

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 96-CR-68

UNITED STATES OF AMERICA,
Plaintiff,

vs.

TERRY LYNN NICHOLS,

Defendant.

REPORTER'S TRANSCRIPT

(Trial to Jury: Volume 97)

PROCEEDINGS BEFORE THE HONORABLE RICHARD P. MATSCH,

Judge, United States District Court for the District of Colorado, commencing at 1:43 p.m., on the 28th day of November, 1997, in Courtroom C-204, United States Courthouse, Denver, Colorado.

Proceeding Recorded by Mechanical Stenography, Transcription
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APPEARANCES

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LARRY MACKEY, SEAN CONNELLY, BETH WILKINSON, and GEOFFREY MEARNS, Special Attorneys to the U.S. Attorney General, 1961 Stout Street, Suite 1200, Denver, Colorado, 80294, appearing for the plaintiff.

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

THOMAS KELLY, Attorney at Law, 2500 Republic Plaza, 370 17th Street, Denver, Colorado, 80202-4004, appearing for third parties The Arkansas Democrat-Gazette and Rodney Bowers.

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PROCEEDINGS

(Reconvened at 1:43 p.m.)

THE COURT: Be seated, please.

HEARING ON MOTION TO QUASH SUBPOENA

We have the motion to quash subpoenas served upon a third-party witness, Rodney Bowers, of The Arkansas Democrat-Gazette with Mr. -- there you are, Mr. Kelley.

And you filed the motion. And I hadn't required a written response, but I think -- I have the motion. I have the affidavit of Rodney Bowers which was attached to it and a motion to set this hearing on it.

I think maybe the easier thing for us to do, Mr. Kelley, is to hear from Mr. Tigar about what is proposed to be asked of this witness.

MR. KELLEY: I would appreciate that, your Honor.

THE COURT: You're not claiming an absolute privilege not to respond to the subpoena but a privilege that has been discussed as a qualified privilege in the cases.

MR. KELLEY: That's right. And I've also learned it is uncomfortable waltzing in here and being the first to speak, because I can't know as much about the case as people --

THE COURT: Yes. Well, I think we ought to know what is the purpose of the defendant's subpoena -- and we ought to know the purpose of it and see what problem there is, if any.

MR. KELLEY: Thank you, your Honor.

THE COURT: Mr. Tigar, if you will address . . .

DEFENDANT'S ARGUMENT

MR. TIGAR: If your Honor please, in the examination -- cross-examination, rather, of Roger Moore, I asked him about a number of prior versions of events that he had given to a number of people. The alleged robbery of Roger Moore is, of course, in the indictment; and our motions to strike it out of there on various grounds have all been denied by the Court.

We therefore take it that Mr. Moore's prior statements to other people inconsistent with his testimony here are admissible and at the very least, of course, they're admissible as impeachment; but they may also be admissible as substantive evidence under Federal Rule of Evidence 801. That's all we seek.

As I fairly set the stage with Mr. Moore: Didn't you tell so-and-so this about the robbery; and he said, No, I didn't. I never had such a conversation. I'll -- I intend to put the witness on and say, Did you have that conversation; did Mr. Moore say such and such?

The article in question that we use as the basis for our inquiry is one in The Arkansas Democrat-Gazette that quotes a confidential informant and a bunch of other stuff. We don't intend to go into any of that.

THE COURT: This is the 6-22-95 article --

MR. TIGAR: Yes, your Honor.

THE COURT: -- which quotes Mr. Moore?

MR. TIGAR: Yes, your Honor. And -- another water cup, your Honor. I think I should stand somewhere else.

THE COURT: Or maybe we ought to put everybody on a water ration.

MS. WILKINSON: It wasn't my cup this time, your Honor.

MR. TIGAR: So, your Honor, I fail to see that there is a privilege issue here. The matter is no different from Mr. Moore having spoken to anybody in the street.

THE COURT: So the only thing you intend to ask him about is what Mr. Moore said to him.

MR. TIGAR: That's correct, your Honor.

THE COURT: On the occasion of the -- apparently an interview.

MR. TIGAR: Right. And I don't know from the article

now much or that was by telephone and now much or it was in person. Obviously, we'd have to establish some foundation for that. But that's it. That's all we intend to ask. And I know of no case law that says that's covered by a privilege.

THE COURT: Well, Mr. Kelley, what do you say to that, now that we know the purpose of the subpoena?

THIRD PARTIES' ARGUMENT

MR. KELLEY: Well, I think our record also shows that this reporter knows everything he knows as a newspaper reporter. I don't think that's in issue. And I've been over Mr. Moore's testimony; and near as I could tell, the only thing Mr. Tigar asked Mr. Moore about that Reporter Bowers would be able to impeach him on is a question that appears on page 114 of the odd-line transcript. I don't know if that's of any help to anyone. I take it back.

It's on page 115. There are two questions asked. The first one:

"Do you remember telling the reporter that the guy had been standing there since dawn?" They could determine that.

And the answer was, "Yes." He admitted saying it.

So on that statement, there is no need for any impeachment.

The second is on the next page, 115: "Do you remember ever saying to Mr. Rodney Bowers or any other reporter: 'Whatever I was doing for the FBI is F-blank' --" it's an expletive deleted -- "'up because they blew my cover'?"

"Answer: Absolutely not."

And that's the one item that does appear in the -- I think the article is June 22.

And this is an interview with Mr. Moore on that shortly after the robbery occurred but after the bombing in May or so of -- May and June of 1995. And the pertinent paragraph is -- reads as follows:

"Subsequently Moore said, 'Whatever I was doing for the FBI is F-blank up because they blew my cover,'" and goes on to say, "He," Moore, "who has sold ammunition at gun shows across the nation, declined to discuss his involvement with the FBI."

THE COURT: Well, there is also some material in here about a list of serial numbers.

MR. KELLEY: Maybe I missed it, but --

THE COURT: I'm talking about the published article.

MR. KELLEY: -- but I don't recall Mr. Moore being set up for impeachment --

THE COURT: Well, look, you know, I'm not going to rule on what's impeachable and what isn't impeachable with your client not here testifying. You're seeking to excuse him completely from a subpoena. That's the issue.

MR. KELLEY: That's right.

THE COURT: All right.

MR. KELLEY: In support of that request, your Honor, I think we have shown that the only thing he has to say --

THE COURT: Well, that's not -- what I'm not going into with you, what is impeachment and what isn't. I'm not going to deal with that without the witness here.

MR. KELLEY: Well, your Honor, I think showing why he is being called to testify is part of the burden that has to be

is being called to testify is part of the burden that has to be met to satisfy Silkwood.

THE COURT: Well, your motion is denied. Have him here.

MR. KELLEY: Your Honor, I -- I would like to argue why a privilege is being claimed.

THE COURT: Well, I understand that you want me to have Mr. Tigar say exactly what questions are you going to ask this man and then rule on whether that's proper impeachment; right?

MR. KELLEY: No. I want your Honor to apply the three-part test that is set forth in the Silkwood test.

THE COURT: That's how you want me to apply it, isn't it?

MR. KELLEY: Well, I think what the Court has to look at is relevance. That is Item No. 1 in the Silkwood test. And yes, I think that's what the Court has to look at.

THE COURT: Well, the one question that has been asked is relevant. That's not collateral impeachment in this case. You make that point in your motion that you can't impeach on a collateral matter; right?

MR. KELLEY: Yes.

THE COURT: All right. This is not collateral impeachment.

MR. KELLEY: If your Honor finds that it's relevant, there are two other points that have to be addressed in the Silkwood case, the first of whether it goes to the heart -- heart of the claim --

THE COURT: Silkwood case is a civil case, you recognize.

MR. KELLEY: That's right, but relevance is a concept that is very identifiable in criminal cases as well.

THE COURT: Well, the basic law here is Branzburg vs. Hayes still.

MR. KELLEY: Well, I understand that.

THE COURT: All right.

MR. KELLEY: The Tenth Circuit in Silkwood --

THE COURT: I don't think that the Silkwood case is controlling on this matter.

MR. KELLEY: Well, Branzburg did indicate -- and circuits all over the country have so applied it to require that there be some balancing of a reporter's interest in maintaining flow of information from sources and the actual --

THE COURT: You put in your motion that he's too busy to come here. Now, is that a ground for me to excuse him from a subpoena; that he's busy?

MR. KELLEY: Nobody is saying that is a ground by itself.

THE COURT: Well, why did you put it in the motion?

MR. KELLEY: Because case after case has said that taking a reporter from the job of reporting the news for a day or two is not something that should be done unless there are grounds for overcoming the privilege.

THE COURT: Well, go ahead and complete your argument.

MR. KELLEY: Your Honor, this test, the Silkwood test, requires that the evidence not only be relevant -- and I think in this case we have a witness who has been impeached several

times on several subjects, and there are several areas in which evidence of this kind can be brought in. Thus, I don't think there has been a meeting of the burden to show that this is somehow uniquely important and relevant to the defense that's being put on.

What is being -- what Counsel is trying to show is either that this witness said at the time he was interviewed by the reporter untruthfully that he had been working with the FBI presumably in some fashion other than cooperating in this case, or that he's testifying untruthfully and denying having said that. And it certainly won't be the first time that a witness denies having said something to a reporter.

There is a privilege, your Honor. There is a recognized privilege for someone in Mr. Bowers' position. When he testifies, what he says will be published nationally. In terms of how it affects his ability to gather news, I think the Court could just --

THE COURT: Well, do you have any appreciation of the importance of Mr. Moore's testimony in this case?

MR. KELLEY: Yes, sir.

RULING

THE COURT: All right. And the credibility of Mr. Moore goes to whether the jury is to believe that Terry Nichols robbed him. And that is a rather significant point in the Government's case, and this is a capital murder case.

Have Mr. Bowers here. Your motion is denied.

MR. KELLEY: Thank you, your Honor.

THE COURT: And you can be here when he's here so that areas that may be within the scope of the qualified privilege can be ruled on at that time. But there is a sufficient showing here to require him to appear.

And with respect to the timing and importance of his work and our interruption of it, I'm sure that that can be arranged with Counsel to minimize the time involved.

MR. KELLEY: Thank you, your Honor.

THE COURT: All right.

HEARING ON MOTION TO STRIKE TESTIMONY

THE COURT: Now we have the matter of whether there has been a violation of Rule 615 in connection with the testimony of Ronald Kelly, so I wish to proceed on that.

Mr. Kelley, you're excused. You don't --

MR. KELLEY: Thank you, your Honor.

THE COURT: -- have to hang around for this.

The Court of Appeals may not be open today. I don't know.

DEFENDANT'S ARGUMENT

MR. TIGAR: In cross-examining Mr. Kelly, your Honor, we brought out the basic facts, and I would suggest that he be brought in in case anyone has additional questions to make. I obviously --

THE COURT: Well, I didn't know whether you wanted to ask him some additional questions beyond what was done with the jury here.

MR. TIGAR: No, I don't have any additional questions, your Honor, unless they are suggested -- it's just inconceivable to me that these witnesses were not instructed

with respect to this matter. The custody of Q507, this piece of paper (sic), has been a matter in sharp dispute ever since the issue first surfaced; and I was, quite frankly, quite surprised to hear about these conversations. I don't know if the Government wants to develop more of a record here. I would certainly now like to ask Agent Wilson to come in. I understand he's been kept, also, to get his version of these conversations. But I did not have any more questions of Mr. Kelly. Perhaps the Court did, or the Government.

THE COURT: All right. But you will want to call Mr. Wilson.

MR. TIGAR: Yes, your Honor.

THE COURT: Yes. All right. Well --

PLAINTIFF'S ARGUMENT

MS. WILKINSON: Your Honor, could I just address the legal issue of a violation of Rule 615 --

THE COURT: Yes.

MS. WILKINSON: -- to set the stage for calling Mr. Wilson?

My understanding is that the rule says that the purpose is that at the request of a party, the court shall order witnesses excluded so they cannot hear the testimony of other witnesses; and it may make the order of its own motion.

We all agree that is impermissible for one witness to hear another witness' testimony, or once the witness is finished with his testimony, for him to discuss it with another witness.

I do not think that Mr. Kelly said he discussed Mr. Wilson's testimony with him. Mr. Wilson was on the stand Wednesday afternoon at the close of -- towards the close of business. Mr. Wilson got off the stand. My understanding is there was no conversation between them when Agent Kelly took the witness stand. I can't remember if he came -- well, he came on, I think, Friday.

THE COURT: I believe his testimony is that after he testified in the Timothy McVeigh trial, he talked.

MS. WILKINSON: Meaning when he said he talked a month ago -- a month or two ago to Mr. Wilson.

THE COURT: Yes. It's not what happened this week; it's what happened after his testimony in the McVeigh trial.

MS. WILKINSON: I didn't understand --

THE COURT: Isn't that right, Mr. Tigar?

MR. TIGAR: Yes, your Honor, that's my understanding. I'd also like to respond to that interpretation of Rule 615.

MS. WILKINSON: I didn't understand that -- Mr. Kelly to be saying he discussed his testimony from the McVeigh case with Mr. Wilson.

THE COURT: He discussed the evidence, and his testimony was about the evidence. And it was about this very point, wasn't it?

MS. WILKINSON: I believe it was about who took the photographs, which ultimately is not the real point -- I understand that witnesses should not be discussing their trial testimony; but the ultimate point is that they were discussing -- my understanding is -- from his testimony is who took the photographs, which doesn't -- and the testimony didn't change. I mean Mr. Kelly still believes that Mr. Wilson took

change. I mean, Mr. Kelly still believes that Mr. Wilson took the photographs, and Mr. Wilson still thinks that he did not take the photographs. And I believe that's what was presented to the jury. But if defense counsel wants to call Mr. Wilson, that's fine.

THE COURT: All right.

MS. WILKINSON: Our point is -- Counsel has the ability -- has already had the ability to question Mr. Kelly in front of the jury and bring out those points and can make those arguments, obviously --

THE COURT: Well, who has been dealing with these witnesses from the prosecution?

MS. WILKINSON: I have, your Honor.

THE COURT: And did you instruct them with respect to the requirements of the order of sequestration under Rule 615?

MS. WILKINSON: I don't recall whether I instructed Mr. Kelly specifically. I recalled when I prepared them for testimony, I prepared each of them separately, as is our procedure. I called Mr. Wilson into my office with another agent, not an agent who is testifying about this issue, prepared him, sent him out, and brought in Agent Wilson. I believe that agents know they're not allowed to discuss the trial testimony. I know Mr. Kelly is not an agent and has never testified as a non-expert before, so perhaps that was my mistake, your Honor. I may have instructed him. I just can't say that I specifically instructed him; so in that regard, it's my fault. But it was my understanding that FBI employees know they're not supposed to discuss their trial testimony.

And I questioned them separately for exactly that reason, so I would get their recollections. And their recollections don't match, which happens sometimes with witnesses.

THE COURT: Well, that isn't the issue here. The issue is whether there has been a violation of Rule 615.

MS. WILKINSON: I understand that, your Honor; and if it was my lack of direct instruction, I'm not -- I can't tell you whether I instructed them or not. I tell all witnesses when they get off the stand, of course, not to discuss their testimony. I thought I did that with Agent Kelly long ago; but whether I gave him a specific instruction when he came back to the office for preparation, I can't tell you that I did.

THE COURT: Well, what was told to the witnesses who testified at the McVeigh trial about the continuing Rule 615 obligation to this trial?

MS. WILKINSON: I don't believe we gave any general instruction. I'll have to confer with Mr. Mackey, but I don't believe we gave them any general instruction.

MR. MACKEY: There was none, Judge. No one on behalf of the Government identified every specific witness that we anticipated would be called in the Nichols case and gave them in oral or written fashion an instruction that "Please anticipate you may be a witness again, and therefore don't talk about the case." We did not do that. Obviously, when this case geared up, jury selection began and the evidence began flowing, that instruction was given; but nothing was anticipated months in advance of the start of this evidence

with that -- with that kind of foresight. Perhaps it should have been. It was not done. I did not do so.

THE COURT: It would have been helpful, yes.

All right, Mr. Tigar.

DEFENDANT'S FURTHER ARGUMENT

MR. TIGAR: If your Honor please, in an earlier motion, we briefed the issue of the Tenth Circuit's interpretation of Rule 615, your Honor may recall, with respect to meetings held in Oklahoma City with prosecutors.

THE COURT: Yes.

MR. TIGAR: And at that time, we pointed out that under the case law construing Rule 615, the rule is considered to prohibit consultations among witnesses who know that they are going to be called in a proceeding. Thus, it is not simply the literal text of the rule: The Tenth Circuit goes beyond and has this additional protection of the process.

Agent -- excuse me. Mr. Kelly states that no one ever told him he wasn't supposed to do this. Mr. Kelly says in the McVeigh trial Agent Wilson took the pictures.

On direct examination here, he comes and says, "No, Agent Wilson didn't take the pictures. I was mistaken," and then on cross-examination says, well, maybe he wasn't mistaken; now he just doesn't remember.

The significance of the pictures becomes clear --

THE COURT: Well, I think what he said was it's still his best recollection --

MR. TIGAR: Yes.

THE COURT: -- that Mr. Wilson took the pictures.

MR. TIGAR: Yes. That was where he finally wound up, although he said, as I recall, on direct examination that he had been mistaken at the earlier time. The record will show what the record shows.

THE COURT: Yes.

MR. TIGAR: The point is that Mr. Kelly, having been part and parcel of this dispute over the provenance of Q507, cannot have been unaware of the significance. Indeed, in the last trial it was suggested by the defense that Q507 had been retrieved by a civilian and that -- and had been brought in, and then you had a lot of testimony about that, so that there was never any doubt in the Government's mind that this custody issue and where Q507 was and who got it and who took a picture of it and when they took a picture of it was something that was very, very important.

Now, Agent Wilson did not testify in the last trial; but since he was in the chain of custody, he could reasonably anticipate that he might be called and at some point -- the Government doesn't tell us when -- he received notice that he should be available to testify in this case.

As a special agent of the FBI, he should know what that means.

Mr. Kelly, as a 19-year veteran of the FBI, should also know what that means. And here we have the statement that corroborates that nobody ever told him.

Your Honor, this is a violation of the rule as to this important issue, and we do think that Agent Wilson should be called. Perhaps, as I say, there are other questions of

Mr. Kelly. And at that point, we made a motion at the bench and we repeat it now: We believe that the testimony of Agent Kelly and Agent Wilson should be stricken and that then the Court should consider what that does about the chain of custody of Q507.

THE COURT: All right.

PLAINTIFF'S FURTHER ARGUMENT

MS. WILKINSON: Your Honor, may I address one other issue --

THE COURT: Yes, sure.

MS. WILKINSON: -- just to make the record complete?

We did not know that we were going to call Agent Wilson, obviously, in the McVeigh case, since we did not. About a month before or two months before we were getting ready for this trial, I called Agent Wilson in because I had reviewed the transcript from the McVeigh case and thought that Mr. Tigar may challenge the chain of custody of Q507.

I believed Agent Wilson was the photographer. His name is on the log. His name is on the back of the photographs. So when I brought him in and he said he was -- he did not think he was the photographer, I then called in Mr. Kelly again to confront him, to see if we had an error in the McVeigh case, knowing I would have some obligation if we did to report that and to make that clear in this case.

THE COURT: What do you mean you confronted him? Did you have a three-way conversation?

MS. WILKINSON: No. No. I brought him in separately and asked him separately what was the basis of his recollection. I can see why he recollected that and reviewed the documents and thought that Agent Wilson was the photographer; but when Agent Wilson tells me he's not the photographer, I realize there is a conflict.

THE COURT: Well, is there any record other than this log --

MS. WILKINSON: There isn't, your Honor. That's the problem. I mean, we have these -- can I finish, Mr. Tigar, please.

MR. TIGAR: Of course. I thought you were finished.

THE COURT: You know, I wanted to know independently.

MS. WILKINSON: No, we've searched, your Honor. As soon as I realized there were two conflicting memories, which as we've said happens sometimes, we tried to track it down. We cannot determine who the photographer was. So we felt like we had to leave the record the way it was, but I had to -- I say "confront" -- talk to Mr. Kelly and see what the basis was of his recollection.

THE COURT: So after inquiry of the FBI, the only information you have about recording this process is the log that we have in evidence.

MS. WILKINSON: That's right.

THE COURT: Which Mr. Wilson says is incorrect.

MS. WILKINSON: Right. He says that he kept the log but he didn't take the photographs.

THE COURT: Yes.

MS. WILKINSON: Nowhere on it does it say he was the photographer. I assumed that, and I assume what happened was on the back of the photographs where it says "Agent Wilson" and

on the back of the photographs where it says "Agent Wilson" and the roll number that FBI lab processes these photographs and -- and I assume because the photograph log says Mr. Wilson's name on it, they put his name on the photographs just like when Ms. Hester came forward about the FBI key -- I mean the picture of the key -- she was the photographer and kept her own log. But there is no other written record to determine who the photographer was.

THE COURT: Well, is there a record of who was assigned to this team, this chemical team?

MS. WILKINSON: You've seen what we have, which is that 302 that they put on top; and all that has is Mr. Kelly's name and Mr. Wilson's name. They recall other people being there at certain times, but there is no record of who the photographer was. And, you know, again, I think they just --

THE COURT: Well, do we have a record about who the photographer was on these other items?

MS. WILKINSON: It's all the same roll of film.

THE COURT: All the same roll.

MS. WILKINSON: And that's the problem. And obviously, someone was directing Mr. Wilson to write down the photographs, and that's why we see that he doesn't write down every photograph that was taken. So, you know, I can only guess as to what happened with the photographer; so we presented -- when I interviewed both of them, until a couple days ago, we still weren't sure whether we were going to call Mr. Wilson at all or just call Mr. Kelly. We finally decided we should present all the evidence, and now I feel like by presenting all the evidence we're just trying to show there is a discrepancy in the memories. And I believe what happened was not knowing -- not talking to either of the individuals about it, they had been both confronted by me separately and challenged quite vigorously as to their memories to try and figure out what happened; and they must have gotten back together, talked about it when they were looking at the evidence, I assume, trying to figure out what happened.

THE COURT: Well, I think we ought to find out what Mr. Wilson's version of these discussions is.

MS. WILKINSON: Sure.

THE COURT: Mr. Tigar?

DEFENDANT'S FURTHER ARGUMENT

MR. TIGAR: Your Honor, may I just be heard briefly?

If, indeed, Mr. Wilson -- excuse me -- If, indeed, Mr. Kelly told Ms. Wilkinson some time ago that his recollection of who took the photographs might now be different, then under the Court's prior order we should have received some notification of that, because that's a change, even if that took place in an interview with counsel. That's what I understood the Court's order to be. We have never received any such notification.

And with respect to who the photographer is, that is Exhibit E5. If the Court looks on the back of each of the photographs, the sticker says, "Photographer, Mr. Wilson." I just wanted to make clear that that is the state of the record. Now we're now told that's something that's done in the processing laboratory. That had not previously been brought out. But I do agree we should hear from Agent Wilson.

THE COURT: Let's get him in here, yes.

We had you excused before, but a matter has come up that makes necessary for us to call you back under the previously taken oath; so please resume the witness stand.

(Alton Wilson was re-called.)

THE COURT: Mr. Tigar, do you wish to inquire?

MR. TIGAR: Yes, please.

DIRECT EXAMINATION

BY MR. TIGAR:

Q. Agent Wilson, do you remember the first time that you discussed with members of the prosecution team whether or not you had taken the photographs that were -- the log of which you saw earlier today?

A. Yes, I do.

Q. When was that?

A. That occurred during my initial trial preparation, my initial visit for trial preparation.

Alton Wilson - Direct

Q. When was that, sir?

A. That was approximately September or October of this year.

Q. Of 1997?

A. Of 1997.

Q. By the way, are you aware of why you're here, why you're back here?

A. No, I'm not.

Q. Nobody has told you?

A. That's correct, sir.

Q. And at that time, which prosecutor did you meet with in September of 1997, whenever that was?

A. Beth Wilkinson.

Q. And did you discuss with Ms. Wilkinson whether or not you had taken the photographs?

A. Yes, I did.

Q. Did she tell you that there was a -- some dispute about who had taken the photographs?

A. I believe she did, yes.

Q. And what did she -- what did you understand the dispute to be?

A. Whether or not I took the pictures.

Q. Did she tell you about Mr. Kelly's recollection of that event?

A. I believe she did.

Q. So she told you that Mr. Kelly remembered it differently

Alton Wilson - Direct

than the way you remembered it. Is that right?

A. Pretty much.

Q. And after she told you that Mr. Kelly remembered it differently than the way you remembered it, what did you say?

A. I told her that I did not recall taking the pictures.

Q. And how long did that first meeting take?

A. Approximately 20 minutes.

Q. Now, did you have another meeting in which you talked about who took the pictures?

A. I believe I did, sir.

Q. And when was that?

A. This past weekend, sir. Last Sunday.

Q. So there was no meeting between that first one and the one last Sunday; is that correct?

A. That's correct, sir.

Q. And how long did that second meeting take?

A. About a half hour.

Q. And once again, did you discuss the difference between your memory and Mr. Kelly's memory?

A. Things were pretty much the same. I reiterated once again that I did not recall taking the pictures.

Q. Now, in between the first and second meeting, did you have a talk with Mr. Kelly about who had taken the pictures?

A. I believe I did -- during the first meeting, or my first trip out here.

Alton Wilson - Direct

Q. You say "during the first meeting." Who was present at this discussion you had with Mr. Kelly?

A. It was just myself and Mr. Kelly.

Q. Where did the meeting take place?

A. At the U.S. -- I'm sorry. At the command post for this investigation.

Q. And was that meeting with Mr. Kelly before, or after your meeting with Ms. Wilkinson?

A. That, I can't recall with certainty, sir.

Q. What did you talk about with Mr. Kelly?

A. The topic of conversation was who took the pictures.

Q. And what did he remember and what did you remember?

A. He stated to me that he recalled that I took the pictures, and I stated to him that I recall that I did not take the pictures.

Q. And did you reach some resolution of these different recollections?

A. We did not.

Q. And did you have -- after that meeting, did you have any other meeting with Mr. Kelly in which you discussed the question of who took the pictures?

A. Not that I can recall, sir.

Q. So just the one?

A. That is correct, sir.

Q. After your second meeting with Ms. Wilkinson, did you have

Alton Wilson - Direct

another -- did you have a further meeting with any of the prosecutors?

A. No, sir.

Q. So in terms of discussing your memory of who took the

pictures, there are only three meetings; is that right? One with Ms. Wilkinson, then one with Mr. Kelly and then one with Ms. Wilkinson again; is that correct?

A. To the best of my knowledge, that is correct, sir.

Q. When Ms. Wilkinson spoke to you the first time, was there anyone else present?

A. I believe there was one other individual present.

Q. Who was that person, sir?

A. Agent Jim Norman.

Q. And is that the only other individual who was present?

A. Yes, sir.

Q. And the second time you spoke with Ms. Wilkinson, who was present?

A. Agent Norman again.

Q. And as you sit there today, sir, do you remember whether or not you took the pictures?

A. I do not recall taking the pictures.

Q. Now, in that first conversation you had with Ms. Wilkinson, did she also discuss with you the photo log?

A. I believe she did, sir.

Q. And that's the photo log that shows 10 frames. Correct?

Alton Wilson - Direct

A. That is correct, sir.

Q. What did she say about that?

A. Well, that there was a discrepancy between the number of pictures that were taken and the number of pictures contained in the photo log.

Q. And did she also say there is a discrepancy with respect to the numbering of the frames?

A. I believe she did, sir.

Q. Now, did you discuss the discrepancy between the number of pictures on the log and the number of pictures in the book with Mr. Kelly?

A. I believe I could have, sir, yes.

Q. And was that in that meeting that you told us about after you met with Ms. Wilkinson?

A. Either before -- before I met with her or after.

Q. And did Mr. Kelly show you an evidence recovery log on which he had written certain frame numbers for pictures?

A. That, I don't recall occurring, sir.

Q. Now, did you discuss with Mr. Kelly the discrepancy between the number of frames that you had recorded and the number in the book?

A. I'm sorry. Could you repeat your --

Q. The number of actual pictures in the book as distinct from the number of frames listed in the photo log: Did you talk about that?

Alton Wilson - Direct

A. I believe I did, sir.

Q. And did you talk about with Mr. Kelly the discrepancy between the identification of the items described in your photo

between the identification of the items described in your photo log and the items that were actually shown in the pictures?

A. I don't recall that, sir. I don't recall discussing that with him, sir.

Q. Did -- did you find that there was -- that there looked like there was some problem with the way that photo log was put together?

A. Well, because of the discrepancy in the number of photos, yes.

Q. And that was what you were talking about with Mr. Kelly; right?

A. Yes, sir.

Q. And did you then talk about this again when you met with Ms. Wilkinson the second time?

A. That is correct, sir.

Q. And did you discuss with her that you just didn't remember whether you took the pictures or not? Correct?

A. I -- what I told her was I did not recall taking the pictures.

Q. And what was the tone of that meeting? Was it cordial, angry? How would you describe it?

A. Cordial, professional.

MR. TIGAR: Thank you, your Honor. I don't have any further questions.

MS. WILKINSON: Just a few.

THE COURT: You wish to ask? Yes.

CROSS-EXAMINATION

BY MS. WILKINSON:

Q. Agent Wilson, has your recollection of whether you took the photos ever changed since you first told the Government what you knew about the photos?

A. No, ma'am.

Q. And has your conversations with Mr. Kelly affected your testimony in any way?

A. They have not.

MS. WILKINSON: We have no further questions, your Honor.

THE COURT: You may step down now.

May he be excused now?

MR. TIGAR: Yes, your Honor.

MS. WILKINSON: Yes.

THE COURT: You may step down now. You really are excused.

MS. WILKINSON: Thank you, your Honor.

THE COURT: All right.

Anything else to be offered on this matter?

DEFENDANT'S FURTHER ARGUMENT

MR. TIGAR: Your Honor, I just wonder if Government counsel concedes that at the preparation session for Agent Wilson that Government counsel said, "This is what Agent -- this is what Mr. Kelly is testifying to; yours is different. How do you explain it"; that testimony-comparing went on, which is a new fact.

THE COURT: Well, Ms. Wilkinson, what can you tell us about that?

PLAINTIFF'S FURTHER ARGUMENT

MS. WILKINSON: Your Honor, I don't remember the exact

conversation I had with Agent Wilson, but I'm sure I suggested to him that there was a problem with who took the photographs. I don't think I told him that Agent Kelly testified to this. I just said that "We have -- we're trying to figure out who took the photographs. Agent Kelly recalls that you did it."

He said, "I did not do it."

And as we've said, that's the testimony that we've heard. I don't recall that I said that's exactly how he testified. I don't think that matters, though. The point is that I'm sure I made clear to him that there were different stories.

THE COURT: All right. Mr. Tigar?

DEFENDANT'S FURTHER ARGUMENT

MR. TIGAR: Your Honor, in an investigation of this length and complexity and particularly with respect to an issue as controversial as the chain of custody -- where it was found, who found it, what was done with it, and so on -- the importance of keeping each witness' recollection separate is -- is obvious. And it isn't, it seems to us, a no-harm/no-foul situation; that is, Agent Wilson says, "My recollection has been the same all along. Well, it didn't affect me."

Mr. Kelly, as the Court will recall, you know, has the melancholy distinction of having embraced both versions of events -- that is, the pictures were taken, or were not taken -- and indeed has the third that he simply doesn't remember.

So in terms of effect, it's clear that there has been effect on Mr. Kelly's recollection, followed then by the Government saying on redirect, "Well, you're sure that's the same thing, you're sure that's the same thing," trying to drive it home.

My understanding of the rule is that I'm not supposed to sit down with Witness A who is telling me a story and say, "Now, wait a minute here: Witness B has got a different version of events. Let me tell you what Witness B said, and now let's see if we can get you on that side of the story," or doing that.

That's our interpretation of the rule, your Honor.

And then if I'm right about that, if, then the question is what's the sanction. And we respectfully submit that the sanction is to strike the testimony of the witnesses who were dealt with in this improper manner.

THE COURT: But the jury has heard, really, the whole story, including the fact that Mr. Kelly -- or Agent Kelly -- talked to Agent Wilson. And I think that everything that the jury has heard here has been repeated, so that we don't have an effect on the testimony of their having discussed this matter or with the conference with Ms. Wilkinson.

MR. TIGAR: Except -- well, your Honor, I understand your Honor's view. The question often in matters of this kind is not whether some evidence is relevant. Under Rule 37 of the civil rules, meritorious positions are very often precluded as a sanction for a violation of the rules of the game. So the relevance does not seem to us to be the issue.

If, however, we concede for the moment --

THE COURT: I'm not quite sure that "relevance" is the

word. I've listened here carefully to see whether there was any effect or influence on the testimony by virtue of this discussion, which I agree should not have occurred.

MR. TIGAR: Your Honor, it's clear that with respect to Mr. Kelly, there is influence, because he said under oath in the McVeigh case unequivocally that Agent Wilson took the pictures and now slides all around: "Well, that's still my best recollection, but I'm not sure," so forth and so on. We can see the measure of his suppleness; that is to say, the effect of this treatment to crook the pregnant hinges of the knee where thrift may follow fawning: We can see it.

Now, in addition to that, your Honor, if we look to the analogous provisions of the Jencks Act, 18 U.S.C. Section 3500, it very often happens that a witness is thoroughly cross-examined, but expressly under the Act there is a sanction: They don't produce the material, then the direct is going to be stricken.

That's our position with respect to that; and if the Court doesn't accept that and the Court wishes to take the view, well, the jury has heard it, well, the jury -- what the jury hasn't heard, your Honor, is that this was something that ought not to have happened; that is to say that a party in the process has engaged in behavior that is inimical to the adversary process.

So the alternative relieve we would request, if your Honor is not going to strike the testimony, is that the jury be instructed that there is a rule; that it is clear that lawyers are not supposed to do this. We can work on the language -- and that the jury is entitled to consider that this -- entitled to consider that the method of preparation of these witnesses to testify was improper as it judges the credibility of these witnesses.

RULING

THE COURT: All right. Well, the several motions are denied. I'm not here to use rulings with respect to the evidence in this case or the effects of the evidence in the case to enforce that rule. If it had affected the testimony or I thought that it had, it would be a different issue, of course. So I'm denying the motions.

We'll continue with these other matters. 10 minutes? So -- in chambers.

Court is in recess.

(Recess at 2:27 p.m.)

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REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Dated at Denver, Colorado, this 28th day of November, 1997.

Paul A. Zuckerman

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