operations plan and annex and the marshals critique.[1324] Although identified in this filing, these documents were not produced to the defense until later.[1325] The shooting incident report was delivered by hand on April 7, 1993;[1326] the situation reports and the operations plan were delivered on April 10, 1993; and the Review Group memo and the marshals critique were delivered on April 12, 1993.[1327] The Weaver trial began the next day on April 13, 1993.

d. The Defense Subpoena Duces Tecum For the Shooting Incident Report

On April 13, 1993 the defense filed an ex parte application for subpoenas duces tecum. Among the subpoenas sought was one ordering Inspector Thomas W. Miller, who had headed the review team examining the FBI shooting at Ruby Ridge, to bring "any and all records used by the 'Shooting Incident Review Team.'"[1328] Other subpoenas requested the FBI to produce copies of certain manual provisions and certain personnel files.[1329] Judge Lodge approved the issuance of these subpoenas on April 14.

[1324] These documents were items 1431, 1432, 1433, 1434, and 1435 on the discovery list of items produced. See Government's Eighth Addendum to Response to Discovery Stipulation, filed March 26, 1993.

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[1326] Government Ninth Addendum to Response to Stipulation and Request for Discovery and Inspection, filed April 7, 1993, at 4-6.

[1327] Government Tenth Addendum To Response to Stipulation and Request for Discovery and Inspection, filed April 12, 1993, at 3, 5.

[1328] Subpoena Duces Tecum to Inspector Miller, April 13, 1993.

[1329] See section IV(O) for a discussion of the compliance of the government to these other subpoenas.

Page 397 of Report
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Attached to the subpoenas was a letter dated April 12, 1993 from defense counsel Charles Peterson to "potential witness" advising the witness as follows:

> Although the subpoena requires your attendance on April 17, 1993, I expect that you will not be called to testify until the completion of the Government's case, some six weeks into the trial. Please call my office as soon as possible so that you may be advised of a specific date and time to appear -- otherwise the subpoena requires you to attend continuously from the beginning of the trial until your testimony is given. If I am unavailable, please ask for Diane or Yvonne.[1337]

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[1337] Letter from Charles F. Peterson to Potential Witness, April 12, 1993.

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Page 399 of Report
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on June 4, the package arrived at the USAO.

b5/b7C b6 The court had just excused HRT member Lon Horiuchi after defense questioning had been completed. the package enclosing two copies of documents responsive to the defense subpoena seeking "any and all records used by the Shooting Incident Review Team."

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b6 b7C many of the documents in the package had been provided previously to them and to the defense in discovery. However, other documents in the package had never been produced.

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drawings by HRT sniper Horiuchi including a shooting diagram of the second shot taken through the Weaver front door on August 22, 1992.[

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b6 b7C Thereafter[ ]returned to the courtroom and informed the b6 b7C parties of the package that[ ]had just received. Defense counsel referred to it as the latest in a series of incidents that had prejudiced the rights of the defendants and moved for the case to be dismissed because of alleged prosecutorial misconduct and for sanctions to be imposed on the government. b6 b7C [ ]after noting that many of the materials in the package had b6 b7C been previously produced,[1350] informed the court that[ ]office b6 was in the process of trying to determine the reasons for the b7C late production of these materials.[ ]stressed that[ ] office produced the materials as soon as they were received and suggested that the responsibility for the late production of these materials rested elsewhere. The court deferred a definitive ruling until after the weekend and then stated,

> [T]he Court is very upset about these things happening. It does appear that it is somewhat of a pattern on the part of people, agencies outside of the District of Idaho. The Court does not agree that there is any evidence that the U.S. Attorney's Office at least locally, is doing anything to hinder the prosecution of this case or prejudice the defense. The comments of Mr. Howen just now indicate his veracity and his sincerity in trying to comply with the rules . . . . It seems to be totally inexcusable and extremely poor judgment on the

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[1348] *See* discussion in Section IV(O) which discusses the problems that occurred at trial because of the untimely disclosure by the government of discoverable information.

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part of whoever is involved to send something like this fourth class mail when a trial of this nature is going on, the cost and time and human tragedy that is involved.[1351]

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[1351] Trial Transcript, June 4, 1993.

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On June 8, the parties made additional arguments to the court concerning how they should proceed after the disclosure of the subpoenaed materials. Of particular focus of the parties was the Horiuchi drawing and its significance. The court reserved its ruling until the next day but before doing so stated that:

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> The Court does not excuse the FBI Agency. The Court thinks there has been a failure to comply with what was fully understand [sic] to be required. They get involved in these technicalities as to who was served, but it is obvious they had notice of it, they were aware of what was required, and again, it is not anytime to be playing games with the Court on technicalities.[1359]

Judge Lodge issued his ruling on June 9 and ordered Horiuchi to return for further examination in court due to the failure of the government to produce the materials in a timely manner. In addition, he assessed against the government the costs and defense attorney fees for the one-day delay.[1360] Almost five months later, on October 26, Judge Lodge issued an order imposing a separate fine of $1920 against the FBI. This fine represented the fees paid to defense counsel on the day that Horiuchi was brought back to testify. In this order, which is discussed more fully in section IV(o), Judge Lodge was highly critical of the actions of the FBI which he believed hampered the ability of the government to comply with its obligations to produce discoverable documents including Jencks and Brady materials. As a result of these actions, Judge Lodge found that the FBI had failed to comply with its discovery obligations under Fed. R. Crim. P. 16 and held them to be in contempt of court in violation of 18 U.S.C. § 401.[1361]

3. Discussion

a. FBI Resistance to USAO Discovery Requests

Our investigation has revealed that the prosecution of the Weaver matter was plagued and complicated by a continuing series of disagreements, misunderstandings and preconceptions that existed between the FBI and the USAO. One of the areas where such problems surfaced involved the efforts of the USAO to respond to its discovery obligations in the case.

[1359] Trial Transcript, June 8, 1993, at 84.

[1360] Id., June 9, 1993, at 60-61.

[1361] Order in United States v. Weaver, No. CR 92-080-N-EJL, filed October 26, 1993, at 2-13 (Appendix at 46).

Although the overall effort of the FBI to respond to the discovery requests of the USAO appeared to have been good, we have found two areas where problems existed. The first involved the problems associated with the actions of the FBI Laboratory, which are discussed elsewhere in this report. The second area concerned the resistance of personnel at FBI headquarters to produce a group of documents that was small in number but significant in importance to the issues in the case.[1362]

With regard to the production of this group of documents, it is our conclusion that FBI personnel, predominantly at the headquarters level,[1363] imposed unreasonable resistance and applied inappropriate standards to the discovery requests from the USAO,[

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Based on our investigation, we conclude that headquarters personnel were informed of the scope of discovery sought by the USAO yet failed to take adequate efforts to locate responsive materials.[

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]responsibility in this case must rest on the doorstep of FBI headquarters. [

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]it was not a well organized search. [

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4. Conclusion

Although we found no intent by the FBI headquarters personnel to violate the discovery obligations of the government, we believe that the FBI unreasonably resisted the efforts of the USAO to comply with their discovery responsibilities in the Weaver case. In addition, it appears that the FBI did not put forth its best efforts in responding to the discovery requests or the subsequent defense subpoena. Indeed, the decision of the court in October 1993 to fine the FBI for its intransigence on

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various discovery issues is consistent with our conclusion.

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] There is a critical need in the future to improve the quality of the response of the FBI to discovery demands. Such improvement must include establishing an organized system of responding to and monitoring discovery requests and improving the coordination among FBI components.

N. Alleged Problems With the Participation of the FBI in Case Preparation and Its Relationship With Other Members of the Trial Preparation Team

1. Introduction

One of the issues that arose as the various law enforcement entities converged at Ruby Ridge was which agency had the primary responsibility for planning, organizing and coordinating the activities of law enforcement personnel. It was decided early in the crisis that the FBI would have the lead role in the operations at Ruby Ridge. However, after Weaver and Harris surrendered, the focus shifted from crisis resolution to trial preparation and the U.S. Attorney's Office in Boise ("USAO") assumed the lead role. Initially, the FBI believed that it was to be the sole agency assisting the USAO in trial preparation. Later, [ ] agents from the U.S. Marshals Service and the Bureau of Alcohol, Tobacco and Firearms ("BATF") were assigned by their respective agencies to assist the USAO.

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] The arrival of the marshals and the BATF agents coupled with disagreements over how witness interviews in Iowa were to be conducted worsened the [ ] working relationship between the FBI and the USAO.

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2. Statement of Facts

a. Defining the Structure of the Trial Team and the Role and Responsibilities of the Individual Members

(1) The Lead Agency Concept and the Initial Disagreement Regarding the Interviewing of Witnesses in Iowa

As the various law enforcement agencies arrived at Ruby Ridge on August 21 and August 22, 1992, it quickly became evident that there was a need for one agency to assume the leadership role during the crisis. Because the assault of a federal officer charge fell within the jurisdiction of the FBI, it was decided that it was appropriate for the FBI to perform this role. Once the crisis was over, and the focus had shifted to trial preparation, [ ] the

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[leadership role was transferred from the FBI to the USAO.[1393]

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Another issue that created controversy concerned the conducting of witness interviews[

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Under the Brady doctrine the government is required to disclose to the defense material evidence that is both favorable to the accused and material to either guilt or punishment. See United States v. Bagley, 473 U.S. 667, 676, 682 (1985); Brady v. Maryland, 373 U.S. 83, 87 (1963). This requirement is not limited to information that is in written form but extends to oral statements of which the government is aware. See generally, Carter v. Rafferty, 826 F.2d 1299 (3d Cir. 1987), cert. denied, 484 U.S. 101 (1988). In addition, the prosecutor is responsible for producing Brady information which is within the knowledge of persons working as part of the prosecution team or intimately connected with the government's case. United States v. Butler, 567 F.2d 885, 889 (9th Cir. 1978); United States v. Morell, 524 F.2d 550, 555 (2d Cir. 1975).[

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Page 453 of Report
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[1587] In the discovery stipulation executed by the parties, they agreed "to reciprocal disclosure and inspection of all materials stated" in Fed. R. Crim. P. 16(a)(1) and 16(b)(1). See Stipulation and Reciprocal Request for Discovery and Inspection, Notice of Alibi and Notice of Mental Condition, dated October 16, 1992, at 1. Rule 16(a)(1)(D) of the Federal Rules of Criminal Procedure provides in pertinent part that,

> Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports . . . of scientific tests or experiments . . . which are within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

[1588] See generally, 8 Moore's Federal Practice § 16 05[2] (1993).

Page 455 of Report
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e. Relationship Among the Investigative Team

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The behavior of the FBI in the Weaver case revealed their troubling unwillingness to work as a team player. If the FBI could not be in control or if its views were not adopted, the FBI participated in an unreasonable manner[

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]Examples of such behavior included the intransigence that the FBI showed with regard to its opposition to the case agents conducting the interviews of the Iowa witnesses, the unwillingness of the FBI to accept and work with representatives from other investigatory agencies, the failure of the FBI to actively assist the USAO by providing expert assistance,[1592] and the resistance of the FBI to producing materials that the USAO believed were discoverable.

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[1592] See discussion of this issue in Section IV(J).

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4. Conclusion

The working relationship between the FBI and the USAO and other team members in the Weaver case was poor and, in our view, adversely impacted upon the preparation of the Weaver case for trial. Active steps must be taken to ensure that such problems do not repeat themselves in subsequent prosecutions.

O. Alleged Failure of USAO to Notify the Defense of Brady Material and Other Important Information

1. Introduction

When the Weaver trial began, the U.S. Attorney's Office in Boise ("USAO"), assisted by governmental investigative agencies, had compiled and produced a large volume of materials in discovery including thousands of pages of documents, transcripts, numerous audio and video tapes, photographs and a multitude of investigative reports. In addition, the USAO had permitted defense counsel to inspect the evidence developed during the case investigation.

Despite its efforts to comply with its discovery obligations and the Brady rule, a number of incidents occurred during the trial which cast doubt on whether the Government had been totally forthcoming in its responses to the defense. These incidents included: its resistance to produce FBI and Marshals Service manual provisions and personnel files subpoenaed by the defense; the failure to disclose all facets of the compensation arrangement between the BATF and a confidential informant; the untimely discovery of critical FBI notes relating to the interview of Deputy Marshal Cooper; the failure by [ ] to notify the defense of potentially exculpatory information learned during an interview of Idaho State Police [ ] the untimely production of crime scene photographs and disclosure of the circumstances surrounding how the photographs were taken; and the untimely production of materials associated with the FBI's shooting incident report.

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2. Statement of Facts

a. Defense Subpoenas For FBI and Marshals Service Manuals and Personnel Files

On November 3, 1992, defense counsel Charles Peterson wrote a letter to Assistant U.S. Attorney Howen identifying five classes of documents that he considered encompassed by the discovery stipulation executed by the parties. Two of these classes were "[a]ny manuals, memorandums or directives outlining the procedures and standards for developing operational rules of engagement in the field" and "[a]ny FBI arrest protocols or instructions." Peterson requested Howen to advise him if he did not intend to produce any of these materials.[1591]

[1591] Letter from Charles Peterson to Ronald Howen, November 3, 1992.

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not respond[1592] Peterson did nor did he file a motion to compel production of the materials identified in his November 3, 1992 letter.

On April 13, 1993, which was the first day of the Weaver trial, the defense filed its Third Ex Parte Application for Issuance of Subpoenas and Payment of Costs and Fees. In that document, they requested the court to issue subpoenas for numerous individuals and documents including:

> 4. Federal Bureau of Investigation, (1) for the production of any and all FBI manuals which describe procedures or establish standards and rules for the apprehension of fugitives, arrest of subjects or the use of force. By this request the defendants intend to reach the publications used by members of the FBI which describe what the government's witnesses have testified to as the 'standard rules of engagement' for that agency, and any other policy or procedures used by the agency and its Hostage Rescue Team for the apprehension of fugitives, arrest of subjects or the use of force; and (2) the personnel files in its control for Special Agent Lon Horiuchi, or Deputy United States Marshals William Degan, Arthur Roderick, and Larry Cooper.

The defense also requested similar manuals from the U.S. Marshals Service as well as any personnel files of Horiuchi, Degan, Roderick and Cooper that were in their control.[1593] On April

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[1593] See Third Ex Parte Application for Issuance of Subpoenas and Payment of Costs and Fees, filed April 13, 1993 with signed Order, dated April 14, 1993. The defense also requested a

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14, Judge Lodge issued the subpoenas requested in the ex parte order. However, he modified the order drafted by the defense by adding the following sentence, "[p]ersonnel records to be viewed only by defense counsel and not to be turned over to third parties or the media."[1594]

By oral motion on April 15, defense counsel Peterson sought to compel the production of the personnel files and the manual provisions that the court had ordered the previous day. In particular, Peterson was seeking the personnel file of Deputy Marshal Cooper and the Marshals Service manual provisions to assist in his cross examination of Cooper.[1595] Peterson characterized the issue as a government failure to comply with discovery and argued that production of these materials was required by the recently issued subpoenas.

Howen responded that he could not be expected to respond to the subpoena when he had not been served with it nor had the documents in his possession. In addition, Howen told the court that he would expect counsel at the FBI and the Marshals Service to handle the responses to the subpoenas. However, he argued that he was aware of no court that would allow defense counsel to have direct access to personnel files of witnesses.[1596] Assistant U.S. Attorney Lindquist informed the court that the FBI case agent had told him that they had received the subpoena and that FBI Headquarters had been contacted. With respect to the Marshals Service subpoena, Lindquist stated that he had no knowledge but would take steps to ensure that the Marshals Service responded to it.[1597]

The court acknowledged that the subpoena for the personnel files raised privacy issues and that further restrictions might be necessary but encouraged the government to facilitate the response to the subpoenas even if the documents were not within

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[1593](...continued)
subpoena duces tecum be issued for all records used by the shooting incident review team. A discussion of this subpoena and the controversial response to it is contained in Section IV(M).

[1594] Id.

[1595] Trial Transcript, April 15, 1993, at 142.

[1596] Id. at 144-48.

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[1597] Trial Transcript, April 15, 1993, at 148-49.

their control.[1598] Thereafter, defense counsel Spence agreed to inform the government of the specific requests.[1599]

The Marshals Service provided the applicable Marshals Service manual provisions to the USAO on April 16. [

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On April 23, the defense moved to hold the government in contempt or to compel it to produce the requested manuals and personnel files. As of that date, the government had filed nothing in response to the subpoena.[1601] In court, defense counsel Nevin stated that he had been advised that the subpoenas had been served and that Howen had told him that he had the Marshals Service materials but did not want to produce them.[1602] Howen responded that he viewed this issue as a discovery dispute[1603] and that he was in the process of drafting a motion for a protective order. He disputed that the subpoenas seeking the personnel files had been served although he acknowledged that he learned that day that the subpoenas for the manuals had been served. Howen then referenced the November 1992 communications with defense counsel Peterson regarding the manuals and argued that Peterson should have sought to compel compliance earlier.[1604] Nevin responded that the motion to compel was directed to the recently issued subpoenas not prior discovery requests.[1605] Thereafter, Lindquist announced that he had the

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[1598] Id. at 152-54.

[1599] Id. at 154-55.

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[1601] Memorandum in Support of Motion for Finding of Contempt, or in the Alternative for an Order to Show Cause and to Compel, filed April 23, 1993.

[1602] Trial Transcript, April 23, 1993, at 153-54.

[1603] Howen did not think that the November 1992 letter from Peterson requested discoverable material nor did he understand how the request related to the issues of the case. Thus, after receiving the letter he made no attempts to secure the requested material from the FBI.[ ]

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[1604] Trial Transcript, April 23, 1993, at 157-59, 160-62.

[1605] Id. at 166.

requested Marshals Service personnel files but could not relinquish them without Marshals Service approval.[1606]

Judge Lodge responded that he wanted to assure himself that the subpoenas had been served and then wanted the government to respond either by complying or by filing a response. Judge Lodge stated that it did not matter to him if the response was filed by counsel for the Marshals Service or the FBI, but he expected the Assistant U.S. Attorneys, as officers of the court, to assist "in moving those matters along." If the response to the subpoena was not immediate, Judge Lodge said "this trial will come to a halt." Moreover, if the government had authority that the defense has no right to the personnel files he wanted it to inform the court of the authority. The court also rejected the government's argument that this was a discovery issue and expressed frustration over the ambiguity of the USAO as to whether it represented the FBI and Marshals Service on this issue.[1607] Judge Lodge then ordered the manuals produced "forthwith" but reserved judgment on the personnel files and requested assistance from counsel on the issue "because the Court was concerned with it at the time the Court issued it."[1608]

Later that day, Lindquist informed the court that the FBI had still not received a subpoena for the Horiuchi personnel file but that it was working on its response and that the USAO was drafting a response concerning whether the personnel files could be produced. With regard to the Marshals Service manual, it was agreed the defense would have access to it but that the government would identify sensitive portions and then the court would rule as to whether they could be used at trial.[1609] Howen then told the court that he would be representing the government on this issue and apologized if he had misled the court on this issue.[1610]

On April 23, the USAO moved for a protective order objecting to the subpoenas seeking the personnel files and the manuals. In that motion, the USAO repeated many of the previous arguments it had raised. In addition, it argued that it was outside the

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[1606] Id. at 169-70.

[1607] Id. at 172-74. [

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[1608] Trial Transcript, April 23, 1993, at 172-74.

[1609] Id. at 234-35, 240-41.

[1610] Id. at 244-45.

supervisory power of the court to order the production of the personnel files, that the appropriate procedure was to have a law enforcement officer familiar with the issues to conduct a "Henthorn" review[1611] and that the government had ordered those reviews to be done. It also advised the court that the subpoenas had not been served on either agency and that the USAO had the Marshals Service personnel files but not the FBI file. In addition, the government had requested the FBI and the Marshals Service to review the manuals for sensitive information and, if located, the government would request in camera review.[1612]

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[1611] This review has its origins in the case of United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991), cert. denied, 112 S.Ct. 1588 (1992). In that case, the Ninth Circuit reaffirmed its holding in United States v. Cadet, 727 F.2d 1453, 1467 (1984) that once the defendant has made a discovery request for the personnel files of law enforcement witnesses, the government has the "duty" to review these personnel files to determine if they contain material information that is favorable to the defendant. If the prosecutor is uncertain whether any information is material, he can submit the matter to the court for in camera review. The personnel files do not need to be produced "to the defendant or the court unless they contain information that is or may be material to the defendant's case." United States v. Henthorn, 931 F.2d at 31; accord, United States v. Dominguez-Villa, 954 F.2d 562, 565 (9th Cir. 1992); United States v. Cadet, 727 F.2d at 1468. The review of the personnel files need not be done by the federal prosecutor responsible for the case. It is sufficient if an appropriate agency attorney or a member of his staff conduct the review and then notify the prosecutor of the results of the review. The prosecutor is then responsible for determining if the information is potentially Brady material and if so whether it should be produced or submitted to the court for in camera review. See United States v. Jennings, 960 F.2d 1488, 1492, n.3 (9th Cir. 1992).

[1612] Government Motion for Protective Order, For In Camera Inspection and Motion to Seal, filed April 23, 1993, at 3-6.

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The defense objected to the government's motion for a protective order on April 30, 1993. At that time, the defense stated that it had received the Marshals Service training manuals and that the USAO had the Marshals Service manuals and the Marshals Service personnel files. With regard to the FBI materials, the defense said that the FBI had produced the training manuals but not the personnel manual to the USAO. The defense argued that pursuant to the terms of the discovery stipulation the government was obligated to produce exculpatory material and thus they should have reviewed and produced any such information contained in the personnel files without the need for an additional request. The defense admitted that their request for the complete personnel files may have been too broad but believed that the court's modifications to its order adequately addressed the privacy concerns.[1620]

On May 10, the government filed its Thirteenth Addendum to its Response to the Discovery Stipulation in which it included the Henthorn certifications for Horiuchi, Roderick, Cooper and Degan.[1621] Defense counsel Peterson raised the personnel file

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[1617](...continued)

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[1620] Defendants' Response to Motion for Protective Order, For in Camera Inspection and Motion to Seal, filed April 30, 1993.

[1621] The Marshals Service provided the Henthorn certifications for Roderick, Cooper and Degan on May 4, 1993.

issue again in court that day and repeated his argument that the defendants were entitled to access to the personnel files. Lindquist indicated that neither the FBI nor the Marshals Service had received a subpoena for the personnel files[1622] and that he and Howen had made it clear to defense counsel that the personnel files and manuals could only be obtained by subpoena.[1623] The court opined that the procedure set forth in the Henthorn case was controlling and the complete personnel file did not need to be produced unless such production was necessary to satisfy the Government's disclosure obligations.[1624]

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On May 17, the court ruled on the personnel file issue. It noted at the outset that even though the personnel files were not specifically addressed in the discovery stipulation, the federal prosecutor, under Ninth Circuit law, has the obligation by virtue of his oath of office to produce Brady material without a court order. Furthermore, the court held that "[c]ounsel for the government should have undertaken this search in advance of trial, on their own initiative." It approved the procedure proposed by the government which was to have the law enforcement agent knowledgeable about the issues in the case to review the files for Brady material. If Brady material did not exist, the defense was to be informed; if Brady material was located it was to be presented to the defense; and if the material was questionable, the court was to conduct an in camera review and make a determination as to whether it should be produced. The court ordered that this review should be done no later than two days before the witness is to testify and with regard to those

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[1622] Trial Transcript, May 10, 1993, at 8.

[1623] Id. at 10.

[1624] Id. at 152.

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witnesses who have already testified, the review should be conducted "post haste."[1627] Later that day, defense counsel Spence stated that the only personnel file that they needed was the file of Lon Horiuchi.[1628]

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b. Financial Compensation of Informant Fadeley

It was the gun sale between Weaver and a government informant that provided the basis for the initial criminal charges brought against him. The Government also planned to introduce statements that Weaver had made to the informant during four taped conversations as evidentiary support for its conspiracy theory. After informal attempts to learn the identity

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[1627] Order, filed May 17, 1993, at 1-4.

[1628] On May 21, 1993, the government produced the Henthorn certifications for Deputy Marshals Hunt, Norris and Thomas. Government Fourteenth Addendum to Response to Discovery Stipulation, filed May 21, 1993.

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of the informant had failed,[1634] Weaver's attorneys requested this information in a pretrial motion as well as any evidence that would affect the bias or credibility of the informant including "any promises of consideration given to the informant."[1635] On March 28, 1993, the government responded to this motion and refused to provide the requested information citing the untimeliness of the motion and the risks that disclosure posed on the informant.[1636] Thereafter, on April 12th, the court ordered the government to provide the requested information.

On April 13, the first day of trial, the Government identified the informant as Kenneth Fadeley. With respect to any compensation paid to Fadeley, the government stated, "Mr. Fadley [sic] has received reimbursement for expenses in the approximate amount of $500.00, but no salary."[1637] [

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[1638]]

Kenneth Fadeley began testifying on April 19 and continued into April 20 at which time defense counsel began cross examining him. Toward the end of the cross examination, defense counsel inquired about the compensation that Fadeley had received for his work on the Weaver matter. Fadeley testified that when he works for BATF he is paid for expenses which would include such items as gas and food. He could not recall how much money BATF paid him for expenses in 1986 but agreed that it was greater that $1.00 but less than $10,000.[1639] From 1987-1989, BATF paid Fadeley for "just" expenses but he was unable to recall the

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[1634] See Affidavit of Charles F. Peterson in United States v. Weaver, No. CR 92-080-EJL, dated March 17, 1993.

[1635] See Weaver Motion to Compel Identity of Informant, Criminal Record, and Matters Affecting Bias or Credibility, in United States v. Weaver, filed March 17, 1993.

[1636] Government Response to Motion to Compel Identity of Informant, Criminal Record, and Matters Affecting Bias or Credibility, in United States v. Weaver, filed March 26, 1993.

[1637] Addendum to Response to Motion to Compel Identity of Informant, Criminal Record, and Matters Affecting Bias or Credibility and Order to Seal (sealed), in United States v. Weaver, April 13, 1993, at 2.

[1638] [ ]

[1639] Trial Testimony of Kenneth Fadeley, April 20, 1993, at 152-54.

amount paid.[1640] Later, after Fadeley agreed that he had not assisted the government in this case for money and that BATF had never paid him any type of salary other than the payment of expenses, the following exchange occurred:

> Q . . . .When you first started working for ATF, were you told that you would be paid on a case-by-case basis?
>
> A I was told I'd be paid expenses for my work.
>
> Q Expenses. Were you told that you'd get paid after a case was made against a person?
>
> A After we concluded a case, there may be a monetary settlement, possibly.
>
> Q Okay. "After we concluded a case, there may be a monetary settlement"? Oh, let's talk about this case then. First of all, in order to conclude a case, you would have to get a guy to trial in the case, is that right?
>
> A I would assume so.
>
> Q And you would assume that not only would you have to get him convicted, right?
>
> A If he was guilty.
>
> Q Well, if you don't get a conviction, you don't get any money; isn't that right?
>
> A I would assume so.
>
> Q And that's not just your assumption, sir, that's your understanding about this case too, isn't it? If Randy Weaver gets acquitted of this gun case, you don't get paid; right?
>
> A I guess so.[1641]

Following this exchange, Fadeley testified that he did not know how much money he would be paid if Weaver were convicted and

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[1640] Id. at 154-55.

[1641] Id. at 160-61.

insisted that the amount of any future award had no impact on his testimony.[1642]

On April 20, defense counsel Spence moved in open court to strike the testimony of Fadeley and to dismiss all counts of the indictment based upon the Fadeley testimony. Spence argued that Fadeley was a contingent fee witness and that it was unlawful to permit such testimony to be used at trial.[1643] Howen denied that Fadeley was a contingent fee witness and argued that Fadeley's testimony regarding any future compensation that he might receive was partially based on his confusion regarding money.Fadeley might receive in the future under the witness protection program to compensate for "any differential or loss to him in either his job, his home, or other items."[1644] Howen then represented that BATF Agent Byerly, who communicated with Fadeley regarding financial compensation, would testify that Fadeley was paid for expenses and then was told that he "could be held for an award at a later time."[1645] Howen maintained that such an arrangement did not constitute a contingent fee agreement. Thereafter, the court took the matter under advisement but declined to declare a mistrial.[1646]

The government recalled Byerly to address the Fadeley compensation issue. Byerly testified that Fadeley was neither an agent nor a salaried employee of BATF. He explained that he had made an agreement with Fadeley whereby Fadeley would be reimbursed for his necessary investigative expenses associated with attending the Aryan Nations summer conferences in 1986, 1987 and 1989 and that for the entire period that Fadeley was assisting BATF he was paid expenses of $445. In addition, Byerly testified that he had informed Fadeley that he could receive an award after a case was completed. Byerly stated, "I explained to Mr. Fadeley that at the end of the case, whatever it might be, at the end of the judicial proceedings that I would submit his name to my supervisors for an award."[1647] According to Byerly, his recommendation would be reviewed by several layers of supervisors who could approve, increase or reduce the award. Byerly insisted

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[1642] Id. at 161-63, 179.

[1643] Trial Transcript, April 20, 1993, at 6-10.

[1644] Id. at 11-13.[

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[1645] Trial Transcript, April 20, 1993, at 12-13.

[1646] Id. at 14-15.

[1647] Trial Testimony of Herbert Byerly, April 20, 1993, at 68-70.

that the award was not influenced by the outcome of a case and that he had never informed Fadeley otherwise.[1648] Indeed, Byerly testified there were instances where informants received awards for work on cases that were never prosecuted.[1649]

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[.[1650]] He said that he anticipated that he was going to recommend that Fadeley receive an award of $3,500 for his work on the Weaver case. Byerly insisted that Fadeley was mistaken if he believed that the award was contingent upon there being a conviction in the case.[1651]

On April 21, defense counsel filed a motion to strike the Fadeley testimony arguing that it was improper because Fadeley had been promised a contingent fee if Weaver were convicted. In addition, they complained that the prosecutors had an obligation to disclose this arrangement to the defense prior to trial but had failed to do so. Moreover, they argued that the government's denial that Fadeley had been paid any fee constituted misconduct.[1652] In its response, the government denied that a contingent fee arrangement existed between BATF and Fadeley and then repeated its argument that Fadeley's responses were affected by his confusion over financial benefits he might receive under

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[1648] Id. at 70-72.

[1649] Id. at 75.

[1650]

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[1651] Byerly Trial Testimony, April 20, 1993, at 76-79.

[1652] See Weaver Motion to Strike Testimony of Kenneth Fadley [sic] and Memorandum in support thereof, in United States v. Weaver, filed April 21, 1993.

the witness protection program. Howen also denied having prior knowledge of the possible monetary award from BATF.[1653]

Judge Lodge ruled on the motion to strike on May 17 and found that although "Fadeley believed that he was involved in a contingency fee arrangement," the testimony of agent Byerly indicated that the government did not intend for a contingency fee arrangement to exist.[1654] Consequently, the circumstances did not exist to warrant the striking of the Fadeley testimony. However, Judge Lodge ruled that a cautionary instruction regarding how to evaluate the credibility of Fadeley would be appropriate.[1655] On May 19th, the Government informed the defense of the amounts that Fadeley had received for expenses, and awards and the amount of the proposed cash award.[1656]

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[1653] See Government Response to Motion to Strike Testimony of Kenneth Fadeley.

[1654] Order in United States v. Weaver, dated May 17, 1993, at 7-8.

[1655] Id. at 8.

[1656] Government Second Addendum to Response to Motion to Compel Identity of Informant, Criminal Record, and Matters Affecting Bias or Credibility, and Order to Seal, filed May 19, 1993.

[1657] [

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Pages 473-474 of Report
have been withheld
in their 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)