b6 b7C defense charged that [ ] improperly elicited testimony [ ] about murders, robberies, and other crimes committed by persons associated with the Aryan Nations.[1142]

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[1142] See Memorandum in Support of Defendants' Motions, January 6, 1993, ¶¶ 55-81 (hereinafter cited as "Defendants' Memorandum").

b3 (2) b7C b6 [1143] [ ] The informant, Kenneth Fadeley, testified at trial that the proposed group would fight against the "Zionist Organized Government," or "ZOG," referring to the U.S. Government. Trial Testimony of Kenneth Fadeley, April 20, 1993, at 45, 82-90.

Pages 340-342 of Report
have been withheld
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5 U.S.C. 552(b)(3), Rule 6(e)
5 U.S.C. 552(b)(5),
5 U.S.C. 552(b)(6)
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[1146] The defense claimed that Howen improperly testified by stating that Weaver was not a member of the Order 1 or Order 2. Defendants' Memorandum, ¶ 54.

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have been withheld
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5 U.S.C. 552(b)(3), Rule 6(e)
5 U.S.C. 552(b)(5),
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1154 This refers to the "Queen of Babylon" letter, dated January 22, 1991, and sent to U.S. Attorney Maurice Ellsworth.

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Pages 349-350 of Report
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5 U.S.C. 552(b)(3), Rule 6(e)
5 U.S.C. 552(b)(5),
5 U.S.C. 552(b)(6)
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The prosecution, in its response to the defense motion, asserted that the testimony of [ ] about the Aryan Nations and The Orders 1 and 2 was not unfairly prejudicial to the defendants. It argued that:

> While the prosecution has no evidence at this time that Randall Weaver was a member of any of these groups . . . [the testimony] about the various action groups, their leaders and members, the acts, crimes and wrongs they committed, and their penetration, undoing and arrest facilitated by undercover informants and cooperating codefendants, was relevant to understanding the taped statements and transcripts. With this background, the Grand Jurors could better understand the prosecution's evidence about the nature, scope and objective of the conspiracy, the leaders of the conspiracy and why Randall and Vicki Weaver formed their action group out of family members and "adopted" son, Kevin Harris, particularly after learning . . . that Randall Weaver's statements had been tape recorded by [an] undercover informant [for the BATF].[1160]

The prosecution also noted that the grand jury had been presented a series of letters written by Vicki Weaver, one of which contained a quotation attributed to "Mathews." It then explained to the grand jury who Mathews was and his significance to the Weavers:

> To those who participated in the Order investigation and prosecution, the "Matthews" [sic] is Robert Matthews [sic] and the quotation comes from one of several documents authored and signed by Robert Matthews [sic] shortly before his violent death on Whidbey Island [Washington] in December 1984 in a violent confrontation and shootout with FBI Agents attempting to arrest him. . . . Again, the testimony about the Order, its leader Robert Matthews [sic], the acts, crimes and wrongs the group committed and the manner in which he died when linked to the Weaver family's threats of violence, murder and death is relevant to explaining the content of . . . [other grand jury exhibits] and the conspiracy, its goals and objectives, the murder of William

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[1160] Response to Motions to Disqualify United States Attorney's Office, January 25, 1993, at 84-85.

> Degan and the use of firearms against suspected federal agents.[1161]

In a pretrial order denying the defense motion to dismiss the indictment, the trial court stated:

> It may be arguable the white supremacist or white separatist testimony went on for a period longer than its limited stated purpose might warrant. It is the court's understanding the testimony was intended as foundation or background to supply meaning to a tape recording and a letter written by Vicki Weaver. The intent, as stated by the prosecution in a cautionary instruction before testimony got under way on this issue and again during the middle of this testimony, was as background only.[1162] This was not lost on the grand jury, as evidenced by questions by grand jurors regarding the relevance of this testimony. The prosecution also called witnesses from within the white supremacist or white separatist groups. The testimony of witnesses involved in these organizations was that the defendants were not known members of supremacist or separatist groups. The prosecution stated this on several occasions as well, both on its own initiative and in response to the questions of grand jurors.[1163]

[1161] Id. at 86-87.

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[1162] [ ]

[1163] See Lodge Order, February 26, 1993, at 9-11. The defense motion also mentioned that some of the testimony regarding the Aryan Nations and the Orders 1 and 2 constituted impermissible hearsay. Defendants' Memorandum, January 6, 1993, ¶ 72. [

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(continued...)]

e. Alleged Improper Prosecutorial Statements to Grand Jury Regarding Its Investigative Jurisdiction

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[1163] (...continued)

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Pages 354-356 of Report
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5 U.S.C. 552(b)(5),
5 U.S.C. 552(b)(6)
and
5 U.S.C. 552 (b)(7)(C)

b3 6(a) b6 b7C [[1173] [ ] did not correct [ ] representation to the grand jury.

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f. Decision to Seek the Death Penalty

Count 5 of the second superseding indictment charged Randy Weaver and Kevin Harris with the murder of Deputy U.S. Marshal William Degan while he was "engaged in or on account of the performance of his official duties."[1176] Section 1111 of Title 18, provides for a sentence of death or life imprisonment upon conviction for the murder of a federal officer.

Department of Justice policy requires the approval of the Department's Criminal Division before a U.S. Attorney may recommend application of the death penalty.[1177] [

b5] the trial court considered it a potential death-penalty case from the time the first indictment was returned charging Weaver and Harris with Degan's murder. The Court advised both defendants at their arraignments that the maximum penalty for conviction on that count was death and, as a consequence, gave them additional appointed counsel,

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[1176] See 18 U.S.C. §§ 2, 115, 1111 and 1114.

[1177] U.S. Attorney's Manual § 9-2.148 (1992).

increased the compensation given to counsel, and provided for additional investigative expenses.[1178]

On January 8, 1993, the defense filed a motion claiming that the possible penalties for Count 5 could not, under the Constitution, include the death penalty. The defense argued that the capital punishment provision of 18 U.S.C. § 1111 had been invalidated by virtue of the Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972) and subsequent rulings by the Ninth Circuit.[1179] The prosecution responded that the capital provision of section 1111 was still viable and that the Court could fashion standards for its application that met the requirements of Furman.[1180] The prosecution's response recognized that this position had been rejected by the Fifth Circuit and by the District of Alaska.[1181]

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[1178] See Order Respecting Potential Penalty, February 26, 1993, at 1; Memorandum [on behalf of Harris] in Support of Motion for Order Respecting Potential Sentence, January 8, 1993, at 3-4 (hereinafter cited as "Harris Death Penalty Memo"); Memorandum [on behalf of Weaver] in Support of Motion for Order Respecting Potential Sentence, January 14, 1993, at 3-4 (hereinafter cited as "Weaver Death Penalty Memo").

[1179] Harris Death Penalty Memo, at 3-4, 6. See United States v. Harper, 729 F.2d 1216, 1225 (9th Cir. 1984). Counsel for Weaver subsequently joined in the motion. Weaver Death Penalty Memo, at 3-4.

[1180] Furman requires that 1) the sanction of death be proportionate to the crime; 2) the sentencing scheme narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder, and 3) the sentencer be allowed to consider all evidence that tends to mitigate moral culpability and militate against a sentence of death. See Zant v. Stephens, 462 U.S. 862, 877 (1983); Response to Motion for Order Respecting Potential Sentence, January 25, 1993, at 2-4.

[1181] See United States v. Woolard and Bruner, 990 F.2d 819 (5th Cir. 1993); United States v. Cheely, 814 F.Supp. 1430 (D. Alaska 1992).

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Page 359 of Report
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5 U.S.C. 552(b)(5),
5 U.S.C. 552(b)(6)
and
5 U.S.C. 552 (b)(7)(C)

Shortly thereafter, on February 26, 1993, the trial court issued an order adopting the defense's position that the death penalty provision of 18 U.S.C. § 1111 was void under Furman and Ninth Circuit precedent.[1189]

3. Discussion

a. Scope of the Indictment: The Conspiracy Count

We have found no evidence that the prosecution acted without a good faith belief that sufficient proof existed to support the conspiracy charge, notwithstanding the often harsh accusations made by the defense before and during trial.

[1186]

[1187]

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[1189] See Order Respecting Potential Penalty, February 26, 1993, at 2-3. See also United States v. Steel, 759 F.2d 706, 709 (9th Cir. 1985); United States v. Kennedy, 618 F.2d 557, 558 (9th Cir. 1980).

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at trial, the defense effectively attacked the theory, claiming that the Government was trying to "demonize" Weaver by charging that everything he did proved that he hated the Government.[1191]

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As for the defense claim that many of the overt acts charged in the conspiracy count were without evidential support, the magistrate denied the defense motion to dismiss the indictment after considering whether the allegations about which the defense had complained were "relevant to the charge contained in the indictment and [were] inflammatory and prejudicial."[1192]

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[1191] Closing Argument of Gerry Spence, June 15, 1993, at 10, 46.

[1192] See Boyle Order at 8; United States v. Terrigno, 838 F.2d 371, 373 (9th Cir. 1988) (motion to strike surplusage language from an indictment is within the sound discretion of the trial court).

Page 362 of Report
has been withheld
in its
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5 U.S.C. 552(b)(3), Rule 6(e)
5 U.S.C. 552(b)(5),
5 U.S.C. 552(b)(6)
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[1197] See U.S. Department of Justice, Federal Grand Jury Practice, January 1993, at 104; United States Attorneys' Manual § 9-11.233.

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Page 364 of Report
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pursuant to
5 U.S.C. 552(b)(3), Rule 6(e)
5 U.S.C. 552(b)(5),
5 U.S.C. 552(b)(6)
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1208 The conspiracy count also cites 18 U.S.C. § 3, which defines an accessory after the fact as someone who, "knowing that an offense against the United States has bee committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment."

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[1211] A prosecutor should not pursue criminal charges when he "knows that the charges are not supported by probable cause," or where there is "insufficient admissible evidence to support a conviction." ABA Standards for Criminal Justice: The Prosecution Function, Standard 3-3.9(a)(3d. ed. 1992).[

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D. Prosecutorial Conduct Before the Grand Jury

Although we are not bound by the court's finding that did not give improper testimony in the grand jury, we agree with its conclusion that dismissal of the indictment was not required. We find no support for a claim that misconduct occurred, which "undermined the grand jury's ability to make an informed and objective evaluation of the evidence."[1212] We look at the matter, then, to determine whether any impropriety was committed,[1213]

In discussions with grand juries, prosecutors should be careful not to testify or disclose facts not in evidence so that they do not become an unsworn witness.[1214] Prosecutors do not testify improperly when they summarize evidence presented to the grand jury;[1215] when they explain the law and the relationship of the evidence to legal theories;[1216] and when they speak about

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[1212] See United States v. Sears, Roebuck & Co., 719 F.2d 1386, 1391-92 (9th Cir. 1983), cert. denied, 465 U.S. 1079 (1984); Order, February 26, 1993, at 5.

[1213] See United States v. Birdman, 602 F.2d at 554-555.

[1214] U.S. Department of Justice, Federal Grand Jury Practice, January 1993, at 61.

[1215] United States v. Birdman, 602 F.2d at 560 (prosecutor not testifying when he reviews the evidence presented to the grand jury); United States v. Ogden, 703 F.2d 629, 637 (1st Cir. 1983) (clearly apparent from prosecutor's statement that he was summarizing FBI agent's prior testimony).

[1216] United States v. Troutman, 814 F.2d 1428, 1443 (10th Cir. 1987)(prosecutor can advise the grand jury of applicable statutes); United States v. Sears, Roebuck & Co., Inc., 719 F.2d at 1393-94(in commenting on testimony, prosecutor furnished

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"matters of formality rather than matters substantively material to the indictment" or about "insubstantial" or "arguably uncontested" issues.[1217]

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guidance to grand jury on law and weight of the evidence); United States v. DeRosa, 783 F.2d 1401, 1405 (9th Cir.), cert. denied, 477 U.S. 908 (1986)(prosecutor properly commented on agent's testimony in directing focus of jurors to correct legal issue); United States Attorneys' Manual § 9-11.020 (the "prosecutor's responsibility is to advise the grand jury on the law").

[1217] United States v. Troutman, 814 F.2d at 1443. See also ABA Model Code of Professional Responsibility, DR 5-101(B)(1) and (2).

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It is not improper for a prosecutor to express an opinion as to the merits of the case "as long as it is clear to the jury that the opinion is based only on the evidence that is before the jury and the jury itself can evaluate."[1219]

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a prosecutor should be careful not to delve into facts which are not yet a matter of record, even if they are likely to be introduced later.[1223]

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[1219] United States v. McKenzie, 678 F.2d 629, 632 (5th Cir.), cert. denied, 459 U.S. 1038 (1982). See U.S. Department of Justice, Federal Grand Jury Practice, January 1993, at 63.

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[1223] See U.S. Department of Justice, Federal Grand Jury Practice, January 1993, at 54.

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Prosecutors are accorded wide latitude in presenting their cases to the grand jury.[1226] However, although the prosecutor "properly has wide discretion in grand jury proceedings . . . this discretion is not boundless."[1227]

The Department of Justice has set forth general standards of conduct for prosecutors before the grand jury:

> In his/her dealings with the grand jury, the prosecutor must always conduct himself/herself as an officer of the court whose function is to insure that justice is done and that guilt shall not escape nor innocence suffer. He/she must recognize that the grand jury is an independent body, whose functions include not only the investigation of crime and the initiation of criminal prosecution but also the protection of the citizenry from unfounded criminal charges. The prosecutor's responsibility is to advise the grand jury on the law and to present evidence for its consideration. In discharging these responsibilities, he/she must be scrupulously fair to all witnesses and must do nothing to

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[1226] United States v. Mechanik, 475 U.S. 66, 74 (1986) (O'Connor, J., concurring).

[1227] United States v. Al Mudarris, 695 F.2d 1182, 1184-85 (9th Cir.), cert. denied, 461 U.S. 932 (1983).

inflame or otherwise improperly influence the grand jurors.[1228]

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[1228] United States Attorneys' Manual § 9-11.020. The American Bar Association's Criminal Justice Standards similarly provide that a prosecutor "should not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury." ABA Standards for Criminal Justice: The Prosecution Function, Standard 3-3.5(b)(3d ed. 1992).

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Page 372 of Report
has been withheld
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5 U.S.C. 552(b)(5),
5 U.S.C. 552(b)(6)
and
5 U.S.C. 552 (b)(7)(C)

Page 373 of Report
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5 U.S.C. 552(b)(5),
5 U.S.C. 552(b)(6)
and
5 U.S.C. 552 (b)(7)(C)

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A prosecutor may present a variety of information to the grand jury without becoming a witness. "The key element is whether the prosecutor has placed his or her credibility on the line. If he or she has done so, then the prosecutor may have improperly become a witness."[1236]

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[1237] We find no grounds to conclude that were intended to inflame the grand jurors and divert it from the other evidence.[

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c. Prosecutorial Statements Regarding Investigative Jurisdiction of the Grand Jury

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The United States Attorneys' Manual provides that the prosecutor is "to advise the grand jury on the law and to present evidence for its consideration."[1238] Instructions on the law must be accurate and not deliberately misleading.[1239] Although an indictment returned "by a legally constituted and unbiased grand jury" is presumed valid,[1240] an indictment may be subject to challenge, if the prosecutor's instructions are so flagrantly

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[1236] U.S. Department of Justice, Federal Grand Jury Practice, January 1993, at 62 (citation omitted).

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[1238] United States Attorneys' Manual, § 9-11.020.

[1239] See United States v. Wright, 667 F.2d 793, 796 (9th Cir. 1982).

[1240] Costello v. United States, 350 U.S. 359, 363 (1956).

erroneous that the grand jury is deceived in some significant way.[1241]

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[1241] See United States v. Wright, 667 F.2d at 796. Compare United States v. Linetsky, 533 F.2d 192, 200-01 (5th Cir. 1976).

[1242] See United States v. Al Mudarris, 695 F.2d 1182, 1188 (9th Cir. 1983), cert. denied, 461 U.S. 932 (1983)(prosecutor's right to exercise discretion and selectivity in presenting evidence to the grand jury does not permit him to mislead the grand jury in the performance of its duties).

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Page 376 of Report
has been withheld
in its
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pursuant to
5 U.S.C. 552(b)(3), Rule 6(e)
5 U.S.C. 552(b)(5),
5 U.S.C. 552(b)(6)
and
5 U.S.C. 552 (b)(7)(C)

d. Decision to Seek the Death Penalty

[1240] The prosecution chose to proceed based on arguments raised by the Department of Justice in an appeal then pending before the Ninth Circuit.[1247] We do not fault the prosecution for adopting the Department's legal theory and seeking a ruling from the trial court based on that theory.

There is no evidence to dispute the good faith of the prosecution in making the application to seek the death penalty.[1251] We are not convinced, though, that this case presented

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[1247] Response to Motion for Order Respecting Potential Sentence, January 25, 1993, at 2-4.

[1248] The trial court ruled that the death penalty did not apply as a matter of law and did not address the factual underpinnings of the prosecution's position.

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a good set of facts to test the viability of the death penalty in Idaho was justified.

4. Conclusion

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65]we did not find that the prosecutors charged Weaver and Harris in bad faith,[

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]Finally, the decision to seek the death penalty may be viewed as overreaching by the prosecution.

1252 See United States v. Birdman, 602 F.2d at 553 (prestige of prosecutor's office may enhance his credibility).

M. Alleged Problems with the FBI's Participation and Cooperation in the Discovery Process

1. Introduction

From the beginning of its preparation of the Weaver case for trial, it was always the intent of the U.S. Attorney's Office in Boise, Idaho ("USAO") to provide discovery to the defense in accordance with a modified open discovery policy.[1253]

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In addition, some believed that the failure of the FBI laboratory to process materials and to conduct tests in a timely fashion further impaired the ability of the USAO to respond to the discovery demands of the Weaver case.[1255] A final discovery problem surfaced during trial when the FBI produced, in response to a defense subpoena, additional documents related to the FBI shooting incident report which the USAO maintained it had requested in discovery throughout the pretrial period. It has been alleged that these problems and the delays and embarrassment that resulted were unnecessary and adversely affected the Weaver case.

[1253] This modified open discovery policy provided the defense with greater access to governmental materials and at an earlier time than required under the federal discovery rules.

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[1254] For a discussion of issues surrounding the scope of the indictment, see Section IV(L), supra.

[1255] For a complete discussion of the issues surrounding the performance of the FBI laboratory and the impact of its actions on the discovery process and pretrial preparation in the Weaver case, see discussion in Section IV(J).

2. Statement of Facts

a. Defining the Scope of Discovery

Immediately after Harris and Weaver surrendered to law enforcement authorities, the USAO began preparing the case for indictment and trial. Important components of this process included taking steps to insure that evidence was located and preserved and developing a discovery strategy.[1256] Due to the intense media interest in the Weaver case coupled with the defense allegations that law enforcement personnel had acted unlawfully and that government officials were participating in a coverup, members of the USAO decided to adopt a modified open discovery policy.[1257] Such a discovery policy was consistent with the USAO practice in handling other cases in their district.

On October 16, the USAO and defense counsel entered into an agreement captioned "Stipulation and Reciprocal Request for Discovery and Inspection, Notice of Alibi and Notice of Mental Condition" which set forth the discovery obligations of the parties. Pursuant to the terms of the stipulation, the parties were to provide the reciprocal disclosure of the materials stated in Rule 16(a)(1) and 16(b)(1) and the "reciprocal pre-trial disclosure and inspection of Jencks Act (18 U.S.C. 3500) materials, Rule 26.2, F.R. Crim. P materials and transcripts of testimony and exhibits presented to the Grand Jury."[1258] It was further agreed that "rough notes [were] generally not Jencks or Rule 26.2 materials unless they [were] a substantially verbatim recital of the trial or intended trial witness' oral statement, or seen, signed or otherwise adopted by the witness . . ."[1259] The stipulation added that "in the exchange of Jencks or Rule 26.2 materials including rough notes, the parties

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[1258] Stipulation and Reciprocal Request for Discovery and Inspection, Notice of Alibi and Notice of Mental Condition, filed October 16, 1992, at 2.

[1259] Id.

[were] authorized to redact information from those materials as permitted by case law, statute or rule, including but not limited to . . . information directly or indirectly relating to equipment, tactics and strategies of investigation, apprehension or arrest and case preparation. Such redaction [was to] be subject to in camera inspection by the Court upon written motion or objection of a party."[1260] With regard to the timing of discovery the stipulation stated that, "[i]t is the intention of the parties to accelerate the time table for discovery and inspection to a time significantly in advance of trial so that all pre-trial motions are fully and promptly made and ruled on, so that trial preparation is completed in advance of trial, so that unjustifiable delay and expense are eliminated which may result from literal application of the statutes and rules, and so that a fair, just and truthful determination of the charges pending against the defendants may be resolved consistent with the security concerns of the Court, the parties, the defendants and prospective witnesses. . . . The parties further stipulate[d] and agree[d] to file a written response to [the] stipulation on or before October 23, 1992, and on a continuing basis thereafter pursuant to Rules 12.1(c), 12.2(a) and (b) and 16(c), F.R. Crim. P."[1261]

A week after signing of the stipulation, the government provided its initial discovery response.[1262] The government continued to provide material during the pretrial period and into the trial. Indeed, the government filed multiple addenda summarizing the huge volume of materials that had been produced to the defense, including video tapes, audio tapes, investigative reports, laboratory reports and thousands of pages of documents.

Much of the material that the government produced in discovery originated from the FBI and was produced on a timely basis. However, questions have been raised as to whether actions by the FBI impeded the discovery process. In particular, allegations have been made that the FBI failed to cooperate with the USAO in meeting its discovery obligations and unjustifiably resisted producing certain documents. These actions are alleged to have impacted adversely on the prosecution of the Weaver case.

[1260] Id. at 3.

[1261] Id. at 4-5.

[1262] See Response of the United States to Stipulation and Request for Discovery and Inspection, filed October 23, 1992.

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5 U.S.C. 552(b)(6)
and
5 U.S.C. 552 (b)(7)(C)

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(1) Documents at Issue

The first document at issue was the shooting incident report dated September 30, 1992. That document was a report prepared by a shooting incident review team of the Inspection Division of the FBI and represented the findings of an administrative inquiry into the August 22, 1992 shootings by the HRT at Ruby Ridge which resulted in the death of Vicki Weaver and the injuries to Kevin Harris and Randy Weaver.[1283] It consisted of: a 5-page cover memo with findings from [redacted] dated September 30, 1992; a 5-page memo from [redacted] dated September 30, 1992 summarizing the events surrounding the administrative inquiry; the statements of [redacted] some of which were signed sworn statements and others which were in the form of a FD-302[1284]; autopsy reports of the three individuals killed at Ruby Ridge; a statement of the prosecutive status of the subjects; crime scene photographs and diagrams; and news clippings.

[1281] [redacted]

[1282] [redacted]

[1283] See discussion of this administrative inquiry and the report in Section IV(G).

[1284] The FBI FD-302 is the form that FBI agents use to report or summarize the interviews that they conduct.

Pages 388-394 of Report
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5 U.S.C. 552(b)(6)
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5 U.S.C. 552 (b)(7)(C)

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On March 26, the USAO filed its Eighth Addendum to its Response to the Discovery Stipulation. In that document, the government identified additional items that were being produced in discovery including the November 9, 1992 Review Group Memo, the situation reports, the shooting incident report, the

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