

1 IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Criminal Action No. 96-CR-68

UNITED STATES OF AMERICA

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6 TIMOTHY JAMES McVEIGH and TERRY LYNN NICHOLS,

Defendants

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**REPORTER'S TRANSCRIPT**

REDACTED TRANSCRIPT  
10 (HEARING ON MOTIONS TO SUPPRESS EYEWITNESS IDENTIFICATION)  
VOLUME IV

11

13 Proceedings before the HONORABLE RICHARD P. MATSCH,

<sup>14</sup> Judge, United States District Court for the District of

15 Colorado, commencing at 9:00 a.m., on the 19th day of February,

16 1997, in Courtroom C-204, United States Courthouse, Denver,

17 Colorado.

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1 PROCEEDINGS

2 (In open court at 9:00 a.m.)  
3 THE COURT: Please be seated.  
4 Good morning. Are we ready to proceed with further

5 testimony from Mr. Rozycki?

6 MS. MERRITT: Yes, your Honor.

7 MR. MACKEY: Yes, your Honor.

8 THE COURT: All right. Please resume the stand under

9 the oath taken yesterday.

10 (Raymond Rozycki was recalled to the stand.)

11 MR. NIGH: Your Honor.

12 THE COURT: Mr. Nigh.

13 MR. NIGH: If I might before we begin, you can see

14 that Mr. Jones is not here. He's trying to recover his voice.

15 We had spoken to Mr. McVeigh this morning, and he consents to

16 us proceeding this morning without Mr. Jones.

17 THE COURT: All right. Thank you. Thank you for your

18 report; not for his loss of voice. I don't mean to be

19 misunderstood.

20 All right, Ms. Merritt.

21 DIRECT EXAMINATION CONTINUED

22 BY MS. MERRITT:

23 Q. Good morning, Agent Rozycki. Yesterday, we were talking

24 about how you go about doing your composite sketches. When we

25 talked about that, you said that you believe what you do is an

1 art; and can you tell me what the process is that you go

2 through.

3 A. Yes. In the beginning of the interview, we go -- I go over

4 initially with the witness some general -- a general outline of

5 where the -- where the witness was and give -- and during the

6 course of that, get a general description of the subject that

7 they saw, and I follow basic outline. This is -- the form is

8 an FD383. It accompanies this catalog, which is the FBI facial

9 identification catalog. And they are instructed in the  
10 procedures that I'll use in filling out this form, getting the  
11 general data and then working into the use of the catalog.

12 And it's -- it's a process that it's -- it changes  
13 with each -- each witness, but that's the general structure of  
14 it. We go through and get the -- the witness's information,  
15 their name and then start talking about the situation and the  
16 subject that they -- they viewed.

17 Q. Okay.

18 A. We go through -- it varies whether it goes through sort of  
19 by numbers or whether it's done sort of a -- a looser fashion,  
20 just talking generally about the subject they viewed.

21 Q. Now, on April 20, 1995, you arrived at Fort Riley; is that  
22 correct?

23 A. Yes, ma'am.

24 Q. And you spoke with Agent Crabtree and another agent and  
25 discovered that their -- they believed that Mr. Kessinger had

1 the best recollection of Un. Sub. 1 or Mr. Kling?

2 A. Correct.

3 Q. And did you then proceed to interview Mr. Kessinger?

4 A. Yes, ma'am.

5 Q. Okay. Can you tell me what you said to Mr. Kessinger?

6 A. Not exactly. But again, it's -- it followed the same  
7 general format in that I introduced myself and thanked him for  
8 being there at such an early hour in this case and told him a  
9 little bit about what we were going to do; that I was there to  
10 essentially act as his hands and I would follow his lead on  
11 this and we would just go through the information that he had  
12 available to him about the -- the subject and look through --

13 have him look through the catalog and pick out facial features  
14 that corresponded to his -- his memory of that individual and  
15 then I would do a drawing and show that to him and -- and work  
16 from that.

17 Q. When you first started discussing it with Mr. Kessinger,  
18 did you ask him for what happened or did you go right to what  
19 did the person look like?

20 A. We did do a general -- a little bit of an overview just to  
21 get me oriented as to where he was loosely in the room, how he  
22 was able to see what he saw, and not -- not a whole lot of  
23 detail about that situation, but --

24 Q. Can you tell me what he did tell you about what happened  
25 and where he was.

310

Raymond Rozycki - Direct

1 A. What he did say was that there were two individuals who  
2 approached the desk and were talking with Ms. Beemer and that  
3 for some reason -- my recollection was that it was the -- the  
4 nature of the conversation, it attracted his attention. In  
5 this case, he was somewhere behind and to a side of Ms. Beemer.  
6 And which -- in -- in this sense, from my point of looking at  
7 him -- gave him sort of a more objective distance view of  
8 the -- the proceedings. And just listened to the conversation  
9 and during that conversation was able to view the -- the two  
10 individuals.

11 Q. And did he -- did you then proceed into a discussion of  
12 what that -- the individuals looked like?

13 A. Yes. The first -- started with the first, yes.

14 Q. So you started with the first person?

15 A. Yes, ma'am.

16 Q. And did you make any comments to him before he started

17 explaining his appearance?

18 A. No, ma'am.

20 looked like.

21 A. My recollection is captured on the -- this 383 --

22 Q. Are you referring to Government's Exhibit 50?

23 A. Yes, ma'am.

24 Q. Okay.

25 A. He described him as a white male between the ages of 27 and

Raymond Rozycski - Direct

1 30. Roughly 5 feet 10 inches and between 175 and 185 pounds.

2 His build was slender. He was able to see a greenish --

3 greenish-brown eyes. His hair was short and light brown, and

4 he had some acne -- rough skin possibly due to acne. He -- the

6 form. Strong indications about his chin. He said he had --

7 talked about his chin a fair amount. He was clean-shaven.

8 Q. Let me stop you there. It appears that you're reading from  
9 your notes. Do you have any independent recollection without

10 looking over your notes of what he said to you?

11 A. No, ma'am, I don't.

12 Q. Okay. Do you have any recollection of where he said the

13 acne or the rough skin was on the individual's face?

14 A. No, ma'am.

15 Q. Now, you subsequently drew a composite sketch of this

16 individual; is that correct?

17 A. That's correct.

18 Q. Do you have that in front of you? I believe it's

19 Government's Exhibit 4, but it might also be in your packet,

20 which is 1551.

21 A. Yes, ma'am.

22 Q. Can you tell me where the acne is on that drawing.

23 A. Not on this particular one, no. I could on the -- the

24 actual drawing, itself. This is a -- a Xerox copy of the

25 drawing.

312

Raymond Rozycki - Direct

1 Q. Okay. But you could on the original, itself?

2 A. I can.

3 Q. Now, did Mr. Kessinger tell you that the individual's

4 height was 5-foot 10"?

5 A. Yes, ma'am.

6 Q. And did he tell you that his eyes were green or brown?

7 A. That's correct.

8 Q. Okay. What did you say to Mr. Kessinger during the time

9 that you were obtaining the description of this person other

10 than things that pertained to the description? Did you make

11 any comments?

12 A. Not that I can remember, no, ma'am.

13 Q. Okay. Did Mr. Kessinger make any comments other than

14 specifying what the individual looked like?

15 A. Again, not that I can remember.

16 Q. Did Mr. Kessinger express to you on any occasion during

17 this day that he wasn't certain he remembered exactly what the

18 individual looked like?

19 A. No. Not at all.

20 Q. Did he seem sure to you that he knew what the individual

21 looked like?

22 A. Yes, ma'am.

23 Q. Did he tell you how long he had had an opportunity to view

24 this individual?

25 A. Not the duration, no. Not the time.

313

Raymond Rozycki - Direct

1 Q. Did he discuss with you his vantage point and how clear  
2 or -- a view he had?

3 A. Again, in general terms that he was behind and to the side  
4 and was able to get a good frontal view of the individual.

5 Q. Now, yesterday, when we concluded, you said that you had  
6 some notes and you were going to bring your notes here this  
7 morning. Is the totality of your notes the 383 which is the  
8 form filled out with what he told you?

9 A. My notes would consist of the 383 that the -- the drawings  
10 produced and in this case, the 302. That's the only  
11 documentation I would have on this.

12 Q. Well, the 302 is typed; correct?

13 A. Correct. Yeah.

14 Q. So the 302 wouldn't be your notes?

15 A. Correct, yes.

16 Q. Okay. And is this what you're referring to as the 383 that  
17 your notes are on? This is Government's Exhibit No. 50.

18 A. Yes, ma'am.

19 Q. So you didn't take any independent handwritten notes on  
20 any, like, yellow sheets of paper or any other kind of paper --

21 A. No, ma'am.

22 Q. -- that recorded that?

23 A. No, ma'am.

24 Q. Okay. Now, after you finished the composite drawing, did  
25 you show it to Mr. Kessinger?

1 A. Yes, I did.

2 Q. And what did he say?

3 A. What -- let me just -- there is sort of an evolutionary  
4 process. I went through by the numbers his descriptions and  
5 did a drawing. And then that was used -- he was able to --

6 shown that and we talked about the drawing and -- and he  
7 indicated certain areas that needed to be strengthened to fit  
8 his memory. And that was a give-and-take process. Changes  
9 were made and -- to a point where he finally agreed that that  
10 was -- that was a pretty good likeness.

11 Q. When you said "pretty good likeness," were those the words  
12 he used?

13 A. No, ma'am.

14 Q. Or were those your words?

15 A. No. Those are my words.

16 Q. Can you recall his words?

17 A. No, ma'am.

18 Q. Now, did you also speak with Vicki Beemer or Eldon Elliott  
19 on this date?  
20 A. Yes, ma'am.

21 Q. Did you prepare any composite sketches with each of them?  
22 A. No, ma'am.

24 A. I would not in that case. We've -- as to avoid making any  
25 kind of conflicting -- you know, two sets of drawings about the

1 same individual. When it was determined that there was one  
3 would begin with, make one composite, and then show it to the  
4 other individuals for their comments. And that's the procedure  
5 I followed.  
6 Q. Did you show this drawing to Mr. Elliott?

7 A. Yes, I did.

8 Q. And what did you say to Mr. Elliott?

10 wasn't going to go through the whole format with him. I sat  
11 down with him and talked -- talked to him in general and asked  
12 him if he could describe the individual and took notes from

13 that that were entered on the back of the 38 -- the -- Exhibit  
14 50, the 383. And when I determined at that point -- at a  
15 certain point that he really was not -- was finished with what  
16 he could describe, then he showed him the drawing and asked him  
17 if this -- how he responded to the drawing.  
18 Q. Did Mr. Elliott describe the person he knew as Mr. Kling as  
19 being 5-foot 10"?  
20 A. Yes, ma'am.  
21 Q. And 180 pounds?  
22 A. Yes, ma'am.  
23 Q. Did he say he had short hair and a medium build?  
24 A. That's correct.  
25 Q. Okay. And after -- what was his response to seeing the

316

Raymond Rozycki - Direct

1 drawing?  
2 A. His response -- there was not much of a response. He was  
3 not able to -- to add or subtract anything from that. It was  
4 very little response to it.  
5 Q. Did you make any comments to him about Mr. Kessinger's  
6 selection?  
7 A. No, ma'am.  
8 Q. Did you also talk to Vicki Beemer about -- and show her the  
9 sketch?  
10 A. Yes, ma'am.  
11 Q. And what was Ms. Beemer's response?  
12 A. Again, she said that she saw very little and was able to  
13 give me less of an -- less information than Mr. Elliott.  
14 Q. In fact, she told you she couldn't really identify him;  
15 right?  
16 A. Yeah. That's correct.  
17 Q. Now, what was the next encounter you had with

18 Mr. Kessinger?  
19 A. That was Un. Sub. No. 2.  
20 Q. And was that the same time right immediately following  
21 No. 1 or a different day or --  
22 A. The same day. At a later time.  
23 Q. What time was it?  
24 A. I'm not quite sure of the time.  
25 Q. Was it the same session or did you all disburse and come

Raymond Rozycki - Direct

1 back later that day?  
2 A. It was the same session.  
3 Q. And can you tell me what Mr. Kessinger said to you in that  
4 session?  
5 A. Again -- again, this is captured in the -- the Exhibit No.  
6 51.  
7 Q. Can you tell me what the physical description Mr. Kessinger  
8 gave you of the person you're -- you're referring to as Un.  
9 Sub. No. 2.  
10 A. He described an individual -- again, a white male between  
11 the ages of 26 and 27, 5 feet 10" in height and 200 pounds in  
12 weight. Described a heavy build with brown eyes, brown hair  
13 and a smooth complexion, also clean-shaven. Again, stressed  
14 the smooth complexion. Dark hair, trimmed in a square-cut nape  
15 of the neck.  
16 Q. Again, you're looking at your 302 and your drawing. Is  
17 there anything that you can remember about the encounter with  
18 Mr. Kessinger that is not contained within the 302 or your 383?  
19 A. No, ma'am.  
20 Q. And does that pertain, as well, to the 383 and 302 for Un.

21 Sub. No. 1, the one that we just finished discussing?

22 A. Correct. Yeah.

23 Q. Is there anything in -- that you remember that is not in

24 either of those documents?

25 A. No, ma'am.

318

Raymond Rozycki - Direct

1 Q. Okay. When -- did you make any statements or comments to

2 Mr. Kessinger during the execution of the composite sketch of

3 Un. Sub. 2?

4 A. No. No. I'm not sure what you mean by --

5 Q. Any comments unrelated to the actual physical description?

6 A. No, ma'am.

7 Q. Did you ask him any questions about his encounter with Un.

8 Sub. 2?

9 A. Nothing other than the general statement of -- of -- sort

10 of the general surroundings and the physical location at that

11 point.

12 Q. Did you also go through the facial identification catalog

13 in doing the drawing for Un. Sub. 2?

14 A. Yes. To -- to capture those -- the numbers and the

15 characteristics, yes, we would go through the catalog.

16 Q. Was he certain as he was picking them out or was he rushed,

17 was he taking his time? In what manner did he go through the

18 various sheets of the facial identification catalog with you?

19 A. He was not rushed. He took his time and took great

20 consideration and seemed to -- and was fairly clear about --

21 was clear about the choices that he made.

22 Q. Okay. And it was your understanding, was it not, that the

23 individuals he was describing as Un. Sub. 1 and Un. Sub. 2 were

24 the individuals he saw on April 17, 1995?

25 A. Yes.

319

Raymond Rozycki - Direct

- 1 Q. And they were individuals he saw enter Elliott's Body Shop
- 2 together or at the body shop together?
- 3 A. They were at the counter together.
- 4 Q. Okay. Did you ask Mr. Kessinger to approve the drawing of
- 5 Un. Sub. 2?
- 6 A. Yes, ma'am.
- 7 Q. And did he?
- 8 A. Yes, ma'am.
- 9 Q. And did you later have occasion to modify any of the
- 10 drawings with respect to Un. Sub. 2?
- 11 A. Yes, ma'am.
- 12 Q. And how did that come about?
- 13 A. During the course of working on Un. Sub. No. 2, the first
- 14 drawing, Mr. Kessinger indicated that in -- in going through
- 15 the facial catalog, indicated a hairstyle. And we also
- 16 discussed a cap that he was wearing, indicated that he was
- 17 wearing a cap and discussed that. And in -- essentially, I
- 18 followed his description that included hair. So I had sort of
- 19 a -- a dilemma to include hair or not to include hair, and I
- 20 chose to include the description of hair and do a separate
- 21 drawing of the hat and include that with the -- the drawings.
- 22 On going back to headquarters, to Washington, some
- 23 discussion followed about the issue of the hat or whether he
- 24 was wearing a hat and whether the drawing should include a hat,
- 25 and I decided that I should make the modification to include

320

Raymond Rozycki - Direct

1 the hat. I contacted Agent Smith and had -- directed him to  
2 contact Mr. Kessinger and make him available for the session  
3 that would correct -- make the corrections to the drawing.  
4 Q. And did that happen?  
5 A. Yes, ma'am.  
6 Q. Were you on the phone with him as they were doing this?  
7 A. Yes. It was by phone and fax.  
8 Q. And did you subsequently complete a drawing of the hat?  
9 A. Yes, ma'am.  
10 Q. And did you show that to Mr. Kessinger for his approval or  
11 was it faxed to him for his approval?  
12 A. Yes, ma'am.  
13 Q. And what was his response?  
14 A. He agreed that that was -- that was correct.  
15 Q. Did you have another occasion to do any drawings with  
16 Mr. Kessinger?  
17 A. No, ma'am.  
18 Q. Did you have any occasions to do any drawings with anyone  
19 else?  
20 A. No, ma'am.  
21 Q. What day did you leave Junction City?  
22 A. The 20th.  
23 Q. Okay. So you came in --  
24 A. April 20.  
25 Q. -- for just that one day and you went back to Washington?

1 A. No, ma'am. I went to Oklahoma City.  
2 Q. How long were you in Oklahoma City?  
3 A. A couple days. I -- I don't recollect.  
4 Q. Were you there on the 22nd of April?  
5 A. I believe so, yeah.

6 Q. Were you there on the day that the lineup was conducted?

7 A. I'm -- I'm not aware of a lineup, so . . .

8 Q. Did you have any conversations with any agents concerning

9 whether Mr. Elliott, Ms. Beemer or Mr. Kessinger would be asked

10 to participate in the lineup?

11 A. No, ma'am.

12 MS. MERRITT: May I have a moment, your Honor?

13 THE COURT: Yes.

14 BY MS. MERRITT:

15 Q. Did you have any conversations with Eldon Elliott

16 concerning Un. Sub. No. 2?

17 A. Only insofar as that -- I don't -- I don't believe so. No.

18 There was no cause to. He had not seen No. 2. There would be

19 no reason to talk to him about No. 2.

20 Q. So your recollection is that you had no conversations with

21 Mr. Elliott concerning Un. Sub. 2?

22 A. Correct.

23 MS. MERRITT: One moment, your Honor.

24 THE COURT: All right.

25 BY MS. MERRITT:

Raymond Rozycki - Direct

1 Q. Can you go back and review the notes that you have in front

2 of you of your interviews with these people where you have some

3 handwritten notes.

4 A. This is referring to Un. Sub. 2?

5 Q. Yes.

6 A. Okay.

7 Q. Do you see anything in your notes in which you have a

8 description that Eldon Elliott gave you of Un. Sub. No. 2?

9 A. No, ma'am.

10 MS. MERRITT: I have no further questions.

11 THE COURT: Mr. Mackey, do you have any questions?

12 MR. MACKEY: Yes, your Honor. Thank you.

13 CROSS-EXAMINATION

14 BY MR. MACKEY:

15 Q. Mr. Rozycki, you are not a special agent of the FBI, are  
16 you?

17 A. That's correct.

18 Q. You're not trained or authorized in the investigation of  
19 federal crimes?

20 A. Yeah. That's correct.

21 Q. Your sole responsibility is to provide your background and  
22 expertise as an artist in support of others?

23 A. Correct.

24 Q. And in carrying out that role, then, would it fall to you  
25 in this case or any other case to make, for example, an initial

323

Raymond Rozycki - Cross

1 assessment of what witness would be the person who had the most  
2 detailed recollection of a particular individual?

3 A. Not usually, no.

4 Q. Who makes that assessment traditionally?

5 A. The agent who first encounters the witnesses.

6 Q. And it does not fall to you then to make an evaluation in  
7 the course of your work as to whether that assessment is  
8 correct?

9 A. That's correct.

10 Q. You have before you, do you not, Mr. Rozycki, Government  
11 Exhibit No. 50?

12 A. Yes.

13 Q. All right. And is that in whole or in part what you wrote  
14 in the early morning hours of April 19 -- excuse me -- April 20

15 in Fort Riley, Kansas?

16 A. Yes, it is.

17 Q. As it relates to the identification of Un. Sub. No. 1?

18 A. Yes.

19 Q. Directing your attention to the second page of Exhibit 50,

20 is that your handwriting?

21 A. Yes, it is.

22 MR. MACKEY: And let me ask at this time, your Honor,

23 to move for the admission of Government Exhibit 50.

24 MS. MERRITT: No objection.

25 THE COURT: 50 received.

324

Raymond Rozycski - Cross

1 BY MR. MACKEY:

2 Q. I see at the top the words "Eldon Elliott." Do you see

3 that? On the back.

4 A. Oh. Okay. Yes.

5 Q. And the number 2.

6 A. Yes.

7 Q. What does that 2 represent?

8 A. I'm not really sure.

9 Q. Are you sure it does not represent Un. Sub. 2?

10 A. Yes.

11 Q. It's on the back of your form for Un. Sub. 1?

12 A. Correct.

13 Q. It recounts the information you received from Mr. Elliott

14 concerning Un. Sub. 1?

15 A. Yes.

16 Q. As you worked with Mr. Kessinger on Un. Sub. No. 1,

17 describe in your own terms, Mr. Rozycski, his degree of

18 confidence expressed as he relayed details about facial  
19 features of Un. Sub. 1.  
  
20 A. Mr. -- Mr. Kessinger was very confident. He went through  
21 the book with -- from -- basically from start to finish and  
22 picked out clearly -- distinctly picked out different  
23 categories. Didn't go back and forth throughout the book in  
  
24 trying to relive his -- his selections on them. So he went  
25 through -- straight through and was very -- very clear on

325

Raymond Rozycki - Cross

1 his -- his selections.  
2 Q. All right. And the book you're referring to is your facial  
3 identification catalog marked Government Exhibit 35?  
4 A. That's correct.  
5 Q. And is that the catalog you used on April 20 with  
6 Mr. Kessinger?  
7 A. Yes, sir.  
8 MR. MACKEY: Your Honor, we would move to admit  
9 Government Exhibit 35.  
10 MS. MERRITT: No objection.  
11 THE COURT: 35 received.  
12 BY MR. MACKEY:  
13 Q. Mr. Rozycki, according to my math, there's 60 pages with 16  
14 faces on each one, almost 1,000 some total selections. Is that  
15 the makeup of that catalog?  
16 A. That's correct. Yes.  
17 Q. And they are organized according to the 13 distinct  
18 physical characteristics?  
19 A. That's correct.  
20 Q. And what are those?  
21 A. Well, those are -- they start with the head shape, giving

22 the orientation to the head. Then on each of the other  
23 characteristics, eyes, eyebrows, nose, mouth, chin, cheekbones  
24 and -- cheeks and cheekbones, the ears, hair, any facial lines,  
25 scars and marks, the forehead and skin -- skin irregularities.

326

Raymond Rozycki - Cross

1 Q. And in your presence, did Mr. Kessinger go through this  
2 catalog in great detail as to each of the pages for each of  
3 those categories of features?  
4 A. Yes, sir.  
5 Q. And as he did so, you would make notes on your form and at  
6 the conclusion of the review of the catalog, you would then put  
7 pencil to paper?  
8 A. Correct. Yes.  
9 Q. How much time did you spend with Mr. Kessinger in producing  
10 Government Exhibit No. 4, the composite of Un. Sub. 1?  
11 A. Roughly two hours.  
12 Q. And what portion of that time period did you spend in the  
13 revisions as you and Mr. Kessinger talked through the drawing  
14 itself?  
15 A. The majority of that time is done in the drawing phase and  
16 revisions.  
17 Q. And it's a give and take, to use your words?  
18 A. Correct. Yes. There's -- there's a little bit of both  
19 going on.  
20 Q. All right. And so there's opportunity and repeated  
21 opportunity to work with you to make modifications  
22 correspondent to his memory?  
23 A. That's correct.  
24 Q. And at the close then, what do you remember Mr. Kessinger  
25 saying about your work and how it related to his memory?

Raymond Rozicki - Cross

1 A. He was very clear that that was close to what he  
2 remembered.

3 MR. MACKEY: One moment, your Honor.

4 THE COURT: Yes.

5 BY MR. MACKEY:

6 Q. Mr. Rozicki, you told Ms. Merritt yesterday that you have a  
7 long background and training in art?

8 A. Yes, sir.

9 Q. Been schooled in that subject, a freelance artist, and have  
10 worked for the FBI in this field for many years?

11 A. Yes, sir.

12 Q. And based on that experience and training, are you familiar  
13 then with facial features of persons?

14 A. Yes, I am.

15 Q. All right. Before coming to court, Mr. Rozicki, did I  
16 display to you a comparison chart that had your Un. Sub. No. 1  
17 composite with two photographs?

18 A. Yes.

19 Q. And can you apply your background and training to identify  
20 for the Court what similarities and dissimilarities you see  
21 between your composite and those two photographs.

22 A. Yes.

23 MR. MACKEY: Your Honor, at this time I would move to  
24 admit and display to the witness Government Exhibit 22.

25 MS. MERRITT: No objection, your Honor.

Raymond Rozicki - Cross

1 THE COURT: 22 received.

2 BY MR. MACKEY:

3 Q. Do you see Government Exhibit 22 in front of you,  
4 Mr. Rozycki?  
5 A. Yes, I do.  
6 Q. And the center face is what?  
7 A. It's the composite that I did.  
8 Q. Based on information you gathered firsthand from  
9 Mr. Kessinger?  
10 A. Correct.  
11 Q. Do you recognize the photograph on the left-hand side to be  
12 that of an individual known as Tim McVeigh?  
13 A. Yes, I do.  
14 Q. And do you know the name of the second individual on the  
15 right?  
16 A. No, I don't.  
17 Q. All right. Let me begin by asking you, Mr. Rozycki, to  
18 outline for the Court all similarities that you see between  
19 your composite and the photograph of Tim McVeigh.  
20 A. Beginning with the overall shape of the face, it is a --  
21 it's a long face. It's -- it's a round -- it's an oval face  
22 with a pointed chin. The -- there is a similarity here between  
23 the eyebrows, their shape, and also the -- the planes of the  
24 temple and how the -- the eyebrows fit into that. The -- the  
25 whole area around the eyes is also quite similar as --

1 MS. MERRITT: Your Honor, I'm going to object to this  
2 testimony because I think this is a question for the Court to  
3 determine, and I don't think it's a question for this witness.  
4 And we also don't know when this picture of Mr. Hertig was  
5 taken, under what circumstances, and so whether or not it's  
6 truly a picture that comparison should be being made from.

7       THE COURT: Overruled. Continue.

8       THE WITNESS: Looking at the eyes, the eyes are open  
9 and clear. The -- the lids are shaped in a similar fashion  
10 which -- with the -- the majority of it towards the -- towards  
11 the nose. And -- the nose shape is a -- is a tubular shape  
12 down to a large sort of a bulb on the end of it, the structure  
13 being similar there.

14       The shape of the -- the mouth is -- it's a very --  
15 it's a very clearly structured mouth, and that resembles that  
16 of the drawing. The width of the lips is also similar. The  
17 structure under -- of the -- I don't know the anatomical terms;  
18 but the structure underneath the nose also corresponds fairly  
19 clearly.

20       The -- the flatness of the -- the cheeks and that  
21 shape also is similar, and the chin. The chin, although it's  
22 not clear in this photograph because there's not -- because of  
23 the shadowing, I -- the chin is also -- bears a striking  
24 resemblance.

25 BY MR. MACKEY:

330

Raymond Rozycki - Cross

1 Q. And comparing your composite with the photograph on the  
2 right-hand side of that exhibit, did you note or have you noted  
3 dissimilarities?

4 A. Obvious dissimilarities are in the -- the mustache and the  
5 length of the hair. Also, the structure of the face is a much  
6 squarer face. The -- in general, the -- the features  
7 are more compact towards a horizontal line in the -- in the  
8 center of the face. They are not linearly structured,  
9 vertically structured, more like Mr. McVeigh.

10       The eyes are narrower, not as open and clear. The  
11 eyebrows are much fuller and a different shape. The cheeks are

12 more pronounced, not indicating a flat plane or surface under  
13 the eyes.

14 The nose is -- is a different shape. It's -- it --

15 it's of a different shape. And the -- the lips which are --

16 the mouth is slightly larger and the -- the chin, itself, sort

17 of the bulbous area on the chin is of a different, slightly

18 more frontal and different aspect than the -- the drawing.

19 Q. Did Mr. Kessinger tell you Un. Sub. 1 had facial hair or no

20 facial hair?

21 A. No facial hair.

22 Q. And does the photograph on the right-hand side of that

23 exhibit have a mustache?

24 A. Yes. That's correct.

25 Q. And is that yet another difference between that photo and

Raymond Rozycki - Cross

1 your composite?

2 A. Yes, sir.

3 Q. Which of the two photographs, Mr. Rozycki, most resembles

4 your work?

5 A. The one on the left.

6 MS. MERRITT: Again, your Honor, I'm going to object.

7 This is calling for a conclusion.

8 THE COURT: Objection is overruled.

9 THE WITNESS: The face on the left of Mr. McVeigh.

10 MR. MACKEY: One moment, your Honor.

11 I have nothing else, your Honor. Thank you.

12 THE COURT: Any additional questions?

13 MS. MERRITT: Yeah.

14 REDIRECT EXAMINATION

15 BY MS. MERRITT:

16 Q. Agent Rozycki, I'm going to put this same Exhibit No. 22  
17 back up here. Would you take a look at the hairlines of the  
18 three individuals depicted on the screen and tell me whether or  
19 not you believe the hairline of the two on the right are more  
20 similar than the one in the middle and the one on the left?  
21 A. Yes, I would say.  
22 Q. In other words, isn't the drawing that you did -- doesn't  
23 the person depicted in that picture have a hairline that is  
24 more similar to Mr. Hertig than to Mr. McVeigh?  
25 A. The -- again, the -- the picture on the right --

332

Raymond Rozycki - Redirect

1 Mr. Hertig, you say, his hairline recedes -- seems to recede  
2 more than -- the general shape is clearer on -- is closer to  
3 the drawing and the photograph of Mr. Hertig, yes.  
4 Q. So your answer is the hairline is more like Mr. Hertig than  
5 Mr. McVeigh?  
6 A. Yes.  
7 Q. Now, can you notice when looking at these pictures that  
8 Mr. Hertig is smiling and Mr. McVeigh is not?  
9 A. Yes.  
10 Q. Isn't it true that when an individual smiles, that it  
11 sometimes changes the rest of the face?  
12 A. Yes.  
13 Q. Now, looking at the foreheads of these three individuals,  
14 isn't it true that the shape and expanse of the forehead of  
15 Mr. Hertig is more similar to that of Un. Sub. No. 1 than it is  
16 Mr. McVeigh?  
17 A. Yes.  
18 Q. And isn't it true that in discussing the mouths of these  
19 individuals, that the top portion of the lip of Mr. Hertig is  
20 obscured by the mustache?

21 A. Yes.

22 Q. Now, isn't it true when you look at those pictures that you  
23 cannot -- that there is no greater difference between the noses  
24 of Mr. Hertig, Mr. McVeigh, and Un. Sub. 1 that would allow you  
25 to say that the nose looks more like one person than another?

333

Raymond Rozycski - Redirect

1 A. There's quite a bit of difference.

2 Q. So you believe that the nose depicted in this photograph of  
3 Un. Sub. 1 is more like Mr. McVeigh's nose?

4 A. Yes.

5 Q. Now, looking at the chin of these three individuals, is it  
6 not apparent that the chins of Mr. Hertig and Un. Sub. No. 1  
7 both have some kind of swelling on them, whereas Mr. McVeigh's  
8 does not?

9 A. I'm sorry. Repeat that, please.

10 Q. Looking at the chins of the persons depicted in  
11 Government's Exhibit No. 22, isn't it apparent to you that  
12 there is a swelling of sorts on the chin of Mr. Hertig and Un.  
13 Sub. No. 1 that does not appear on the depiction of  
14 Mr. McVeigh?

15 A. In this photograph, the -- there is -- in this comparison  
16 of photographs, there is a more distinct facial feature on the  
17 chin in Mr. Hertig than in Mr. McVeigh.

18 MS. MERRITT: Thank you. Nothing further, your Honor.

19 MR. MACKEY: Nothing. Thank you, Judge.

20 THE COURT: All right. The witness may now be  
21 excused, I take it.

22 MS. MERRITT: Yes.

23 MR. MACKEY: Yes, your Honor.

24 THE COURT: You may step down and you are excused.

25 THE WITNESS: Thank you.

334

1 THE COURT: Next, please. Next witness, please.

2 MS. MERRITT: Jeanne Boylan, your Honor.

4 (Jeanne Boylan was sworn.)

5 COURTROOM DEPUTY: Would you have a seat, please.

6 Would you -- would you state your full name for the record and  
7 spell your last name, please.

8 THE WITNESS: Jeanne Marie Boylan, B-O-Y-L-A-N.

9 DIRECT EXAMINATION

11 Q. Good morning, Ms. Boylan.

12 A. Good morning.

13 Q. Can you please state where you're from. Not your exact  
14 address but where you're from.

15 A. Bend, Oregon.

16 Q. And can you please tell the Court how you're employed?

18 Q. And can you tell what -- tell me what a forensic artist is.

19 A. My job involves interviewing crime victims and witnesses to  
20 produce graphic renditions of suspects.

21 Q. Okay. And are you also called a cognitive graphic artist?

22 A. Correct.

23 Q. And how long have you been doing this?

24 A. 19 years.

25 Q. And have you consulted on some of the nation's most widely

335

Jeanne Boylan - Direct

1 known criminal cases?

2 A. Yes, I have.

3 Q. Did you consult on, for example, the Susan Smith case?

4 A. Yes, I did.

5 Q. And do you normally get called by the prosecution or the  
6 defense to assist in a case?  
7 A. By the prosecution.  
8 Q. Okay. And in this case, were you called by the prosecution  
9 or the defense to assist?  
10 A. By the prosecution.  
11 Q. And was it your understanding when you were called by the  
12 prosecution that a drawing had already been done by one of the  
13 FBI artists?  
14 A. Yes, it was.  
15 Q. Is that a normal occurrence, that you get called in after a  
16 composite has already been done by the FBI?  
17 A. It's typical, yes.  
18 Q. And can you tell me why that is?  
19 A. Because I use a very different system of interviewing that  
20 relies more on the memory rather than on any images that I  
21 might present to an eyewitness.  
22 Q. So you don't -- do you use things such as a facial  
23 identification catalog when you work with witnesses?  
24 A. No, I don't.  
25 Q. And you work primarily trying to find their true memory;

1 correct?  
2 A. That's correct.  
3 Q. And to do that, you try and get the individual to talk  
4 about the occurrence that they went through and their feelings  
5 about it?  
6 A. To an extent. I try to establish context so that I can  
7 establish a vantage point; and then beyond that, I try to make  
8 a departure so that there's not an emotional component

9 throughout the interview.

10 Q. And how long do your interviews take on an average, or

12 A. Anywhere from three to six hours.

13 Q. Okay. And why do they take so much longer than, say, a

14 graphic -- the FBI's artists?

15 A. Because I use a diversionary system of interviewing, in

16 which I try to move the witness off onto other topics that will

17 elicit a positive emotional response.

19 neither?

20 A. Neither.

21 Q. Okay. But you don't consider yourself an artist?

22 A. No.

23 Q. Are you -- do you consider yourself a psychologist, to some

24 extent?

Jeanne Boylan - Direct

1 Q. Which skills?

2 A. Both psychology and art.

3 Q. Okay. Now, when were you called, what was your first

4 contact with the prosecution in this case or with the FBI?

5 A. In regard to the trial, or at the time of the bombing?

6 Q. In regards to your first participation in the case, which I

7 believe was your being called to sit with an individual and

8 come up with a drawing.

9 A. I -- if I remember correctly, I was contacted initially

10 four or five days after the bombing.

11 Q. And do you know who contacted you?

12 A. I don't recall. It was a member of the task force.

13 Q. Okay. And what did they ask you to do?

14 A. They asked me about my availability and if I might be able

15 to prepare an additional drawing of John Doe 2.

16 Q. Were you in the vicinity of Kansas at that time?

17 A. No, I was in Oregon.  
18 Q. Okay. And did you subsequently come to Kansas?  
19 A. Yes, I did.  
20 Q. And do you recall what day you came to Kansas?  
21 A. It would have been precisely one week after the bombing.  
22 Q. The 26th?  
23 A. Correct. On a Wednesday.  
24 Q. Okay. And what did you do when you arrived?  
25 A. I was met at the airport by FBI agents and transported to

Jeanne Boylan - Direct

1 the command center in Oklahoma City.  
2 Q. Okay. And what did the agents tell you about the  
3 individuals you'd be working with?  
4 A. Very little at that point. It was all still being  
5 discussed within the command post, and I was just standing by  
6 and waiting for instruction.  
7 Q. Okay. And did you get instructions?  
8 A. Yes, I did.  
9 Q. And what were the instructions that you got?  
10 A. That I'd be traveling to Junction City to work with a  
11 witness.  
12 Q. Did they tell you which witness?  
13 A. At that point, I -- I'm not sure.  
14 Q. Okay. Let me ask you this: Do you take notes when you do  
15 these interviews?  
16 A. The drawing, itself, acts as my notes.  
17 Q. Okay. Well, when the person describes what the person  
18 looked like, you're not doing the drawing at that time; right?  
19 A. Well, yes and no. I do the drawing -- the drawing actually  
20 sits on my lap, and it progresses throughout the interview

21 without the eyewitness actually seeing the drawing during that  
22 time period.

23 Q. So as you're interviewing the person, do you share what  
24 you're drawing with the person?

25 A. No.

Jeanne Boylan - Direct

1 Q. Okay. When do you go back and finalize the drawing after  
2 the interview? Where do you do that?

3 A. Well, I do it -- because the mind encodes information  
4 holistically and not in components, I wait until the rendition  
5 is all in context, and then I turn it around so that the  
6 eyewitness can compare the entire image as a single entity with  
7 what they have in their memory.

8 Q. Okay. So on this day, did you meet with Mr. Kessinger?

9 A. It was the following day.

10 Q. The following day. Going back to your first day, what did  
11 you do after you got your instructions?

12 A. The first day, I went to the command post, met with the  
13 SACs at the command center. Then I was -- I believe it was on  
14 the same day -- taken to the airport and flown up to Junction  
15 City.

16 Q. Okay. And tell me about your first encounter with  
17 Mr. Kessinger.

18 A. I was escorted by an FBI agent to the Ryder truck location  
19 and met Mr. Kessinger in the office at that location.

20 Q. Okay. And what did you and Mr. Kessinger first discuss?

21 A. Well, the first order of business was just to have him feel  
22 comfortable with me, so we discussed things other than the --  
23 the reason that I was there. We discussed the chaos and the --  
24 you know, how his life had changed in that week and just  
25 established a friendship.

Jeanne Boylan - Direct

1 Q. Okay. And once you got past the general conversation and  
2 started getting towards the more specific, what did  
3 Mr. Kessinger say or what did you say? Who spoke first about  
4 what actually happened?

5 A. Mr. Kessinger volunteered information about his impressions  
6 of the original John Doe 2 sketch.

7 Q. Okay. Now, what were you told about John Doe 2 in -- were  
8 you also told about someone named John Doe 1 or Un. Sub. 1?

9 A. I was aware of the existence of Un. Sub. 1, yes.

10 Q. And can you tell me what you knew about the circumstances?  
11 A. Only that Un. Sub. 1 had apparently approached the counter  
12 and that that rendition had been done. It was the suspect in  
13 custody; and our focus during my interview with Mr. Kessinger  
14 was to prepare a drawing of Un. Sub. 2.

15 Q. Was it your understanding that Un. Sub. 1 and Un. Sub. 2  
16 were together at the same time in Elliott's Body Shop?

17 A. That -- the chronology actually was not an issue during my  
18 interview.

19 Q. So you don't know whether or not Un. Sub. 1 and Un. Sub. 2  
20 were present at the same time in the body shop?

21 A. I don't know if this answers your question or not. I do  
22 recall Mr. Kessinger making reference to there being no  
23 correlation, no association, no comment, eye contact, any --  
24 any visual association between Un. Sub. 1 and Un. Sub. 2.

25 Q. He said there was no visual contact between Un. Sub. 1 and

Jeanne Boylan - Direct

1 Un. Sub. 2?

2 A. Correct.

3 Q. So did you take that to mean they were physically in the

4 same room at the same time?

5 A. I took that to mean that they were physically in the same

6 room at some time.

7 Q. At some time?

8 A. Uh-huh.

9 Q. Meaning at the -- they were in the same room together?

10 A. I did make that assumption.

11 Q. Okay. Okay. Let me rephrase it, because I didn't mean

12 that. What I meant was not that they were together jointly but

13 that they were both physically present in the room at the same

14 time.

15 A. The time frame was not discussed.

16 Q. Okay. But he said that he didn't make visual contact there

17 with Un. Sub. 2; correct?

18 A. I was trying to establish a vantage point, Mr. Kessinger's

19 vantage point, and how best to depict the image that he had in

20 his memory. And to do so, I had to determine what positioning

21 the two -- the subjects were within the room. And so it was at

22 that point that Mr. Kessinger made it clear that there was no

23 association, no association to him. There was no conversation,

24 no eye contact.

25 Q. But he also made it clear that the two of them were in the

1 room; right?

2 A. That was an assumption I made at the point. I -- I don't

3 think that Mr. Kessinger made that clear to me, no.

4 Q. So he made it clear to you where Un. Sub. 2 was standing;

5 right?

6 A. Correct.

7 Q. He did not make any statements about where Un. Sub. 1 was?

8 A. No. He did make reference to Un. Sub. 1 being at the  
9 counter.

10 Q. Being what?

11 A. Standing at the counter facing him.

12 Q. Okay. Now, what did you tell Mr. Kessinger about your  
13 process and what you were going to do? How did you explain it  
14 to him?

15 A. Mr. Kessinger volunteered information initially about  
16 points on which he felt there was room for improvement on the  
17 John Doe 2 sketch, the original John Doe 2 sketch. And I  
18 didn't display a reaction to him. I just explained to him that  
19 we would just work off what he actually did recall, and then we  
20 began working on the sketch.

21 Q. Okay. Do you recall what improvements he felt were  
22 necessary?

23 A. Well, Mr. Kessinger explained to me that he had seen Un.  
24 Sub. 2 from the profile, and that was the first thing that we  
25 needed to correct; and secondly, that he had never seen him

Jeanne Boylan - Direct

1 without a cap on, so we had to correct that item, as well.

2 Q. Did he say whether or not he had seen Un. Sub. 2 from the  
3 front?

4 A. He explained to me in my preliminary interview with him  
5 that he had not seen him from the front.

6 Q. So how did you go about making these corrections?

7 A. By talking -- by, first of all, not displaying any kind of  
8 an overt reaction to him so as not to endorse that line of  
9 thought, but only to -- to assure him that we would move  
10 forward from that point and just work on what he actually did

11 see.

12 Q. Okay. And what did he actually see?

13 A. Well, we began -- we -- in the preliminary interview --

14 there were two different interviews. In the preliminary

15 interview with him, he began to describe to me what he had

16 seen, which was Un. Sub. 2 from the side with his arms crossed

17 standing in the back of the room.

18 Q. Is that the sum total of the description he gave you in the

19 hour or so you were together?

20 A. In the initial hour, he -- he elaborated more specifically

21 on points on which he was discontent with the initial drawing.

22 Q. Can you elaborate on those with us?

23 A. I don't have --

24 Q. You don't have the --

25 A. -- the 302 to refer to. But to my recollection, he was --

Jeanne Boylan - Direct

1 first of all, we needed to turn to a profile, as opposed to a

2 frontal view.

3 Q. Is this the drawing that's Government's Exhibit 5 that --

4 you should have it in front of you --

5 A. I see.

6 Q. -- in the book, as well as on the screen.

7 A. I can see.

8 Q. Okay. Is this the drawing that Mr. Kessinger was trying to

9 improve upon?

10 A. It was the drawing that I was trying to improve upon.

11 We -- this drawing was not referenced in our interview. It was

12 not referenced visually. He made reference to the fact that

13 the eyebrows were not scowling the way that they were portrayed

14 in this, and his primary point of discontent was that the

15 subject was portrayed as being from the front and without a hat

16 on, so --

17 Q. Ms. Boylan, I'm having a little trouble hearing you. Can

18 you maybe move the microphone a little bit closer to you?

19 Thank you.

20 A. Uh-huh.

21 Q. So I heard you say the eyebrows. What was the next thing

22 you said?

23 A. He said that the eyebrows in the initial sketch were

24 scowling, and that's not what he had recalled; and he also

25 explained that as Un. Sub. 2 was standing in the back of the

1 room, he was standing with his arms crossed in a profile, and

2 that was his primary vision.

3 Q. Did he say anything about the hair?

4 A. He explained that he had actually never seen Un. Sub. 2

5 without the hat on, so he couldn't attest to whether or not

6 that hair was correct.

7 Q. And then he couldn't attest to whether the hairline was

8 correct; right?

9 A. That's correct.

10 Q. But so did you afterwards go back and make another drawing?

11 A. Yes, I did.

12 Q. And is this a copy of the drawing that you made?

13 A. That's correct. Uh-huh.

14 Q. And is this drawing from the side portrait or the profile

15 because that's the way Mr. Kessinger expressed to you that he

16 had seen the individual?

17 A. That's correct.

18 Q. Okay. And can you describe the hat, what he told you about

19 the hat that resulted in this drawing.

20 A. He described the -- the color and the hat, to my  
21 recollection. He also described the pattern.  
22 Q. What was the color that he described to you?  
23 A. I believe it was blue. Dark blue and -- and white.  
24 Q. Now, again, you didn't do this drawing with him; correct?  
25 A. With Mr. Kessinger?

346

Jeanne Boylan - Direct

2 A. Oh, yes, I did.  
3 Q. So this one, you didn't take back and then work on?  
4 A. I'm not understanding your question.  
5 Q. I thought you said that you interview the person, you take  
6 notes with the sketch pad on your lap and then you go back by  
7 yourself and come up with the final rendition and then you go  
9 A. No. I did a preliminary interview with Mr. Kessinger. At  
10 that point, the decision had not been made by the commanders as  
11 to whether or not the discrepancies would be sufficient enough  
12 to warrant the production of a second composite. So after  
13 doing my preliminary interview, I then called the command post  
14 and told them of my conversation with Mr. Kessinger and then  
16 Q. Do you know who you spoke with?  
17 A. I spoke -- I believe I spoke with SAC Tubbs at the Fort  
18 Riley command post.  
19 Q. Tubbs?  
20 A. Correct.  
21 Q. And is he the one that gave you the instructions to go  
22 ahead and do the second drawing; that the dissimilarities were  
23 sufficient to warrant another drawing?  
24 A. Not at that point, no.  
25 Q. Who gave you that instruction?

Jeanne Boylan - Direct

1 A. That decision was being made collectively by the commanders  
2 in Oklahoma City, so I waited for that decision. I can't tell  
3 you specifically who made it. I believe it was collective.

4 Q. Okay. Was this a discussion in which you all participated  
5 simultaneously or in which you just provided your information

7 A. The latter.

8 Q. Okay. So you met with Mr. Kessinger again the next day;

9 correct?

10 A. Correct.

11 Q. And that's the day that you worked on this drawing and he  
12 was present and then you showed it to him?

14 Q. And did he approve of this drawing?

15 A. Yes, he did.

16 Q. Did he feel better about this drawing or more certain than  
17 he did about the first drawing?

19 with in the initial drawing, yes.

20 Q. Okay. And was it your understanding that this was the  
21 individual that he saw at Elliott's Body Shop on April 17,  
22 1995?

23 A. I didn't ask about dates. It's -- it's my impression that  
24 it was the subject that he had seen at one point standing in

Jeanne Boylan - Direct  
1 that was information on the wall.  
2 Q. Was it your understanding that this is the person who had  
3 no eye contact with Un. Sub. No. 1?  
5 facing the wall only and didn't turn and converse with anyone  
6 at the counter.  
7 Q. Okay. But what about -- is it your understanding that this  
8 is the person who didn't have eye contact with Un. Sub. No. 1?  
9 A. This is -- my understanding from Mr. Kessinger's

10 description is this is the person who was only facing the wall  
11 and didn't have eye contact. Did not turn toward the counter  
12 at any point. The two were considered separate entities. I  
13 wasn't there to interview him about Un. Sub. 1.

14 MS. MERRITT: Okay. Can I have a moment, your Honor?

15 THE COURT: Yes. This is Exhibit 11 that's being --

16 MS. MERRITT: I'm sorry, your Honor. It is Exhibit  
17 11. I apologize.

18 THE COURT: Thank you.

19 BY MS. MERRITT:

20 Q. Did Mr. Kessinger give you any indication of any kind of a  
21 logo being on the hat aside from the drawings of the stripes or  
22 the -- that were on there?

23 A. No.

24 Q. Okay. How certain was he that this was the individual that  
25 he saw and called John Doe 2 or Un. Sub. 2?

Jeanne Boylan - Direct

1 A. How certain was Mr. Kessinger?

2 Q. Yes.

3 A. I'm not sure that I could answer that.

4 MS. MERRITT: Okay.

5 THE COURT: Mr. Mackey.

6 MR. MACKEY: Thank you.

C R O S S - E X A M I N A T I O N

8 BY MR. MACKEY:

9 Q. Ms. Boylan, I understood your testimony to be that you've  
10 been a forensic artist for some 19 years?

11 A. That's correct.

12 Q. And approximately how many cases have you worked on?

13 A. Thousands and thousands. Federal and local agencies,

1 4 r e g i o n a l .

15 Q. So not solely on behalf of the FBI, but most often on

16 behalf of law enforcement?

17 A. Correct.

18 Q. In that class of cases, are they most often involving

19 witnesses who have experienced some trauma?

20 A. Yes, they are.

e x a m p l e , 2 1 Q F o r a b a n k r o b b e r y ?

22 A. That's correct.

23 Q. Mr. Kessinger was not such a witness?

24 A. No.

25 Q. Have you worked with other witnesses where you gather

350

Jeanne Boylan - Cross

1 physical information when they have recalled it in a

2 nontraumatic setting?

3 A. Yes, I have.

4 Q. And based on that total experience, have you grown

5 confident and comfortable that those people, nonetheless, have

6 a reason to recall what they are describing?

7 A. Yes. Uh-huh.

8 Q. Tell the Judge what you've learned about that.

9 A. Well, there has to be sufficient reason for information to

10 transfer from short- to long-term memory. Information is

11 encoded into memory more firmly on that basis. The determining

12 factors are -- one determining factor would be the -- the

13 amount of time that would occur between the time something was  
14 observed and the time that information was known to be of  
15 significance by the person who had made that observation. If  
16 it's a reasonable amount of time -- for instance, if years go  
17 by, that would be problematic. If days go by before they  
18 realize the significance of that information, that information  
19 then could be encoded into long-term memory.

20 Q. All right. Based on your interviews with Mr. Kessinger,  
21 were you confident that he had a reason to recall his  
22 descriptions of both Un. Sub. 1 and Un. Sub. 2?

23 A. Yes, I was.

24 Q. And what was that?

25 A. His reasons for recalling Un. Sub. 1 were very distinctive.

1 He was mentally engaged in the conversation taking place  
2 between Un. Sub. 1 and the clerk that was behind the counter.  
3 He paid particular attention to them because there was  
4 reference made to a birthday that was coming up. He recalled  
5 that. He also was -- as he explained it -- and his words to me  
6 precisely were, I can't tell you why, but I just fixated on  
7 that guy's face. And he said he went on to elaborate the  
8 reasons being that because of the -- he had a long, thin face  
9 and then also because he was perplexed as how someone could  
10 potentially be chewing tobacco and have it on both sides of  
11 their mouth. He said that that -- that traditionally, when  
12 someone chews tobacco, it's to one side or the other; and that  
13 he noticed two different tufts and he was intrigued by that  
14 characteristic.

15 Q. Those tufts are ones that you saw on the facial features of  
16 Un. Sub. 1, the drawing?

17 A. In the drawing, yes.

18 Q. Done by Mr. Rozycki?

19 A. That's correct.

20 Q. All right. Did that drawing correspond to the information

21 you personally got from Mr. Tom Kessinger?

22 A. Yes, it did.

23 Q. Among the thousands of witnesses that you have met and

24 worked with in the detailed fashion you've described, how did

25 Mr. Kessinger strike you as -- in terms of confidence and

Jeanne Boylan - Cross

1 recall?

2 A. Mr. Kessinger's -- although I wasn't there to interview him

3 about Un. Sub. 1, he did elaborate on his description of Un.

4 Sub. 1; and in terms of his description of that subject, he

5 was -- he would rate very high. If I were to rank it on a

6 scale, he would certainly be in the -- close to the top of that

7 scale in terms of his description.

8 Q. And that's his -- as of Un. Sub. 1?

9 A. Of Un. Sub. 1; correct.

10 Q. All right. And in contrast, how about Un. Sub. 2?

11 A. Un. Sub. 2 was very vague because there was no particular

12 reason to remember Un. Sub. 2. It was a subject that was

13 standing at the back of the room that had no eye contact or

14 interaction. No conversation. So he wasn't engaged on an

15 audio level, basically. And there was no -- no interaction.

16 Un. Sub. 2, he described to me as only standing in the back of

17 the room with his arms crossed for a brief time, reading  
18 information on the wall.  
19 Q. Ms. Boylan, based on your experience, what does the fact  
20 that Mr. Kessinger made no association between Un. Sub. 1 and  
21 Un. Sub. 2 tell you?  
22 A. Well, it tells me that --  
23 MS. MERRITT: Your Honor, I'm going to object that it  
24 calls for speculation. That's beyond her area of expertise.  
25 THE COURT: I'm not sure I understand your question.

353

Jeanne Boylan - Cross

1 It's calling for an opinion, but I don't know based on what.  
2 MR. MACKEY: Well, it was a matter that was touched on  
3 briefly in direct examination.  
4 THE COURT: I know. But what is the purpose of your  
5 question?  
6 MR. MACKEY: The purpose of the question is to ask her  
7 whether, in her experience, this person could have been  
8 describing two people that he saw at the same place at  
9 different times. And that's the thrust of the defense.  
10 THE COURT: Well, I don't think she has the  
11 qualifications shown in her testimony to make that  
12 determination as an opinion. If it meant something to her in  
13 her work, that's a different thing that you can ask about. But  
14 as simply an opinion about whether that supports or doesn't  
15 support that premise is a different issue.  
16 MR. MACKEY: Thank you, your Honor.  
17 THE COURT: Excluded for that.

18 BY MR. MACKEY:

19 Q. All right. Was there anything about, Ms. Boylan, this  
20 disassociation as described to you by Mr. Kessinger that  
21 affected your work?

22 A. No. No, I'm not sure that I'm understanding your question.

23 Q. All right. I'll leave it at that.

24 A. All right.

25 Q. It remained your impression, though, after two sessions

354

Jeanne Boylan - Cross

1 with Mr. Kessinger that he had much stronger recall of details  
2 about Un. Sub. 1 than Un. Sub. 2?  
3 A. No question.  
4 Q. Okay.

5 MR. MACKEY: Your Honor, I move to admit Government  
6 Exhibit 11, the composite identified previously by the witness  
7 as her profile of Un. Sub. 2 done with Mr. Kessinger.

8 MS. MERRITT: No objection.

9 THE COURT: All right. It's received. I thought we'd  
10 already received it, but -- there's no harm in receiving it  
11 again.

12 MR. MACKEY: Thank you.

13 THE COURT: Ms. Merritt.

14 REDIRECT EXAMINATION

15 BY MS. MERRITT:

16 Q. Ms. Boylan, you said in your responses to Mr. Mackey that  
17 Mr. Kessinger did elaborate on a description of Un. Sub. 1.  
18 Can you tell me what that description was.  
19 A. Well, he described to me -- the reason I remember this is

20 because I remember feeling almost envious; I wish that I had  
21 been able to work with him on Un. Sub. 1 because his  
22 description was so good. It -- his description was of a long,  
23 thin-faced man. Clean-shaven. He talked about the size of the  
24 ears. He talked about the positioning of the mouth and the  
25 eyes and the two tufts underneath the lower lip. The

355

1 lankiness. The nervousness. The conversation.  
2 Q. What did he say about the size of the ears?  
3 A. That they protruded.  
4 Q. Now, did you say something in response to Mr. Mackey about  
5 chewing tobacco?  
6 A. Yes, I did.  
8 tobacco?  
9 A. No, he did not.  
10 Q. What was the reference you were talking about with respect  
11 to chewing tobacco?  
12 A. Mr. Kessinger explained to me that -- he was trying to find  
13 the reason why he had so fixated on Un. Sub. 1; and the reason  
15 Sub. 1 looked as if he was chewing tobacco and that there was a  
16 tuft on each side of the face and in his experience with  
17 tobacco chewers, the tuft would either be on one side or the  
18 other; that people would tend to favor one side. It appeared  
20 implying that Un. Sub. 1 was chewing tobacco. Simply that it  
21 had that same appearance.  
22 Q. Who used the word "tuft" first? You or him?  
23 A. I believe that's my word.  
24 Q. Okay. Do you recall what his word was?  
25 A. No, I don't.

356

Jeanne Boylan - Redirect

1 Q. Now, you said before that you were not concerned with dates  
2 and you don't know anything about dates of when these people  
3 were in the shop; correct?

4 A. Correct. I had no idea that would be an issue.

6 describing to you as Un. Sub. 1 was in the shop on April 17 or  
7 April 18; right?

8 A. No. Mr. Kessinger is in that same location every day, so  
9 there would be no particular reason for him to distinguish  
10 between one day and another.

11 Q. Is the answer to my question yes, you don't know whether  
12 the person he saw and described to you as Un. Sub. 1 was in the  
13 shop on April 17 or April 18?

14 A. Correct.

15 Q. And Mr. Kessinger never told you that Un. Sub. 1 and Un.  
16 Sub. 2 were not together, did he?

17 A. No. He didn't -- no. It wasn't an issue of discussion, so  
18 it wasn't one way or the other.

19 Q. So the answer is no, he never told you that?

20 A. Correct.

21 MS. MERRITT: Thank you.

22 MR. MACKEY: Nothing, your Honor.

23 THE COURT: All right. Is the witness excused from

24 this hearing?

25 MS. MERRITT: Yes, your Honor.

1 MR. MACKEY: Yes, your Honor.

2 THE COURT: You may step down. You're excused.

3 Next, please

4 MS. MERRITT: I believe it's Agent Scott Crabtree.

5 THE COURT: All right.

6 (Scott Crabtree was sworn.)

7       COURTROOM DEPUTY: Would you have a seat, please.

9 last name, please.

10       THE WITNESS: Scott Crabtree, C-R-A-B-T-R-E-E.

11       COURTROOM DEPUTY: Thank you, very much.  
12                    DIRECT EXAMINATION

13 BY MS. MERRITT:

14 Q. Good morning, Agent Crabtree.

16 Q. Can you tell us how you're employed.

17 A. I'm a special agent with the FBI.

18 Q. And how long have you been so employed?  
19 A. A little over 14 years.

20 Q. And where do you work out of?

21 A. The Salina, Kansas, resident agency.

23 A. Yes, ma'am, I was.

24 Q. And at what time did you hear about the Oklahoma bombing?

25 A. Sometime in the late morning.

Scott Crabtree - Direct

1 Q. Okay. And how did you hear about it?

2 A. The first time I heard about it, I had called into our  
3 headquarters in Kansas City. I was informed by somebody in the  
4 Kansas City office that it had occurred.

5 Q. And what -- were you instructed to do anything?

6 A. At that point, no.

7 Q. At what point were you instructed to do something?

8 A. About 3:00 that afternoon, I received a call from the Miami  
9 division, stating that I needed to go to Elliott's Body Shop  
10 where the truck had been rented.

11 Q. And did you know why you were going to Elliott's Body  
12 Shop -- do you know how they found out it was rented there or  
13 why the Government believed it was rented there?

14 A. Yes. They traced it back to the manufacturer, to Ryder,

15 and Ryder reported -- showed that it was last at Elliott's Body  
16 Shop, had been rented from there last.  
17 Q. Did you telephone Elliott's Body Shop before you went over  
18 there?  
19 A. Yes, I did.  
20 Q. And who did you speak with?  
21 A. I think Vickie Beemer answered the phone, and then I  
22 eventually got on the phone with Eldon Elliott.  
23 Q. Vic Beemer?  
24 A. Vickie Beemer.  
25 Q. Vickie Beemer.

359

Scott Crabtree - Direct

1 Okay. And what did you tell Mr. Elliott?  
2 A. That we needed the records from that rental. That they  
3 shouldn't be touched or handled anymore. That -- and I asked  
4 him to keep everybody around there until I got there so I could  
5 determine who all the possible witnesses might have been to the  
6 rental, itself.  
7 Q. And then did you go over there?  
8 A. Yes, ma'am, I did.  
9 Q. What time did you get there?  
10 A. Approximately 4:30.  
11 Q. And who was there when you got there?  
12 A. Well, there's Eldon Elliott, Vicki Beemer, Tom Kessinger,  
13 and a number of other people that were working in the shop.  
14 Q. Okay. And did you speak with them all together, or did you  
15 immediately talk to them separately? Who did you speak to  
16 first?  
17 A. I spoke to Eldon Elliott first. We went into his office,  
18 and all of the discussions were had in his office.

19 Q. Can you tell me what the discussion was with Mr. Elliott?  
20 A. Yes. We discussed the documents he provided me, the

21 original contracts. And we went over the fact that these were  
22 the documents that had been completed on the 17th of April,

24 Q. Did he -- did you ask him anything about the person who  
25 rented the truck?

360

Scott Crabtree - Direct

1 A. Yes.

3 A. Asked him if he could describe the person that rented the  
4 vehicle that he knew as Robert or Bob Kling.

5 Q. And what did he say?  
6 A. He said he was 5' 10", white male, medium build; short,  
7 light brown, military-style haircut.

8 Q. Okay. Did he tell you how long he had an opportunity to  
10 A. On that occasion, very quickly.

11 Q. He told you very quickly, or he told you that he had had --  
12 A. On that particular occasion, he just had a quick view of  
13 him.

14 Q. Okay. And when you say "on that occasion," which occasion  
15 are you referring to?

16 A. The date the truck was rented. On Monday, the 17th.

17 Q. Did he tell you at that time of any other time that he had  
18 seen Mr. Kling?

19 A. No.

20 Q. And what did you -- how did you respond to Mr. Elliott  
21 after you got that description?

22 A. Took the information down, and then we went from there,  
23 went to Vicki Beemer next.

24 Q. Okay. So you decided after you were done with Mr. Elliott  
25 to go to Ms. Beemer?

Scott Crabtree - Direct

1 A. Right.

2 Q. And did you ever talk to all three of them together, or did  
3 you always talk to them separately when you were getting a  
4 description?

5 A. Separately.

6 Q. So you were alone, then you took Mrs. Beemer --

7 A. Into Mr. Elliott's office, yes.

8 Q. And can you tell me what you said to Mrs. Beemer?

9 A. We discussed the contract and asked her what she recalled.

10 MR. MENDELOFF: Your Honor, objection. I'm not sure  
11 how Ms. Beemer's interview relates to this hearing.

13 did in connection --

14 THE COURT: I know, but we ought to stay within the  
15 focus of this hearing.

16 MS. MERRITT: Fine.

17 THE COURT: If you had any discussion about  
18 identification, that's the point.

20 ask was whether Ms. Beemer told him that Mr. Kessinger had  
21 described to her --

22 THE COURT: All right. Ask that.  
23 BY MS. MERRITT:

24 Q. Okay. Did Mrs. Beemer tell you anything about whether  
25 Mr. Kessinger had given her or Mr. Elliott any information

Scott Crabtree - Direct

1 about his recollection of Robert Kling?

2 A. No, she didn't.

3 Q. Now, after you spoke with Mrs. Beemer, did you then speak  
4 with Mr. Kessinger?

5 A. Yes, ma'am.

6 Q. And can you tell me what you asked Mr. Kessinger?

7 A. We discussed what his recollection was of the person that

8 rented the truck on the 17th.

9 Q. And what was his recollection?

10 A. Okay. That it was a white male, short brown hair, had

11 close-set eyes, medium nose, a chin that was kind of pushed up

12 and out.

13 Q. Did he tell you whether or not he got a good view of this

14 individual?

15 A. Yes, he did. He said because of the comment that --

16 between Ms. Beemer and the renter about the renter's age that

17 he -- that caused him to focus on the renter's face.

18 Q. Can you tell me what the comment was?

19 A. Something to the fact of his age and the fact that

20 Ms. Beemer had been married longer than he had been alive --

21 the renter had been alive.

22 Q. Okay. Now, did he tell you that there were one or two

23 people that came up to rent the truck at that time?

24 A. Mr. Kessinger related there had been two people.

25 Q. Okay. Did Mr. Kessinger indicate to you whether he

1 believed the two people were together?

2 A. That was his indication, yes.

3 Q. Okay. And after Mr. Kessinger gave you his description,

4 what did you do next?

5 A. With Mr. Kessinger, or period?

6 Q. Well, if you did something with Mr. Kessinger.

7 A. We discussed the other person, and then we were getting

8 ready to take the -- the three of them, Eldon Elliott, Vicki

9 Beemer, and Mr. Kessinger, to a sketch artist.

10 Q. Okay. Let's back up to the first thing you said, which was  
11 that you discussed -- you finished discussing No. 2 with  
12 Mr. Kessinger; correct?

13 A. Right.

14 Q. Can you tell me what Mr. Kessinger told you about No. 2?

15 A. Yes. He said he was a white male that appeared to be a  
16 little bit younger than the renter of the vehicle; that he had  
17 on a black, short-sleeved T-shirt and that he could see a part  
18 of a tattoo below the left sleeve and that he had on a baseball  
19 cap that was blue in the front and white in the rear and it had

21 Q. Okay. Did you ask Mr. Kessinger at this time whether he  
22 thought he could pick this person out if he were to see him  
23 again?  
24 A. No. I don't remember asking him that.

25 Q. Did you ask him how certain he was of his description of

Scott Crabtree - Direct

1 either of these individuals?  
2 A. Not specifically, no.  
3 Q. But you felt his description was certain enough to bring  
4 him to a sketch artist; correct?  
5 A. Correct.

7 artist?  
8 A. Well, we ultimately didn't take him to a sketch artist. We  
9 flew in a sketch artist from our headquarters.  
10 Q. Who made the decision to have Mr. Kessinger sit with a  
11 sketch artist?

12 A. Well, in discussing it with the management in Kansas City,  
13 saying that I believe that he could provide a sketch or a  
14 composite to an artist, they arranged for an artist to be flown  
15 out from Washington, D.C.

16 Q. So the decision was based upon your recommendation to  
17 management in Washington?

18 A. Correct -- management in Kansas City, Missouri.  
19 Q. In Kansas City?  
20 A. Right.  
21 Q. And it was your belief that of the three witnesses -- or  
22 potential witnesses, that Mr. Kessinger had the best  
23 recollection of the facial features of these two individuals on  
24 Un. Sub. 1 and Un. Sub. 2?  
25 A. Yes, ma'am. He had been the only one that wasn't involved

365

Scott Crabtree - Direct

1 in the transaction and was able to just set there and look at  
2 these individuals, yes.

3 Q. So you used as a factor in deciding that his recollection  
4 was superior the fact that he wasn't involved in the  
5 transaction?

6 A. Correct.

7 Q. Were you present when the sketch artist arrived?

8 A. Yes, I was.

10 artist and Mr. Kessinger?

11 A. No, ma'am.

12 Q. Were you present when the drawing was made?  
13 A. No, ma'am.

14 Q. What were you doing during this time?

15 A. Interviewing Eldon Elliott and Vicki Beemer for a second

17 Q. Okay. What was the -- going to the second interview with  
18 Eldon Elliott, what did Eldon Elliott tell you?

19 A. We went more into the transaction as to how the payment for  
20 the truck rental on Saturday had occurred; and I'd asked him  
21 the evening before, before he and Ms. Beemer left, to give some  
22 thought to the transaction and the episode to see if they would

24 better description of the renter of the vehicle.

25 Q. Okay. Now, during your first interview with Mr. Elliott,

Scott Crabtree - Direct

1 you said that he didn't disclose to you that he had also seen

2 Mr. Kling Saturday; correct?

3 A. That's correct.

4 Q. So how did you find out that he had seen Mr. Kling on

5 Saturday, as well?

6 A. When I spoke to Vicki Beemer on the 19th.

7 Q. So it was Vicki Beemer who told you about the second --

8 A. The prior contact.

9 Q. -- contact?

10 A. Right.

11 Q. Okay. And when you reinterviewed Mr. Elliott, you told him

12 that you knew about this other contact on April 15?

13 A. Yes.

14 Q. And what did Mr. Elliott describe to you about that

15 contact?

16 A. That the renter of the vehicle had come in and had paid for

17 the rental of the truck and basically how the transaction

18 occurred.

19 Q. Did he give you any description of the individual that came

20 in to give the deposit to rent the truck?

21 A. Yes, he did.

22 Q. And what was the description that he gave you?

23 A. White male, short brown -- light brown hair, 5' 10" to

24 5' 11" inches tall, 180 to 185 pounds, medium build. He

25 thought he might have been right-handed.

Scott Crabtree - Direct

1 Q. And did he give you -- did Mr. Elliott give you a

2 description of the other person, Un. Sub. 2?

3 A. Yes, ma'am. He did.

4 Q. And what description did he give you?

5 A. He said he was a white male, approximately 5' 7" to 5' 8".

6 That's basically it.

7 Q. What else? Anything else?

8 A. We discussed the fact that he had seen a hat that this

9 individual was wearing.

10 Q. Did he discuss the build that the individual had?

11 A. Not that I recall.

12 Q. Did he describe anything about the skin of this second

13 person?

14 A. Not that I recall.

15 Q. Okay. So you recall what -- the details that you just gave

16 us; correct?

17 A. Yes, ma'am.

18 Q. Do you know whether he gave those details to the sketch

19 artist?

20 A. I don't know. I wasn't present when he had talked to the

21 sketch artist, either.

22 Q. Well, after you finished speaking with Mr. Elliott, did you

23 make a decision as to whether Mr. Elliott should meet with any

24 of the sketch artists?

25 A. Well, he went down to meet with Mr. Rozynski after Tom

1 Kessinger had finished.

2 Q. And was it your intention that Mr. Elliott would do a

3 composite sketch with the sketch artist?

4 A. If the sketch artist believed that that was possible, yes.

5 Q. Okay. So the decision as to whether Mr. Elliott was going

6 to make a sketch with the sketch artist was up to the sketch  
7 artist, not you; right?  
8 A. Well, he was going to talk to him and make that decision,  
9 yeah, if they could do it or not.  
10 Q. Okay. Now, Mr. Elliott told you that there were two people  
11 in the shop on April 17; correct?  
12 A. Yes. On the Thursday morning interview, he recalled a  
13 second person.  
14 Q. Okay. When you say "the Thursday morning interview," is  
15 that a different interview than his first interview with you?  
16 A. Than the Wednesday afternoon, yes.  
17 Q. Okay. So on Wednesday afternoon, he didn't say anything to  
18 you about two people being in the shop?  
19 A. He only recalled one person being at the counter when he  
20 brought the damage analysis into the shop.  
21 Q. Did Mr. Kessinger say anything to you about -- strike that.  
22 Did Mr. Elliott say anything to you about whether he  
23 had discussed with Mr. Kessinger Mr. Kessinger's recollection  
24 of the events or the descriptions of any of the people?  
25 A. No.

Scott Crabtree - Direct

1 Q. So you don't have any information that Mr. Kessinger shared  
2 with Mr. Elliott his recollection of the physical description  
3 of either Un. Sub. 1 or 2?  
4 A. No.  
5 Q. What statements did you make to Mr. Elliott after this  
6 second interview about what he described? Did you make any  
7 statements to him?  
8 A. No.  
9 Q. Okay. What did you tell Mr. Elliott you were going to do  
10 next?

11 A. After we were finished?

12 Q. Uh-huh.

13 A. That he would be meeting with a sketch artist from FBI  
14 headquarters.

15 Q. Okay. And this was on the 20th; correct?

16 A. Yes, ma'am.

17 Q. Okay. Now, at some point, someone decided to hold a lineup  
18 on April 22 in Oklahoma City; right?

19 A. I don't specifically recall that. I wasn't involved in  
20 that.

21 Q. Okay. So that was going to be my question. Did you have  
22 any conversations with any agents about the lineup that was  
23 held on April 22?

24 A. Not that I recall.

25 Q. You do know now as you sit here that there was a lineup on

Scott Crabtree - Direct

1 A. April 22; right?

2 A. On specifically that date, no. I know there was one, but I  
3 can't tell you exactly what date it was.

4 Q. Do you know it was within a few days after the bombing?

5 A. Yes.

6 Q. Do you know that neither Mr. Elliott, Mr. Kessinger, or  
7 Ms. Beemer were at that lineup?

8 A. I -- I didn't know who was at the lineup, ma'am. I wasn't  
9 down there in Oklahoma City.

10 Q. Okay. So even to this day, you have no knowledge that  
11 neither Mr. Kessinger, Mrs. Beemer or Mr. Elliott went to the  
12 lineup to see if they could identify the person?

13 A. I don't recall it, no.

14 Q. Now, did you have any discussions with any of these

15 individuals about media and avoiding media?

16 A. Yes, ma'am.

17 Q. Okay. And you had a discussion on May 3, I believe it was,

18 with -- or May 2?

19 A. May 2, ma'am.

20 Q. Okay. And your discussion was with Mr. Kessinger at that

21 time; correct?

22 A. That's correct.

23 Q. And Mr. Kessinger called you on the morning of May 2 to

24 tell you that he had been watching television and saw a

25 driver's license depicted on a Topeka -- on a broadcast out of

Scott Crabtree - Direct

1 Topeka and that the individual in the driver's license photo

2 looked somewhat like John -- Un. Sub. 2; correct?

3 A. Correct. He had called headquarters and I had called him

4 back, just so it's straight. He didn't call directly to me.

5 Q. And at that time, you told him that he should avoid

6 watching the media; correct?

7 A. Correct.

8 Q. Okay. And you reflected that fact in your 302; correct?

9 A. I believe so, yes.

10 Q. Okay. Now, have you reviewed any of your other 302's prior

11 to testifying in court today?

12 A. Yes.

13 Q. Okay. Isn't it true that the May 2 302 that you did is the

14 first 302 that references any instructions concerning avoiding  
15 the media or even the media?  
16 A. I believe that's the first one that I actually noted it

17 down, yes.

18 Q. Okay. Are you telling us that you had some other  
19 advisement with these people, but just neglected to put it in  
20 your 302?

21 A. Prior to leaving the CIC or the criminal investigative  
22 command at Fort Riley on the 20th after they were through, I  
23 asked the individuals to not confer among themselves or to  
24 watch anything that might affect what they might be asked to do  
25 later as far as seeing a lineup, seeing a photo spread or

372

Scott Crabtree - Direct

1 anything to that effect.  
2 Q. And that's a pretty important point, isn't it?  
3 A. Yes, it is.  
4 Q. Because you want these witnesses not to have their memories  
5 tainted by an outside image of what they see on television when  
6 they give their description to the agents; right?  
7 A. That's correct.  
8 Q. You want their recollection to be a product of their own  
9 memory and not some external influence; right?  
10 A. That's correct.  
11 Q. And even though this was an important point and you did do  
12 a report of what happened on that day, you neglected to put  
13 that in the report? Is that true?  
14 A. There was no report where I summarized that conversation,  
15 that is correct.  
16 Q. So you've had other conversations with Mr. Kessinger which

17 are not put down in an investigative report?

18 A. No. That was just an instruction as they were leaving. It

19 wasn't -- I wasn't gathering information at that time.

20 Q. Was it a part of a conversation?

21 A. Yes.

22 Q. And was that conversation -- was any part of the

23 conversation ever reduced to a 302?

24 A. No.

25 Q. So you had a conversation with Mr. Kessinger that was not

Scott Crabtree - Direct

1 reduced in writing to an investigative report as were your

2 other conversations with Mr. Kessinger?

3 A. Correct.

4 Q. Now, there was another time that you had a conversation

5 with Mr. Kessinger and you were discussing his describing

6 people; correct?

7 A. If you're speaking of the second time he sat down with the

8 second sketch artist, yes.

9 Q. And isn't it true in your 302, you tell him at that point

10 to put aside any images he may have seen in the media?

11 A. I don't recall that.

12 MR. MENDELOFF: Your Honor, could I inquire as to what

13 counsel is referring to?

14 THE COURT: I think she's getting it.

15 MS. MERRITT: I'm looking for it.

16 THE COURT: Let's take a recess while you're doing

17 that. We'll be in recess until a quarter to.

18 (Recess at 10:25 a.m.)

19 (Reconvened at 10:45 a.m.)

20 (Stephen Jones present for Defendant McVeigh)

21 THE COURT: Be seated, please.

22 Please continue.

23 MS. MERRITT: Thanks.

24 BY MS. MERRITT:

25 Q. Agent Crabtree, we were talking about the admonitions that

Scott Crabtree - Direct

1 you gave to Mr. Kessinger concerning media coverage when we

2 took our break; and I believe that you said that you had

3 advised him prior to May 3 or May 2 not to watch media but that

4 you hadn't put that in any of your 302's; correct?

5 A. That's correct.

6 Q. And you did speak to him on May 2, when he telephoned you

7 to notice -- to tell you what he had noticed on television;

8 correct? You spoke with him?

9 A. Yes, ma'am.

10 Q. And at that time you again repeated your admonition; right?

11 A. Yes, ma'am.

12 Q. And he had told you, didn't he, that he had been watching

13 the news?

14 A. He said he saw the news, that's correct.

15 Q. And hadn't he told you that he seen the news before?

16 A. No.

17 Q. Is this the first indication -- is it your testimony that

18 this is the first indication you had that Thomas Kessinger had

19 viewed any kind of media since April 19?

20 A. Yes, ma'am.

21 Q. Okay. And how many times before May 2 had you advised him

22 not to watch the media?

23 A. Just once.

24 Q. Okay. So there was -- it wasn't that every time you met

25 with him you again reminded him as he was leaving not to watch

Scott Crabtree - Direct

1 the media; right?

2 A. That's correct.

3 Q. It was only on one prior occasion, which you didn't put in

4 a 302; right?

5 A. Correct.

6 MS. MERRITT: Your Honor, may I have a moment?

7 THE COURT: Yes.

8 BY MS. MERRITT:

9 Q. Can you tell me if you can recall any other statements that

10 either Mr. Kessinger, Ms. Beemer or Mr. Elliott made to you

11 that are not included in your 302's?

12 A. No, ma'am.

13 Q. So to your knowledge, everything else, other than this one

14 media warning, that these witnesses told you, is reflected in

15 your 302's?

16 A. Yes, ma'am.

17 MS. MERRITT: I'm done, your Honor.

18 THE COURT: All right.

19 Mr. Mendeloff?

20 MR. MENDELOFF: Thank you, your Honor.

21 CROSS-EXAMINATION

22 BY MR. MENDELOFF:

23 Q. Agent Crabtree, when you -- when you approached Elliott's

24 that day on the 19th, did you have an objective to try to

25 take -- try to accomplish when you got there?

Scott Crabtree - Cross

1 A. Yes, sir.

2 Q. And what was that objective?

3 A. Attain any of the contract-type documents that might  
4 contain fingerprints so they could be forwarded to our  
5 laboratory.

6 Q. All right. And what else?

7 A. Ascertain if there was any witnesses that would be  
8 potentially able to give us a composite or sketch of the person  
9 renting the vehicle.

10 Q. Was it one of your objectives to perform exhaustive  
11 interviews of any witnesses at Elliott's on that day?

12 A. No, it was not.

13 Q. What was the reason for that?

14 A. We were in a hurry to try to get the documents back to  
15 headquarters and identify witnesses for possible composite; and  
16 that was the goal, and that's what I tried to accomplish as  
17 quickly as possible.

18 Q. The bombing had happened that day before?

19 A. Yes.

20 Q. And the person that had done it was at large?

21 A. Yes, sir.

22 Q. On April 19, I believe you testified that you interviewed  
23 Eldon Elliott in his office at Elliott's Body Shop; is that  
24 correct?

25 A. That's correct.

Scott Crabtree - Cross

1 Q. And you interviewed regarding several things but  
2 specifically including the events of April 17, the day the  
3 truck was picked up?

4 A. That is correct.

5 Q. Now, when you went into that interview, what did you know  
6 about the number of days that had been involved in this

7 transaction? In other words, let me rephrase: How many times  
8 did the people at Elliott's have contact with Robert Kling?  
9 A. Upon going into the office, I was aware of just the Monday  
10 contact.  
11 Q. And when you began your interview with Eldon Elliott, did  
12 you focus on that day?  
13 A. Yes, sir, I did.  
14 Q. Did you ask him any questions about any other days?  
15 A. No, sir, I did not.  
16 Q. When did you learn that there was more than one day  
17 involved in this arrangement with Mr. Kling?  
18 A. In a subsequent interview with Vickie Beemer.  
19 Q. After that interview, did you go back and try to further  
20 interview Eldon Elliott?  
21 A. Yes, I did.  
22 Q. And when was that?  
23 A. Thursday morning, the 20th.  
24 Q. After the sketch artist had been flown in?  
25 A. Correct.

1 Q. Now, during your interview with Eldon Elliott on the 19th,  
2 did he provide information regarding the clothing that the  
3 person that he had seen was wearing -- excuse me -- the  
4 clothing that the renter was wearing in picking up the truck on  
6 A. Yes, he did.  
7 Q. And what did he say?  
8 A. He said it was possible that the person was wearing  
9 fatigues or something similar, but he was not certain. Most of  
10 their business is military-related, and he had had a number of  
11 the people in the office that day.

13 the other people wearing military clothing and the renter?

14 A. He could not.

15 Q. Did you have another conversation with him about clothing  
16 the next day?

17 A. Yes, sir, I did.

18 Q. And what did he tell you on that day?

20 the 15th, when he -- the renter had come by to pay for the

21 deposit and the renter -- the rental of the truck that he

22 believed that he had on a camouflage-type T-shirt and possibly  
23 some green slacks.

24 Q. That was on Saturday, the 15th?

25 A. That was on Saturday, correct.

Scott Crabtree - Cross

1 Q. What did he tell you how much he could remember -- let me

2 rephrase. On April 20, when you interviewed Eldon Elliott,

3 what did he tell you about how much he could remember regarding

4 the renter's clothing on the 17th, the day the truck was picked

5 up?

6 A. He said that he was uncertain; and I had asked him if there

7 was a possibility that there was attire similar to what he had

8 worn on Saturday; he said that was possible; that their contact

9 was very short; that he just didn't know.

10 Q. All right. So the portion of your interview in which he

11 said -- he restated that he said it was possible the clothing

12 was being worn was the result was a result of your probing

13 question?

14 A. Yes.

15 Q. And his initial statement was that he was uncertain about

16 what the renter wore on Monday? Is that right?

17 A. That's correct.

18 Q. Now, on direct examination, you were also asked about your

19 interview with Tom Kessinger on April 19. Do you remember

20 those questions?

21 A. Yes, sir.

22 Q. And I believe you indicated that Mr. Kessinger said that he

23 focused on the renter when he had heard a portion of a

24 conversation between the renter and Vickie Beemer; is that

25 right?

1 A. That's correct.

2 Q. And I believe you said that that conversation involved an

3 initial comment about age?

4 A. Yes, sir.

5 Q. And a statement "I've been married longer than you have

6 been alive" by Ms. Beemer?

7 A. That's correct.

8 Q. Did he go into what he meant by age, the comment about age?

9 A. There had been some comment as to the birth date of the

10 renter and it approaching and how old he was; and then she

11 commented that she had been married longer than he had been

12 alive.

13 Q. Now, when Mr. Kessinger related his description of the

14 renter, I believe you described -- you indicated that he had

15 described the chin as being pushed up and out?

16 A. Correct.  
17 Q. Did Mr. Kessinger actually use those words?  
18 A. Yes, I believe he did.  
19 Q. Did he make a gesture to you to describe what he meant?  
20 A. Yes, he did.  
21 Q. What did he do?  
22 A. He grabbed his chin and kind of pushed it up and out.  
23 Q. Now, in making the description, I believe you offered  
24 several of the things Mr. Kessinger said. Did you ask  
25 Mr. Kessinger whether or not the renter had facial hair?

381

Scott Crabtree - Cross

1 A. Yes, I did.  
2 Q. And what did he say?  
3 A. He did not.  
4 Q. Now, also did you ask Mr. Kessinger about the clothing that  
5 the renter was wearing?  
6 A. Yes.  
7 Q. And what did Mr. Kessinger indicate?  
8 A. He indicated he possibly could have been wearing some kind  
9 of a multicolored uniform or T-shirt, some military-type  
10 outfit.  
11 Q. Now, did he say he was certain about this?  
12 A. No, he said it was possible.  
13 Q. Now, is the portion of the interview involving the fact  
14 that Mr. Kessinger said it was possible but he wasn't certain  
15 about the clothing captured in your 302?  
16 A. There is discussion about the clothing. The mention of the  
17 possibility was not put in the 302.  
18 Q. Where was it?  
19 A. It was in the notes.

20 Q. Now, on April 29, I believe that you sat down with  
21 Mr. Kessinger and Ms. Boylan to orchestrate a meeting between  
22 them; is that right?  
23 A. I brought them together over at the Fort Riley command --  
24 investigative command office, right.  
25 Q. And prior to that meeting, did you have a discussion with

Scott Crabtree - Cross

1 Mr. Kessinger about the view he had had of John Doe 2?  
2 A. Yes.  
3 Q. And what did he tell you?  
4 A. The point of that contact was so that a profile drawing  
5 could be done of Un. Sub. No. 2, but we did discuss the fact  
6 that although the majority of the time that he saw Un. Sub. 2  
7 was from the profile, he did see him from the front, also.  
8 MR. MENDELOFF: One moment, please, your Honor.  
9 Nothing further, Judge.  
10 THE COURT: Any follow-up question?  
11 MS. MERRITT: No, your Honor.  
12 THE COURT: Witness excused, I take it?  
13 MS. MERRITT: Yes.  
14 THE COURT: Step down. You're excused.  
15 THE WITNESS: Yes, sir.  
16 THE COURT: Next, please.  
17 MS. MERRITT: Jon Hersley.  
18 THE COURT: Raise your right hand and be sworn.  
19 THE COURTROOM DEPUTY: Raise your right hand.  
20 (Jon Hersley was sworn.)  
21 THE COURTROOM DEPUTY: Have a seat, please.  
22 State your full name for the record and spell your  
23 last name.  
24 THE WITNESS: My name is Jon Hersley, H-E-R-S-L-E-Y.

25 THE COURTROOM DEPUTY: Thank you.

383

Jon Hersley - Direct

1 DIRECT EXAMINATION

2 BY MS. MERRITT:

3 Q. How are you employed?

4 A. I'm an FBI agent assigned out of Oklahoma City.

5 Q. How long have you been employed with the FBI?

6 A. About a little over 22 years now, I guess.

7 Q. And on April 19, 1995, where were you stationed?

8 A. In Oklahoma City.

9 Q. And at what time did you find out about the bombing?

10 A. I heard the bombing at our office when it went off; and it

11 was shortly after then that we got on the news that the federal

12 building had been bombed.

13 Q. And at what time did you get your first instructions to

14 participate in any kind of investigation regarding the bombing?

15 A. It would have been within minutes after the bombing, within

16 probably 10, 15 minutes after the bombing.

17 Q. And what were your first instructions?

18 A. I was tasked with staying at the FBI office, because most

19 of our agents were responding immediately down to the federal

20 building and we needed somebody to stay in our office and

21 handle communications with the other offices and with the

22 command post back and forth. So I did that for about three

23 days, three to four days.

24 Q. What was your first connection or contact with Eldon

25 Elliott or Tom Kessinger in this case?

384

Jon Hersley - Direct

1 A. I believe that would have been in May or June of '95, when  
2 I went to Junction City.  
3 Q. Okay. And what happened in May or -- first of all, do you  
4 know whether it was May or June?  
5 A. I believe it was June.  
6 Q. Okay. And what was your purpose in going to Junction City?  
7 A. Oh, to meet Mr. Elliott and to introduce two of Oklahoma  
8 prosecutors to Mr. Elliott and the other -- Ms. Beemer and  
9 Mr. Kessinger.  
10 Q. Which two prosecutors did you introduce to Mr. Elliott?  
11 A. Arlene Joplin and Kerry Kelly.  
12 Q. And what did you -- what was the discussion that you had  
13 with Mr. Elliott or Mr. Kessinger or Ms. Beemer -- forget  
14 Ms. Beemer right now -- just Mr. Kessinger or Mr. Elliott on  
15 this date?  
16 A. Primarily introductions. We discussed with Mr. Elliott the  
17 general nature of his business, the fact that he owned the body  
18 shop there and the Ryder business, things of that nature, and  
19 give the prosecutors a chance to also meet Mr. Elliott.  
20 Q. Did you talk at all about Mr. Elliott's ability to identify  
21 the individual who rented a Ryder truck from Elliott's Body  
22 Shop on April 17?  
23 A. In general terms, we did, yes.  
24 Q. What were those general terms?  
25 A. To talk with Mr. Elliott about the man that he had seen

1 that had rented the truck, the time periods that he had had an  
2 opportunity to observe this individual, that being on Saturday,  
3 April 15, and on Monday, April 17.  
4 Q. And what did he say about his ability to observe? What did  
5 he tell you his ability was?

6 A. He talked about the fact that on Saturday that he had spent  
7 a good amount of time -- I think he said about ten minutes with  
8 the renter and that it was just he and the renter in the  
9 offices on that occasion and that he had been able to converse  
10 with this individual one on one and looking each other right in  
11 the face.

12 Q. And this is on Saturday, April 15?

13 A. Yes.

14 Q. So it was your understanding that it wasn't just a  
15 momentary or brief encounter that he had with Mr. Elliott on  
16 April 15?

17 A. That's correct.

18 Q. Did he describe to you the clothing that Robert Kling was  
19 wearing on April 15?

20 A. We did not get into specific discussions about the clothing  
21 on this particular occasion.

22 Q. Did you get into a discussion of his physical appearance?

23 A. In general terms, we did, yes.

24 Q. And what were the general terms that you got into it with?

25 A. That he was -- the renter was a Caucasian male; that he

1 was -- I believe Mr. Elliott said about 5' 10" or maybe a  
2 little taller. Mr. Elliott said he was 5' 10" and he  
3 remembered the renter being at least his height, possibly a  
4 little taller; that he was of a medium build; that he had light  
5 brown hair, cut short, and a military-style-type haircut.

6 Q. Did he say anything about his complexion?

7 A. Not that I recall.

8 Q. Okay. And did you give -- did you ask Mr. Elliott any  
9 questions on this date that you were interviewing him about his

10 ability to pick -- pick this individual out of any kind of  
11 lineup or photo spread?  
12 A. No, not at this time.  
13 Q. And you don't recall what date in June this was?  
14 A. Not exactly, no.  
15 Q. So do you recall that on June 8, 1995, you met with  
16 Mr. Elliott in Junction City?  
17 A. No. That was in Oklahoma City.  
18 Q. You met with him in Oklahoma City?  
19 A. Yes.  
20 Q. And wasn't this the time that he was shown the photo spread  
21 and asked if he could identify anyone?  
22 A. Yes.  
23 Q. And were you present when he did that?  
24 A. Yes.  
25 Q. Can you tell me what admonitions were given to him before

Jon Hersley - Direct  
1 he was asked to make his selection?  
2 A. We told Mr. Elliott that we wanted to show him a photo  
3 spread; that he should take caution to make sure that if he's  
5 should take -- block that out of his mind; and we asked him  
6 whether or not he had a clear and sufficient enough memory  
7 to -- of the individual that was in his office on Saturday and  
8 then again briefly on Monday that he felt like he would be able  
9 to identify him in a photo spread.  
10 Q. So you mentioned Mr. McVeigh by name when you were talking  
12 A. Yes.  
13 Q. You knew at the time that he was being shown the photo  
14 spread that the suspect was Timothy McVeigh, did you not?  
15 A. Yes.  
16 Q. And was it apparent to you that Mr. Elliott knew that the

17 suspect was named Timothy McVeigh and was in this photo spread?

19 clear and sufficient enough memory from the events on April 15

20 that he would be able to identify the individual in the photo

21 spread if he was, in fact, in the photo spread.

22 Q. You mentioned April 15. Why did he -- why was there no

23 discussion of April 17?

24 A. That, as I had testified -- that date was also mentioned;

25 but Mr. Elliott said that he had a much better opportunity to

Jon Hersley - Direct

1 view this individual on the 15th because it was just the two of

2 them in the shop and it was for quite a bit longer time period.

3 On Monday, there were several individuals in the shop,

4 according to Mr. Elliott, and he only viewed this individual

5 for a short -- very short period of time.

6 Q. Okay. And when this photo spread was shown to Mr. Elliott,

7 you knew which photograph in the array was that of Mr. McVeigh,

8 didn't you?

9 A. Yes, I did.

10 Q. Can you tell me what comments Mr. Elliott made while he was

11 viewing the photographs?

12 A. Mr. Elliott, as I testified, said that he did have a good,

13 clear memory of what this individual that had rented the truck

14 and that he had seen in the shop on Saturday looked like and

15 that he would be able to put aside anything that he had seen in

16 news coverage and make his choice based solely on his memory.

17 Q. So he did tell you that he had seen something in the news

18 coverage; correct?

19 A. Yes.

20 Q. Do you know what it was he saw on the news coverage?

21 A. Yes. I believe he said that he had seen the initial

22 coverage of Mr. McVeigh as he was walking out of the Perry  
23 jail.

24 Q. Did he tell you how many times he had seen that?

25 A. He said once or twice.

Jon Hersley - Direct

1 Q. Do you know when -- do you know if he saw that as it was

2 occurring, or if he saw repeats of it in subsequent days?

3 A. At that time, I wasn't sure if it was the very first

4 coverage or if it was the repeat in the days following that.

5 Q. Okay. You just know that he had seen that coverage before

6 he had made his selection?

7 A. Yes.

8 Q. Did he appear to hesitate when he was going over the

9 pictures or did he go right to the person he thought was Robert

10 Kling?

11 A. He was able to readily identify the individual that he said

12 had rented the truck and that had given the name Kling to him.

13 Q. How did he express his selection to you? With what words?

14 A. He pointed to the picture that he said that was the

15 individual that had rented the truck.

16 Q. And what was your comment or any of the other agents'

17 comments in response to him pointing at a selection and making

18 his selection?

19 A. There was no comment made at that time. We made no

20 statements as to his identification; and I remember asking him

21 to then turn the photo spread over and to date and initial it

22 on the reverse side and to indicate the number of the choice

23 that he had made.

24 Q. And did he do that?

25 A. Yes, he did.

Jon Hersley - Direct

- 1 Q. Did you have any other conversation with Mr. Elliott after
- 2 he selected this photograph?
- 3 A. About the photo spread, or other?
- 4 Q. Other. Anything.
- 5 A. Yes.
- 6 Q. And what was that?
- 7 A. We told Mr. Elliott that we wanted to show him a photograph
- 8 of a hat and asked him to compare his memory of another
- 9 individual that was -- he had said that had been into the body
- 10 shop with the hat that was depicted in that photograph. We
- 11 wanted him to compare his memory of the hat that he said this
- 12 other individual was wearing when he was in the body shop with
- 13 the photograph of that hat.
- 14 Q. And this day that the second individual was in the body
- 15 shop: Isn't it true that Mr. Elliott told you that this was
- 16 the day the truck was rented, on April 17?
- 17 A. Yes.
- 18 Q. So Mr. Elliott clearly described to you that two people
- 19 came in to rent the truck on that date; right?
- 20 A. Yes.
- 21 Q. And he told you that one of those persons was wearing a
- 22 hat; correct?
- 23 A. He told us that one individual had come in to rent the
- 24 truck and that he believed that individual was accompanied by a
- 25 second individual, and that's the individual he said that was

Jon Hersley - Direct

- 1 wearing the hat.
- 2 Q. And you thought that he had seen the hat well enough to

3 make it worth your while to show him a photograph of the hat  
4 and see if he could identify it; right?  
5 A. He told us that he had a pretty clear memory of what the  
6 hat looked like and that he felt like he would be able to  
7 identify it if it was shown to him.  
8 Q. Did you show it to him?  
9 A. Yes, I did.  
10 Q. And what was his response?  
11 A. He said that he did not believe that was the hat.  
12 Q. Did he tell you what opportunity he had to view the face or  
13 the body of the second individual, the one wearing the hat?  
14 A. Yes.  
15 Q. And what was that?  
16 A. He said he didn't pay any attention to the individual  
17 except for just very briefly glancing at the individual and  
18 noticing a hat.  
19 Q. Did Mr. Elliott make any statements to you about whether  
20 Mr. Kessinger had shared with him or with Ms. Beemer his  
21 recollection, that being Mr. Kessinger, of the individual  
22 described as either Un. Sub. 1 or Un. Sub. 2?  
23 A. Can you rephrase that? I'm not sure I followed you.  
24 Q. Yeah. What I'm -- can you tell us whether Mr. Elliott told  
25 you that Mr. Kessinger had shared with him, and maybe even with

1 Mrs. Beemer, Mr. Kessinger's recollection of the physical  
2 appearance of either Un. Sub. 1 or Un. Sub. 2?  
3 A. Yes. Mr. Elliott said he could recall no conversation like  
4 that from Mr. Kessinger or Mr. Beemer -- Ms. Beemer.  
5 Q. So Mr. Elliott told you specifically that he had not heard  
6 anything from Mr. Kessinger about what Mr. Kessinger thought  
7 these people looked like?

8 A. My testimony was that he said he could recall no such  
9 conversation.

10 Q. So he wasn't saying it didn't happen, just that he couldn't  
11 recall it?

12 A. That's correct.

13 Q. And this would have been on June 8 in Oklahoma City that he  
14 made this statement to you, or would it have been on another  
15 occasion?

16 A. No, it was on a later occasion.

17 Q. What occasion was that?

18 A. When Mr. Mendeloff and myself were having conversations  
19 with Mr. Elliott.

20 Q. Okay. Now, did you know that there was a lineup conducted  
21 in Oklahoma City on April 22?

22 A. I found that out after it had been conducted, yes.

23 Q. Did you know that neither Mr. Kessinger, Mr. Elliott, nor  
24 Ms. Beemer were at that lineup?

25 A. Yes, I came to learn that. Yes.

Jon Hersley - Direct

1 Q. And do you know why that is?

2 A. No, I do not. The lineup, I know, was on April 22 that  
3 you're referring to -- was set up for potential eyewitnesses  
4 at -- that had seen an individual that they believed to be the  
5 suspect in the days leading up to the bombing or on the day of  
6 the bombing right around -- in or around the federal building.

7 There were four such witnesses, I believe, that went to that  
8 lineup.

9 Q. Isn't it true that the FBI also believed that the person  
10 who rented the Ryder truck at Elliott's Body Shop was also  
11 involved in the bombing?

12 A. Yes.

13 Q. Now, Mr. Elliott first gave his description of the

14 individual known as Mr. Kling on April 19, 1995; correct?

15 A. That's correct.

16 Q. And you got yours shortly thereafter; correct?

17 A. I'm not --

18 Q. You got your description from Mr. Elliott shortly

19 thereafter, or are you saying that you didn't get it until you

20 met with him in June?

21 A. We talked with him in general terms about the description

22 in the meeting in Junction City before he came down to Oklahoma

23 City; and I believe that was in June of '95. It could have

24 been May, late May.

25 Q. Okay. Do you know why Mr. Elliott was not asked to try and

394

Jon Hersley - Direct

1 identify the person he thought was Robert Kling between

2 April 19, '95, and June 8, 1995?

3 A. I don't believe there was an affirmative decision made one

4 way or the other to ask Mr. Elliott to identify the individual

5 that had rented the truck out of a photo spread or a lineup

6 between those days. We made that decision when we knew -- when

8 that's when we showed him the photo spread.

9 Q. So are you saying it was oversight that he wasn't asked

10 between April 19 and June 8?

11 A. No. I think the decisions as to whether or not he would be

12 shown a photo spread or lineup were being made at a higher

13 level than I was at, and I don't really honestly know if there

15 just know that -- when the decision was made when I was

16 involved in it.

17 Q. Do you know whether the decision was being made by members

18 of the Department of Justice, as opposed to the FBI?

19 A. I don't know.

20 Q. Do you know who made the decision or who was involved in

22 A. Before the decision that was made in -- to show him the

23 photo spread in Oklahoma City?

24 Q. Yes.

25 A. No, I don't.

Jon Hersley - Direct

1 Q. Do you know whose decision it was to conduct the lineup, or

2 who was involved in conducting the lineup?

3 A. I don't know whose decision it was to make that. That

4 decision was made before I reported to the command post. I

5 know that one of the prosecutors in Oklahoma City, Leslie May,

6 was involved in -- actually at the lineup. I came to find that

7 out later.

8 Q. Now, let's leave Mr. Elliott for a while and go back to

9 Mr. Kessinger. What was your contact with Mr. Kessinger?

10 A. I believe I met Mr. Kessinger on that same trip to Junction

11 City as when we met Mr. Elliott.

12 Q. Okay. And this would have been in June of 1995?

13 A. Yes.

14 Q. Had you ever spoken with Mr. Kessinger prior to that time?

15 A. No, I had not.

16 Q. Okay. And what did you -- when you got there and began

17 talking to Mr. Kessinger, what did you talk about?

18 A. Primarily this meeting on this occasion when we went to

19 Junction City this first time, we met Mr. Elliott, we met

20 Mr. Kessenger, and we met Ms. Beemer. It was in meetings that

21 were set up primarily so that the prosecutors could be

22 introduced to them to discuss in general terms the nature of

23 the business, to find out a little bit more about it, and

24 things of that nature.

25 When we met Mr. Kessinger, it was also at the body

Jon Hersley - Direct

1 shop; and we discussed in general terms the same type of

2 information that we discussed with Mr. Elliott.

3 Q. Okay. I understand that that was your purpose of going

4 there, because you said that before. I guess what I'm trying

5 to elicit is what did you say to Mr. Kessinger and what did he

6 say to you, particularly with respect to the people that he saw

7 on April 17, 1995?

8 A. Just in general terms, asked Mr. Kessinger where he was

9 seated on April 17 when he observed the individuals that he

10 said had come in and for which he had drawn the -- helped draw

11 the composite sketches and how long of an opportunity

12 Mr. Kessinger had to observe the individuals.

13 Q. Okay. Let's stop right there and break it down. How long

14 an opportunity did Mr. Kessinger tell you he had to observe the

15 individuals?

16 A. He said about 5 to 10 minutes.

17 Q. And where did he tell you he was seated?

18 A. He was seated along one of the walls in the main office

19 there.

20 Q. Okay.

21 A. Where the trucks are rented.

22 Q. And did he give you a description of either of these

23 individuals?

24 A. Yes, briefly.

25 Q. Okay. And which individual was he able to describe more

Jon Hersley - Direct

1 clearly?  
2 A. Mr. Kling.  
3 Q. Okay. And what description did he give you of John Doe  
4 No. 2?  
5 A. Just generally that the individual was in his mid 20's, he  
6 was a Caucasian male; that he had a muscular build; that he was  
7 wearing a hat and black T-shirt, and that he could see a tattoo  
8 protruding beneath the left shirt sleeve of the individual's  
9 arm.

10 Q. And Mr. Kessinger was clear as he was speaking to you that  
11 this is the individual he saw on April 17 with Robert Kling,  
12 wasn't he?

13 A. That's the individual at that time he was describing during  
14 this meeting was with Robert Kling. He has since indicated  
15 that he is not certain whether that individual was with  
16 Mr. Kling or not.

17 Q. I understand that. But my question was at the time that he  
18 was giving you this information, he appeared certain that the  
19 individual he was describing was the individual who was with

20 Mr. Kling on April 17, 1995; is that correct?

21 A. During that meeting, that's correct.

22 Q. Thank you.

23 Now, he told you about his basic physical appearance.

24 Did he mention anything about acne on John Doe No. 1, on Un.  
25 Sub. 1?

1 A. No. We did not discuss that.  
2 Q. What else did he tell you about the physical appearance of  
3 Un. Sub. No. 1?  
4 A. We talked a little bit about the height; that he thought

5 the individual was around 5' 10"; that he had kind of a slender  
6 to medium build; and I think he described the weight as being  
7 175 to 185. He said the individual was in his mid to late  
8 20's.

9 Q. How many times over the course of this investigation have  
10 you personally met with Mr. Kessinger?

11 A. Probably around eight or nine times.

12 Q. And who was with you -- first of all, were you always with  
13 someone else when you met with Mr. Kessinger?

14 A. Yes.

15 Q. So you never met with Mr. Kessinger alone?

16 A. That's correct.

17 Q. And is it fair to say that some of the times you met with  
18 Mr. Kessinger you were with prosecutors, assistant United  
19 States attorneys, and some of the time you were with other FBI  
20 agents?

21 A. I believe every time I met with Mr. Kessinger, I was with  
22 one of the assistant United States attorneys.

23 Q. Were there any other agents ever present besides you at  
24 these meetings?

25 A. Yes. I believe Agent Larry Tongate was present at at least

1 one of the meetings.

2 Q. So there is about seven meetings where you met with  
3 Mr. Kessinger with a prosecutor?

4 A. As I said, there was eight or nine. The time I'm talking  
5 about that Agent Tongate was with me, there was also a  
6 prosecutor there.

7 Q. Okay, so just you and the prosecutor would be seven or  
8 eight times, if it was eight or nine times with Mr. Tongate?

9 A. That's correct.

10 Q. And on each of these occasions, did you describe or did you  
11 discuss Mr. Kessinger's recollection of the appearance of these  
12 two individuals that he had seen on April 17?

13 A. No, not on each one of the occasions.

14 Q. On how many of the occasions did you discuss his  
15 recollection of the appearances of these individuals?

16 A. Of either one of them?

17 Q. Correct.

18 A. We wouldn't always discuss both of them. I would say  
19 probably on four or five different occasions.

20 Q. When was the first time after June 8 that you had a  
21 discussion with Mr. Kessinger and a prosecutor concerning the  
22 appearance of either Un. Sub. 1 or Un. Sub. 2?  
23 A. In November of 1995, I believe it was, we had another  
24 meeting in Junction City with Mr. Kessinger where we would  
25 discuss just in general terms again his description. On this

Jon Hersley - Direct

1 occasion, I believe it was Assistant United States Attorney  
2 Larry Mackey and U.S. Attorney Pat Ryan that were with me.  
3 Q. And the purpose of this meeting was to discuss again in  
4 general terms his recollection of the description?  
5 A. No. The purpose of the meeting was so that Mr. Mackey and  
6 Mr. Ryan could meet Mr. Kessinger and get to know him a little  
7 bit. It was not a lengthy meeting.  
8 Q. Okay. And what was discussed at this meeting concerning  
9 the two individuals that Mr. Kessinger had viewed on April 17?  
10 A. Just basically with Kessinger? Now you're talking about  
11 with Mr. Kessinger?  
12 Q. Yes.

13 A. In general, the fact that the individuals had come in on  
14 April 17, according to Mr. Kessinger at that time, and the  
15 general positioning of where they were in the office area of  
16 the shop and much the same description that I've previously  
17 described that occurred in the earlier meeting.

18 Q. Where did Mr. Kessinger say the two individuals were  
19 standing in the shop?

20 A. The same as he had described in his testimony here; that  
21 Mr. Kling was standing in front of the counter closest to the  
22 door and the other individual that he said at that time he  
23 thought was accompanying Mr. Kling was standing over towards  
24 the location where the counter elbows, closer to the wall.

25 Q. Thank you. Did you prepare a 302 for each of these

401

Jon Hersley - Direct

1 meetings?

2 A. No.

3 Q. Did you prepare a 302 for any of these meetings with the  
4 prosecutors and Mr. Kessinger?

5 A. No.

6 Q. Now, you mentioned Mr. Kessinger's testimony, so I presume  
7 that you were in the courtroom and you heard Mr. Kessinger  
8 testify yesterday?

9 A. Yes.

10 Q. Can you think of anything that Mr. Kessinger said in the  
11 courtroom that was different than he had previously told you?

12 A. Yes.

13 MR. MENDELOFF: Judge, objection. That's slightly  
14 broad.

15 THE COURT: Sustained.

16 BY MS. MERRITT:

17 Q. Did Mr. Kessinger say anything about what Mr. -- what

18 Mr. Kling looked like yesterday that was different than he had  
19 told you previously?

20 A. Yes, he did. He said that when he was testifying, I  
21 believe, that he was not certain of Mr. Kling's height because  
22 of the fact that he was sitting down, he was seated in the  
23 chair when he was observing the transaction.

24 Q. And what is that different from?

25 A. He talked more about the -- pardon me?

402

Jon Hersley - Direct

1 Q. What is that different from?

2 A. He had previously said that Mr. -- that he thought  
3 Mr. Kling's height was 5-feet-10, and he said he really wasn't  
4 that sure of it because of the fact that he was sitting down.

5 Q. So now did he tell you something different than that?

6 A. Initially, he had talked about Mr. Kling being 5-foot-10;  
7 then later in conversations with myself and Mr. Mendeloff is  
8 when he said that he really wasn't sure just how tall Mr. Kling  
9 was because of the fact that he was seated when he was  
10 observing him.

11 Q. Okay. I don't want -- I guess what I'm getting at is if  
12 there is anything he described in court that varied from what  
13 he told you previously.

14 MR. MENDELOFF: Judge, objection. Again, that's  
15 overbroad.

16 THE COURT: Sustained.

17 BY MS. MERRITT:

18 Q. Now, at what point did you bring up with Mr. Kessinger  
19 Mr. Tipton?

20 A. I did not speak with Mr. Kessinger about Mr. Tipton.

21 Q. You have never spoken with Mr. Kessinger about Mr. Tipton?

22 A. No.

23 MS. MERRITT: Okay. One moment, your Honor.

24 BY MS. MERRITT:

25 Q. The hat that you showed Mr. Elliott and asked him if he

Jon Hersley - Direct

1 could identify: Was that Todd Bunting's hat?

2 A. Yes.

3 Q. And did you also show that hat to Mr. Kessinger?

4 A. Yes.

5 Q. Can you tell me whose decision it was to conduct the photo

6 lineup with Mr. Elliott -- with Mr. Kessinger? I'm sorry.

7 A. No. That decision was made earlier on, and I'm not aware

8 of whose decision that was -- made to present the photo spread

9 to Mr. Kessinger?

10 Q. Correct.

11 A. Yeah, I'm not aware of whose decision that was.

12 Q. How about whose decision it was to conduct the photo spread

13 with Mr. Elliott on June 8?

14 A. That was as a result of a conversation between myself,

15 Arlene Joplin and Joe Hartzler.

16 Q. And what was the reason that you decided to conduct the

17 photo spread on that date?

18 A. We wanted to know if he would be able to identify the

19 person that had rented the truck from him on April 17 and that

20 had been in his shop on April 15.

21 Q. Now, when you went to these meetings that you didn't make

22 302's for with one of the prosecutors and Mr. Kessinger, did

23 you take any notes during those meetings?

24 A. No.

25 Q. So everything you're testifying in court today is based

Jon Hersley - Direct

1 upon your independent recollection of what occurred at those  
2 meetings and not a review of any of your notes?

3 A. That's correct.

4 MS. MERRITT: I have nothing further, your Honor.

5 THE COURT: Mr. Mendeloff?

6 MR. MENDELOFF: Thank you, your Honor.

7 CROSS-EXAMINATION

8 BY MR. MENDELOFF:

9 Q. Agent Hersley, you were asked a series of questions  
10 regarding your initial meetings with Tom Kessinger in June of  
11 1995 accompanying -- in which you stated you were accompanied  
12 by two attorneys.

13 A. That's correct.

14 Q. And what was the general purpose of those meetings?  
15 A. Just an introductory, orientation-type meetings where the  
16 attorneys would be able to meet Mr. Elliott and Mr. Kessinger  
17 and to get an idea of the type of business that they have  
18 there.

19 Q. Were those meetings meant to be exhaustive reviews of their  
20 testimony?

21 A. No.

22 Q. In those meetings, did you review with the witnesses prior  
23 FBI 302 reports and things they had said regarding descriptions  
24 in earlier interviews?

25 A. No, we did not.

Jon Hersley - Cross

1 Q. In November of 1995, I believe you testified that there  
2 were -- there was another meeting including Mr. Mackey and

3 Mr. Ryan.

4 A. That's correct.

5 Q. What was the purpose of that meeting?

6 A. It was the same type of meeting. Mr. Mackey and Mr. Ryan I

7 don't believe had met the individuals at Elliott's Body Shop by

8 that time, and that was the primary purpose of those meetings.

9 Q. All right. Were they -- were those -- was that meeting

10 meant to be exhaustive?

11 A. No.

12 Q. Now, I believe you testified that when Eldon Elliott was

13 first -- when you first talked to Eldon Elliott, he told you

14 that he had seen two people in the -- in his dealership on

15 Monday, April 17.

16 A. That's correct.

17 Q. And I believe you were asked whether or not Eldon Elliott

18 said that both people had come in together.

19 A. Yeah.

20 Q. Did Eldon Elliott state that he was present when the two

21 men walked into the dealership on the 17th?

22 A. No. Mr. Elliott said that he was back in the body shop

23 portion of the shop and that he only came out to the front

24 office area when Vickie Beemer summoned him there to do a walk

25 around the truck.

Jon Hersley - Cross

1 Q. I'm sorry. Did Eldon Elliott say that he was present when

2 the two men left?

3 A. He said he was not present when they left.

4 Q. Now, Mr. Hersley, during the course of the investigation in

5 this case, have you made attempts to determine how tall Tim

6 McVeigh is?

7 A. Yes.

8 Q. And what did you do to determine that?

9 A. Through conversations with the witnesses; but also more  
10 recently, we had Mr. McVeigh measured for his height.

11 Q. All right. Let me start with your initial investigation.

12 Initially, when you were investigating the case, prior to the  
13 recent measurement, did you get some evidence of how tall  
14 Mr. McVeigh was?

15 A. Yes.

16 Q. And did you rely on documents for that primarily?

17 A. Yes.

18 Q. What documents were those in general?

19 A. There was military documents that I was able to review,  
20 Mr. McVeigh's Michigan driver's license, other documents,  
21 official record-type documents.

22 Q. And they are primarily documents Mr. McVeigh filled out  
23 himself?

24 A. That's correct.

25 Q. What did he list as his height in those documents?

1 A. Sometimes he would list 6-foot-1 and sometimes he would  
2 list 6' 2".

3 Q. Now, when was Mr. McVeigh measured?

4 A. Just this past Saturday, February 15.

5 Q. Where was he measured?

6 A. At the FCI at Englewood.

7 Q. And who measured him?

8 A. There was a certified physician's assistant that measured  
9 him at the prison.

10 Q. Were representatives present from both sides of this case?

11 A. Yes.

12 Q. And what was the measurement of Mr. McVeigh's height that  
13 day?

14 A. He is 6-foot and 1/2 inch.

15 Q. 72.5 inches?

16 A. That's correct.

17 Q. Were you present in court when Tim Donahue and Glynn Tipton  
18 testified?

19 A. Yes, I was.

20 Q. Were you present when those witnesses described Mr. McVeigh  
21 as having some sort of beard or facial growth?

22 A. Yes.

23 Q. During the course of the investigation in this case, did  
24 the Government uncover evidence in the form of photographs of  
25 Tim McVeigh?

408

Jon Hersley - Cross

1 A. Yes.

2 Q. Let me ask you to turn in your book to page -- to Exhibit  
3 36, please.

4 A. Okay.

5 Q. Where was that exhibit recovered?

6 A. This was recovered at Terry Nichols' house in Herington,  
7 Kansas, during the -- when we were serving a search warrant  
8 there.

9 Q. All right. And from where was that exhibit recovered?

10 A. From Terry Nichols' house.

11 Q. All right. Where in the house? Do you remember? Was it  
12 enclosed in anything?

13 A. It was in a photo album.

14 Q. Do you recognize the building in the background of this  
15 photo?

16 A. Yes, I do.

17 Q. What was that?

18 A. That's the rented house that Tim Donahue had leased and

19 which Terry Nichols was living in during 1994.

20 Q. And did -- do you remember Mr. Donahue's testimony as to

21 the dates during which Mr. Nichols was living there?

22 A. Yes.

23 Q. When was that?

24 A. From March, '94, until September 30 of '94.

25 MR. MENDELOFF: All right. Your Honor, we move the

Jon Hersley - Cross

1 admission of Government's Exhibit 36.

2 MS. MERRITT: Your Honor, I'm going to object because

3 there is no indication of when Exhibit No. 36 was taken, and so

4 therefore it's not relevant to this hearing.

5 THE COURT: Overruled. Received.

6 MR. MENDELOFF: One moment, please, your Honor.

7 Your Honor, may I publish this exhibit, please?

8 THE COURT: Yes.

9 BY MR. MENDELOFF:

10 Q. Now, Agent Hersley, do you see Exhibit 36?

11 A. Yes, I do.

12 Q. Do you see anything on Mr. McVeigh's face?

13 A. Yes.

14 Q. What is there?

15 A. It appears that there is a growth of whiskers. Might be

16 two, three, four days.

17 Q. Okay.

18 A. Stubble.

19 Q. Now, Agent Hersley, based on your investigation in this

20 case, have you determined where Mr. McVeigh was during a

21 portion of that period mid-March to September 30, 1994?

22 A. Yes.

23 Q. And what is -- what review have you done to determine that?

24 A. Through a check of different records and interviews at

25 Mr. McVeigh's place of employment in Kingman, Arizona, and

410

Jon Hersley - Cross

1 through discussions with other witnesses, potential witnesses,

2 people who knew Mr. McVeigh.

3 Q. All right. Let's talk about his employment. How long was

4 he employed in Kingman, Arizona?

5 A. He began working at True Value Hardware in February of '94,

6 and he continued working there until I believe the 1st of June

7 of 1994, and he worked for about nine or ten days at a

8 temporary labor express-type location, Cotter & Company.

9 Q. And where was that?

10 A. That was in Kingman, Arizona.

11 Q. When was that?

12 A. That was in June of 1994.

13 Q. Now, did you have any other indication of Mr. McVeigh's

14 whereabouts in July of 1994?

15 A. Yes.

16 Q. And what was that?

17 A. He was still in Kingman, Arizona.

18 Q. And what indication do you have along those lines?

19 A. Through different telephone calls that we've been able to

20 look at and also through conversations with Michael Fortier.

21 Q. All right. Now, do you have any -- business documentation

22 from Bullhead City, Arizona, that applies to Mr. McVeigh?

23 A. Yes.

24 Q. What is that?

25 A. He had taken his vehicle to -- it's a brake shop-type of

Jon Hersley - Cross

1 place out there.

2 Q. What date? Do you recall?

3 A. It was on a couple different occasions. I believe in June  
4 and possibly July of '94. I'm not sure of the exact dates.

5 MR. MENDELOFF: All right. Thank you. Nothing  
6 further, your Honor.

7 THE COURT: Ms. Merritt, anything further?

8 MR. MENDELOFF: I'm sorry, Judge.

9 I neglected to ask Mr. Hersley a question about  
10 something else, another exhibit. Excuse me.

11 THE COURT: All right.

12 MR. MENDELOFF: Mr. Mackey reminded me.

13 BY MR. MENDELOFF:

14 Q. Let me show you what's been marked Government's Exhibit 21.

15 Agent Hersley, are you familiar with this exhibit?

16 A. Yes.

17 Q. And who is depicted in this exhibit?

18 A. Michael Hertig.

19 Q. Have you had discussions with Michael Hertig regarding his  
20 appearance in April of 1995?

21 A. Yes, I have.

22 Q. And what has he told you?

23 A. He said he looked just like the photograph of him that's  
24 pictured here.

25 Q. Did he have a mustache in April of 1995?

Jon Hersley - Cross

1 A. Yes, he did.

2 Q. Did he explain to you when he grew that mustache?

3 A. Yes, he did.

4 Q. When was that?

5 A. He said he grew that when he was on field maneuvers in the

6 fall of 1994.

7 Q. And how long did he continue to wear that mustache?

8 A. For many months after April of '95.

9 Q. All right. Do you know when this photo was taken?

10 A. This photo would have been taken sometime, I believe, in

11 May of 1995.

12 MR. MENDELOFF: Thank you. Nothing further, your

13 Honor.

14 REDIRECT EXAMINATION

15 BY MS. MERRITT:

16 Q. When Mr. McVeigh was measured this week or a few days ago,

17 did he have shoes on?

18 A. No, he did not.

19 Q. Was he barefoot?

20 A. Yes.

21 Q. Do you have any information that Robert Kling was barefoot

22 when he came to Elliott's Body Shop in April of 1995?

23 A. No.

24 Q. Do you have any evidence that Mr. McVeigh was ever

25 5-foot-10 or 5' 11"?

1 A. He would have been at some point in his life, but --

2 Q. Well, relevant to the time period of his investigation?

3 A. No.

4 Q. He could have had a growth spurt.

5 Do you have -- do you have any evidence that he

6 weighed 150 or 160 pounds during the time period of this

7 investigation?

8 A. No. The records that I've seen put him a little bit

9 heavier than that.

10 Q. Do you have any records or evidence that shows his weight

11 was 180 or 185 pounds during the course of this investigation?

12 A. Any records?

13 Q. Or evidence.

14 A. I've seen no records that would indicate him being that

15 heavy. They primarily put him around 160 to 165.

16 Q. Now, Mr. Mendeloff asked you some questions about

17 Mr. Hertig. When you met with Mr. Hertig, was Mr. Bunting with

18 him?

19 A. No, not when we were talking to Mr. Hertig.

20 Q. So you never met with Mr. Hertig or Mr. Bunting together?

21 A. No. Our conversations with those two individuals were

22 separate.

23 Q. Okay. Did Mr. Hertig tell you that Mr. Bunting was with

24 him on April 18, 1995, when he went to Elliott's to rent a

25 Ryder truck?

414

Jon Hersley - Redirect

1 A. Yes.

2 Q. Did Mr. Hertig tell you that he was dressed in

3 military-type camouflage clothing on April 18, 1995, when he

4 went to rent the Ryder truck from Elliott's?

5 A. Yes, he did.

6 Q. Did Mr. Hertig tell you that he had a conversation on

7 April 18 with Vickie Beemer in which Vickie Beemer made a

8 comment to him?

9 MR. MENDELOFF: Objection. Objection. This has

10 nothing to do with description.

11 THE COURT: Sustained.  
12 MS. MERRITT: No further questions.  
13 MR. MENDELOFF: One question, your Honor.  
14 THE COURT: All right.  
15 RECROSS-EXAMINATION  
16 BY MR. MENDELOFF:  
17 Q. Remember Ms. Merritt's question about whether Robert Kling  
18 was barefoot when he came into Elliott's Ryder -- Elliott's  
19 truck shop?  
20 A. Yes.  
21 Q. Did the witnesses indicate that they were barefoot?  
22 A. No, they did not say that.  
23 Q. So if somebody is 5-foot-10 to a witness who is 5-foot  
24 10 -- let me rephrase. A witness is 5-foot-10 in his barefoot  
25 feet -- that is, Mr. Elliott. He'd be a little taller wearing

415

Jon Hersley - Recross

1 shoes?  
2 A. Correct.  
3 Q. And it would be from that perspective that he would be  
4 judging height; is that right?  
5 A. Yes. They would be on equal footing, so to speak.  
6 MR. MENDELOFF: Nothing further, your Honor.  
7 THE COURT: You may step down.  
8 Next witness.  
9 MS. MERRITT: The next witness is Agent Ronald Koziol.  
10 THE COURTROOM DEPUTY: Would you rise your right hand,  
11 please.  
12 (Ronald Koziol affirmed.)  
13 THE COURTROOM DEPUTY: Have a seat, please.  
14 Would you state your full name for the record and  
15 spell your last name.

16 THE WITNESS: Ronald J. Koziol, K-O-Z-I-O-L.

17 THE COURTROOM DEPUTY: Thank you.

18 DIRECT EXAMINATION

19 BY MS. MERRITT:

20 Q. Agent Koziol, how are you employed?

21 A. With the FBI as a special agent.

22 Q. And how long have you been so employed?

23 A. Since 1990.

24 Q. And where are you stationed?

25 A. Kansas City.

416

Ronald Koziol - Direct

1 Q. And where were you on April 19, 1995?

2 A. Kansas City.

3 Q. And what was your first participation in the Oklahoma City

4 bombing case?

5 A. I was told to go out to Herington, Kansas.

6 Q. And when were you told this?

7 A. I believe -- I can't recall if it was the 19th or the 20th.

8 Q. So it was simultaneous with the bombing; correct?

9 A. Right.

10 Q. And what did you do when you got to Kansas? You said you

11 were told to go out to Kansas?

12 A. Right.

13 Q. What did you do when you got there? Were you there because

14 you were stationed there?

15 A. No, I responded to Herington, Kansas; and I ended up going

16 to Marion, Kansas. I never made it to Herington.

17 Q. Who were you with?

18 A. I believe I drove alone.

19 Q. Okay. What was your first contact in this case with either

20 Mr. Kessinger or Mr. Elliott?

21 A. I don't recall the exact date.

22 Q. Can you recall the month?

23 A. It was in April.

24 Q. And what occurred at that encounter?

25 A. With Mr. Kessinger?

Ronald Koziol - Direct

1 Q. Well, let's start with Mr. Kessinger. That's fine.

2 A. Okay. I interviewed him.

3 Q. And what did you interview him about?

4 A. Asked him about what happened the day of April 17.

5 Q. And did you ask him about the description of the persons he  
6 has described as No. 1 and No. 2, Mr. Kling and individual with  
7 him?

8 A. Not specifically about total descriptions, no.

9 Q. Okay. Did you ask him anything -- did you get a general  
10 description from him at that time?

11 A. About No. 2, I believe we got a better description than  
12 about No. 1.

13 Q. So you got some description of both individuals; correct?

14 A. Yes.

15 Q. And what description did you get of No. 1?

16 A. If I recall my report, Mr. Kessinger told us that No. 1 had  
17 an unusual jawline.

18 Q. Can you recall anything else he told you about No. 1?

19 A. Not without looking at my report, no.

20 Q. And you don't recall the date of this meeting?

21 A. I believe April 27 possibly.

22 Q. So your discussion with Mr. Kessinger was prior to the time  
23 that he was asked to look at a photo spread and select an  
24 individual from that photo spread; correct?

25 A. Yes.

Ronald Koziol - Direct

1 Q. And what did Mr. Kessinger tell you on this date about the  
2 individual referred to as Un. Sub. 2 or John Doe 2?

3 A. He described basically his build.

4 Q. What did he describe about his build?

5 A. He was a stocky or well-built person as though he was a  
6 weight lifter of some sort. A V shape, I remember  
7 specifically. And he also mentioned having a dark complexion  
8 and a tattoo.

9 Q. Did he mention anything about the complexion of No. 1?

10 A. Not that I recall.

11 Q. Now, did he indicate to you that No. 1 and No. 2 were  
12 together on April 17, 1995?

13 A. Yes.

14 Q. Did he give any recitation to you of where he was in  
15 connection with No. 1 or No. 2 on April 17, 1995?

16 A. He stated he was in the office area of the body shop,  
17 Elliott's Body Shop.

18 Q. Did he say what part of the office area he was in?

19 A. He was sitting in a chair directly to the side of the front  
20 counter.

21 Q. Did he describe for you where No. 1 and No. 2 were  
22 physically located in the office at that time?

23 A. They were standing just within the door by the counter.

24 Q. Were they standing together?

25 A. I don't know what you mean by together. It's a small room.

Ronald Koziol - Direct

- 1 Q. One next to the other?
- 2 A. I don't specifically remember if he said together.
- 3 Q. So then you don't remember whether he said they were
- 4 standing apart, do you?
- 5 A. Correct.
- 6 Q. Did he recount for you any of the conversation that
- 7 occurred between any of the individuals on that date?
- 8 A. He mentioned that No. 2 didn't say anything; that No. 1
- 9 seemed to do all the talking.
- 10 Q. Did he say anything about his opportunity to observe No. 2
- 11 or the vantage point from which he was observing No. 2?
- 12 A. Can you rephrase that?
- 13 Q. Did he give you any indication of whether he was able to
- 14 see John Doe No. 2 from the front or only from the profile?
- 15 A. He seemed to indicate it was from the profile, he had a
- 16 better vantage point.
- 17 Q. How certain did he appear to you to be in his description
- 18 of either No. 1 or No. 2?
- 19 A. He seemed pretty certain.
- 20 Q. Of both of them?
- 21 A. Based on what I discussed with him, correct.
- 22 Q. Did you look at any photographs with him on this date?
- 23 A. No.
- 24 Q. Did you look at any composite sketches or artist's
- 25 renditions on this date?

420

Ronald Koziol - Direct

- 1 A. I don't recall.
- 2 Q. Can you tell me whose decision it was to have him try and
- 3 select the person he had seen on April 17 from a photo spread
- 4 on April 30?
- 5 A. We were directed by an FBI supervisor to go to his house to

6 show him that photo lineup.

7 Q. Can you tell me who the FBI supervisor was?

8 A. I believe it was Tom Moore.

9 Q. And did you go to Mr. Kessinger's house on April 30?

10 A. Yes.

11 Q. And who did you go with?

12 A. Special Agent Doug Fencl and Detective Sergeant Robert

13 Story of the Junction City, Kansas, Police Department.

14 Q. And prior to exhibiting the photo spread to Mr. Kessinger,

15 did you have any conversation with him or provide him with any

16 instructions?

17 A. Yes.

18 Q. And can you tell me what those were?

19 A. Briefly, we mentioned to Mr. Kessinger to rely only on his

20 memory of the date of April 17, to disregard any news media

21 accounts of what had occurred. We asked him not to guess, and

22 we told him that there may be a possibility that the

23 photographs in that lineup may not appear to him at all as

24 being somebody he knows.

25 Q. So you were aware that he had seen media portrayals of some

421

Ronald Koziol - Direct

1 individuals or of this coverage prior to the time you were

2 showing him the photographs? You told him to disregard any

3 media he may have seen. Does that --

4 A. Right.

5 Q. Doesn't that imply that you knew he had seen some?

6 A. It implies that, yes.

7 Q. Did you know if he had seen some?

8 A. I don't recall if we had asked him that.

9 Q. You didn't -- so you never inquired of him before the photo

10 spread identification process as to whether he had seen any  
11 media portrayal of Mr. McVeigh?

12 A. Correct.

13 Q. And you showed him these photographs; correct?

14 A. Correct.

15 Q. Did you give him any other instructions?

16 A. That's all I can recall off the top of my head.

17 Q. Now, at the time that you showed him the photo spread, it's

18 true that you knew that the suspect was Timothy McVeigh;  
19 correct?

20 A. Yes.

21 Q. And it's true that you knew which of those eight pictures

22 was Timothy McVeigh; correct?

23 A. Yes.

24 Q. Now, when Mr. Kessinger was reviewing the photo spread, did

25 he make any comments before arriving at a selection?

Ronald Koziol - Direct

1 A. I don't recall.

2 Q. Were you present?

3 A. Yes.

4 Q. Okay. Do you recall how he made or expressed his selection  
5 to you?

6 A. No, and I'm not sure if it's indicated how he did that in  
7 my report or in the report that was written.

8 Q. Do you have any independent recollection of it as you sit  
9 here today?

10 A. No.

11 Q. Do you recall what he said to indicate that he was making a  
12 selection?

13 A. No.

14 Q. Do you remember him making a selection?

15 A. Yes.

16 Q. Do you remember which photograph he made the selection of?

17 A. Yes, No. 2.

18 Q. And how is it that you remember him making that selection?

19 A. From reviewing the 302 report.

20 Q. But you have no independent recollection, even though you

21 were there, of him making the selection?

22 A. The 302 reminds me of what had happened there; but I don't

23 recollect exactly what happened that day.

24 Q. Okay. What is your memory today based upon having reviewed

25 your 302, how he made the selection, how he expressed it?

423

Ronald Koziol - Direct

1 A. I can't recall how he expressed that day. All I'm going on

2 is by the 302 report.

3 Q. And you're saying that it's not in the 302 report?

4 A. How exactly -- whether he pointed at it or made comment?

5 Q. Uh-huh.

6 A. I don't recall what's in the 302 report at this time.

7 Q. Okay. Now, do you recall whether he hesitated at all or

8 whether he went right to the picture and picked the person out?

9 A. No, I don't recall that, either.

10 Q. Okay. When he finished selecting the person he believed to

11 be the person he knew as Robert Kling from April 17, did you

12 give him further instructions?

13 A. We asked him to sign the back of the photographic spread.

14 Q. Did you give him any instructions about continuing not to

15 watch the media?

16 A. I don't recall if we mentioned that or not.

17 Q. Do you recall the media being mentioned on this date at any

18 time other than you telling him at the beginning to disregard

19 any prior descriptions he may have seen in the media?

20 A. No.

21 Q. Now, did you also have conversations with Eldon Elliott?

22 A. Yes.

23 Q. And when was the first time you had a conversation with

24 Eldon Elliott?

25 A. I believe it was the same date, April 27, that I talked to

Ronald Koziol - Direct

1 Mr. Kessinger at the body shop.

2 Q. And were you alone when you were talking with Mr. Elliott,

3 or was someone with you?

4 A. I believe Sergeant Story was with me at the time.

5 Q. And Sergeant Story is a local police officer, not an FBI

6 agent?

7 A. Correct.

8 Q. And what did you discuss with Mr. Elliott at that time?

9 A. I asked him to go over what happened on the weekend of

10 April 14, 15 and 16 when Mr. Kling came into the body shop.

11 Q. So at this time, you knew that Mr. Elliott had encountered

12 someone named Robert Kling on two occasions, April 15 and

13 April 17?

14 A. Correct.

15 Q. And what did Mr. Elliott tell you? Let's start with

16 April 15. What did he tell you about his recollection of the

17 appearance of the person he knew as Robert Kling on April 15?

18 A. He recalled to us that the day before, on Friday, the 14th,

19 Mr. Kling apparently had made contact with Elliott's Body Shop

20 to set up a rental of a truck; so that Saturday morning on

21 April 15, Mr. Elliott while he was at the body shop met

22 Mr. Kling for the first time, apparently.

23 Q. Okay. And did he describe his appearance?

24 A. We did not ask him for a description at that time.

25 Q. Did you discuss April 17 with Mr. Elliott?

425

Ronald Koziol - Direct

1 A. Yes.

2 Q. And did you ask him for or did he volunteer a description  
3 of the person he saw on April 17?

4 A. No.

5 Q. Did he give you any indication of whether he had a better  
6 opportunity to view Robert Kling on April 15 or April 17?

7 A. No, he didn't indicate either way.

8 Q. Okay. Now, did you discuss anything else about Robert  
9 Kling on April -- on this date with Mr. Elliott, this date that  
10 you're meeting with him. Strike the April.

11 A. We just talked about the facts about what Mr. Kling did  
12 when he was at the body shop.

13 Q. And what did Mr. Kling do?

14 MR. MENDELOFF: Objection, your Honor. I don't  
15 believe this has to do with description. This is facts

16 regarding the encounter.

17 MS. MERRITT: Well, my only purpose in eliciting what  
18 he did is it might show the proximity of Mr. Kling to  
19 Mr. Elliott, which would indicate his --

21 BY MS. MERRITT:

22 Q. Did Mr. Elliott tell you anything that Mr. Kling did that  
23 would have been within Mr. Elliott's eyesight?  
24 A. On what day are we talking?

25 Q. The first day that you interviewed Mr. Elliott.

Ronald Koziol - Direct

1 MR. MENDELOFF: Objection. Vague.

2 THE COURT: He saw him on two days.  
3 MS. MERRITT: Right. He saw him on April 15 --  
4 THE COURT: The witness is asking you which day.  
5 BY MS. MERRITT:

7 A. Mr. Elliott met with Mr. Kling at the office of Elliott's  
8 Body Shop.  
9 Q. Okay. Well, let me try it a different way, because I don't  
10 want to take up too much time with this. You just said that he  
11 told you what Mr. Kling did. That was the nature of the  
12 additional conversation you had with him; correct?  
13 A. Correct.  
14 Q. And what I'm trying to find out is if there is anything  
15 that Mr. Elliott said Mr. Kling did that would have something  
16 to do with Mr. Elliott's ability to observe him and that would  
17 be indicative of the closeness or proximity physically of  
18 Mr. Kling to Mr. Elliott.

19 MR. MENDELOFF: Objection to the form of the question,  
20 your Honor.

21 THE COURT: Overruled.  
22 MR. MENDELOFF: If we just ask --  
23 THE COURT: Answer it, please.  
24 THE WITNESS: We discussed with Mr. Elliott about what  
25 he did that day on April 15 and on April 17 with Mr. Kling. I

Ronald Koziol - Direct

1 I don't recall if we discussed how close they stood next to each  
2 other or not.  
3 BY MS. MERRITT:  
4 Q. Now, when was your next meeting with Mr. Elliott?  
5 A. I can't recall without reviewing the report.  
6 Q. Okay. Did you have any participation in any identification  
7 processes with Mr. Elliott, where he was asked to select --

8 select a picture or a depiction of anyone?

10 MS. MERRITT: Can I have a moment, your Honor?

11 THE COURT: Yes.

12 MS. MERRITT: I have no further questions.

13 THE COURT: Mr. Mendeloff.

14 MR. MENDELOFF: Just several, your Honor.

15 CROSS-EXAMINATION

17 Q. Will you look in the book next to you at Government's

18 Exhibit 14, please. You're going to need to pull it out of the

19 sleeve.

20 Please look at the front and the reverse of that

21 exhibit.

22 A. Okay.

24 A. It's a photocopy of the photo lineup we showed to

25 Mr. Kessinger on April 30, 1995.

Ronald Koziol - Cross

1 MR. MENDELOFF: Move the admission of Government's

2 Exhibit 14, Judge.

3 THE COURT: We already have it in.

4 MR. MENDELOFF: We do? Okay. All right. Can I

5 display it to the witness?

6 THE COURT: Yes.

7 BY MR. MENDELOFF:

8 Q. Now, I believe you testified that Mr. Kessinger made a

9 selection from this photo spread?

10 A. That's correct.

11 Q. And which photo did he select again?

12 A. No. 2.

13 Q. Now, after he selected the photo, did you ask Mr. Kessinger

14 to do anything to designate his selection?

15 A. He wrote on the back of the photo spread.

16 Q. All right. Behind which photo?

17 A. Excuse me. He wrote behind No. 2.

18 Q. All right. And is that his signature there?

19 A. Yes.

20 Q. Did you observe that?

21 A. Yes.

22 Q. Are your initials listed among the initials of the people

23 present as witnesses?

24 A. Yes. They're the second set of initials, RJK.

25 MR. MENDELOFF: Nothing further, Judge.

429

Ronald Koziol - Cross

1 MS. MERRITT: No questions.

2 THE COURT: I take it he's excused from this hearing,

3 then.

4 You may step down. You're excused.

5 Next witness.

6 MS. MERRITT: Douglas Fencl, your Honor.

7 THE COURTROOM DEPUTY: Would you raise your right

8 hand, please.

9 (Douglas Fencl affirmed.)

10 THE COURTROOM DEPUTY: Have a seat, please.

11 Would you state your full name for the record and

12 spell your last name.

13 THE WITNESS: Douglas J. Fencl, F as in frank, E-N as

14 in Nancy, C-L.

15 THE COURTROOM DEPUTY: Thank you.

16 DIRECT EXAMINATION

17 BY MS. MERRITT:

18 Q. Agent Fencl, how are you employed?

19 A. I'm a special agent with the FBI, assigned to the Kansas  
20 City office.

21 Q. How long have you been employed with the FBI?

22 A. 25 years.

23 Q. And when were you first asked to be part of the  
24 investigation concerning the Oklahoma City bombing?

25 A. It was four or five days after the bombing.

430

Douglas Fencl - Direct

1 Q. And what was your first participation with respect to the  
2 bombing?

3 A. I was assigned to a squad headed by Tom Moore.

4 Q. When was the first time you met with either Mr. Kessinger  
5 or Mr. Elliott?

6 A. I met Mr. Kessinger the first time on April 30. I don't  
7 think I ever met Mr. Elliott.

8 Q. Did you ever have any conversations by telephone with  
9 Mr. Kessinger prior to that date?

10 A. No.

11 Q. And what was the purpose of your meeting on April 30, 1995?

12 A. To show Mr. Kessinger a photo spread.

13 Q. And who were you with?

14 A. I was with Special Agent Koziol and Detective Bob Story  
15 from Junction City, Kansas.

16 Q. Do you know whose decision it was to show a photo spread to  
17 Mr. Kessinger on that date?

18 A. I can just say that I was instructed by my supervisor, Tom

19 Moore, to go show him one.

20 Q. Now, were all three of you present when Mr. Kessinger

21 viewed a photo spread on that date?

22 A. Yes.

23 Q. And can you tell me what instructions, if any, you gave to

24 Mr. Kessinger prior to showing him the photo spread?

25 A. I told Mr. Kessinger we were going to show him a photo

Douglas Fencl - Direct

1 spread; that he should only rely on his memory of events which

2 he participated in. We told him that there may or may not be a

3 photograph of an individual there that he would recognize. We

4 told him not to guess, to only pick if he was certain.

5 We told him to look at each photograph before he made

7 Q. Did you make any comment to Mr. Kessinger about avoiding

8 any media he may have seen?

9 A. I didn't, no.

10 Q. Did you hear anyone else make that admonishment to him?

11 A. I did not.

12 Q. So you don't recall anybody mentioning the media during

14 A. I don't recall that, no.

15 Q. Now, who is the agent that was primarily speaking with

16 Mr. Kessinger on this date?

17 A. I was.

18 Q. So it was you that showed him the photographs?

19 A. Yes.

21 of prior to showing him the photographs?

22 A. I believe so, yes.

23 Q. And when you showed him the photographs, what did he do?

24 A. He looked -- I watched him and he looked at every

25 photograph. It took him 5 or 10 seconds and then he pointed to

Douglas Fencl - Direct

1 photograph No. 2.

2 Q. When you say 5 or 10 seconds, was that that his gaze rested

3 for 5 or 10 seconds on each photograph in the spread, or that

4 it took him 5 or 10 seconds for the whole thing?

5 A. No, it was the entirety of the whole thing.

6 Q. Did he appear to you to be fairly certain in his selection

7 of this individual?

8 A. Yes.

9 Q. Did he make any comments or statements while he was viewing

10 the photographs?

11 A. No. When he pointed at the picture, he said, This is the  
12 same guy that I rented the Ryder truck to.

13 Q. He said he rented the Ryder truck to the guy?

14 A. Or no, that he saw rent the Ryder truck. Excuse me.

15 Q. As you sit here today, do you remember which one of those

16 two sentences he said?

17 A. He saw the guy rent the Ryder truck, the same guy.

18 Q. Who rented the Ryder truck?

19 A. Yes.

20 Q. Prior to showing him the photographs, did you have any

21 preliminary discussions with him about the description of

22 either of the two individuals who he saw on April 17, 1995, at

23 Elliott's Body Shop?

24 A. No.

25 Q. Did you have any discussion as to whether there was one or

Douglas Fencl - Direct

1 two individuals that he saw on April 17, 1995?

2 A. Not that I recall.

3 Q. Do you recall anybody mentioning a second individual --  
4 whether it was you or one of the other agents or  
5 Mr. Kessinger -- during the time you were with him on April 30,  
6 1995?  
7 A. Not that I recall.  
8 Q. Did you give him any admonishments after he finished  
9 selecting the photograph?  
10 A. No.  
11 Q. Did you make any -- you didn't instruct him not to watch  
12 any media accounts even after he made the selection?  
13 A. I didn't, no.  
14 Q. Did you hear any of the other agents you were with give him  
15 that admonishment?  
16 A. No.  
17 Q. Did you or any other agent make any comment about his  
18 selection of photograph No. 2?  
19 A. No.  
20 Q. Now, have you had an opportunity to meet with Mr. Kessinger  
21 since April 30, 1995?  
22 A. No.  
23 Q. Was this your one and only encounter with him?  
24 A. Yes.  
25 MS. MERRITT: Your Honor, if I may have a moment.

Douglas Fencl - Direct

1 THE COURT: Yes.  
2 MS. MERRITT: I have no further questions.  
3 THE COURT: Any questions?  
4 MR. GOELMAN: Briefly, your Honor.  
5 THE COURT: Mr. Goelman, all right.  
6 CROSS-EXAMINATION

7 BY MR. GOELMAN:

8 Q. Agent Fencl, you told Ms. Merritt that you don't recall  
9 telling Mr. Kessinger that he should avoid contact with the  
10 media. Is that right?

11 A. I don't recall that, no.

13 rely --

14 MS. MERRITT: Objection, your Honor. This is leading.

15 He's already testified he doesn't remember that.  
16 THE COURT: Overruled.

17 BY MR. GOELMAN:

18 Q. Do you remember telling Mr. Kessinger that he should rely  
20 in the media?

21 A. Yes.

22 Q. And do you remember whether or not you put this in your  
23 302, sir?

24 A. Yes, it was in my 302.

25 Q. You indicated that Agent Moore was your supervisor?

Douglas Fencl - Cross

1 A. That's correct.  
2 Q. On April 30, 1995, before going out to see Mr. Kessinger,

3 did you have a conversation with Agent Moore?

4 A. Yes, I did.

5 Q. What was that conversation about?

6 A. It was about the photo spread and how to present it.

7 Q. And did you receive specific instructions from Agent Moore  
8 on how to present that photo spread?

9 A. That's correct.

10 Q. Do you remember what they were?

11 A. Yeah.

12 Q. What were they?

13 A. To rely on his own memory of events which he personally  
14 participated in, not to rely on anything that he had seen in

15 the media, not to guess; that there may or may not be a picture  
16 of an individual that he could identify, and to look at all the  
17 photographs before he makes a selection.

18 Q. And when you and Agent Koziol and Officer Story went out to  
19 visit with Mr. Kessinger, did you, in fact, give Mr. Kessinger  
20 those instructions?

21 A. Yes.

22 Q. What was Mr. Kessinger's reaction to your instructions?

23 A. Didn't seem to have any reaction. He listened and that was  
24 it.

25 Q. Before showing Mr. Kessinger the photo spread, did you tell

436

Douglas Fencl - Cross

1 him that Mr. McVeigh's picture was part of that photo spread?

2 A. No.

3 Q. Did you say anything to him about what -- whether that  
4 photo spread may contain someone who he saw rent a Ryder truck?

5 A. No.

6 Q. And what happened after you gave Mr. Kessinger those  
7 instructions?

8 THE COURT: He's already testified to all this.

9 MR. GOELMAN: Your Honor, just trying to elicit how he  
10 handed him the spread, itself.

11 THE COURT: Well, what do you mean how he handed it to  
12 him?

13 MR. GOELMAN: Whether there was any indication of  
14 which --

15 THE COURT: Well, you're just repeating his previous  
16 examination, wasting time.

17 MR. GOELMAN: I'll move on, your Honor.

18 BY MR. GOELMAN:

19 Q. I'm showing you what's already been admitted, Government's  
20 Exhibit 14. Do you recognize this?

21 A. Yes.

22 Q. What is it?

23 A. A photo spread.

24 Q. And when have you seen that photo spread before?

25 A. On April 30.

437

Douglas Fencl - Cross

1 Q. Is that the one you showed Mr. Kessinger?

2 A. Well, I have to see the back of it to see.

3 Yes. This is the one, a copy of the one.

4 Q. What did you have Mr. Kessinger do after he identified a  
5 picture, sir?

6 A. I told him to sign and date the photograph which he  
7 selected; and then I initialed it, Agent Koziol initialed it,  
8 and Detective Story initialed it and dated it.

9 MR. GOELMAN: I have nothing further.

10 MS. MERRITT: No further questions, your Honor.

11 THE COURT: You may step down. You're excused be in  
12 recess till 1:30.

13 (Recess at 12:03 p.m.)

14 \* \* \* \* \*

15 INDEX

16 Item

Page

17 WITNESSES

|    |   |     |
|----|---|-----|
| 18 | Raymond Rozycski                            |     |
| 19 | Direct Examination Continued by Ms. Merritt | 307 |
| 20 | Cross-examination by Mr. Mackey             | 322 |
| 21 | Redirect Examination by Ms. Merritt         | 331 |
| 22 | Jeanne Boylan                               |     |
| 23 | Direct Examination by Ms. Merritt           | 334 |

|    |                                     |     |
|----|-------------------------------------|-----|
| 24 | Recross-examination by Mr. Mackey   | 349 |
| 25 | Redirect Examination by Ms. Merritt | 354 |

438

|    |                                      |   |     |  |
|----|--------------------------------------|---|-----|--|
| 1  | Scott Crabtree                       |   |     |  |
| 2  | Direct Examination by Ms. Merritt    | 357   |     |  |
| 3  | Cross-examination by Mr. Mendeloff   | 375   |     |  |
| 4  | Jon Hersley                          |   |     |  |
| 5  | Direct Examination by Ms. Merritt    | 383   |     |  |
| 6  | Cross-examination by Mr. Mendeloff   | 404   |     |  |
| 7  | Redirect Examination by Ms. Merritt  | 412   |     |  |
| 8  | Recross-examination by Mr. Mendeloff | 414   |     |  |
| 9  | Ronald Koziol                        |   |     |  |
| 10 | Direct Examination by Ms. Merritt    | 415   |     |  |
| 11 | Cross-examination by Mr. Mendeloff   | 427   |     |  |
| 12 | Douglas Fencl                        |   |     |  |
| 13 | Direct Examination by Ms. Merritt    | 429   |     |  |
| 14 | Cross-examination by Mr. Goelman     | 434   |     |  |
| 15 | PLAINTIFF'S EXHIBITS                 |   |     |  |
| 16 | Exhibit                              | Offered Received Refused Reserved Withdrawn |     |  |
| 17 | 11                                   | 354   | 354 |  |
| 18 | 22                                   | 327   | 328 |  |
| 19 | 35                                   | 325   | 325 |  |
| 20 | 36                                   | 408   | 409 |  |
| 21 | 50                                   | 323   | 323 |  |
| 22 | * * * * *                            |   |     |  |
| 23 |                                      |   |     |  |
| 24 |                                      |   |     |  |
| 25 |                                      |   |     |  |

439

1                   REPORTERS' CERTIFICATE

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

4       Dated at Denver, Colorado, this 19th day of February,  
5   1997.

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7                   

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8                   Paul Zuckerman

9                   

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10                  Bonnie Carpenter

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