known and were disclosed to defense counsel, there was no question that there were two calls, one in particular on April 14, that were powerful evidence in this case. And indeed, in our letter disclosing these calls to defense counsel, those two calls were mentioned, highlighted; and when Mr. Mackey presented the documents himself to defense counsel, he showed them those two calls in particular. Those are the calls that were made on the morning of April 14.

So I dare say that no one who is interested in obtaining the truth in this case, no one whose responsibility was to find the facts and seek the truth could conduct an interview of Mr. Manning after knowing the information about the Bridges -- the two Bridges calls without asking if McVeigh left his sight during any time between 9:00 and 10:30.

And defense counsel, of course --

THE COURT: Well, now, that's eon of the things that Mr. Nigh has raised here; that that was not done.

I don't know the time sequence here. Mr. Tigar said that those records became available through the state

investigator.

MR. HARTZLER: That's mistaken.

THE COURT: All right. Well, when did they become available to the FBI, if you know?

MR. HARTZLER: I'm not sure I understand.

THE COURT: What I'm getting to is were there interviews by FBI agents and 302 reports produced after the FBI knew of the significance of the timing of these calls?

MR. HARTZLER: Well, the last interview is the one that's attached to the motion as Defense Exhibit 8 and dated -- I said "interview." It's not the last interview. It's dated 11-13, 1995, and that's the one sentence in which the agent went out and merely obtained a copy of the invoice.

In the previous interviews -- the next previous one, I believe it took place in mid-July.

THE COURT: Will, were those records available then?

MR. HARTZLER: Well, I don't -- I'd be surprised they were available; but my point is, once those records became available, we would not routinely direct an FBI agent to run out and interview Mr. Manning with respect to those records. I mean, that's something that -- that we would routinely recognize as being part of a pretrial interview by the attorneys.

As we discover more information as the case goes along, it's not something that we would want necessarily an agent to run out and collect that information from him. We'd throw it into the file on Manning; and whoever is going to be interviewing or preparing Mr. Manning for trial would have that information and ask him about it at the same time. But, mind

you, it's the same process the defense counsel uses. That's why I say that Manning is somewhat of a bad example to be using for the defense, because not only did they have the opportunity to speak with Mr. Manning after they knew about the Bridges calls, they did speak with him. They did interview him. And if they had been intent upon eliciting from him the whole truth and nothing but the truth, they certainly would have asked these questions; so there is a suggestion here, somehow, that there is an ambush going on, that we did not disclose to them this information.

Well, the information was disclosed to them. They certainly knew that unless there was -- unless McVeigh left Mr. Manning's sight or if he did not -- pardon me -- if he did not leave Manning's sight during that hour and a half, then there is a pretty significant conflict with our theory of the case if it is that McVeigh made those calls.

So they could have easily asked Mr. Manning these questions; and I think the fact that they did not is reflective of a conscious effort to hope that the Government also would not ask the obvious question; and we did.

Now, there are certainly witnesses, as you know, who have declined to talk to the defense, and there are instances, I'm sure, when those witnesses will provide information that you might characterize as new information, not contained in the 302's. But again, Manning is an example and the other

witnesses that are cited in Mr. Tigar's report are examples of witnesses for whom we have made Brady disclosures. And we're

sort of damned if we do, damned if we don't. We provide the information on these various witnesses, including -- there is a mention of the -- our co-conspirator statements. Well, we gave a detailed proffer attached to the co-conspirator statements, and now we're accused of not disclosing Brady information. I suppose what's the argument; that we didn't provide it in the right context, or something? We're doing what we're obliged to do, fulfilling our responsibilities. We get blamed if we don't provide the information; we get blamed if we do provide the information.

So I think that in fashioning any kind of remedy to this, I would urge you to consider not simply the Manning deposition but the prospect of having witnesses at trial that will testify beyond the four corners of the FBI 302, and all that is the Government lawyers fulfilling our responsibility to examine these witnesses before trial and get as much information as we possibly can.

I'm pausing because I sense you had a question. Maybe I'm --

THE COURT: Well, you know, I don't want to jump too far ahead of you. What is -- you want me to deny this motion, of course, with respect to suppressing this portion of the testimony. And you don't think it's necessary to give them an

opportunity to recross this witness.

MR. HARTZLER: I think if you read the transcript, you'll agree with that.

THE COURT: Yeah; but now, you did say something about the need for guidance, and I'm just asking you, do you want -- does the Government want me to enter any kind of order clarifying what I think is the responsibility of interviewing

witnesses by counsel and what should be done on it?

MR. HARTZLER: Your Honor, I believe that we know what our responsibility is; and I will tell you that I believe everyone on this team is fulfilling that responsibility. This is an honorable group; but if there is any suggestion in any of the arguments or anything that you have observed in this case to date that suggests any misconduct by the Government, then say so and we will change today.

THE COURT: Or if it isn't misconduct, it might be characterized better as, you know -- there is a difference between misconduct and uninformed or unsensitive -- insensitive conduct.

What I'm saying is one of the things about this case that is a problem -- and I've mentioned it before in a lot of ways, and this is why we have done a lot of sealing here: You've got to protect the integrity of the witnesses' recollections and not have them influenced by the publicity in the case.

MR. HARTZLER: We are aware of that.

THE COURT: And the investigations being done by people from news organizations, who then publish things that -- you know, from sources we don't know anything about and you don't know anything about. If witnesses read all of that, they can be influenced by what they read, just like any other human being.

MR. HARTZLER: We're quite conscious of that. Indeed, we ask witnesses what they have read, if they obtained information in the news media.

THE COURT: And if the answers to that in your

interviews were to be, Well, I really can't tell you now whether what I've just told you -- you know, let's say there is a new recollection or some new statement that wasn't in any of the reports and has never been -- this person has never said it before. They remember now some new detail, this type of thing --

MR. HARTZLER: Yes.

THE COURT: -- but unrelated to this and you interview this person and the prospective witness tells you that. And then you say, "Well, where did you get it from," and you know, "Why are you telling me this now?"

And the witness says, "Well, I don't really know now whether I remember it, or I read it some place."

Would you consider that to be Brady and disclose it?

MR. HARTZLER: Well, we might. We wouldn't elicit the testimony. I mean, I assume, certainly, if there is going to be testimony on that subject, then we would reveal the fact.

THE COURT: I'm assuming it's an important detail; that it affects the quality of the testimony.

MR. HARTZLER: If a witness were to tell us that they couldn't really remember but they read something in the newspaper and were going to testify to that, we would not allow -- we'd advise the court and tell the defense counsel and everybody in the world that this witness, we think, is testifying not from their own memory but from something they read in the newspaper.

THE COURT: All right. So you would give that to opposing counsel? You agree.

MR. HARTZLER: Not only would we give it, it wouldn't be in the trial. We wouldn't call somebody to testify as to

something that's not within their own recollection.

THE COURT: Or, remember what I said was the witness says, "I don't know now whether this is what I remember, or this is what I read."

MR. HARTZLER: We're pretty cautious people. We're not --

THE COURT: All I'm asking you for is would you disclose that under Brady?

MR. HARTZLER: Yes.

THE COURT: All right. That answers the question.

MR. HARTZLER: All right.

I may have addressed the other points in responding to your questions. Of course, I did want to respond to Mr. Tigar's suggestion that somehow, Mr. Mackey is vouching for his own credibility when he asked the witness if he was present, or however the question came out. And I agree with your Honor: I just don't think it is workable; and in my experience, it often occurs that a witness will refer to a prior meeting with an attorney.

I don't in any way see how that is vouching for the credibility of the witness, merely because the witness says, "I said something and you were present." And of course, as you know, we are not planning on calling any of the lawyers to support that testimony.

With respect to Mr. Tigar's argument that our notes are Jencks statements, that's novel for me. I do not believe that when the attorneys meet with these witnesses in pretrial preparation, typically, we are not taking verbatim information from the witness. We, like the FBI agents I suggested, are not

scriveners.

THE COURT: Well, I don't think that's the point, though. The point, as I understand it, that's being made is as you take notes -- and this goes back to Goldberg, really -- as you take notes, you don't hand the whole thing over to the

witness and say, "Now, did I get it right?" But suppose there is a phrase in quotation marks in your notes and you do say to the witness, "Now, are these exact words," and the witness says, "Yes."

Mr. Tigar is saying that portion of the notes constitutes Jencks statements because it's been adopted; even though all the notes haven't, that phrase or that line has been. Do you disagree with that?

MR. HARTZLER: No, I don't disagree with that. No.

THE COURT: Okay.

MR. HARTZLER: I can envision that.

THE COURT: I think that was the point: that it doesn't have to be all of the notes and a speaker's verbatim statement, but where there are specific quotations, assuming they're important and you review them with the witness and the witness says, "That's exactly right."

MR. HARTZLER: I think the key is a review with the witness.

THE COURT: Right.

MR. HARTZLER: I understand that circumstance where you're trying to get the phraseology precisely and you put it in your notes -- I can understand how that would be Jencks.

I will tell you, just so you're not expecting that, we're going to be disclosing an abundance of attorney notes as Jencks statements that that would be very atypical. I thought

that what Mr. Tigar was referring to is when a witness says, "I was standing at the corner and driving along Broad Street. I saw the defendant in a red car," and we write down "red car." And I would not think of that as --

THE COURT: No, no. The cases that are cited are the cases of the type that I've just put in my question.

MR. HARTZLER: Right, where there is a review and an adoption by the witness.

THE COURT: Well, an affirmation: Yeah, did I get it right? That kind of thing. I think that's, in fact, what was in the Goldberg case: Did I get this right, or something like that.

MR. HARTZLER: Right. I believe we can abide by that standard. There is no disagreement on that issue.

I want to conclude only by reiterating that I think the Manning situation crystallizes this issue. It's not the best situation for the defense, because I do think there was a conscious effort by them not to ask this question when they had several opportunities to do so.

I also believe that if you review the transcript, you'll see that there was more than adequate cross-examination on the very issue and, therefore, no need to reopen the deposition. And, ultimately, of course, I don't believe there was any violation whatsoever of Brady. I don't believe it can fairly be characterized as exculpatory. And, indeed, I don't

believe the defendants would be seeking to suppress it if it

were actually exculpatory; so of course, we're asking that the Court not suppress this portion of the deposition.

Thank you.

THE COURT: All right.

MR. JONES: I would like to respond on behalf of Mr. McVeigh.

THE COURT: All right. But I don't know who did the interview of Mr. Manning from your side before the -- before the deposition was taken; but Mr. Hartzler raises the point that he understands that the defense had those telephone records before interviewing him and did not ask about whether he left. So I need a response.

MR. JONES: I'm happy to address that question.

I wonder if I might ask the Court's indulgence. I want to find out what date we got the Bridges summary.

THE COURT: You want to take a recess?

MR. HARTZLER: The Bridges summary was delivered on November 17, 1996.

MR. JONES: Mr. Hartzler is mistaken. Both of our interviews occurred before that day.

MR. HARTZLER: If I may, Mr. Nigh spoke to him on the phone after the Bridges summary. Mr. Nigh called Mr. Manning prior to the deposition after the Bridges summary.

MR. JONES: May I make my response?

THE COURT: Go ahead, but he raised a question in my mind: If you had an opportunity to ask him about it before this deposition ever took place, why didn't you?

MR. JONES: May we take a short recess?

THE COURT: Well, we have to take a recess of about 20 minutes, any recess, but we'll go ahead, if you get -- need to

consult with Mr. Nigh, if he's the one who talked --

MR. JONES: Sure, and I want to check one other detail in my files.

THE COURT: We'll take 20 minutes.

(Recess at 10:25 a.m.)

(In open court at 10:45 a.m.)

THE COURT: Be seated, please.

All right. Mr. Jones?

DEFENDANT MCVEIGH'S REBUTTAL ARGUMENT

MR. JONES: Thank you, your Honor.

May it please the Court, I'm sorry, I must take exception to almost every statement Mr. Hartzler made with respect to the facts of this matter and that he draws as to the prejudices to the defendant and whether it is inculpatory or not. And I want to address, if I may, each of the questions that the Court asked him and asked me. And I think -- I hope and believe that when I finish, the Court will have a different perspective of what's happened here, because a lot of gloss has been put on a very simple mistake and misleading conduct by the

Government lawyers, and I use those terms advisedly.

But I think there is nothing more offensive to me professionally in this case than the suggestion made by Mr. Manning and adopted by the Government that out of eleven interviews, eight with the FBI, two with us and one with Mr. Tigar, that he didn't volunteer that Mr. McVeigh had left for ten minutes because no one asked him.

This is a case where 167 people died in a bomb, the largest unprecedented terrorist attack in American history that preempted every television program. 19 of these victims are

children under the age of 6, eight of them are law enforcement, and 73 percent of them are government employees, and he has to be asked every question. What kind of behind the ball game are we playing here? They knew as early as -- I'll ask Mr. Woods for the date.

MR. WOODS: May 19, 1995.

MR. JONES: May 19, 1995, the FBI knew. The Department of Justice knew about these two phone calls because upstairs in the 1B file is a time line prepared by the Oklahoma State Bureau of Investigation on these cards. Now, we didn't get the information in the now discredited and completely inaccurately and misleading Bridges summary until, I believe, January 1996. That's when we got it.

Our interview with Mr. Manning conducted by Mr. Reid, which was tape recorded -- so at least in our case, there's no

question that -- that -- what was said -- occurred on June 30, 1995, over six months before we got the phone calls. The second interview with him by Mr. Reid was a telephone interview -- it may have been by Mrs. Sparks -- which occurred on November 16, 1995, two months before we got the Bridges summary. So in those two interviews, we had no reason to ask the question because we didn't have the Bridges summary. But the Government interviewed him or had access to him or stopped by to see him on June 13, 1995; July 14, 1995; August 9, 1995; and November 13, 1995.

But in addition to that, Mr. Manning, when he was interviewed by Mr. Reid and Mrs. Sparks, made a very significant statement; and I'm going to ask permission of the Court to file the copy of this interview under seal, but this part, I can put in the public record. Mr. Reid and Mrs. Sparks

are interviewing Mr. Manning. This is in a face-to-face interview at his shop. And incidentally, it goes to the question that I'm going to answer more fully in a minute as to why Mr. Nigh didn't ask him the question that Mr. Hartzler says we should have asked him.

THE COURT: Now, is this November 16?

MR. JONES: No, sir. This is June 30, 1995.

THE COURT: First interview.

MR. JONES: Yes, sir. If you read the first page when you get it, your Honor, and the second page, you will see that

Mr. Manning didn't want to talk to us at all. In fact, what he said was, I really don't have time, I really don't think it's necessary to talk to anybody else, I've already talked to the FBI, meaning everything that I've said, I've given them. And in fact, on page 9 of the transcript of this interview, that's exactly what he says. He says -- we asked him -- this must be Mrs. Sparks because it says "S." She says beginning at line 5, "Sure. Was that all they had come in to tell you day before yesterday, was that we would probably be around?" And Mr. Manning said, "No. They brought in a federal prosecutor to go over every detail." And Mrs. Sparks said, "Every detail?" And he says, "You know, what had already been." And then Mr. Reid says, "Federal prosecutor out of Oklahoma City?" And he says, "Yeah." And then he asks his name, and I don't know whether this is a correct spelling of the name or not.

So in June of 1995, Mr. Manning told our investigator in a transcript that we had and which was given to the Government as part of a reciprocal discovery that he had seen a prosecutor in June and had gone over every detail with him.

Now, our interview was on June 30, I believe. Let me just check. Yes. He says it occurred just a day or two before, but we don't have that because the last one we have is dated June 13, and that's simply a date that he was asked to correct something about when he called the police. So there is yet another interview. And if he is correct that he told that

prosecutor every detail, then in June of 1995, they knew about it. And if he didn't tell them in June of '95, then when he told Mr. Mackey later, it was a prior inconsistent statement that we should have had.

Now, with respect to why Mr. Nigh didn't ask him the question, I don't want to stand up here and tell the Court how honorable I am, but I would like to tell the Court that I think I have some common sense. We don't interview fact witnesses if we can possibly avoid it because of this very problem. That's why we have asked the Court's permission for private investigators, and that's why, in many of these interviews, we tape record it just for our protection so there isn't any doubt about what we've said.

Now, I asked Mr. Nigh over the break -- and if I'm mistaken and he's had time to think about it, I hope he'll refresh my memory. I can't recall of any fact witness that I've interviewed that has to do with the first stage of the proceeding other than expert witnesses. Mr. Burr has conducted a number of interviews with people that might be called in the second stage if the trial ever gets that far. And there was a short period of time after Mr. Burr and myself and Mr. Nigh were appointed, but I believe before the Court authorized private investigators -- we were then down in Oklahoma City -- that Mr. Nigh and Mr. Burr made a quick trip to Michigan and

New York, and I think they interviewed Jennifer and they may

have interviewed James Nich -- couldn't have interviewed James, I guess -- but may have interviewed Kevin Nichols and one or two other people, but we've tried to use the investigators. And where we will start our trial preparation, we're going to have somebody else in the room so that if this question comes up, there will be some clear statement as to precisely what happened.

Now, as to the question about when Mr. Nigh called him, why didn't he ask him the question, well, first of all, perhaps Mr. Hartzler hadn't seen Dr. Tobias Daravant's description of Mr. Manning. It's attached -- well, it's not attached, but I'm going to put it in the supplement. It was an attachment to Mr. Mackey's letter of October 18. This is how Mr. Mackey described what Dr. Daravant said about Mr. Manning. He said, "Attached to this motion is the declaration of Dr. Titus Daravant, Mr. Manning's physician, who explains that Mr. Manning is in danger of suffering a second probably fatal cardiac arrest and that this danger could be exacerbated by a stressful experience such as publicly testifying in a trial of this magnitude and public interest."

And I guess I don't have to file it because it's already attached to the motion to take deposition, but I remember that what Dr. Daravant said about Mr. Manning was that he had had a serious heart attack, that he had lost a high percentage of the use of his heart muscles, that he had had a

conversation with him and told him he needed to change his pattern of life about smoking and drinking and working hard, because, apparently, Mr. Manning is a very hard worker; and Mr. Manning said, Doc, I ain't going to change anything. I'm going to go just as I have. And the doctor said he was overweight.

And curiously though -- and I must say it was curious, and the Court will see it in the deposition because it's videotaped -- when I saw Mr. Manning -- I didn't see his heart, but he looked pretty healthy to me. And I was frankly surprised. So first, we're told that here is a man that, under a stressful experience, could have a second heart attack which will be fatal and the only reason Mr. Nigh called him was just simply to say, Hello, how are you, here's who I am, do you remember Tim McVeigh, we're going to be up there, as a preparatory so that we didn't surprise him. We didn't conduct an interview by the telephone.

I frankly was surprised under the description the doctor gave there weren't paramedics there when Mr. Manning testified because that description of his physical condition is the most serious one that I have read in 30-some-odd years of practicing law.

Now, as to the question of whether the prejudice, which is what the Court asked about -- now, I will admit that Mr. Hartzler has a point. He says, Well, if it's exculpatory,

why would you want to suppress it? Well, that's a good question; and the answer to it is I wouldn't. But I just got lucky this time. This man inadvertently and, I hope, truthfully gave exculpatory testimony, and I will explain in a minute why it's an exculpatory; but there's a catch to it, and

it's another one of those things I don't have yet. What I'm concerned about are all the other people that these lawyers are interviewing; and most of the people they are interviewing, your Honor, it becomes clear that what they are really doing is conducting a counter-exculpatory investigation. They are not preparing the witnesses for trial. They are preparing their cross-examination in the event I subpoena them by talking to them. And getting them to perhaps -- I shouldn't say getting them, but out of these conversations, somehow, the other -- what they previously had told the FBI and grand jury in various meetings is changing. It's changing with respect to some of these eyewitness identifications which we put under seal. It's changing with respect to -- even to people that may not even be witnesses but whom the Government fears may be witnesses.

So while I got lucky in this case because Mr. Manning testified to something that is helpful, if the record stands as it is, I don't know that the next time Mr. Mendeloff or Mr. Mackey or Ms. Wilkinson conduct an interview in which I'm not furnished the notes that I'm going to be that lucky. So what I'm really trying to get here today is, yes, I want to

suppress this deposition, and no, I don't think we should reopen the deposition. But equally important with suppressing it is -- and we've been over this now since December of '95, the very first time your Honor came down to Oklahoma City. You've said it in court, you've said it in conferences, and you've said it by an order. There is no excuse for the prosecution -- and I don't say the Government, I say the prosecution -- not to know what your Honor considers to be exculpatory information. Brady, Giglio, whatever.

Now, how is it important in this case and what is the prejudice? Mr. Hartzler's statements that a criminal trial is a search for the truth is a fiction that all prosecutors say. It's not a search for the truth. It's a testing of the prosecution's evidence. There are all kinds of rules in a criminal trial that we wouldn't have if we were just searching for the truth. But common-law experience judging back to the Magna Carta tells us that those rules are necessary as a restriction on government power when it tries to take the liberty and life of a citizen.

Here's what happened. Our theory and what we are called upon to meet and what we must test is the allegation that at 9:51 and at 9:53, I believe it is, on April 14, an individual made two telephone calls from a pay phone at the bus station in Junction City. One phone call is the phone call -- very important phone call to Elliott's Body Shop that rents the

Ryder truck. The other phone call -- and when I say it rents the Ryder truck, I'm saying that because that's what the people at Elliott's say, that the individual identified himself as Robert Kling, I want to reserve a Ryder truck. How much does it cost?

The second phone call, supposedly at least on the summary, is made a few minutes later; and I believe that's the one to Terry Nichols' house, but it doesn't make any difference which one was first. Both phone calls terminated before 10 a.m.

Now, what Mr. Manning testified to -- and I presume he said the same thing to Mr. Mackey -- was that Mr. McVeigh was gone from the dealership for only 10 to 15 minutes and returned at 10:15 or 10:20. Well, under that testimony made under oath

after his five-hour meeting with Mr. Mackey, Mr. McVeigh cannot be Robert Kling, which is a key element of the defense; that the evidence does not establish it. So at a minimum, if Mr. Mackey was given those times, that's exculpatory. As Mr. Hartzler said, this is a key phone call.

Now, I will admit Mr. Manning could have been off and maybe Mr. McVeigh made the calls and maybe he was gone from 9:45 to 10:00, but that's not what the witness testified to. You say, well, then that helps you. Why should you be unhappy, let the jury hear it.

Well, here's the catch: The catch is that these

Bridges summaries aren't worth the paper they are written on. What you've got is a phone -- you've got records showing who was called using that Bridges record, that number. What you don't have is there's no electronic evidence trail on where the call was made from to where the call was made to. Debit billing is not like direct distance dialing or a credit card where the place you call from is important in determining how much the call costs, because under the debit bill, it's 25› a minute whether you call across the street or across the country, and they could care less where you call from because they have already got your money. They simply want to know where you called to.

These cards -- these calls don't match up. In other words, a lot of these calls have an eight-minute window. So if it turns out at trial when we go through these records that now the call was not made at 9:53 but was made at 10:02, which is the next thing I expect to receive, then, of course, it does fall within this minute of opportunity.

Now, that's the problem I have with Mr. Tigar's suggestion that the Court review this, because we all remember the Dennis case which talks about that it's not the function of the judge to try to sit as a defense attorney when he's reviewing items filed under seal. There are so many nuances to this case that there's no way that the Court can be prosecutor, defense counsel, and the Court. You can't possibly know fully

what my strategy is or what I'm going to make of this because you don't know everything I know and you don't know everything Mr. Hartzler knows, so that's why we put the burden on the Government.

But even if for a moment, we go along with the idea that this wasn't exculpatory, although it clearly was, that it wasn't new information, although it clearly was, were we misled? Were we treated less than candidly? I have said to the Court before that I am concerned about very careful wording of the prosecutors so that when you see it on paper, you see that it's a lot more restrictive than when you hear it in court. And here's what Mr. Mackey wrote us: "Dear gentlemen," second paragraph, "As I mentioned on the phone, we expect Mr. Manning to testify about the details of the transaction he conducted on the morning of April 14, 1995, with Tim McVeigh whom he knew personally from when Mr. McVeigh was stationed at Ft. Riley, Kansas. I am enclosing copies of all the records of Mr. Manning's statements in our possession." And then he recites all the 302's and sends us a copy of our two investigative reports as well as Mr. Bodley's reports.

Well, truthfully speaking, the impression created by this letter -- and there is no other interpretation consistent with honor or logic -- is this is what he's going to testify

to. Right here. These statements. Eleven of them. And what are we to make of the statement, "I'm enclosing copies of all

the records"? Well, there's a record of these prosecutors' interviews. He didn't say, I'm enclosing copies of all the records but my notes of my interview. He didn't say, I'm enclosing copies of all of his statements. What he said was, I am enclosing copies of all the records, and the key word is "record." He didn't enclose all of the records. And Mr. Manning didn't just testify about the details of the transaction.

This sounds suspiciously similar to the assurances that we received that we would have a chance for an observation of the test in New Mexico. We just didn't know it was going to be five miles down the road. This type of concern we have repeatedly called to the prosecution's attention and to the Court's. It is not consistent with our duties as trial counsel in this case to be as candid as we can be in dealing with each other, consistent with our responsibilities.

If Mr. Manning's statement made to Mr. Mackey is not exculpatory, if he doesn't believe it's exculpatory -- and I'm sure that whatever Larry believes, he in good faith believes. I'm satisfied of that because I've dealt with him. But it's a question of whether that mistaken belief is a correct view of the law and, more particularly your Honor, who makes the law in this case, and I don't think it is.

PI will agree that we've probably spent too much time already on this incident. But the reason that it's instructive

and the reason we need to spend the time is because we cannot have this come up in a trial that might last 12, 16 to 20 weeks. We're trying to avoid that. And that's why we need the Court to either sanction it -- to sanction the Government so that the lesson is brought home -- although I agree with Mr. Tigar, I don't think, based upon the pleading last night, it's still brought home -- or failing that, the Court must, I respectfully submit, lay down to the prosecutors precisely what is meant by these interviews.

And if I might have just a moment to -- well, I want to address one other thing. Mr. Hartzler said, Well, now, we all know that these 302's aren't script, and I certainly agree with that. Sometimes I think there's no document more meaningless in a criminal investigation than a 302. Now, the Airtel sent to the FBI that accompanies a 302, that's a different deal. But I respectfully submit that while it's not a script, Mr. Mackey, by his letter, said it was a script. And we are entitled to rely upon a man who signs his letter as Special Attorney to the United States Attorney General. If that's not telling us this is what the man is going to testify to -- here are all these records, 11 of them -- then I submit that we just have such a vast difference over what is meant by these words and what we expect, that it is difficult to do anything except by formal motion before the Court which would prolong this unnecessarily. It is an important issue to us.

But what I'm more concerned about is what we're going to do in the future to avoid this problem.

THE COURT: Well, I -- you know, you've asked for prospective relief there. But with respect to this deposition,

which is the immediate issue as well, there was an opportunity to cross-examine after the information was disclosed with respect to Mr. Manning's statement to Mr. Mackey.

MR. JONES: There was, your Honor.

THE COURT: So is there any real prejudice here as far as Manning's testimony is concerned for trial?

MR. JONES: Only to this extent: We probably would have done it differently had we known beforehand.

THE COURT: All right.

MR. JONES: But that's just one lawyer talking to another.

THE COURT: All right. Thank you.

Mr. Tigar?

DEFENDANT NICHOL'S REBUTTAL ARGUMENT

MR. TIGAR: Very briefly, your Honor. If the Court directs the Government to produce the notes or other records of all of the meetings Government lawyers and investigators had with Mr. Manning before the deposition and if, upon examination of those, it turns out there is Jencks material in whatever amount, then the Jencks Act has been violated and the statute calls for some sort of a sanction.

That is to say, the statute tells one that in the absence of full Jencks production, the opportunity to cross-examine, however extensive it may have been, is simply inadequate.

THE COURT: Well, what -- what causes you to suggest that Jencks has been violated with respect to Mr. Manning?

MR. TIGAR: Mr. Manning was interviewed by Government counsel in the presence of FBI agents on a number of occasions,

including the one Mr. Jones talked about. They probably made notes. If their notes meet the standard of the Jencks Act, that is to say, if there are other recordings -- recording includes writing down -- that are substantially verbatim recitals of an oral statement and recorded contemporaneously, then that material that is Government counsel's notes would be Jencks material.

THE COURT: Well, I reviewed with Mr. Hartzler the interpretation of Jencks, including this adoptive phrase instead of the whole, you know, interview, and he agreed that that was Jencks. So I don't see that there's anything here which would cause me to believe that Government counsel doesn't know what's Jencks.

MR. TIGAR: I respectfully suggest that there is some daylight between the -- Mr. Hartzler's rendition of the Jencks obligation and Mr. Hartzler's rendition of the Brady obligation on the one hand, and, on the other hand, what the law requires.

In any case, the Jencks Act under the Campbell case requires that the Court examine the statements in camera and then perhaps in a quasi-adversary hearing to determine whether the material is producible.

THE COURT: Are you asking me to do something?

MR. TIGAR: Yes, your Honor. I am requesting that the Court require the Government to produce all notes and records of its meetings with Mr. Mackey so that the Court can review them to see if they are Jencks material. I can give your Honor an example.

THE COURT: So you want me to direct Mr. Mackey to file his notes?

MR. TIGAR: Yes, your Honor. Mr. Mackey, Mr. Goelman,

all other Government lawyers. I'll give your Honor an example. It -- in the trial of John Connolly, Jake Jacobson said on direct, I saw Governor Connolly count $15,000 and he was wearing rubber gloves. Judge Hart ordered the prosecutors to produce their notes; and in the handwritten notes, Mr. Jacobson had said -- and they reported that verbatim so it was producible -- that Mr. Connolly counted the money with a glove. Glove. Mr. Williams confronted Mr. Jacobson with the inconsistency, and Mr. Jacobson said, Well, I got to thinking about it and you couldn't hardly count money with just one glove.

It was Jacobson's willingness to change his testimony

for the convenience of it that was vital evidence in that case. And that was just one word in one lawyer's interview of one key witness.

So yes, your Honor, I don't hesitate to say to the Court with some apology, I'm sorry, but I believe the Act and the cases under it confer that burden on the Court. That's my first point.

Now, my second one is that I believe that there is substantial daylight between Mr. Hartzler's rendition of his Brady obligation and the Court's as reflected in the November 13 transcript that I quoted, and prospectively we do ask that the Court embody the Court's interpretation in an order so that there's no doubt about this.

After all, all we have to go on is 20,000 FBI 302's. That was represented to us as being an important thing to get for our concession. And if this other Brady material, as the Court defines it, is available, we believe it should be there.

The final thing is that over the recess, we did confirm, your Honor -- and Mr. Jones has it correct -- the Oklahoma Bureau of Investigation has a time line of phone calls, and that's dated May 19, 1995. That document was not turned over to us on that date. That was the date it was generated; and I think it's a fair assumption it was turned over to the United States shortly thereafter. We didn't get it until months later, on into 1996, because rather than be a

discovery item, it was in the 1B's; that is, discovery material, not documentary production, which we had to hunt for like another one of these buried truffles that we've so often spoken of.

Thank you, your Honor.

THE COURT: There have been some factual statements here and there's some disagreement about it, I think. Mr. Hartzler, you can respond to that, although, you know, I'm not going to have this argument back and forth and back and forth.

MR. HARTZLER: I get the last word, right?

THE COURT: No. I do.

MR. HARTZLER: I'm not sure exactly what factual statement you're referring to but the --

THE COURT: Well, about when the telephone records were developed and who developed them with this line that Mr. Tigar just referred to the Oklahoma Bureau of Investigation, I think.

PLAINTIFF'S SURREBUTTAL ARGUMENT

MR. HARTZLER: I'm not familiar with that particular document. As you know, in previous experience with the phone records that the FBI was working on compiling the summary, I

know that -- I would estimate that it was about November when those of us in the prosecution team became, in general, familiar with the format that was being produced, and, indeed,

it took some time to try to finalize it and make sure --

THE COURT: To develop the summary?

MR. HARTZLER: The summary and make sure about the accuracy.

THE COURT: Yeah. And I don't know if we still have that. I'll discuss that with counsel.

MR. HARTZLER: Right. We'll address that later. There was a factual statement that Mr. Jones made to support the argument that this was exculpatory information, and I merely want to refer you again to the deposition which Mr. Manning was asked about the timing of this departure. And he was asked specifically by Mr. Nigh, I believe it was, when or how long McVeigh was gone. He said 10 or 15 minutes.

"Question: Do you remember specifically?

"Answer: I can't give the exact time. I remember we concluded the deal. I pulled the car in so we could take care of checking it over, backed out the car, and then he was back.

"Question: Do you know what time it was when he left?

"Answer: No. I wasn't all -- all I know, there was a short period of time he was -- he was not on the lot and he wasn't up in the front room.

"Do you know what time it was when he returned it?

"Answer: I don't have any exact times, no.

"Question: Approximate time?

"10:15, 10:20, somewhere in that general vicinity.

So I'm -- I appreciate what Mr. Jones -- Jones would like to argue and would like the jurors to believe that, somehow, this excludes McVeigh as a possible candidate for the one who made the calls, but it's fairly clear when you read the whole transcript that Manning did not have a recollection of the exact time of the calls.

The other point Mr. Jones made was with respect to the letter that Mr. Mackey sent in which he enclosed the various records of statements. And there's some suggestion that that letter implied that this is the entire scope of the testimony. Well, if that's the case, then we're going to run into the same problem with respect to every trial witness. Certainly, defense counsel did not envision that the trial lawyers in this case didn't prepare Mr. Manning and discuss his testimony with him prior to the deposition, and, clearly, our notes were not in the material that Mr. Mackey sent over.

I -- so I really think that Mr. Jones is overstating it to your Honor to say that there was expectation that these 302's reflected everything this man could testify to. And if that's the standard we're adopting, then we have some concerns about the trial, because, certainly, there are going to be witnesses in trial who will say things that are not contained in the 302's.

Mr. -- Mr. Tigar is inviting the Court to review attorneys' notes. I think that's bad practice. It certainly

would be cumbersome and burdensome on the Court in this case. I think it would establish a bad precedent for other cases. But I want to make clear that no one now is suggesting that we

reopen the deposition. Mr. Jones, I understood, abandoned that proposal, remedy, so I need not address that.

The final point and the one in which I initially suggested that perhaps we should get guidance from the Court is Mr. Tigar's point that you had indicated on November 13 in a general statement that any new or additional information should be disclosed. And I'm paraphrasing now. I don't have the transcript in front of me. But I believe that was in the context of this Manning deposition. And the argument was made that new, additional information had come up and been disclosed. And to the extent that we are directed to disclose to the defense counsel in this case information that is not Brady material but is what I would characterize as a crease in the fabric of the information contained in the 302, which is, in fact, inculpatory, but, indeed, is additional information outside the four corners of the 302, we believe there is no rule of law under which that should be disclosed to defense counsel. And again, the 302's are disclosed. They have a full opportunity to impeach a witness who says anything additionally; and that's, frankly, the bread and butter of defense practice.

THE COURT: Okay. Mr. Jones, I didn't realize until

Mr. Tigar just asked me that I was being asked to order Mr. Mackey to deliver his notes for in camera review. Are you asking me to do that?

MR. JONES: Yes, your Honor. The notes of all Government counsel's interview with Mr. Mackey -- I'm sorry --

THE COURT: Mr. Manning.

MR. JONES: -- Mr. Manning -- excuse me -- and any FBI

agents that were present, any notes that they took. In other words, any Government counsel that interviewed Mr. Manning, those notes; and if there was an FBI agent or somebody else present that took notes, whether it was a secretary, paralegal, ATF, whomever, that those also be produced for the Court's in camera inspection.

THE COURT: And that's to see if there's a Jencks violation?

MR. JONES: If there's a Jencks Act violation. And that's why I say I agree with Mr. Tigar that that should be addressed, but I also -- and most importantly -- ask the Court to reaffirm its statement of November 13 concerning new or different information. When Government attorneys with the FBI or without the FBI interview someone that says something that's material, that's different from what was said either in the grand jury or what was said in the 302's because I think that's exculpatory.

THE COURT: Mr. Tigar?

MR. TIGAR: Your Honor, I -- I'd like to light a light at the end of the tunnel and have it not be an onrushing train. I think if your Honor does review the notes with respect to this witness, your Honor will clarify for us and for the Government what is and is not a Jencks statement within your Honor's view because the -- the act is not a model of clarity, the portion that I quoted, other statements, substantially verbatim and so on.

Once your Honor has done that with one review, I -- I predict that the Government will be clear about what its obligations are and we will be greatly less inclined to try to impose this review burden on your Honor as the case goes on.

That's another one of these things where, once we get the rules set, I think matters will proceed more smoothly.

THE COURT: But I doubt that the notes would contain something like did I get it right, are these exact words.

MR. TIGAR: Well, that's -- that's right. The notes do not. Sometimes when people take notes, they put quotation marks around things. At other times -- now you have the Manning deposition and so you're going to -- when your Honor is going to read that, you may see things in the notes that, based on the questions Mr. Mackey is asking, it looks like the notes do constitute some sort of Jencks material.

The -- unfortunately, Campbell II and Goldberg -- that's Mr. Justice Brennan helping us out here -- tell us that

sometimes you need a quasi-adversary hearing, that distinction between the relevancy determination that's made totally in camera and the quasi-adversary character of the hearing to determine whether or not it's a statement. If it's any solace, it's an historic practice. Jencks -- I believe the case comes out of the Tenth Circuit. It involves Clifton Jencks and the Mine, Mill and Smelters Union. There's a patina of history in what I'm asking the Court to do. If there's not solace enough, I believe there is a way to resolve these questions, and the Supreme Court has told us what it is.

THE COURT: All right. Well, the motion stands submitted. I'll issue a written opinion.

We'll meet with counsel and the parties at 1:30 to continue the discovery matters which will be going forward in camera, as we say. That is in the nonpublic hearing because, in part, for the very reason that it could contain and would

contain information which should not be public and should not be going to the witnesses who read the -- and hear newscasts and reports. 1:30 in the chambers.

MR. HARTZLER: Your Honor, we're breaking a little early. I'm only concerned about taking the entire afternoon --

THE COURT: 1:30.

MR. HARTZLER: Very well. Recess.

(Recess at 11:24 a.m.)

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REPORTERS' CERTIFICATE

We certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated at Denver, Colorado, this 9th day of January, 1997.

_____
Paul Zuckerman

_____
Bonnie Carpenter