b. Failure To Provide Expertise and the Hiring of Independent Experts

Our investigation revealed a lack of cooperation and initiative by the Laboratory beyond specific tests requested. We found that the requisite expertise was present at the Laboratory, but it was something that the USAO had to discover.[

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We believe a more coordinated, professional, creative, and cooperative approach to litigation and investigations would be far more helpful than the process we discovered in the Weaver matter.

c. Discovery Demand for Test Firings and Laboratory Notes

Our investigation found that the delay in turning over Laboratory notes and test firings was one of several examples of the FBI resistance to, disagreement with, and misunderstanding of its discovery obligations in the Weaver case. We found the FBI's actions and decisions inappropriate.

We found no evidence that the delays in the Laboratory tests were designed or intended to postpone the trial or obstruct justice.

4. Conclusion

The lack of coordination and communication both within the FBI and with the USAO appears to be the major cause of the delays and the other problems examined in this section of the report.

K. The Preliminary Hearings of Weaver and Harris

1. Introduction

Following their arrests, government agents transported Weaver and Harris to hospitals to receive medical treatment for the gunshot wounds that they had suffered. Thereafter, the court decided to conduct separate preliminary hearings for the two men. In addition, the federal magistrate judges handling the preliminary hearings elected to combine the preliminary examination and detention hearing in one proceeding. The combined preliminary examination and detention hearing for Weaver was scheduled to begin on September 10, 1992; the combined preliminary examination and detention hearing for Harris was scheduled to begin on September 14, 1992.

On Friday, September 11, 1992, one day after the Weaver preliminary hearing had begun, U.S. Attorney Ellsworth appeared in court to argue a motion seeking to continue the preliminary hearing of Harris from September 14 to September 15 in order to accommodate the additional security needs presented by the visit of Vice President Quayle to Boise on September 14. It has been alleged that Ellsworth represented in court that Harris would be permitted a full preliminary hearing that would not be terminated or interrupted by the return of a grand jury indictment. With the understanding that a full preliminary hearing would be conducted, counsel for Harris consented to the continuance.

The preliminary hearing of Harris began on September 15. On the second day of the preliminary hearing, the proceedings were interrupted by Assistant U.S. Attorney Ronald Howen, who informed the court that the grand jury had just returned an indictment against Weaver and Harris. The Weaver preliminary hearing was also interrupted and the parties informed of the indictment. Although the magistrate judges ultimately decided to discontinue the preliminary hearings, they afforded Weaver and Harris the opportunity to question witnesses during the detention phase of the hearings.

It has been alleged that the government acted improperly when it sought grand jury indictments while the preliminary hearings were in progress. In particular, it has been argued that once the government elected to proceed by preliminary hearing, it was estopped from abandoning the preliminary hearing. With regard to the Harris preliminary proceeding, the question has been raised whether the government, in light of the Ellsworth representations, was obliged to complete the preliminary hearing and whether the failure to do so violated any legal or ethical rules.

2. Statement of Facts

a. Arrest and Initial Processing of Weaver and Harris

On August 23, 1992, a criminal complaint was filed charging Weaver and Harris with violations of 18 U.S.C. §§ 111, 1111 and 1114. Harris surrendered to federal authorities on August 30, and was taken for medical treatment to the intensive care unit at Sacred Heart Medical Center in Spokane, Washington. The next day, Weaver surrendered and was taken to St. Lukes Hospital in Boise for treatment. On September 2, 1992, U.S. Magistrate Judge Cynthia Imbrogno conducted the initial appearance of Harris in the hospital and continued his preliminary examination and detention hearing until September 14 because of his medical condition.

Assistant U.S. Attorney Howen originally planned to conduct joint preliminary hearings for Weaver and Harris but the delay caused by the medical treatment for Harris, coupled with federal time requirements, precluded this plan.[1015] As a result, the preliminary hearing for Weaver was scheduled for September 10th before Magistrate Judge Mikel Williams and the preliminary hearing for Harris was scheduled for September 14 before Magistrate Judge Lawrence Boyle. The magistrate judges decided to conduct the preliminary hearing and detention hearing in one proceeding.

Howen was assigned to handle the Harris preliminary hearing while Assistant U.S. Attorney Lindquist was assigned to handle the Weaver preliminary hearing.[1016] [

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[1015] See Transcript of Preliminary Hearing in United States v. Harris, MS 3934, September 16, 1992, at 43 (hereinafter cited as "Harris Preliminary Hearing Transcript"). Pursuant to Fed. R. Crim. P. 5 and 18 U.S.C. § 3060, the preliminary examinations needed to be conducted within 10 days of arrest. Rule 5 provides that a defendant charged with a nonpetty offense is entitled to a preliminary examination, "within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody . . . provided, however, that the preliminary examination shall not be held if the defendant is indicted . . . ." A federal magistrate judge may extend the time limits if the defendant consents to the extension or if a showing is made that "extraordinary circumstances exist and that delay is indispensable to the interests of justice."

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has been withheld
in its entirety
pursuant to
5 U.S.C. 552(b)(5),
5 U.S.C. 552(b)(6)
and
5 U.S.C. 552 (b)(7)(C)

b. September 10-11, 1992

The combined preliminary examination and detention hearing for Weaver began on September 10. On that day the government spent the entire day examining Deputy Marshal Roderick.[1025] When the preliminary hearing resumed on September 11, defense counsel cross-examined Roderick and, in the afternoon, the government conducted the direct examination of Deputy Marshal Cooper. At the end of the proceedings on September 11, it was agreed, at the request of defense counsel Gerry Spence, that the hearing would resume on September 16, 1992.[1026]

On Friday September 11, 1992, three days before the Harris preliminary hearing was to commence, U.S. Attorney Ellsworth, filed a motion and a supporting affidavit requesting that the Harris preliminary hearing be continued one day until September 15. Ellsworth explained that the Boise Chief of Police had expressed concern to him about being able to provide security to both the Harris preliminary hearing and to Vice President Quayle who was scheduled to visit Boise on September 14.[1027] In arguing the motion to the court, Ellsworth[1028] told the court that the U.S. Secret Service had also expressed concern over the increased security demands created by the Quayle visit.[1029] When Judge Boyle asked for Harris' position on the continuance, defense counsel Nevin replied:

> The primary concern that I have is that this not be simply an opportunity for the government to get a grand jury impaneled and to indict Mr. Harris and avoid the obligation to provide him with a preliminary hearing. And I've been afraid all along that was what was

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[1025] See Transcript of Preliminary Hearing in United States v. Weaver, No. MS-3934, September 10, 1992 (hereinafter cited as "Weaver Preliminary Hearing Transcript").

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[1027] See Motion to Vacate and Continue Preliminary and Detention Hearings, United States v. Harris, No. MS-3934, filed on September 11, 1992; Affidavit of Maurice O. Ellsworth, United States v. Harris, No. MS-3934, September 10, 1992. [ ]

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[1028] Ellsworth was arguing the motion because the Assistant U.S. Attorneys assigned to the case were unavailable. [ ]

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[1029] See Transcript of Motion Hearing, United States v. Harris, No. MS-3934, September 11, 1992, at 7.

> going to happen and that this would get delayed in some way so that would be possible.
>
> I understand . . . this is approximately the time when the grand jury sits and is available. And if this is just an effort to do that, then I certainly object to it.
>
> Now maybe Mr. Ellsworth could assure us or we could stipulate that a preliminary will be held on Tuesday and that there will not be an indictment filed which would supersede that, and in that case I would be glad to stipulate to it.[1030]

The court then invited comment from the Government to which Ellsworth responded:

> As indicated in my affidavit there is no underlying basis for this . . .beyond the representations to me of the chief of police of Boise. . . . [W]e are prepared and ready to go to the preliminary hearing on Monday. I am willing to give assurances that we intend to have a preliminary hearing and there is no ulterior motive other than the request of the chief of police of Boise that the -- he's concerned about his security people. . . .But there is no ulterior motive other than what's expressed in the motion and affidavit.[1031]

Thereafter, the following exchange occurred between the parties and the court,

> THE COURT: Okay. Do you gentlemen want to take a minute and talk privately and then I can come back in?
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> MR. NEVIN: Yeah, I mean if -- if what counsel is saying is that there is going to be a preliminary hearing on Tuesday no matter what, why that's fine. I -- we --no objection.
>
> THE COURT: So you would agree and stipulate to --
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> MR. NEVIN: Yeah.

[1030] Id. at 5-6.

[1031] Id. at 6-7.

THE COURT: -- to postpone the preliminary examination and detention hearing from Monday the 14th to Tuesday the 15th?

MR. NEVIN: Upon that condition, yes.

* * * * * *

MR. ELLSWORTH: The government has no problem with that stipulation.

THE COURT: All right. Well, let me just understand so I don't make a procedural mistake. And is it my understanding Mr. Nevin, that you agree based on the representations of the United States attorney that their motive is simply to honor requests by the chief of police regarding Mr. Quayle's visit to Boise, you will stipulate for a transfer of this -- or rescheduling of this from Monday until Tuesday?

MR. NEVIN: Yeah. And just so I don't make a mistake in what I'm saying. I read what Mr. Ellsworth has said as a guaranty that we'll have a prelim on Tuesday, and that there -- this is not an attempt to delay this proceeding so that an indictment could be filed or the grand jury could be impaneled, whatever. And that we will have a preliminary hearing on Tuesday no matter what. And upon that representation I stipulate that the matter may be continued until Tuesday.

THE COURT: Okay, you're not asking as a condition of your stipulation that they not subsequently impanel a grand jury and return an indictment if that's such?

MR. NEVIN: Yeah. No, I don't consider that to be part of our stipulation.

THE COURT: All right. Mr. Ellsworth, is that agreement adequate for you?

MR. ELLSWORTH: I have no problem with that agreement, Your Honor. . . .[1032]

[1032] Id. at 7-9.

Thereafter, Judge Boyle granted the motion to continue the preliminary hearing until September 15.[1033]

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[1033] Id. at 10.

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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)

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(2) Beginning of the Harris Preliminary Hearing

The preliminary hearing of Harris began on September 15. For the first two hours, Howen argued 10 motions that the government had filed late the previous day.[1045] Thereafter, Lindquist spent the remaining part of the day conducting the direct examination of Special Agent Gregory Rampton while Howen left the hearing and presented witnesses before the grand jury in another room in the courthouse.

At the end of the proceedings on September 15, Lindquist informed the court that he had a scheduling conflict if the Harris preliminary hearing continued the next day since he was supposed to participate in the Weaver preliminary hearing. Lindquist explained that Howen was unavailable to conduct either hearing because, "we have the grand jury convened, which is going to demand his time."[1046] As a result, Lindquist requested that the Harris hearing be continued. After defense counsel objected to the request,[1047] the following colloquy occurred:

> MR. NEVIN: . . . . The -- I have been concerned all through this, that where the United States was going was a grand jury indictment, and then an argument that would cut off our right to have a preliminary hearing.

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[1045] The judge interrupted Howen early in his argument and stated that, "[w]e had a hearing last Thursday, September 10, where many of the issues you are raising today were argued by very able counsel for the Government." Harris Preliminary Hearing Transcript, September 15, 1992, at 12. Later, after Howen had finished arguing another point, the judge stated, "I believe that is consistent with, Mr. Howen, what I told counsel in our conference this morning. I think that you have just merely restated what I told you my position was." Id. at 38. Notwithstanding these remarks, Judge Boyle later refused to become involved in a debate as to whether the USAO had been attempting to delay the proceedings. Id., September 16, 1992, at 68.

[1046] Id., September 15, 1992, at 226.

[1047] Id.

> When we appeared in Court last Thursday, Mr. Ellsworth was there, and Mr. Ellsworth was there on a motion to continue these proceedings from yesterday until today.
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> I said at that time, that was what I was afraid they were doing, and that if they would guarantee me that was not what they were doing, and that we would go forward with a preliminary hearing, no matter what, they holding it at another time was fine with me.
>
> I went outside here, and I saw grand jury witnesses going into the grand jury room, I know that's what they are doing. We've been told Mr. Howen can't be here tomorrow because he's got to appear before, and again that's a choice they have made for him to be there instead of here.
>
> But, in any event, if counsel will assure me that we will hold and complete this preliminary hearing, I don't mind if we continue it until a later time, and that there will be no argument upon -- if a grand jury indictment is returned, that we're not entitled to complete this hearing. And upon that insurance, let's hold it another time, whenever it's convenient, that's fine. . . .
>
> MR. LINDQUIST: . . . [C]ounsel will not have that assurance. We're all very much aware that the purpose of a preliminary hearing does not result in a charging document. The purpose is to get us to that grand jury, which is the institution that initiates the charging document. . . .
>
> I'm simply saying that we are proceeding with the grand jury as it is convened, pursuant to Court order, and I'm not going to make any commitment as to what that grand jury will do. That is not in my power. That's not my authority.[1048]

The court then asked Lindquist whether he had "visited with Mr. Ellsworth about the nature of the hearing held last week on this very question," to which Lindquist replied that he had "about a two-minute meeting" with Ellsworth and had simply learned that

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[1048] Id. at 228-30.

defense counsel was cynical about the reasons Ellsworth had given for the continuance. Having ordered that the preliminary hearing reconvene the next morning, the court explained that it was going to "pull out the tape" of the earlier hearing because it believed that Ellsworth had represented that "there would be a complete preliminary hearing held in this matter."[1049]

d. September 16, 1992

(1) Proceedings Before the Grand Jury

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[1051] Thereafter, the grand jury deliberated and returned two indictments against Weaver and Harris charging them with violations of 18 U.S.C. §§ 1, 115, 1111 and 1114.

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[1049] Id. at 230-33.

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(2) Harris Preliminary Hearing

The Harris preliminary hearing resumed on September 16 with
b6 the defense examining its first witness, Deputy Marshal Hunt.
b7C Assistant U.S. Attorney [ ] handled the proceeding while Lindquist continued to handle the Weaver preliminary hearing and Howen was before the grand jury.[1056] In the middle of the morning session, Howen interrupted the proceedings and informed the court that the grand jury had returned two indictments against Weaver and Harris.[1057] Howen requested immediate arraignment. Thereafter, the court declared a 10 minute recess. When court resumed, Howen stated that he had not been present in court when certain conversations occurred between the court and Ellsworth. The court then took another brief recess to allow Howen to review a transcript of the September 11 hearing

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[1057] The first indictment charged them with the willful, malicious and premeditated murder of William Degan in violation of 18 U.S.C. §§ 2, 115, 111 and 1114 the second indictment charged them with forcibly resisting, impeding and assaulting Deputy Marshals Roderick, Cooper and Degan in violation of 18 U.S.C. §§ 2 and 111.

transcribed by the judge's secretary the previous evening.[1058]

When the proceedings resumed, Judge Boyle made it clear that he considered the initial appearance of Harris to have been at the Spokane hospital on August 30, 1991 before Judge Imbrogno and, therefore, that the time requirements of Fed. R. Crim. P. began to run from that date.[1059] Howen then argued that the case would have been indicted the prior week if the court had not delayed the impaneling of the grand jury for one week because of the Labor Day holiday.[1060] Howen then admitted that Ellsworth "did guarantee a preliminary hearing" but argued "[w]e appeared for the preliminary hearing. We've gone through a full day of a preliminary hearing. . . . [W]e think at this time, with the return of the indictments. . . the preliminary hearing now should go on to the detention hearing. . . ."[1061]

Although Judge Boyle concluded that Ellsworth had moved for the continuance in good faith and seemed to agree that, as a legal matter, the return of an indictment extinguished the right to a preliminary hearing, he was concerned that the Ellsworth representations might have estopped the government from indicting Harris.[1062] In response, Howen adopted a narrow reading of the September 11 transcript and argued that preliminary hearings are typically brief and that all that Ellsworth was promising was that a preliminary hearing would be held on September 15[1063] and that because a hearing had been held on that day, the Government was not estopped from indicting Harris.[1064] Howen denied having any improper motive in presenting the indictment to the grand jury and argued that because the defendants were in custody, they had a right to immediate presentment before a grand jury and indeed, that the Speedy Trial Act mandated that they be brought before a grand jury within 30 days of arrest.[1065]

[1058] Harris Preliminary Hearing Transcript, September 16, 1992, at 23-25.

[1059] Id. at 27-29.

[1060] Id. at 33-37.

[1061] Id. at 37.

[1062] Id. at 35-39.

[1063] Id. at 39-40.

[1064] Id. at 48-50, 90-91.

[1065] Id. at 44-45.

Defense counsel Nevin argued that this matter was not dependent upon the statutory provisions and caselaw that held that an indictment extinguished the right to a preliminary hearing but rather was dependent upon the effect to be given Harris' waiver of a right to object to a continuance in return for a promise by the U.S. Attorney that Harris would have a preliminary hearing.[1066] Nevin, pointing to the lengthy argument of motions and the lengthy direct examination of Rampton, argued that Howen had no intention of completing the preliminary hearing on September 15, 1992.[1067] He maintained that the clear import of what was stated in court on September 11th was that in return for Harris' consent to continuing the preliminary hearing the government agreed to give Harris a full preliminary hearing without interrupting it with the return of an indictment.[1068] Thereafter, Nevin moved to quash the indictment.

After listening to the arguments of the parties, the court took the matter under advisement and commenced the detention phase of the hearing.[1069] Thereafter, the government resumed its direct questioning of Special Agent Rampton after which defense counsel cross examined Rampton.

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[1066] Id. at 53-54.

[1067] Id. at 54-55.

[1068] Id. at 56.

[1069] Id. at 100.

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(3) Weaver Preliminary Hearing

On September 16, the preliminary hearing of Weaver resumed. However, before defense counsel began to cross-examine Deputy Marshal Cooper, Lindquist informed the court and defense counsel that a grand jury had been convened and would be handing down an indictment that day.[1074] Shortly thereafter, an indictment was served on Weaver and the court heard argument from the parties as to whether the preliminary hearing should be continued. The court then permitted defense counsel to cross examine Cooper before ruling that the preliminary hearing was being terminated. Judge Williams concluded that the grand jury's finding of probable cause obviated the need for the preliminary hearing and opined that the issue of prosecutorial misconduct could be addressed by motion with the district court judge.[1075] Thereafter, the court proceeded to the detention

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[1074] See Affidavit of Charles F. Peterson in Support of Motion to Dismiss Indictment and to Remand for Preliminary Hearing, filed November 16, 1992, at 2.

[1075] Weaver Preliminary Hearing Transcript, September 16, 1991, at 157-158.

phase of the proceedings. Lindquist rested after introducing a few exhibits; defense counsel called no additional witnesses. The court ordered that Weaver be detained.[1076]

e. September 17, 1992

On September 17, the court ruled on the Harris motion to quash the indictment. Judge Boyle concluded that although he "truly believe[d]" that Ellsworth had made the request for a continuance in good faith, he interpreted "the stipulation entered into between counsel as contemplating that Mr. Harris would be entitled to a preliminary examination."[1077] With regard to what legal effect should be given the breach of the agreement, including whether it warranted quashing the indictment, Judge Boyle thought that the issue was better left to a superseding proceeding or appeal. However, he did not believe that Harris had been prejudiced by how the preliminary and detention hearings were conducted.[1078] The court concluded that the return of the indictment extinguished the need for the preliminary hearing since the grand jury had performed the purpose of the preliminary hearing which was to determine whether probable cause existed that a crime had been committed and that Harris had committed it. As a result, Judge Boyle held that the preliminary hearing would not continue.[1079]

Thereafter, the court began the detention phase of the hearing and defense counsel proceeded to cross-examine Special Agent Rampton. After Rampton completed his testimony, defense counsel called and questioned Deputy Marshals Dave Hunt, Arthur Roderick, Larry Cooper, Joseph Thomas and Francis Norris. Following argument by counsel, Judge Boyle ordered that Harris be detained.[1080]

[1076] Id. at 184.

[1077] See Harris Preliminary Hearing Transcript, September 17, 1992, at 4.

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[1079] Harris Preliminary Hearing Transcript, September 17, 1992, at 5-9. Magistrate Judge Williams denied a similar motion filed by Weaver. See Order, United States v. Weaver, No. MS-3934, filed on September 17, 1992.

[1080] Harris Preliminary Hearing Transcript, September 17, 1992, at 208-15.

f. Subsequent Defense Challenges

On November 16, 1992, Weaver and Harris sought to dismiss the indictments returned against them, arguing, among other grounds that the preliminary hearing had been improperly terminated. They asserted that the Government improperly obtained the indictments only after it realized that probable cause had not been demonstrated at the preliminary hearings because none of the witnesses offered had seen either defendant fire the shot that killed Degan. In addition, they argued that once the Government elected to proceed against the defendant by preliminary hearing it should "be estopped from abandoning that proceeding."[1081] To hold otherwise, in their view, would permit the Government to abuse the preliminary hearing, if it appeared that the defense might prevail, in violation of the due process rights of the defendants to introduce evidence.[1082] Harris also contended that dismissal was warranted in his case since his consent to a continuance had been secured by a false promise that the hearing would not be superseded by an indictment.[1083]

The Government filed its response to the Weaver and Harris motions to dismiss on November 23, 1992 and argued that there was no legal authority to support the proposition that it was unconstitutional for the prosecution to have the grand jury return an indictment while a preliminary hearing was in progress.[1084] Furthermore, the Government noted that Weaver had requested the continuance of the preliminary hearing from September 11, 1992 to September 16, 1992.[1085] The Government

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[1081] See Memorandum of Points and Authorities in Support of Motion to Dismiss Indictment and to Remand for Preliminary Hearing, United States v. Weaver, filed November 14, 1992, at 4.

[1082] Id. at 3-5.

[1083] See Affidavit of David Z. Nevin, United States v. Harris, dated September 16, 1992, at 3; Motion to Dismiss, United States v. Harris, filed November 16, 1992, at 1-2.

[1084] Government Response to Motion to Dismiss Indictment and to Remand for Preliminary Hearing, United States v. Weaver, filed November 23, 1992, at 1-2.

[1085] Id. at 2. The Government also noted that normally the grand jury for the District of Idaho would meet on the second Tuesday of each month but could not do so in September 1992 because of delay caused by the Labor Day holiday and the need to swear in a new grand jury. If this delay had not occurred, the grand jury would have met on September 8th and returned the

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failed to address directly Harris' argument that the Government had represented that an indictment would not be returned prior to the completion of the preliminary hearing. It did, however, argue that Harris had been afforded a complete preliminary hearing that was completed on September 17, 1992, one day after the indictment had been returned.[1086]

Magistrate Judge Williams concluded that the U.S. Attorney's Office had acted within the scope of the applicable laws and was not guilty of prosecutorial misconduct. In addition, he concluded that there was no legal barrier to an indictment being returned prior to the completion of the preliminary hearing. Once the indictment was returned, the need for the probable cause determination of the preliminary hearing became unnecessary.[1087]

Shortly thereafter, Magistrate Judge Boyle ruled on the claims made by Harris in his Motion to Dismiss.[1088] In that opinion, Judge Boyle adhered to his earlier ruling on the issue and reiterated his conclusion that there was no legal impediment to a grand jury returning an indictment while a preliminary hearing was in progress.[1089] In addition, Judge Boyle found that Harris had failed to demonstrate that he had been deprived of any constitutional or procedural right or that he had suffered

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[1085](...continued)
indictment before the preliminary hearing had begun. It was the Government's contention that the defense had attempted to manipulate the preliminary hearing proceedings so as "to frustrate and prevent the orderly receipt of evidence and testimony by the Grand Jury" and that its request for a remand for further preliminary hearing was no more that a discovery device since they had been unable to satisfy the deposition requirements of Fed. R. Crim P. 15. Id. at 3; Government Response to Motion to Dismiss, United States v. Harris, filed November 23, 1992, at 2.

[1086] Government Response to Motion to Dismiss, United States v. Harris, filed November 23, 1992, at 2.

[1087] Order, Report and Recommendation, United States v. Weaver, January 6, 1993, at 2-4.

[1088] This order superseded a December 23, 1992 order that was withdrawn by the court on January 8, 1992.

[1089] Order Report and Recommendation, United States v. Harris, January 8, 1993, at 2-3.

prejudice that justified dismissal of the indictment.[1090]

On January 8, 1993, Weaver and Harris filed a joint motion in which, among other forms of relief, they sought to dismiss the indictment. In this pleading, they repeated their allegation that the U.S. Attorney's Office had subverted the preliminary hearing process by securing a grand jury indictment when it had become apparent that probable cause could not be found at the preliminary hearing. In addition, they argued that this alleged subversion was exacerbated in the case of Harris since the U.S. Attorney had stated to the court that an indictment would not be sought until the completion of the preliminary hearing.[1091]

District Court Judge Edward Lodge rejected this defense challenge and adopted the recommended report and order of Magistrate Judges Williams and Boyle in orders issued on February 17, 1993. Judge Lodge repeated his rejection of the motion to dismiss in his order addressing the motion to disqualify the U.S. Attorneys Office from prosecuting the case.

3. Discussion

We agree with the judicial determinations in the Weaver and Harris prosecutions that the return of an indictment in the midst of a preliminary hearing extinguishes the right to a preliminary hearing. The sole purpose of the preliminary hearing is to determine whether probable cause exists to believe that the defendant has committed the criminal conduct described in the complaint. Once the grand jury has made an independent determination that probable cause exists and returns an indictment, that document becomes the charging document in the prosecution. There is no reason for the preliminary hearing to continue. Nor are we aware of any estoppel principle that would restrict the government from returning an indictment while a preliminary hearing is in progress.

[1090] Id. at 1-2.

[1091] See Motion to Disqualify the United States Attorney's Office, To Dismiss the Indictment, To Strike Prejudicial Allegations, To Order an Evidentiary Hearing and For a Continuance Pending an Investigation by the United States Attorney General and Pending Interlocutory Appeals by the Parties, United States v. Weaver, filed January 8, 1993, at 2-3. In addition, Weaver and Harris filed separate pleadings on January 19, 1993 and January 25, 1993 respectively in which they objected to the report and recommendation filed by Magistrate Judges Boyle and Williams.

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concern is directed at two other areas. First, whether the statements that Ellsworth made constituted a guarantee that Harris would have a "full" or "complete" preliminary hearing in return for agreeing to a continuance and, if such a representation was made, did Ellsworth make it with the intent to promise a complete preliminary hearing.[1092] Second, whether Howen or Lindquist understood that Ellsworth had made such a representation before the indictment was presented to the grand jury.

Focusing on the first issue, an examination of the September 11 transcript reveals clearly that defense counsel Nevin was concerned that if the preliminary hearing were continued, the prosecution might obtain an indictment and terminate the hearing. Thereafter, there was an exchange among Nevin, Ellsworth and the court in which the agreement of the parties was formed. Ellsworth insisted that he had no ulterior motive for the request and stated that "I am willing to give assurances that we intend to have a preliminary hearing . . . ."[1093] Nevin said that he would have no objection to the continuance "if what counsel is saying is that there is going to be a preliminary hearing on Tuesday no matter what. . . ."[1094] Ellsworth responded that "[t]he government has no problem with that stipulation." The court then proceeded to ensure that the parties understood the terms of the agreement. Nevin agreed that he was agreeing to

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[1092] Standard 3-2.9(d) of the American Bar Association Standards for Criminal Justice provides that, "[a] prosecutor should not intentionally misrepresent facts or otherwise mislead the court in order to obtain a continuance." Nor should a prosecutor "seek a continuance solely for the purpose of mooting the preliminary hearing by securing an indictment." Standard 3.3.10(d), ABA Standards for Criminal Justice (1992). Although the Department of Justice has not adopted the ABA Standards as official policy of the Department, it recommends all U.S. Attorneys to familiarize themselves with the standards since the courts use the standards when addressing matters presented to them. United States Attorneys' Manual, § 9-2.102.

[1093] Transcript of Motion Hearing, United States v. Harris, No. MS-3924, September 11, 1993, at 6-7.

[1094] Id. at 7.

continue the preliminary hearing on the representation that Ellsworth was making the motion simply to honor the requests of the chief of police, that Ellsworth was not making the request to

permit his office time to present an indictment to the grand jury and that Ellsworth was providing a guarantee that Harris would have a preliminary hearing on September 15. Nevin agreed that the agreement did not include a promise that the USAO would not subsequently impanel a grand jury and return an indictment. In response, Ellsworth told the court that he had "no problem" with the terms of the agreement.[1095]

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]wnen first confronted with the statements that Ellsworth made, Howen stated to the court, "[w]e think, in good faith, the United States Attorney, with the -- with the transcript I have here, did guarantee a preliminary hearing."[1096] The remarks of the court echoed this view.[1097] In its initial ruling on this issue, the Court

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[1095] Id. at 7-9.

[1096] Harris Preliminary Hearing, September 16, 1992, at 37.

[1097] For example, at the proceedings on September 15th, after Lindquist informed the court of his scheduling problems, defense counsel Nevin reiterated his concern about the grand jury returning an indictment. When Lindquist asserted that he could not assure Nevin that Harris would have a complete preliminary hearing uninterrupted by an indictment, the court inquired whether Lindquist had "visited with Mr. Ellsworth about the nature of the hearing held last week on this very question." Later the court stated that it was going to review the tape of the hearing that evening because he thought that "there was some representation that there would be a complete preliminary hearing held in this matter." Id. 228-233.

concluded that the stipulation "contemplat[ed] that Mr. Harris would be entitled to a preliminary examination."[1098]

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] we cannot conclude that Ellsworth intended to guarantee Harris a full preliminary hearing.

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[1098] Id., September 17, 1992, at 4.[

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

4. Conclusion

We do not believe that Mr. Ellsworth intentionally misrepresented the position of the government yet we do conclude that he gave insufficient consideration to the information available to him and to the plain meaning of his statements. Finally, the evidence does not sustain the charge that before the indictment was presented to the grand jury that Howen and Lindquist believed that Ellsworth had guaranteed a complete preliminary hearing to Harris. We find no misconduct by them in this matter.

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L. Scope of the Indictment and Alleged Prosecutorial Misconduct Before the Grand Jury

1. Introduction

Following Weaver's surrender, the prosecution presented a series of charges against him and Harris to a grand jury on September 15, 1992. An indictment was returned on September 16, charging the defendants with the murder of Deputy Marshal Degan and with an assault on Degan and Deputy Marshals Roderick and Cooper.[1103]

Between September 16 and October 1, 27 witnesses appeared before the grand jury, which returned a superseding indictment on October 1 that included a broad charge of conspiracy by Weaver and Harris.[1104] On November 18 and 19, nine more witnesses testified before the grand jury, which returned a second superseding indictment on November 19, setting forth essentially the same charges contained in the October 1 indictment.[1105]

On January 8, 1993, counsel for Weaver and Harris filed pretrial motions to dismiss the superseding indictment, in part, because of alleged prosecutorial misconduct that occurred during the grand jury proceedings between September 16 and October 1. b6 b7C The defense claimed that [ ] made improper statements to the grand jury, which were the b6 b7C equivalent of unsworn testimony, and that [ ] had elicited irrelevant and protracted testimony regarding the violent criminal activities of white supremacist groups known as the Aryan Nations, Order 1 and Order 2. Defense counsel asserted that this evidence was introduced to inflame the grand jury and prejudice it against Weaver and Harris.[1106]

Weaver's counsel also alleged at trial [ ] b5 that the conspiracy charged in Count 1 of both superseding indictments was overly broad in that it covered a period beginning in January 1983 and continuing through

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[1103] See 18 U.S.C. §§ 2, 111, 115, 1111, and 1114.

b6 b7C [1104] The witnesses were presented by [ ]

[1105] See Indictments in United States v. Randall C. Weaver and Kevin L. Harris, dated September 16, October 1, and November 19, 1992.

[1106] See Memorandum in Support of Defendants' Motions, January 8, 1993, at 21-26 (hereinafter cited as "Defendants' Memorandum").

August 31, 1992.[

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In addition to these allegations, we have also considered whether the prosecution improperly limited the scope of the grand jury's investigation to crimes committed by Weaver and Harris and precluded a broader inquiry into possible crimes committed by law enforcement officers in the shooting of Vicki Weaver.[1107] Finally we have examined the propriety of the decision of the government to seek the death penalty in the Weaver case.

2. Statement of Facts

a. Scope of the Indictment: The Conspiracy Count

Count 1 of both superseding indictments alleged the existence of a wide-ranging conspiracy among "Randall C. Weaver, Vicki Weaver, Kevin L. Harris and others known and unknown to the Grand Jury, including some other members of the Weaver family," beginning from the time Weaver moved his family from Iowa to Idaho in 1983 and continuing through Weaver's surrender to authorities on August 31, 1992. The prosecution's theory was that the Weavers and Harris had long planned a violent confrontation with law enforcement, a plan that came to fruition on August, 21, 1992, when Harris killed Deputy Marshal Degan.[1108]

Weaver's counsel accused the prosecution of "engaging in the 'demonization'" of Randy Weaver by adding the conspiracy count to the original indictment. Defense counsel alleged that the conspiracy count was used to justify the introduction of inflammatory and prejudicial evidence at trial.[1109]

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[1108] See Response to Motions to Disqualify United States Attorney's Office, January 25, 1993, at 14-16.

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, in a 1983 newspaper interview, Weaver had discussed plans to move from Iowa to Northern Idaho to live in an isolated hideaway and "survive the coming 'great tribulation.'" The article stated that Weaver was "developing defense plans that include[d] a 300 yard 'kill zone' encircling [his] compound."[1113]

[1114]

[1109](...continued)
trial, Weaver and Harris were acquitted of the conspiracy count. Harris was acquitted on all the other counts that went to the jury. Weaver was convicted only on Count 3, failure to appear for trial on the original firearms violation , and Count 9, committing an offense while on pretrial release.

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[1113] "Survivalist Makes Plans for Time of 'Great Tribulation,'" Waterloo Courier, January 9, 1983, at B1; Objection to Report and Recommendation and/or Motion for Reconsideration, January 8, 1993, at 2-3.

[1114] The initial indictment only charged Harris and Weaver with the murder of Deputy Marshal Degan and with the assault on Degan and two other deputy marshals.

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1118] The objects of the conspiracy were set forth in the indictment:

> 1. To forcibly resist, oppose, impede, interfere with, intimidate, assault and/or otherwise cause a violent confrontation with law enforcement authorities in the engagement in or on account of the performance of their official duties of

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] Rule 404(b) of the Federal Rules of Evidence, which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . .

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enforcing the laws of the United States . . . as to said Randall C. Weaver, Vicki Weaver, Kevin L. Harris and others;

2. To purchase, develop and maintain a remote mountain residence/stronghold;

3. To illegally and otherwise make, possess, sell and/or conceal firearms and ammunition;

4. To fail to appear for trial on pending federal criminal charges after orally and in writing agreeing to appear for trial before a federal judge;

5. To hinder or prevent the discovery, apprehension, arrest and trial of federal fugitives from justice;

6. To steal, conceal, retain and/or convert the personal property of others to their own use;

7. To intimidate neighbors, as well as law enforcement officers and agents, by the use, display, threat to use and/or discharge of firearms;

8. To use, display, threaten to use, fire and/or discharge firearms at or near human beings, vehicles and/or aircraft; and

9. To assault, shoot, wound, kill and/or murder, or threaten to cause such to occur . . . by means of the use of deadly weapons. . . .[1119]

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[1119] See Second Superseding Indictment, United States v. Randall C. Weaver and Kevin L. Harris, CR92-080-N-EJL, dated November 19, 1992.

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b. Evidential Support for Certain Overt Acts and Substantive Offenses

b5 Defense counsel [ ] in pretrial motions [ ] claimed that "a great majority" of the overt acts alleged in the indictment as part of the conspiracy count were without evidentiary support and should not have been charged.[1126] The defense also complained that many of the overt acts were not, in themselves, criminal or had no relation to the object of the conspiracy.

The defense asserted in pretrial motions that Count 1 of the indictment, which charged a wide ranging conspiracy, forced them to defend against "alleged crimes that are irrelevant to the

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case."[1127] The overt acts challenged included those set forth in the following paragraphs of the second indictment:

> 7. On or about May 6, 1985, Randall C. Weaver and Vicki Weaver mailed a letter addressed to the President of the United States and the . . . United States Secret Service; . . . .
>
> 32. On or about April 18, 1992, Randall C. Weaver, Vicki Weaver, or Kevin L. Harris shot at or near a helicopter and its occupants; . . . .
>
> 36. On or about May 2, 1992, Randall C. Weaver and Kevin L. Harris stole a video camera and other equipment, later destroying it or converting it to their own use; . . . .
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> 38. On or about August 3, 1992, Randall C. Weaver, Vicki Weaver, Kevin L. Harris and/or some other members of the Weaver family stole a water tank and pipe belonging to another;
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> 39. On or about August 17, 1992, Kevin L. Harris and/or some other members of the Weaver family attempted to enter a residence occupied by another and took or attempted to take the personal property of others; . . . .
>
> 41. On or about August 22, 1992, Randall C. Weaver or Kevin L. Harris and an

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[1127] Weaver's counsel initially raised this issue in a Motion to Strike Surplusage contained in the Superseding Indictment and argued that certain overt acts did not allege federal offenses and should be stricken. Memorandum in Support of Motion to Strike Surplusage November 13, 1992, at 8-9. That motion was referred to U.S. Magistrate Judge Larry M. Boyle, who agreed that certain language should be stricken from the indictment as surplusage but denied the request that overt acts, which constituted nonfederal crimes, be stricken. Order, Report and Recommendation, January 8, 1993, at 9 (hereinafter cited as "Boyle Order"). Counsel renewed this argument in a Motion to Disqualify the U.S. Attorney's Office, filed with the trial court on January 8, 1993. This Motion addressed the Second Superseding Indictment. Judge Lodge found Judge Boyle's ruling on the issue dispositive and denied the motion. Order, February 26, 1993, at 16 (hereinafter cited as "Lodge Order").

> unidentified female, probably Vicki or Sara Weaver, took offensive action against a helicopter and its occupants, including attempting to shoot at the helicopter, resulting in the death of Vicki Weaver and the wounding of Kevin L. Harris and Randall C. Weaver. . . .[1128]

The defense also claimed that there was no evidence to support the allegation that Randy Weaver shot Deputy Marshal Degan on August 21, 1992 and fired at the other marshals.[1129] The trial court adopted the finding of Magistrate Judge Boyle, who ruled that the overt acts complained of were relevant to the defendants' role in the conspiracy and that statements, acts, and threats of violence against others bore upon issues such as premeditation and malice.[1130]

The court dismissed Counts 6 and 8 on the defendants' motion at the conclusion of the prosecution's case-in-chief. Count 6, which charged Weaver and Harris with assaulting federal officers in a helicopter on August 22, 1992, was dismissed because the court found no evidence that the officers knew of the assault. The court considered this knowledge to be an element of the offense. Count 8, which charged the receipt and possession of firearms by a fugitive, was dismissed because the court found no proof that Randy Weaver had travelled across state lines, as is required by the statute under which the crime had been charged.

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c. Alleged Unsworn Testimony Given by [ ] Before the Grand Jury

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Defense counsel asserted in pretrial motions that [ ] made [ ] a witness by offering unsworn testimony on a number of matters to the grand jury.

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[1128] Second Superseding Indictment, United States v. Randall C. Weaver and Kevin L. Harris, returned November 19, 1992.

[1129] See Defendants' Memorandum, January 6, 1993, ¶ 18.

[1130] See Boyle Order, at 9; Lodge Order, at 16. See also United States v. Ayers, 924 F 2d 1468, 1484 (9th Cir. 1991)(allegations and/or overt acts of a conspiracy do not have to allege federal crimes or be unlawful).

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b7C [The defense also charged that [ ] had "testified as an expert as to how Vicki was shot."[1135] [

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[1135] Defendants' Memorandum, January 6, 1993, ¶ 54.

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In its response to the defense motion, the Government asserted that "[t]he statements cited [by the defense], when reviewed in the context of the witnesses testimony and/or grand jury inquiry, are not 'unsworn testimony.'"[1139]

In a pretrial order, Judge Edward J. Lodge ruled that the comments did not warrant dismissal of the superseding indictment. The court held that there was no misconduct that "'substantially influenced the grand jury's decision to indict' or [raised] 'grave doubt' that the decision to indict was freed from the substantial influence of such violations."[1140] With regard to the majority of [ ] statements, the court found that:

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> [They] were at the request of grand jurors and were not unsolicited remarks. . . . [T]he overall tenor of the statements . . . was professional and, for the most part, impartial . . . . It was repeatedly stressed that the grand jury acts independently of the prosecution, and all charging decisions were exclusively the province of the grand jury . . . . [T]he prosecution treated the grand jury with respect and with a deference to its independent function. The court believes the prosecution took steps to ensure the grand jury understood its independence.[1141]

d. Alleged Inflammatory Testimony by Prosecutor Before the Grand Jury

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The defense also alleged in a pretrial motion that [ ] intentionally sought to prejudice the grand jury against Weaver and Harris by linking them to unpopular religious beliefs and by associating them with violent criminal activities of various white supremacist groups which had previously investigated and prosecuted. In particular, the

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1139 See Response to Motions to Disqualify United States Attorney's Office, January 25, 1993, at 89.

1140 Lodge Order, at 7. See Bank of Nova Scotia v. United States, 487 U.S. 250, 256 (1988), quoting, United States v. Mechanic, 475 U.S. 66, 78 (1986).

1141 Lodge Order, at 9-11.