

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,)
) Case No.
 Plaintiff,) CR-04-127-S-RCT
)
 vs.)
)
 DAVID ROLAND HINKSON,)
)
 Defendant.)
)

BEFORE THE HONORABLE RICHARD C. TALLMAN
JUDGE OF THE UNITED STATES CIRCUIT COURT
SITTING BY DESIGNATION
(Sitting with a Jury)

Boise, Idaho
January 14, 2005 (Fri)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

PROCEEDINGS RE: TRIAL TO A JURY
(VOLUME 5, PAGES 956 THROUGH 1,200)

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(Whereupon, the following proceedings were held outside the presence of the jury:)

THE COURT: I have three items that I wanted to take up with you before we bring the jury in.

Mr. Hoyt and Mr. Nolan, I was thinking last night about our logistical problems in getting the inmate witnesses here that you are going to need. Let me suggest a couple of things.

One: It occurred to me that some of the folks who were incarcerated with Mr. Hinkson are probably state and local prisoners, as opposed to federal prisoners; so you are going to need writs of habeas corpus and ***** to condemn.

The other thing I was going to suggest to you is, if you would, to talk to Deputy Meyer upstairs in the Marshal's Office and let him know who you want. He can check and see where they are to make sure they are still here.

I was going to offer, if you want already have the forms filled out -- he does have a form of order for the writ of habeas corpus ***** for condemn.

MR. HOYT: May I approach, Your Honor?

THE COURT: Absolutely, Mr. Hoyt.

MR. HOYT: I only have the one original. We

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1 can make copies light. I prepared a motion for order to
2 transport on each prisoner. I prepared --

3 THE COURT: I was trying to save you a little
4 bit of trouble. Go ahead.

5 MR. HOYT: -- an application for ** condemn and
6 order pursuant to the writ for the transport.

7 THE COURT: Very good. How many people are we
8 talking about?

9 MR. HOYT: At this point, there are only
10 three.

11 THE COURT: Very good.

12 MR. HOYT: We have a couple others. It may be
13 cumulative. They are not in the facility.

14 THE COURT: That is why I thought you might
15 want to check with Deputy Meyer first so he can find out
16 where they are.

17 MR. HOYT: We have been tracking that
18 information.

19 THE COURT: That takes care of that one.

20 Second thing: I know you have had some
21 discussions with Ms. Longstreet about the transcripts in
22 electronic form. Let me make clear what it is I am
23 trying to do here.

24 I want to make sure that we get into your
25 record an electronic version of the transcript since the

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1 court reporter did not try to simultaneously transcribe
2 the tapes while we were playing them.

3 I understand, through Ms. Longstreet, that
4 there was a problem with the court reporter. A fire or
5 something?

6 MR. HOYT: I don't know about a fire. The
7 Government didn't make the transcript. It was prepared
8 by Brit Groom by hiring a court reporter. We gave him
9 the tape two or three years ago, at the time of the
10 first detention hearing, the revocation of bond hearing.

11 He had that tape transcribed by a court
12 reporter in the Grangeville area named Keith Evans. So
13 the Government has never prepared a transcript. We have
14 been using the one prepared by Mr. Groom.

15 THE COURT: My only concern was it looked --
16 the version I had was about an eighth-generation
17 photocopy. What we can do is scan it but the problem --
18 I am trying to protect your record here.

19 The problem is it is not going to scan very
20 well; and that is going to cause everybody problems down
21 the road.

22 If we can get the best, clearest,
23 sharpest-image copy that we can, we will scan that; and,
24 that way, we will have an electronic version to complete
25 the record.

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1 MR. SULLIVAN: We will attempt to.

2 MR. NOLAN: I think we can get an electronic
3 version from the court reporter.

4 MR. HOYT: His computer went down, and he has
5 a new computer; that was the problem.

6 Your Honor, we will search -- we have many
7 boxes of this type of thing. We may have a better
8 quality copy. We are talking about the body wire of
9 March 27th?

10 THE COURT: Although, in terms of transcripts,
11 I would like to do this for all of the transcript
12 evidence that we have so that we have got it in the
13 record. So it would be the March -- whatever it is --
14 27th body wire plus the April 2003 --

15 MR. SULLIVAN: January 8, 2003, radio
16 interview.

17 THE COURT: Yes. That one, as well. I guess
18 we have three then; is that right?

19 MR. SULLIVAN: Only two. There are only two
20 entered by the Government.

21 THE COURT: Are we going to do anything with
22 regard to the tape of the April arrest, the one that --
23 the December 7th?

24 MR. NOLAN: I don't think so. We are going to
25 put in the full -- we are going to, at least, mark a

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1 full copy of the transcript of the body wire.

2 THE COURT: Yes.

3 MR. NOLAN: We haven't decided whether to
4 offer the full transcript, in light of some of the
5 testimony. If I could approach and show the court what
6 I have?

7 THE COURT: That would be fine.

8 MR. NOLAN: This is what I have. It's on the
9 computer, but it's a much better copy.

10 THE COURT: That is much better than the one I
11 was looking at.

12 MR. NOLAN: We would be happy to provide that
13 to the court.

14 THE COURT: Pick the best you have got, and
15 give to Ms. Longstreet. She can get it imaged, and we
16 will have it in the record.

17 MR. NOLAN: Why don't I do that now?

18 THE COURT: Finally, I am handing back to the
19 Government -- I have reviewed the 302s, again, prepared
20 by Agent Long and Special Agent Martin, regarding the
21 two interviews of Chad Croner.

22 I don't see a problem with the relevant
23 testimony that the Government has marked. Obviously,
24 the defense may make objections as the testimony comes
25 in; but I don't think we are going to have the problem

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1 that I was concerned about. 965
2 MR. NOLAN: Could I give --
3 THE COURT: Absolutely.
4 MR. NOLAN: She will have to go to where they
5 have excised -- where the court ordered the excising,
6 because this is a full copy.
7 THE COURT: All right. Well, I think we made
8 clear on the record, did we not, the page and line
9 numbers that we were playing. Unless you want something
10 further done, we will just scan the entire transcript
11 into -- well, I guess --
12 THE COURTROOM CLERK: That's fine. I can do
13 that. I could do 50-page segments. You know, 1 through
14 50 would be one scan and 51 through 100.
15 THE COURT: I was just thinking. So that it
16 is clear what portion was actually --
17 MR. NOLAN: I think the whole thing should be
18 scanned. Pilled out and made a separate exhibit would
19 be what the court ruled they could play. I think I made
20 some objections. Probably the whole thing should be
21 scanned as a court exhibit.
22 THE COURT: I think that will work.
23 MR. NOLAN: Pull from that what was played as
24 an actual exhibit.
25 THE COURT: The record should be clear enough.

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1 MR. NOLAN: Right. Do we get the 302s on 967
2 Croner?
3 THE COURT: I previously ruled on that. Not
4 yet. It depends upon how the Croner testimony comes in.
5 Based upon the written ruling that I made the other
6 morning, I did review it in camera and I did not see
7 that it was either a statement within the meaning of the
8 Jinks Act or, at least, pretrial that there was Giglio
9 material in there.
10 But I did say in my order that I would
11 reconsider it after we hear from Mr. Croner, depending
12 upon how his testimony comes in.
13 MR. NOLAN: The Government made an offer as to
14 what they were going to elicit from Mr. Croner.
15 THE COURT: The reason I asked for it is there
16 are some things in the Croner's 302 that I am quite
17 certain the defense does not want Mr. Croner to testify
18 in front of the jury about, which are not relevant to
19 the issues in this case and which the court would
20 exclude under 403 as being unduly prejudicial.
21 I wanted to make sure they were not going to
22 try to offer any of those portions of the Croner
23 testimony.
24 MR. NOLAN: We received, yesterday,
25 handwritten notes Mr. Croner. Would the court --

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1 if that becomes important enough down the road, that you 966
2 will be able to make appropriate arguments and identify
3 for anybody who is reviewing the transcript what portion
4 was played and what was excised.
5 Is that acceptable to the Government?
6 MR. SULLIVAN: It is, Your Honor.
7 THE COURT: That is all I have. Unless
8 somebody has anything else, I think we are ready.
9 MR. SULLIVAN: The Government has two matters.
10 THE COURT: Go ahead.
11 MR. SULLIVAN: I was discussing, just moments
12 before Your Honor took the bench, with Mr. Nolan whether
13 he had a memory of the court giving a 404(b) instruction
14 regarding Albers-type testimony. Neither one of us seem
15 to recall.
16 THE COURT: Nobody asked for it. I was
17 certaining going to include such an instruction in the
18 final jury instructions, but I will be happy to give one
19 first thing this morning.
20 MR. NOLAN: I am not requesting it.
21 THE COURT: You are not requesting it?
22 MR. NOLAN: No.
23 THE COURT: I guess we can revisit the issue
24 when we settle the closing instructions, as to whether
25 you want one.

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1 THE COURT: I would like to see a copy of 968
2 those, as well.
3 MR. NOLAN: If the court would do me a favor
4 and show which ones the court, in effect, excluded so I
5 don't go into them in cross, if you know what I'm
6 saying.
7 THE COURT: Yes, I do.
8 MR. HOYT: Your Honor, could we probably get
9 an extra copy?
10 THE COURT: Why don't you do this. I don't
11 need to do this right now.
12 MR. NOLAN: That's right. He is not the next
13 witness.
14 THE COURT: We are not going to get to him
15 until next week -- oh, I guess today.
16 MR. HOYT: Maybe we could darken them or
17 something. They are pretty light.
18 THE COURT: I will have Ms. Barrett make some
19 copies for us.
20 MR. SULLIVAN: One other matter. We are going
21 to call Joe Swisher as our next witness. This matter
22 relates to his cross-examination.
23 I wanted to ensure that what not be a matter
24 of cross-examination is the trial he had some twenty
25 years ago where he was acquitted.

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1 The allegation was child abuse, and I see no
2 possibility of that coming in. Obviously, under the
3 rules, it is not proper cross-examination.

4 THE COURT: That is my understanding of the
5 rule.

6 Mr. Nolan?

7 MR. NOLAN: First of all, you know, I think we
8 have been doing a pretty good job of --

9 THE COURT: You are doing a fine job.

10 MR. NOLAN: I thought about that last night.
11 Here is what I intended to do: I intended to establish
12 that he, also, has a bias against Mr. Albers. The bias
13 relates to a lawsuit he was involved in. I wouldn't get
14 into the nature of it, but it was a criminal matter.

15 He was ultimately found not guilty, but he
16 harbors hostility and never has liked him. So in other
17 words, I wasn't going to get into the circumstances or
18 the nature of the allegation; but that there is a long
19 period of hostility towards Mr. Albers.

20 So the conversation between Mr. Hinkson and
21 Mr. Albers might very well -- Mr. Hinkson and
22 Mr. Swisher might very well their both disliking Albers.
23 That was how I was planning on doing that.

24 MR. SULLIVAN: That is why I wanted to bring
25 it up. I don't want to see a foot in the door to

1 explore this. This sounds like the first foot of
2 several.

3 THE COURT: I do not think that opens the
4 door. I think that is the appropriate way to handle a
5 sensitive issue.

6 MR. SULLIVAN: I object to it.

7 THE COURT: Well, it does go to potential bias
8 of the witness against Mr. Albers.

9 MR. SULLIVAN: He is talking about the
10 witness's bias against some third party who is not a
11 witness in the case.

12 MR. NOLAN: It has to do with his testimony
13 that he was -- Mr. Hinkson was talking about Albers and
14 that the two of them had hostility towards Albers during
15 those conversations. It wasn't just Mr. Hinkson.

16 I have given the complete -- that is what I
17 was going to do, which I think is the proper thing, not
18 getting into any of the details.

19 THE COURT: It certainly does help to explain
20 why he would be willing to entertain the suggestion of
21 harm to Mr. Albers.

22 MR. SULLIVAN: Which is good for the
23 Government.

24 THE COURT: Well, it could cut both ways,
25 depending how the jury sees. They might conclude that

1 Mr. Swisher was off on a lark of his own.

2 I am not going to argue the defense's case for
3 them, but let's do it this way. Let me hear Mr. Swisher
4 on direct. And then when we get to cross-examination,
5 if I have a concern about Mr. Nolan going into that
6 area, we can take it up outside the presence of the
7 jury.

8 At this point, my preliminary ruling is that
9 Mr. Nolan is entitled to cross to the limited extent on
10 this issue that he proffered.

11 MR. SULLIVAN: Does limited extent, Your
12 Honor, include, "You were tried and acquitted?"

13 THE COURT: Well, I think the way he said it
14 was a fair question.

15 "Isn't it a fact that you dislike Mr. Albers
16 by virtue of the fact that, when he was the Prosecuting
17 Attorney for Idaho County, he prosecuted you in a case
18 that you were ultimately acquitted of?"

19 And I assume the answer will be, "Yes, that's
20 true."

21 That is as far as we are going to take it. I
22 think that is fair cross-examination.

23 MR. NOLAN: I wouldn't go any further than
24 that, Your Honor.

25 THE COURT: If you want to instruct --

1 MR. SULLIVAN: This is a trial twenty years
2 ago.

3 THE COURT: Well, but the guy could still hold
4 a grudge for twenty years, Mr. Sullivan. As I say, it
5 is certainly not the fact that -- it is certainly not
6 admissible for impeachment, in the sense of a prior
7 conviction, because it did not result in a conviction.

8 MR. SULLIVAN: We are bringing to the jury's
9 attention something that would be totally inadmissible
10 for any purpose except to show that something that is
11 favorable to the Government.

12 They want to bring out something favorable to
13 the Government. I say that is the camel's nose under
14 the tent.

15 THE COURT: Well, I do not agree that it is.
16 A question I think you are now raising which is actually
17 a good one -- Mr. Nolan, perhaps you can respond to
18 it -- if it is 23 years ago, that is a long passage of
19 time.

20 MR. NOLAN: But the fact of the matter is, I
21 mean, if I needed to, I could establish that that
22 hostility went right up to the day that Mr. Swisher's
23 father provided the letter which was published by
24 Mr. Hinkson to defeat him in the -- I wasn't going to go
25 into all of that.

1 MR. SULLIVAN: There is a lot of history to
2 all this.

3 THE COURT: I recall from the tax trial -- as
4 I recall, Mr. Albers testified in the tax trial, didn't
5 he, Mr. Hoyt?

6 MR. HOYT: Yes, he did.

7 THE COURT: And I recall that we did get into,
8 I think, some of the election issues and Mr. Hinkson's
9 participation.

10 MR. SULLIVAN: The election issues related
11 right back to Mr. Albers trying Mr. Swisher for this
12 child abuse charge.

13 THE COURT: Let's do it this way.

14 MR. NOLAN: I wasn't going to get into that.
15 I'm saying that shows that the hostility continued.

16 THE COURT: I think the Government is entitled
17 to -- you said you are not calling Mr. Albers?

18 MR. SULLIVAN: I'm not.

19 THE COURT: Are you going to get into the
20 election issues at all in order to establish motive by
21 Mr. Hinkson?

22 MR. SULLIVAN: I had no intention of doing it.

23 THE COURT: You are going to leave it -- as
24 far as the jury is concerned, you are going to leave it
25 as animosity arising from the Annette Hasalone

1 litigation?

2 MR. SULLIVAN: Yes. Mr. Swisher would
3 testify, actually, not just to Swisher's animosity to
4 Albers but Mr. Hinkson's animosity to Albers. I didn't
5 intend to develop anything about Swisher's feelings.

6 THE COURT: The jury has already heard the
7 testimony about the Annette Hasalone litigation. I
8 think they have heard enough with regard to why
9 Mr. Hinkson -- and as I understand it, Agent Long is
10 also going to testify, when he interviewed Mr. Hinkson,
11 Mr. Hinkson confirmed his dislike for Mr. Albers.

12 MR. SULLIVAN: This is an offer to kill
13 Mr. Albers for \$10,000 that Swisher is going to --

14 THE COURT: I understand that. You are going
15 to be allowed to elicit on direct that the offer was
16 made.

17 I think I am going to reiterate my prior
18 ruling. I think Mr. Nolan's proffered cross-examination
19 is proper, limited in scope as Mr. Nolan is offering to
20 do.

21 I will certainly entertain another objection
22 from the Government as we hear the evidence come in. At
23 this point, my preliminary ruling is he is entitled to
24 ask those questions.

25 All right. Let's bring in the jury.

1 (The following proceedings were held in the
2 presence of the jury:)

3 THE COURT: Mr. Swisher, if you would, step
4 forward here. The clerk will administer the oath. Good
5 morning, sir.

6 THE COURTROOM CLERK: Please raise your right
7 hand.

8 * * *

9 ELVEN JOE SWISHER,
10 having been called, sworn, testified as follows:

11 THE COURTROOM CLERK: Thank you. Please take
12 the stand, sir. If you would, please state your name
13 and spell your last name for the record.

14 THE WITNESS: Elven Joe Swisher,
15 S-w-i-s-h-e-r.

16 THE COURTROOM CLERK: Thank you.

17
18 DIRECT EXAMINATION

19 BY MR. SULLIVAN:

20 Q. Mr. Swisher, how old of a man are you?

21 A. I turned 68 yesterday.

22 Q. You live in Idaho?

23 A. Yes, I do.

24 Q. For how long?

25 A. My gosh. Over thirty years.

1 Q. Where were you born and raised?

2 A. I was born and raised in the Upper Ozarks area
3 of Missouri.

4 Q. What is the level of your education?

5 A. I have an undergraduate degree from Central
6 Missouri University. I have a graduate degree, a
7 Master's, from the University of Missouri, Columbia. I
8 have had doctoral studies at the University of Idaho and
9 Washington State University.

10 Q. What are your degrees in?

11 A. My undergraduate degree was a Bachelor of
12 Science in psychology and sociology.

13 Q. What was your Master's Degree in?

14 A. In psychiatric social work.

15 Q. You say you also engaged in doctoral studies?

16 A. Yes, in the field of special education. I am
17 still short a dissertation.

18 Q. Did you work in that field?

19 A. Yes.

20 Q. What did you do in that regard?

21 A. Oh, my goodness. I began work at the Old
22 King's Road in Fulton, Missouri, State Hospital Number
23 One. It was a psychiatric hospital for adults and
24 juveniles, as well.

25 Q. How long were you there?

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1 A. I was there about four years, and then I
2 transferred with advancement to the State of California.
3 I became employed with the Bureau of Protective Services
4 there. I rendered service to the three major hospitals
5 in California -- Mendocino, Sonoma, and Napa.
6 THE COURT: These would be the state mental
7 hospitals, Mr. Swisher?
8 THE WITNESS: Yes. Two of them are state
9 mental hospitals, and one is a hospital for the
10 retarded.
11 BY MR. SULLIVAN:
12 Q. How long did you -- were you employed in this
13 field of psychology and social work? Is that a fair
14 characterization of it? I don't mean to --
15 A. Oh, I think that's fair. In excess of twenty
16 years. And then I have been in private practice and
17 kept my hat in the ring for some period of time. I am
18 still certified.
19 Q. Certified as what?
20 A. I am certified as a political social worker.
21 I belong to the Academy of Certified Social Workers. I
22 am a certified psychotherapist through the APA. I am
23 also a certified forensic counselor.
24 Q. Did there come a time, after some twenty years
25 of working in this field, that you switched careers?

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1 A. I have taken CEUs from the University of Idaho
2 in metallurgy, assaying, mine development, things of
3 that nature.
4 Q. Did you work in that field?
5 A. Yes.
6 Q. What did you do?
7 A. In the early -- late '70s, early '80s, I
8 brought one of the first mines back into production in
9 Idaho since the war years.
10 Q. Do you still work in that field?
11 A. Yes.
12 Q. Do you work for a particular employer?
13 A. I am more considered a consultant at this
14 point in time.
15 Q. All right. Consulting with whom?
16 A. Oh, I consult with the mining companies, with
17 people that need plants set up either in mining or in
18 environmental remediation.
19 Q. Prior to being a consultant, did you work full
20 time for some company?
21 A. Oh, pretty much for companies I had an
22 involvement with. I worked at my father's company for a
23 number of years, Idaho Mining and Development Company.
24 Q. Say it again.
25 A. Idaho Mining and Development Company.

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1 A. That's correct.
2 Q. When, approximately, did you switch careers?
3 A. Oh, in the early to mid '70s, I began to get
4 into mining and get into a little less strenuous
5 occupation.
6 Q. That was quite a switch. How did you have an
7 interest in mining?
8 A. Well, I have an old friend, who is now dead --
9 bless his soul -- and he was one of the -- he was the
10 epitome of an Idaho range rider till the day he died.
11 He carried an old, single-action Colt .45 and rode the
12 range in the back country.
13 Q. My question is: How did you manage to switch
14 careers?
15 A. I'm getting to that, counselor.
16 THE COURT: Get to it, Mr. Swisher.
17 THE WITNESS: Anyway, he introduced me to the
18 back country and some mining property that he knew of.
19 And then, as a result of my association with him, I
20 became actively involved in mining.
21 BY MR. SULLIVAN:
22 Q. Did you engage in any academic studies, mining
23 or chemical analysis?
24 A. Oh, yes.
25 Q. What did you do in that regard?

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1 Q. Where was that located?
2 A. It was located in Cottonwood, Idaho.
3 Q. Where is Cottonwood?
4 A. Cottonwood is approximately sixty miles south
5 of Lewiston.
6 Q. In the year 2000, for whom were you working?
7 A. Actually, in the year 2000, I was probably
8 still doing some work for Idaho Mining and Development
9 and, also, for Northwest Analytical.
10 Q. Where was Northwest Analytical located?
11 A. Also located in Cottonwood, Idaho.
12 Q. What was your position with Northwest
13 Analytical?
14 A. Oh, I was an assayer; and I handled most of
15 the assaying for that company.
16 Q. What is assaying? Can you define "assaying"
17 for us?
18 A. Oh, assaying is, basically, the determination
19 of metals or minerals in solid or solution.
20 Q. Did you ever perform assaying for a company
21 called WaterOz in Grangeville, Idaho?
22 A. Yes, I did.
23 Q. When did you start doing that?
24 A. Probably about mid year 2000.
25 Q. How did you get introduced to doing that work?

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1 A. Well, I met David Hinkson at the office of my
2 attorney there in -- well, he was operating out of
3 Grangeville at that time. And I was introduced to
4 Mr. Hinkson. Mr. Hinkson invited us -- my wife was with
5 me -- he invited us out for a tour of his plant.
6 Q. Who is the attorney that you were seeing at
7 that point?
8 A. Brit Groom.
9 Q. Was that a chance meeting of Mr. Hinkson?
10 A. I believe so.
11 Q. What did he invite you out to his plant to do?
12 A. Oh, to look around.
13 Q. Did this include some professional services or
14 just socializing?
15 A. No. I think that it was more of a social
16 nature at that time.
17 Q. Did you go out to his plant?
18 A. Yes.
19 Q. What did you do there?
20 A. He showed us around the plant. He showed us
21 through. And, oh, he had a number of tapes and
22 information on water products and so on that he provided
23 for us.
24 Q. Did you get interested in his water product?
25 A. Yes.

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1 Q. When did that start?
2 A. That started in -- sometime in 2000.
3 Q. How did you begin working for him in this
4 professional relationship?
5 A. Would you say it again?
6 Q. How did it start? Did he ask you to do this?
7 A. He didn't initially ask. His manager did.
8 Q. Who was that?
9 A. That was a lady by the name of Teri (sic.)
10 Gray.
11 Q. What did she want you to do?
12 A. She wanted us to run tests on the product to
13 verify that there was the correct amount or
14 parts-per-million of the minerals that they indicated on
15 the label actually in the product itself.
16 Q. Did you, also, discuss that to any degree with
17 Mr. Hinkson that you were going to provide that service?
18 A. Yes.
19 Q. What did you discuss with him about doing
20 that?
21 A. Just that we had been asked to provide that
22 and, if he had no objection, we would do that.
23 Q. What did he say to that?
24 A. To go ahead.
25 Q. What did you do then, in that regard, to

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1 Q. For what purpose or reason?
2 A. Well, I had been taking medication for chronic
3 arthritis; and it hadn't been terribly effective. It
4 was my understanding that the water products may be more
5 effective.
6 Q. Did you start using them?
7 A. Yes, I did.
8 Q. What sort of conditions did you use them for?
9 A. Primarily, for the arthritis.
10 Q. Did you discuss that with Dave Hinkson?
11 A. With Dave?
12 Q. Yes.
13 A. Yes.
14 Q. Did you become a social friend of
15 Mr. Hinkson's?
16 A. Yes.
17 Q. And would you -- in what fashion would you
18 socialize with him?
19 A. Oh, I would go out and, you know, talk with
20 him; and he would come in town and meet with my wife and
21 I. We went to a number of dinners together, things of
22 that nature.
23 Q. Did there come a time when you provided
24 professional services to his company, WaterOz?
25 A. Yes.

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1 provide that professional service?
2 A. Well, I think, initially, we were supplied
3 samples to run; and we ran those to determine the parts
4 per million and whether, actually, what was stated on
5 the label existed in the product. On the first -- on
6 the first couple of runs of that type that we ran, it
7 was as stated on the label.
8 Q. How often did you do this testing?
9 A. Initially, we started out, oh, a couple of
10 times a month; and then that increased in frequency --
11 Q. To what?
12 A. -- as we were asked. Oh, I think, at the time
13 that our last services were provided, they were on a
14 daily basis.
15 Q. Did you work almost daily on it, on this then?
16 A. In one way or another.
17 Q. Would you be in the WaterOz plant frequently?
18 A. Yes.
19 Q. Would you be in contact with Mr. Hinkson
20 frequently?
21 A. Yes.
22 Q. Did you continue, also, to socialize with
23 Mr. Hinkson?
24 A. Yes.
25 Q. Do you see Mr. Hinkson in the courtroom today?

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1 A. Yes. 985
2 Q. Where is he?
3 A. He is seated between the two gentlemen to your
4 immediate left.
5 THE COURT: The record will reflect that the
6 witness has identified the defendant, Mr. Hinkson.
7 BY MR. SULLIVAN:
8 Q. How long did your professional services last
9 with WaterOz?
10 A. From probably about mid year 2000 up until the
11 end of the first quarter in 2003.
12 Q. What were you charging for these services?
13 A. We were charging standard lab fees on an
14 hourly basis on work provided and performed.
15 Q. Now, was this under the auspices of one of the
16 companies that you worked for at that time?
17 A. Yes.
18 Q. Which company?
19 A. Northwest Analytical.
20 Q. Can you tell us what a monthly charge would be
21 to WaterOz in this period?
22 A. Oh, it was variable. It might have been
23 anywhere from \$1,000 up to \$4,000 or \$5,000.
24 Q. Could you give us any estimate of what it
25 would have -- that charge, that is, what you were

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1 charging WaterOz -- would have been for the entire year 986
2 of, say, 2002?
3 A. Probably in that first year, that short year,
4 probably around \$20,000, \$25,000. That's just a guess.
5 I don't have the records with me.
6 Q. How were you actually paid?
7 MR. NOLAN: I'm sorry. Can I just have a
8 moment?
9 THE COURT: Sure.
10 (Whereupon, an off-the-record discussion was
11 held between Mr. Sullivan and Mr. Nolan.)
12 BY MR. SULLIVAN:
13 Q. Let me ask for a clarification, please,
14 Mr. Swisher. You gave us an answer. My question was:
15 Can you approximate what your charge was to WaterOz for
16 your services in the year 2002? Did you hear that
17 question correctly?
18 A. Oh, my services?
19 Q. Yes, for Northridge (sic).
20 A. For Northwest Analytical?
21 Q. I'm sorry. Northwest Analytical?
22 A. Right.
23 Q. What was it for 2002?
24 A. I am saying somewhere around \$25,000.
25 Q. You mentioned something about a short year?

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1 A. Yeah. 987
2 Q. Mr. Nolan wasn't sure what you meant. In
3 2001, would that have just been services for
4 approximately six months or thereabouts?
5 A. Oh, I'm sorry. I beg your pardon. I have a
6 head cold, and it's really affected my hearing. Did you
7 say the year 2000, which would have been the short year,
8 or 2002?
9 Q. I said 2002.
10 A. Well, then it would have probably been in the
11 neighborhood of double that amount, probably closer to
12 fifty.
13 Q. All right. Thank you. If you don't hear
14 something too well, please try to, you know, let me
15 know. Now, you told us that you continued to socialize
16 with Mr. Hinkson?
17 A. That's correct.
18 Q. Did you ever go to his home?
19 A. Yes.
20 Q. Where was his home?
21 A. He had a trailer immediately adjacent to the
22 WaterOz plant.
23 Q. Can you describe this home? Let me ask this:
24 Was it the kind of trailer that was on wheels?
25 A. Oh, no.

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1 Q. What kind was it? 988
2 A. It was set -- based on a foundation. It had
3 an upstairs, downstairs, several bedrooms, baths, dining
4 room, living room, up and down.
5 Q. In your socializing, did you ever -- did
6 Mr. Hinkson ever inquire about your background, your
7 personal background?
8 A. He may have.
9 Q. Have you ever served in the Armed Forces,
10 Mr. Swisher?
11 A. Yes.
12 Q. Did Mr. Hinkson ever ask you about your
13 service in the Armed Forces?
14 A. Yes.
15 Q. What branch did you serve in?
16 A. United States Marine Corps.
17 Q. Did you ever discuss that with Mr. Hinkson?
18 A. Yes.
19 Q. And what was the nature of your discussion
20 with him?
21 A. As I recall, Mr. Hinkson stated he had been in
22 the Navy. I indicated I had been in the Marine Corps.
23 He asked if I had served in any combat situations. I
24 explained -- or told him, "Yes."
25 Q. What else did he ask you about combat

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1 situations? 989
2 A. He asked if I had ever killed anyone.
3 Q. What did you say?
4 A. I told him, "Yes."
5 He asked, "How many?"
6 And I told him, "Too many."
7 Q. Was that one conversation or several?
8 A. It may have happened over a prolonged period
9 of time.
10 Q. What period of time?
11 A. Oh, probably off and on throughout the year
12 2001.
13 Q. Did you ever have occasion to discuss weapons,
14 guns, with Mr. Hinkson?
15 A. Briefly.
16 Q. Did you ever go shooting guns with
17 Mr. Hinkson?
18 A. Yes.
19 Q. And on how many occasions?
20 A. Only one that I recall immediately.
21 Q. Did you ever claim to Mr. Hinkson that you had
22 proficiency with firearms?
23 A. I believe he knew that I was an expert
24 rifleman, pistolman.
25 Q. How did he know that?

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1 there. I assumed they came from Mr. Hinkson. 991
2 Q. What kind were they?
3 A. One of them was a shotgun; and I think there
4 was another rifle there, as well.
5 Q. What did you bring?
6 A. I brought a .22 Henry lever-action rifle and a
7 .32 semi-automatic Browning pistol, and a .45 auto.
8 Q. How was your shooting?
9 A. I always hit what I aim at.
10 Q. How was Mr. Hinkson's shooting?
11 A. Not terribly good.
12 Q. What were you shooting at?
13 A. Well, we shot some trap with a shotgun. I
14 only shot maybe a half dozen times because I recently
15 had a pacemaker installed; and a shotgun, a twelve-gauge
16 particularly, kind of jars you around a little. I
17 decided I would quit in due time, but I hit my targets.
18 As I recall, I don't believe David hit any of his.
19 THE COURT: Counsel, you might have him
20 explain, for those jurors who do not know what trap
21 shooting is, a little bit more about that sport.
22 MR. SULLIVAN: Yes, Your Honor.
23 Q. Were you engaged in trap shooting?
24 A. Yes.
25 Q. Please explain what that is.

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1 A. I probably told him. 990
2 Q. I'm sorry?
3 A. I probably told him, and he observed my
4 shooting.
5 Q. What was the occasion that you went shooting
6 with him?
7 A. I believe it was probably in December,
8 sometime in December of 2002, that he had a gentleman
9 from the Soviet Union, from the Ukraine, visiting. I
10 received a call from Mr. Hinkson.
11 He said we were going to meet out at an
12 employee's who lived in the country, Mr. Rich Bellon.
13 He indicated that his friend from Russia would like to
14 do a little shooting. Apparently, they didn't get to do
15 much of that in the Soviet Union. So he asked if I
16 would bring some weapons.
17 Q. What did you do?
18 A. I cleared my schedule and made time for that,
19 and I took a rifle and several handguns; and we shot
20 during the course of the day.
21 Q. Who did?
22 A. Myself, Mr. Hinkson, and the Russian
23 gentleman.
24 Q. Did Mr. Hinkson bring his own weapon?
25 A. I'm not sure. There were a couple of others

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1 A. Well, that's where -- in this case, we didn't 992
2 have a machine. We had a thrower and the people --
3 Q. I'm sorry. A "thrower," is that a person?
4 A. Yes.
5 Q. Someone who --
6 A. The person who wasn't shooting would throw the
7 clay pigeons for the others. You have a spring-loaded
8 hand unit that will kick them out, I expect, thirty,
9 forty yards without any problem at all, airborne. So
10 that's, basically, what it is. And the challenge is to
11 hit the airborne target when it's across from you.
12 Q. During 2001 and 2002, did you become aware of
13 legal problems that Mr. Hinkson was having?
14 A. Yes.
15 Q. Who made you aware of those legal problems he
16 was having?
17 A. Primarily, Mr. Hinkson.
18 Q. Would he talk about it on more than one
19 occasion to you?
20 A. Yes.
21 Q. What did he -- what sort of legal problems did
22 he tell you he was having?
23 A. Well, he had had some difficulty with, as he
24 described it, an ex-employee who had sued him for a
25 large amount of money; and this was before I met him.

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1 But at the time I met him, he was very disturbed because
2 the employee had been awarded by the court about
3 \$100,000.

4 Q. Was he upset about that?
5 A. Oh, yes.
6 Q. Did he talk about it?
7 A. Yes.
8 Q. On more than one occasion?
9 A. Yes.
10 Q. What would be his demeanor when he would talk
11 about that?
12 A. Well, he was very angry, initially; and his
13 demeanor reflected that.
14 Q. Did he talk about the lawyer for this
15 employee?
16 A. Yes.
17 Q. Did he name him?
18 A. Yes.
19 Q. Who was that?
20 A. That was a Grangeville attorney by the name of
21 Dennis Albers.
22 Q. Did Mr. Hinkson express any anger towards that
23 lawyer, Mr. Albers?
24 A. Considerable.
25 Q. Did Mr. Hinkson ever ask you to do anything

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1 regarding Mr. Albers?
2 A. Yes.
3 Q. What did he ask you?
4 A. Oh, he talked about things prior to my
5 appearance before the Grand Jury in Coeur d'Alene in
6 April of 2002, but he never really asked me to do
7 anything until after I had appeared there before the
8 Grand Jury.
9 Q. Let me back it up then. Prior to your
10 appearance in the Grand Jury -- you say it was April of
11 2002?
12 A. Yes.
13 Q. Is that correct? What were the things that
14 Mr. Hinkson said about Mr. Albers?
15 A. Oh, prior to that time?
16 Q. Yes.
17 A. Oh, he wanted to see him dead. He was very
18 upset because he felt that he had abused the judicial
19 system. He was, also, angry with other people at that
20 time, as well, who had been involved in the case.
21 Q. After your appearance before the Grand Jury --
22 did you say Coeur d'Alene?
23 A. Yes.
24 Q. And that was April 2002?
25 A. Correct.

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1 Q. Did Mr. Hinkson bring up Dennis Albers again
2 to you?
3 A. Yes.
4 Q. Where did it occur?
5 A. That occurred at WaterOz, in his private
6 office.
7 Q. Did anything lead up to it?
8 A. Well, he just asked to talk to me in private.
9 Q. Did you know what about?
10 A. Well, I was there, yes.
11 Q. Well, when he asked to talk to you in private,
12 did you know what he was leading up to?
13 A. Oh, not at the time but -- but we had talked
14 before, in private, on a sundry of subjects.
15 Q. On this occasion, did he say something further
16 about Dennis Albers?
17 A. Yes.
18 Q. Did he include Mr. Albers' family?
19 A. Yes.
20 Q. What was it that Mr. Hinkson said?
21 A. Well, he started off by talking about how he
22 would like to have Mr. Albers and his family,
23 particularly his wife, Margaret, tortured and killed.
24 And he went into quite a description on the torture.
25 Q. And what was that?

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1 A. He would -- he said he would like to see them
2 stripped, bound, and gagged, and then burned with
3 cigarettes or cigars.
4 And then while Albers was down on his knees
5 observing this occurring to his wife and any other
6 family members that might be present, he wanted to have
7 a plastic bag put over her head so that she would
8 suffocate to death in front of him, along with other
9 family members. Then he wanted that procedure repeated
10 on Mr. Albers, himself.
11 Q. Did he want you to do something in that
12 regard?
13 A. When he finished describing what he wanted
14 done, then he offered me \$10,000 a head to do it.
15 Q. What was his demeanor like when he was telling
16 you these things?
17 A. He was cool and calm at that time.
18 Q. What was your response to Mr. Hinkson?
19 A. I told him he was out of his mind and he
20 needed to knock that kind of BS off, and I didn't even
21 think about it.
22 Q. How did he respond to that?
23 A. He just smiled and then didn't reply and
24 changed the subject.
25 Q. With regard to your Grand Jury appearance in

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1 Coeur d'Alene in April of 2002, had you been subpoenaed? 997
2 A. Yes.
3 Q. Did you know at the time -- who subpoenaed
4 you, first?
5 A. I believe that was the Federal Prosecutor. I
6 believe that was Nancy Cook who subpoenaed me.
7 Q. Did someone physically hand you a document
8 titled "subpoena"?
9 A. Yes, but I'm not sure who handed it to me.
10 Q. What did that subpoena require you to do?
11 A. It required me to bring documentation
12 regarding my contacts, professional contacts as an
13 assayer and chemist, with WaterOz and then to present
14 myself at 8:30 the morning that had been scheduled for
15 me before the Grand Jury to appear.
16 Q. Did you do so?
17 A. I'm sorry?
18 Q. Did you do so?
19 A. Yes.
20 Q. Were you met by anyone at the courthouse?
21 A. Yes.
22 Q. Who were you met by?
23 A. As I recall, I think -- well, it was one of
24 the people involved in the Grand Jury, the prosecution.
25 I think, probably, Nancy Cook, herself.

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1 Q. Prior to your arriving there in Coeur d'Alene, 999
2 had you told anyone at WaterOz that you were subpoenaed?
3 A. No.
4 Q. When you returned from the Grand Jury
5 proceeding, did you mention to anyone that you had
6 appeared before a Federal Grand Jury?
7 A. Probably. I know I mentioned it to my
8 attorney.
9 Q. Who was that?
10 A. Mr. Groom, Brit Groom.
11 Q. Did you ever become aware that other WaterOz
12 employees had been subpoenaed to Grand Jury proceedings?
13 A. I had heard that. I don't know that for
14 certainty, but I heard it.
15 Q. At any time during 2002, after your appearance
16 in April, did you have any discussion with Mr. Hinkson
17 regarding a Grand Jury investigation?
18 A. Probably. If I did, it was brief.
19 Q. I'm sorry. Let me back up one moment. While
20 you were there in Coeur d'Alene at the Grand Jury
21 proceeding, did something occur there in the building
22 regarding -- involving Nancy Cook?
23 A. Yes, I believe so.
24 Q. Did you observe it?
25 A. Well, partially, in any event. During my

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1 Q. Did you appear before the Grand Jury? 998
2 A. Yes.
3 Q. How long was your appearance?
4 A. Oh, my goodness. I don't think I got on until
5 3:30 or 4:00 o'clock, and it lasted until after 5:00.
6 Q. Were you questioned by Nancy Cook?
7 A. Yes, limited. Most of the questioning was
8 done by a Federal Prosecutor out of Washington, DC; and
9 I believe his name was Tom Bradley.
10 Q. Did you have some understanding or belief
11 about what the nature of this Grand Jury proceeding was
12 about?
13 A. Vaguely, at that point in time.
14 Q. Where did you obtain this vague understanding
15 or belief about the Grand Jury proceeding?
16 A. We had a -- Ms. Cook took my wife and I
17 upstairs in the Federal Building there in Coeur d'Alene,
18 and then there was a meeting with an Internal revenue
19 agent by the name of Steve Hines, Mr. Bradley -- Nancy
20 Cook was there for a while. There was a gentleman by
21 the name of Vernon, I think, who I later learned was
22 also a witness. And then some testimony was discussed.
23 Q. You discussed what you were going to testify
24 to?
25 A. Basically.

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1 testimony -- and I was responding to Mr. Bradley's 1000
2 questions -- Mr. Hines came in the door of the Grand
3 Jury Room and handed some papers to Ms. Cook.
4 And then, subsequently, I learned that
5 Mr. Hines had been served with a litigation by
6 Mr. Hinkson that date. And I think, later on --
7 MR. NOLAN: Objection. Beyond the scope of
8 his knowledge.
9 THE COURT: Overruled.
10 BY MR. SULLIVAN:
11 Q. You can finish your statement.
12 A. Later on, I believe that Ms. Cook was also
13 served that same day.
14 Q. Now, at some point, did you get involved in
15 that particular civil lawsuit?
16 A. I was asked to, at one point, give an
17 affidavit, I think --
18 Q. Who asked you --
19 A. -- for Mr. Hinkson. Actually, Mr. Hinkson's
20 attorney asked me to give an affidavit to them.
21 Q. What were you asked to do? With regard to
22 what?
23 A. In regards to what had happened in the Grand
24 Jury Room. They seemed to feel it was inappropriate for
25 Mr. Hines to have walked in and given anything to the

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1 Q. I am sorry?

2 A. I am having a void right now.

3 Q. Okay.

4 A. But he did accumulate the conversation by --

5 oh, I remember he made some comment to the effect of --

6 he asked if I had remembered the offer he made regarding

7 Mr. Albers and his family. And I said that, of course,

8 I did.

9 And he said he wanted that done, basically,

10 with Ms. Cook and her family and Mr. Hines and his

11 family.

12 And I told him, again, that he was out of his

13 mind. And I, also, went into a little bit of a

14 dissertation because David was a friend at that time.

15 And he said, "Well, you know, I know you're

16 used to it. I mean, you have killed people."

17 I said, "Yes, I have killed people in defense

18 of my life and others; but what you are talking about is

19 murder, and there is a significant difference here.

20 "And you need to get it out of your head

21 because, if you continue talking that way, it will get

22 you in trouble. And if you continue talking this way

23 and I think you are serious about this, I will have to

24 report it to the authorities."

25 Q. How did he respond to that?

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1 Q. What did he tell you about being indicted for

2 those matters?

3 A. Well, he, basically, felt that he would

4 prevail at some point in his litigation against the

5 Government to the tune of millions of dollars. But in

6 the same respect, he was extremely hostile to all of the

7 people who had been involved in that arrest.

8 Q. Did he talk in the same fashion about those

9 people as you have mentioned prior to his arrest?

10 A. Yes. And in January of '03, he approached me

11 again on that, went through the names of the people that

12 had offended him, and added a federal judge by the name

13 of Lodge to that list. And I, essentially, dropped the

14 hammer at that point in time on David.

15 Q. Let me first ask what he asked you to do

16 regarding those people?

17 A. He wanted them all treated the way that the

18 initial offer regarding Albers and his family had been

19 handled.

20 Q. Were you to receive anything in return for

21 doing that?

22 A. At least \$10,000 a head. And I made a mental

23 tally that, with all of the people he named at that

24 time, we were well over \$100,000.

25 Q. You mentioned that he mentioned Judge Lodge on

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1 A. Well, I got his smile again; and then he

2 changed the subject and went on to something else at

3 that point.

4 Q. Now, did he tell you why he had these harsh

5 feelings against Mrs. Cook and Mr. Hines?

6 A. They had abused the judicial system, they had

7 abused him tremendously, and it cost him a lot of money,

8 and they just didn't deserve to live.

9 Q. Did you become aware that Mr. Hinkson was

10 arrested then in November of 2002?

11 A. I am.

12 Q. How did you become aware of it?

13 A. I am not sure. Mr. Groom might have mentioned

14 to me that he had been arrested.

15 Q. Did you learn -- arrested for what?

16 A. Well, I wasn't really sure on that; but I,

17 subsequently, after his arrest, learned that he had

18 violated the IRS laws and there were several other

19 issues. I heard something about forty counts or

20 something of that nature.

21 Q. Did you ever discuss this new legal problem

22 with Mr. Hinkson?

23 A. Oh, yes.

24 Q. After his arrest, I mean?

25 A. Yes, yes.

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1 this occasion?

2 A. Yes, he did.

3 Q. Had he ever talked about Judge Lodge

4 previously?

5 A. I'm not sure. He may have mentioned him in

6 passing a time or two.

7 Q. Did he give you any more information about why

8 he had this harsh feeling against Judge Lodge on this

9 occasion in January of 2003?

10 A. I think there was something he mentioned about

11 Judge Lodge's name being on the arrest warrant, the

12 November arrest warrant. There was something else about

13 the Judge having thrown part of the civil case out or

14 getting ready to or something of that nature. But I

15 just tuned part of it out.

16 Q. Did the \$10,000 offer include Nancy Cook and

17 Steve Hines?

18 A. Oh, yes.

19 Q. Did it include Mr. Albers?

20 A. Yes.

21 Q. Did it include the children of those people?

22 A. Yes.

23 Q. What did he want done with the children of

24 those people?

25 A. Treated in the same fashion.

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1 what?

2 A. No. It would have probably been getting close

3 to summer there. Spring, summer, somewhere through

4 there. Sometime after April, I'm thinking.

5 Q. All right.

6 A. I might be wrong.

7 Q. And who did you contact?

8 A. I contacted the Idaho County Assistant

9 Prosecutor from Grangeville.

10 Q. Now, is he a State Prosecutor, as opposed to a

11 Federal Prosecutor?

12 A. Yes. That's correct.

13 Q. And did you express some concern to him?

14 A. I did.

15 Q. Was it regarding Mr. Hinkson?

16 A. Yes.

17 Q. Thereafter, were you contacted by the FBI?

18 A. Yes.

19 Q. Who contacted you?

20 A. Mr. Will Long.

21 Q. That's the person here at the table?

22 A. Correct, sitting right there.

23 THE COURT: For the record, the witness has

24 identified Special Agent Long.

25 MR. SULLIVAN: Thank you, Your Honor.

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1 I have no further questions on direct, Your

2 Honor.

3 THE COURT: Cross-examination?

4 MR. NOLAN: Thank you very much, Your Honor.

5

6 CROSS EXAMINATION

7 BY MR. NOLAN:

8 Q. Prior to coming here today, did you review any

9 of your testimony that you have given under oath on

10 previous occasions?

11 A. Would you repeat that, sir?

12 Q. Did I speak loud enough, first of all?

13 A. No. I do have a hearing --

14 Q. I'm sorry.

15 A. I have a hearing problem.

16 Q. That's fine. No problem. Before testifying

17 today, did you read any of your prior testimony?

18 A. Yes.

19 Q. When did you do that?

20 A. Yesterday.

21 Q. What testimony did you read?

22 A. I read the transcript from the Grand Jury in

23 April of 2002, and I read the transcript when I appeared

24 before the Grand Jury here in Boise. I think that was

25 in February of '04.

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1 Q. Did you read anything else?

2 A. I read my affidavit that I had given that was

3 previously on the screen.

4 Q. Did you read anything else?

5 A. Oh, I glanced at a copy of a deposition that I

6 gave for Mr. Hoyt earlier this year.

7 Q. Anything else?

8 A. I don't think so.

9 MR. NOLAN: Okay. Thank you.

10 Now, is it appropriate, Your Honor, for me to

11 use this writing screen to assist, in terms of putting

12 down numbers and things?

13 THE COURT: Yes.

14 MR. NOLAN: Fine. Thank you. Let me see if I

15 know how to work it. Okay. Good.

16 Q. Sometime in the year 2000, you became aware of

17 WaterOz; correct?

18 A. Correct.

19 Q. And you worked -- you worked at WaterOz or

20 worked for WaterOz until 2003?

21 A. I was never an employee of WaterOz.

22 Q. The company you worked for did work for

23 WaterOz?

24 A. That is correct, sir.

25 Q. You never worked for WaterOz?

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1 A. No, not directly.

2 Q. All right. And between two -- I will get to

3 use this somehow. I will figure it out. Sometime

4 between 2000 and April of 2002 -- oh, boy.

5 THE COURT: I'm afraid you are off the screen.

6 MR. NOLAN: I'm not going to be able to do a

7 very good job of this.

8 THE COURT: Do you want to use that butcher

9 paper?

10 MR. NOLAN: Oh, that would be much better.

11 THE COURT: Shall we go back to the

12 old-fashioned way, Mr. Nolan?

13 MR. NOLAN: I really prefer to do that. Thank

14 you.

15 May I be in the well?

16 THE COURT: Yes, you may.

17 Mr. Sullivan, if you would like to, move

18 around so you can see what he is writing. That's fine,

19 too.

20 MR. NOLAN: I will try to put it -- do we have

21 any markers?

22 THE COURT: Ms. Longstreet, how are we doing

23 on our supply of colored crayons?

24 THE COURTROOM CLERK: I have got black.

25 THE COURT: We have got black. We can start

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1 you out with one color, Mr. Nolan.

2 MR. NOLAN: Thank you. Thank you.

3 Q. So sometime in mid 2000, you became aware of

4 WaterOz; correct?

5 A. Yes.

6 Q. And sometime in April -- A-p-r-i-l -- of 2002,

7 you testify; right?

8 A. I believe it was the 16th.

9 Q. All right. You testified; correct?

10 A. Yes.

11 Q. Was your testimony in April of 2002 truthful?

12 A. As I believed it to be at that time, yes.

13 Q. All right. It was truthful; correct?

14 A. As I believed it to be at that time. I was

15 under oath.

16 Q. And you told the truth?

17 THE COURT: Counsel, you are arguing with the

18 witness.

19 MR. NOLAN: I'm sorry. I didn't understand.

20 THE COURT: I think the jury has understood

21 his answers.

22 MR. NOLAN: All right. I'm sorry. I'm

23 left-handed.

24 MR. SULLIVAN: Now I can't see.

25 THE COURT: Mr. Sullivan, if you want to, move

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1 over. I would rather have it so the jury can see. I

2 don't want Mr. Nolan blocking the jury's view.

3 BY MR. NOLAN:

4 Q. I will try to do it this way. The last

5 contact you had, as far as working for WaterOz, was

6 January of '03; is that correct?

7 A. No.

8 Q. When was that?

9 A. I beg your pardon.

10 Q. The last contact you had with WaterOz, doing

11 work for WaterOz?

12 A. I previously testified that it was probably in

13 April of '03.

14 Q. April of '03. Between mid 2000 and April of

15 2002, about how many times did you meet with

16 Mr. Hinkson?

17 A. Quite a number of times.

18 Q. More than ten or twelve?

19 A. Probably. I would like to correct one thing.

20 We did the professional work for WaterOz which would

21 have concluded sometime toward the end of April 2003.

22 However, after Mr. Hinkson was arrested -- and

23 I'm thinking that was probably around November or

24 December of '03 -- I received a call from jail, from

25 Mr. Hinkson.

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1 THE COURT: Well, I'm not sure you are

2 correcting anything. Let's wait for a question,

3 Mr. Swisher.

4 THE WITNESS: Thank you, Your Honor.

5 BY MR. NOLAN:

6 Q. It's your testimony that, at the time you

7 testified before the Grand Jury in April of 2002,

8 Mr. Hinkson had not said anything about soliciting you

9 to kill Mr. Albers, his family, or anyone else; is that

10 correct?

11 A. He did not ask me directly to do that prior to

12 that time.

13 Q. You had a number of conversations with him

14 between mid 2000 and April 2002 where you talked about

15 his hostility to Mr. Albers; correct?

16 A. Correct.

17 Q. Now, isn't it true that you testified before

18 the Grand Jury in -- was it November of 2000 -- I'm

19 sorry -- February of 2004; correct?

20 A. Yes.

21 Q. And you told the Grand Jury that, right after

22 the lawsuit was decided and very soon after you first

23 met him, met Mr. Hinkson, that he talked about having

24 Mr. Albers killed, his wife tortured, and members of the

25 family present?

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1 A. Yes.

2 Q. And he said -- or you said in the Grand Jury,

3 in February, that Mr. Hinkson said he would give you

4 \$10,000 for taking care of these people?

5 MR. SULLIVAN: Page number?

6 THE WITNESS: \$10,000 a piece.

7 BY MR. NOLAN:

8 Q. Page 12, 13. He included his wife, did he

9 not?

10 A. The first time, yes.

11 Q. The first time he offered you money; correct?

12 A. Right, which would have been in April of 2002.

13 Q. Now, isn't it true you testified that it was

14 right at the time that Ms. Hasalone had been awarded her

15 money?

16 A. That is not correct. If you will check the

17 testimony, I believe I asked -- I made a comment -- I

18 wasn't sure exactly of the time frame; but it was

19 sometime after that. And, of course, April of '02 is

20 sometime after that, counselor.

21 Q. Isn't it true you were asked the question,

22 page 12, line 20: "Please. Approximately when was

23 that? The lawsuit, I believe, was in the summer --"

24 Answer: "This was right about the time that

25 he had -- Hazelton had been awarded all of this money,

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1 and he was very, very angry.

2 "Then in the same time frame, he was having

3 trouble with his wife at that time -- or slightly before

4 that --"

5 A. He did talk about those things, but the offer

6 to kill them didn't come in until later.

7 Q. Isn't it true --

8 A. He talked about them all the time.

9 Q. Isn't it true you testified at the Grand Jury

10 that the time he offered you the money was to kill those

11 people, including Mrs. Hinkson (sic.) -- I'm sorry --

12 Mr. Hinkson's former wife, was about the time the

13 lawsuit was decided?

14 A. May I see what you are quoting me from?

15 Q. You certainly may. You certainly may.

16 A. May I please see page 9, sir?

17 Q. Certainly.

18 THE WITNESS: If I may, Your Honor?

19 THE COURT: Yes. Take your time, Mr. Swisher.

20 You are welcome to as much of it as you need to answer

21 Mr. Nolan's questions.

22 THE WITNESS: Thank you, sir. On page 9, when

23 I was --

24 THE COURT: No. That's not the way we do it,

25 Mr. Swisher. You can review as much of it as you want

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1 question.

2 MR. NOLAN: Yes, I will. Thank you.

3 Q. You see page 12, do you not?

4 A. Yes, sir.

5 Q. Let's look at page 10. He talks -- you talk

6 about the fact that there was a civil suit, correct, on

7 line 8?

8 A. Yes.

9 Q. Ms. Hasalone had received a judgment of some

10 kind; correct?

11 A. Yes.

12 Q. Over \$100,000, somewhere in that neighborhood;

13 correct?

14 A. Yes.

15 Q. He wasn't happy; correct?

16 A. Yes.

17 Q. That's what you said at that point in time?

18 "He started talking about how he really would like to

19 have Mr. Albers killed, and he would like to have his

20 family tortured . . ." That's at page 11, lines 12

21 through 18; correct?

22 A. Yes.

23 Q. You'd let him ramble on; correct?

24 A. Yes.

25 Q. He said -- I'm sorry. He said -- according to

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1 to review; but then you have to answer his question,

2 okay? So take a look at it, and then I will have him

3 restate the question.

4 THE WITNESS: Okay. I have looked at it.

5 Thank you.

6 THE COURT: Are you ready for the question?

7 MR. NOLAN: I'm going to see if I can get

8 another copy so he can have that in front of him, if you

9 don't mind.

10 THE COURT: Very well. Thank you.

11 MR. NOLAN: I am sorry.

12 THE COURT: Do you want to switch copies?

13 MR. NOLAN: I have to take it back until I get

14 another one, if that's okay. I'm sorry. I should be

15 better prepared.

16 THE COURT: You are doing fine, counselor.

17 Does the Government have an extra copy?

18 MR. NOLAN: That's all right. I will give him

19 a copy.

20 THE COURTROOM CLERK: I can go make one.

21 THE COURT: Let's see --

22 BY MR. NOLAN:

23 Q. Here you are.

24 A. Okay. Thank you.

25 THE COURT: Mr. Nolan, please restate your

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1 you, "He said, 'I would like you to take care of the

2 matter for me because I know you've done this kind of

3 thing before'?"

4 A. Yes.

5 Q. According to you, he said, "I will give you

6 \$10,000 ahead . . ."

7 A. Run that by me again, sir.

8 Q. The next thing you said, at page 12, line 2,

9 is that Mr. Hinkson said, quote, "I will give you

10 \$10,000 ahead . . ." That is ahead, a-h-e-a-d, ahead

11 of time, in effect?

12 THE COURT: Counselor, now you are arguing

13 about how the court reporter transcribed the answer. I

14 think we have to let the jury decide that.

15 MR. NOLAN: I will spell it.

16 THE COURT: Just read it into the record.

17 MR. NOLAN: "I will give you \$10,000 ahead for

18 taking care . . ." I see what you are saying. I didn't

19 think about that.

20 THE COURT: I understand. That's my job.

21 BY MR. NOLAN:

22 Q. "I will give you \$10,000 ahead for taking

23 care of Albers and his wife;" but he said, "I want her

24 taken care of first, and he has to watch it, and watch

25 her being tortured."

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1 That's your testimony; correct?

2 A. Correct.

3 Q. You talked about the plastic bag; correct?

4 A. Yes.

5 Q. That you couldn't believe this; correct?

6 A. Yes.

7 Q. If he were serious, you would have to do

8 something else, probably; correct?

9 A. Yes.

10 Q. And then the next question was:

11 "Approximately when was that? The lawsuit, I believe,

12 was in the summer --"

13 Answer: "That was right about the time that

14 he had -- Hazelton had been awarded all this money and

15 he was very, very angry."

16 Correct?

17 A. Yes.

18 Q. And then you talked about his first wife. I

19 don't know her name.

20 And then you said: ". . . oh, I would say

21 within a couple weeks of this incident, I was out -- in

22 fact, I think my wife was with me. He started blowing

23 off again about all of these things he wanted done."

24 Correct?

25 A. Yes.

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1 was that he wanted to correct, to determine whether or

2 not it's proper to allow him to do that. I'm not sure

3 where he was going with his answer.

4 MR. SULLIVAN: I'm not sure either.

5 THE COURT: I will permit you to talk to him

6 solely about that correction that he wanted to make and

7 nothing else on the break.

8 MR. SULLIVAN: I can tell the court and

9 Mr. Nolan I directed him not to mention anything about

10 an offer to kill Marie.

11 THE COURT: Well, counsel raised it.

12 MR. NOLAN: I raised it. I raised it.

13 THE COURT: Do you want to go there?

14 MR. NOLAN: I certainly do. I mean, that was

15 a conscious decision on my part.

16 THE COURT: I thought it was, but I just

17 wanted to make that clear for the record. If you want

18 to get into solicitations to murder Marie Hinkson,

19 that's your prerogative.

20 MR. NOLAN: The theory of the defense is, Your

21 Honor, that none of this is serious and that he --

22 THE COURT: I understand.

23 MR. NOLAN: And just for the record, I will

24 object to counsel talking to the witness.

25 THE COURT: I am going to --

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1 Q. "He pulled me aside, and he said, 'There

2 would be another \$10,000 if you take care of Marie, as

3 well. She is just a pain in the ass.'"

4 A. Yes.

5 Q. "Do you remember where you were when he said

6 that? Was it a restaurant?"

7 Answer: "No."

8 MR. SULLIVAN: Your Honor, I object to this

9 procedure. It's not a proper procedure.

10 THE COURT: Sustained. I think it is

11 improper, Mr. Nolan.

12 MR. NOLAN: Very well.

13 THE COURT: I think we are going to take our

14 recess this morning. Ladies and gentlemen, we will be

15 in recess for fifteen minutes. Hopefully, we will be

16 back in fifteen minutes.

17 Mr. Swisher, just sit there for a second.

18 Go ahead, ladies and gentlemen. I want to

19 talk to counsel about something.

20 (Whereupon, the jury was excused from the

21 courtroom; and the following proceedings were held:)

22 THE COURT: I am going to make an exception to

23 my rule about the Government, in this case, being

24 allowed to talk to Mr. Swisher during the break.

25 I would like you to talk to him about what it

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1 MR. NOLAN: I understand.

2 THE COURT: For the record, I am going to give

3 a witness who says in open court that he would like to

4 correct his testimony an opportunity to do that if it's

5 relevant and permissible testimony. The only way I

6 know -- well, I guess we can do it right here.

7 MR. NOLAN: We can do it right now.

8 THE COURT: Mr. Swisher, what was it that you

9 wanted to correct in front of the jury that I cut you

10 off on?

11 THE WITNESS: Thank you, Your Honor. What I

12 wanted to correct was -- and I mentioned page 9, before

13 this testimony began, before the Grand Jury.

14 At that point in time, I was feeling probably

15 about like I am today. I was asked the question: "At

16 some point, did you have discussions with Mr. Hinkson or

17 hear Mr. Hinkson make threats towards anyone?"

18 And my answer was: "I don't remember the

19 occasion."

20 And then I tried to qualify it and narrow it

21 down the best way I could. I knew that it had been

22 after these other circumstances and events.

23 But I, at this point, had not had an

24 opportunity to go back and check my wife's calendar or

25 anything so I described -- what I described is accurate,

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1 but it just didn't happen at that particular time frame.

2 THE COURT: All right. Thank you,

3 Mr. Swisher.

4 I will permit the Government, on redirect, if

5 it wishes, to elicit that clarification or you can ask

6 him, Mr. Nolan.

7 MR. NOLAN: I would ask that the court -- that

8 counsel review their 302s because I believe that he told

9 them that the first time he was offered money was soon

10 after he met Mr. Hinkson.

11 And that's a significant change because he

12 testified before the Grand Jury and never -- well, it's

13 part of cross.

14 THE COURT: Yes, I understand.

15 MR. NOLAN: His testimony before the Grand

16 Jury in 2002 --

17 THE COURT: Hang on just a second. Can we

18 excuse Mr. Swisher?

19 MR. NOLAN: I would like that.

20 THE COURT: Mr. Swisher, if you need to use

21 the restroom, why don't you step out of the courtroom

22 and I will hear the rest of the argument from counsel?

23 (Whereupon, witness Swisher was excused from

24 the courtroom, and the following proceedings were held:)

25 MR. NOLAN: Here is the problem. This is,

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1 jury's job.

2 MR. NOLAN: It's hard for me. That doesn't

3 mean the rules change or anything. Quite frankly, I

4 think that he told people it was -- after he tried to

5 take over the business, after he decided that

6 Mr. Hinkson put out a hit on him, after he decided

7 Mr. Hinkson shot at him, after he decided that he

8 wouldn't be getting all of these things from

9 Mr. Hinkson, he became an enemy of Mr. Hinkson.

10 After he became an enemy of Mr. Hinkson, then

11 he comes back and joins the bandwagon; and he tells them

12 right after I started this. That's important because

13 it's before his testimony which puts doubt on his

14 credibility.

15 THE COURT: Okay. I understand where you are

16 going, Mr. Nolan. I think that's fair

17 cross-examination. I am going to allow you to engage in

18 it.

19 I am going to order the Government, over the

20 recess, to take a look at the 302s to see whether or not

21 there is an inconsistency between his Grand Jury

22 testimony and what he told the FBI, prior or after, with

23 regard to the timing of these alleged solicitations.

24 MR. NOLAN: Right. And so it's okay -- now he

25 will say, "I want to change that," which is fine. You

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1 actually, a very significant issue because his testimony

2 in April of 2002 is, basically, a glowing report of

3 everything.

4 I mean, I'm characterizing it; but he doesn't

5 say anything about any of the behavior of Mr. Hinkson

6 that would or should have come up in the nature of some

7 of the questions.

8 It shows that, you know, he tested the product

9 himself; he loved the guy; he loved the product -- all

10 of this kind of stuff.

11 If he was telling us the truth then and now he

12 is coming back and saying, "Oh, he offered, during that

13 time to, you know, kill these people" -- that's why I

14 brought Marie in.

15 If he was having trouble with Marie, it wasn't

16 in April of 2002. I can prove it was in 2000. So it

17 shows that he is actually lying and it's extremely

18 important because he really -- I don't mean to affect

19 the court. He has lied so much that he is going to be

20 hard for me.

21 MR. SULLIVAN: I don't see what the issue is

22 that is going to be discussed here.

23 THE COURT: I think I understand where

24 Mr. Nolan is going. It's not hard for the court. I

25 don't have to decide his credibility. That is the

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1 know, he will say, "Well, I didn't know;" and it really

2 was after 2002.

3 THE COURT: You can attempt to impeach the

4 witness, the Government can attempt to rehabilitate the

5 witness, and the jury will decide whether he is telling

6 the truth.

7 MR. NOLAN: I understand that. I want the

8 court to understand why I think that's so significant.

9 THE COURT: I think you have made your record.

10 I have made my ruling. I hope it's clear with everybody

11 as to what we are doing here.

12 MR. NOLAN: That's fine.

13 THE COURT: Now, the next matter. Juror

14 Mrs. Hanes handed a note to the clerk which says:

15 "Your Honor, I do not know if this is allowed for me to

16 ask; but can Mr. Swisher be asked about the mental

17 capacity of Mr. Hinkson? Did he do a clinical

18 evaluation of Mr. Hinkson? Is David Hinkson on

19 medication? Is Mr. Hinkson mentally ill? Are we or are

20 we not supposed to consider his mental capacity?"

21 At this point, counsel, I am --

22 MR. NOLAN: Can you give them Dr. Duke's

23 report now?

24 THE COURT: How do you want me to handle it?

25 Shall I simply say to the jury that I did receive a note

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1 from one of the jurors but, at this point, I am going to
2 allow the parties to proceed to put on their evidence;
3 and that's how we are going to respond to it?

4 MR. NOLAN: I think that's the best way.

5 THE COURT: That's how I would like to handle
6 it.

7 MR. SULLIVAN: I agree with that, Your Honor.

8 THE COURT: All right. You have ten minutes
9 for a recess. I will see you back here in ten minutes.

10 (Recess.)

11 THE COURT: Mr. Nolan, my law clerk had, I
12 guess, spoken to you briefly about some potential
13 impeachment information on Mr. Croner.

14 MR. NOLAN: I apologize. We just found out
15 that the file on Chad Croner in the state court, in the
16 County of Ada, is under seal; so we can't find out about
17 the underlying facts.

18 We are trying to get a hold -- we are having
19 somebody try to get the lawyer, to see if we can find
20 out something. I wanted to alert -- I don't think the
21 court has the authority to tell the state court to
22 unseal their records.

23 But because of the lateness of all of this, I
24 wanted to make a record that we are making the effort
25 and maybe a phone call might be needed.

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1 THE COURT: As much as I'd like to think that
2 federal judges have unlimited power, I know of no
3 authority by which I can tell a state court to unseal
4 its files because I need access to them to see if they
5 might be discoverable in an ongoing criminal proceeding.
6 If the Government knows of any authority to permit me to
7 do so -- I know of none.

8 MR. NOLAN: This agency wasn't investigating
9 it, so we don't have a problem there.

10 THE COURT: The only case I can think of is
11 the Younger Doctrine that says I can't interfere in
12 ongoing state proceedings, so I can't enter an order
13 telling a state court judge that he has to stop or
14 terminate an ongoing criminal proceeding for whatever
15 reason.

16 MR. NOLAN: I wanted to make sure I tried.

17 THE COURT: I think we have to stay within the
18 Constitution, Mr. Nolan.

19 MR. NOLAN: I think so, too.

20 THE COURT: Are we ready for Mr. Swisher?

21 MR. NOLAN: I am ready, unless there are some
22 reports I have to get.

23 MR. SULLIVAN: There is not contained in any
24 document that we have in the nature of a debriefing of
25 Mr. Swisher that relates to this issue of what date the

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1 testimony about Mr. Albers occurred.

2 THE COURT: Very well. Bring in the jury.
3 And where is Mr. Swisher?

4 Yes, please.

5 (Whereupon, the following proceedings were
6 held in the presence of the jury:)

7 THE COURT: Ladies and gentlemen, before we
8 continue with Mr. Swisher, Mrs. Hanes gave us a note,
9 which is perfectly fine.

10 I went over that with the lawyers. My
11 response to your question, at this point, is I am going
12 to allow the parties to proceed with the presentation of
13 the evidence. So we won't respond immediately to your
14 question. We will see how the evidence goes. Thank
15 you.

16 Mr. Nolan, you may proceed.

17 MR. NOLAN: Thank you.

18 THE COURT: Mr. Swisher, you are still under
19 oath.

20 THE WITNESS: Yes, sir.

21 BY MR. NOLAN:

22 Q. What you would like to correct, I take it, is,
23 if there is any inference or any suggestion, I think, in
24 your Grand Jury testimony of February of 2003 (sic.),
25 that you were told anything or solicited to kill anybody

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1 between mid 2000 and April of 2002, that's not a proper
2 inference? You didn't intend to say that; correct?

3 A. Well, you mentioned February of 2003. What is
4 that in reference to, sir?

5 Q. I'm sorry. That is the Grand Jury testimony.
6 That's the date of the Grand Jury testimony that you
7 reviewed and said you wanted to correct something about.

8 MR. SULLIVAN: Your Honor, I object.

9 THE WITNESS: No, sir.

10 MR. SULLIVAN: That's a misleading statement
11 by counsel.

12 THE COURT: Sustained.

13 BY MR. NOLAN:

14 Q. I'm sorry. It's two thousand -- my apologies.
15 That's why I have these pieces of paper. It's 2004;
16 right?

17 All right. If you said anything in 2004 that
18 suggested that you were solicited to kill anybody
19 between mid 2002 and April -- mid 2000 -- excuse me --
20 and April of 2002, that what you said is in error;
21 correct?

22 A. Correct.

23 Q. All right. Now, when you first met
24 Mr. Hinkson in mid 2000, did you and he discuss
25 Mr. Albers?

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1 A. Yes.

2 Q. And between mid 2000 and April of 2002, did he
3 discuss with you his hatred for Mr. Albers?

4 A. Yes.

5 Q. Did he discuss with you his wanting to kill
6 Mr. Albers?

7 A. Well, he wanted to see him dead.

8 Q. He wanted to see him dead?

9 A. Right.

10 Q. He didn't say he was going to kill him. He
11 would like to see him dead; right?

12 A. Right.

13 Q. There was a lot of talk that he did about
14 Mr. Albers; is that correct?

15 A. That's correct.

16 Q. And I take it, you have a background with
17 Mr. Albers; correct?

18 A. I know Mr. Albers.

19 Q. Well, a number -- twenty some odd years ago,
20 he prosecuted you. You were found not guilty; correct?

21 A. Correct.

22 MR. SULLIVAN: I object to this.

23 THE COURT: I am going to permit that
24 question. Overruled. It's been the subject of a
25 previous ruling by the court.

1 BY MR. NOLAN:

2 Q. He prosecuted you, and you were found not
3 guilty; is that correct?

4 A. That is correct.

5 Q. And you have had had feelings about him since
6 then, have you not?

7 A. I have had.

8 Q. Okay. And you talked to Mr. Hinkson about
9 your feelings about Mr. Albers between mid 2000 and
10 April of 2002; correct?

11 A. I may have.

12 Q. Well, did you or did you not?

13 A. I don't recall, specifically.

14 Q. Okay. In November of 2000, did you
15 participate with Mr. Hinkson in helping to distribute a
16 piece of literature about Mr. Albers to the public?

17 A. My father did.

18 Q. Did you mail some items?

19 A. I don't think I personally did, no.

20 Q. Did you take them to the post office for
21 mailing?

22 A. I'm not sure. It's possible.

23 Q. And to the best of your knowledge, that caused
24 Mr. Albers not to get re-elected; correct?

25 A. I believe that's correct.

1 THE COURT: Counsel, did you establish what it
2 was that Mr. Albers was trying to get re-elected for?

3 BY MR. NOLAN:

4 Q. I'm sorry. He was trying to get re-elected to
5 the position of prosecutor?

6 A. Yes.

7 Q. Either county or some kind of prosecutor; is
8 that correct?

9 A. That is correct.

10 Q. And one of his -- well, that prevented him
11 from getting elected, that piece of literature, you
12 believe?

13 A. Correct.

14 Q. Now, you are a disabled veteran; is that
15 correct?

16 A. That is correct.

17 Q. And you have a hearing problem; correct?

18 A. Correct.

19 Q. And when you testified -- you first became
20 aware of WaterOz because of a friend of yours; isn't
21 that correct?

22 A. That's correct.

23 Q. A friend was concerned about your health; is
24 that right?

25 A. Yes.

1 Q. You were having a lot of trouble walking, and
2 you had arthritis; is that correct?

3 A. Correct.

4 Q. And he suggested that you look at the
5 possibility of WaterOz; correct?

6 A. Yes.

7 Q. And you went out there, and he introduced you
8 to the people at WaterOz; correct?

9 A. No.

10 Q. In the Grand Jury of April of 2002, on page
11 14, line 1 -- let me see if I can -- can we get -- is
12 there another copy of the transcript? Let me give it to
13 the witness. I am going to try to get a copy of this
14 Grand Jury testimony. Here, let me give you a copy.

15 May I approach?

16 THE COURT: Yes, of course.

17 BY MR. NOLAN:

18 Q. If you could, take a look at page 14. You can
19 start -- I guess, if you want to, go back to 13, at the
20 bottom. You can start anywhere you want, but that would
21 be the place I would suggest.

22 MR. SULLIVAN: Counsel, what was the document?

23 MR. NOLAN: Page 13.

24 MR. SULLIVAN: Which one?

25 MR. NOLAN: Grand Jury of April 2002.

1 MR. SULLIVAN: Okay. 1045
2 THE WITNESS: Yes.
3 BY MR. NOLAN:
4 Q. Okay. Have you been able to review that?
5 A. Yes.
6 Q. Is that your -- does that refresh your
7 recollection that you went with that friend to WaterOz
8 and he introduced you to the people out there?
9 A. That's incorrect.
10 Q. Is that what you testified under oath at the
11 Grand Jury in April 2002?
12 A. That's what I believed at that time, yes.
13 Q. You testified in April of 2002 to that fact;
14 correct?
15 A. Correct.
16 Q. Is that wrong?
17 A. Yes.
18 Q. You testified they took you around and said,
19 "Why don't you try some of these," and so forth? Did
20 you testify that way?
21 A. I testified that way, that it was Mr. Hinkson
22 who did that.
23 Q. Is that true?
24 A. That they took me around?
25 Q. When you testified in April of 2002 to those

1 facts, were those facts true? 1046
2 A. You will have to go back and start --
3 MR. SULLIVAN: I don't know what facts counsel
4 is talking about.
5 THE COURT: I'm not quite sure what you are
6 asking Mr. Swisher.
7 BY MR. NOLAN:
8 Q. You said, April of 2002, quote, line 5, page
9 14: "They took me around and said, 'Why don't you try
10 some of these?'"
11 "And I said, 'Okay. What's to lose? I will
12 give it a whirl.'"
13 You testified that way; correct?
14 A. Yes.
15 Q. Was that testimony true?
16 A. Yes, from Mr. Hinkson. Mr. Hinkson took me
17 around and made those comments. Would you like me to
18 explain that?
19 Q. On page 13, line 24, you said, quote: "I
20 don't really believe in that, but I'm willing to try it.
21 So my friend suggested I go out and, in fact, went with
22 me to WaterOz and introduced me."
23 A. That's incorrect.
24 Q. Is that what you testified to?
25 A. Yes.

1 Q. And that's incorrect? 1047
2 A. Yes.
3 Q. All right. Do you have a good memory, sir?
4 A. Well, I'm 68. I do have some memory flaws
5 but, basically, pretty good.
6 Q. And you have previously testified that you
7 have not -- did not have a good memory; correct?
8 A. Boy, I don't recall that.
9 Q. Isn't it -- if you could, take a look at page
10 36, lines 13 through 19.
11 Your Honor, would the court like a copy?
12 THE COURT: I would love a copy. Thank you,
13 Mr. Nolan.
14 MR. NOLAN: Here is a copy for the court.
15 THE COURT: Thank you.
16 BY MR. NOLAN:
17 Q. Have you read that, sir?
18 A. Which line are you referring to, sir?
19 Q. Line 13, on page 36, through line 19.
20 A. This is my answer: "You're telling me that I
21 have it. There is an old saying, you know . . ."
22 Q. Excuse me. Does that refresh your
23 recollection that you testified in April of 2002 under
24 oath in regards to your memory?
25 A. I guess I did.

1 Q. You have -- 1048
2 A. It says it here.
3 Q. You testified in April of 2002 that you didn't
4 have a good memory; correct?
5 A. That's not what it says here.
6 THE COURT: Counsel, it is not what it says
7 here. I want you to read starting at line 13.
8 MR. NOLAN: I will be happy to. I was trying
9 to characterize it.
10 THE COURT: I want you to read it rather than
11 characterize it
12 BY MR. NOLAN:
13 Q. I would rather read it.
14 Question: That's okay. That's how my memory
15 works sometimes.
16 Answer --
17 THE COURT: That is not correct, Mr. Nolan.
18 You have added a word.
19 MR. NOLAN: I'm sorry. Question: "That's
20 okay. That's how memory works sometimes."
21 MR. SULLIVAN: Your Honor, I would request
22 that the question and answer prior to that be read
23 first, to give the context.
24 THE COURT: I am going to allow you on
25 redirect to clear this up, if Mr. Nolan doesn't want to.

1 on a number of occasions; and he needs to discredit me 1069
2 in the worst way.
3 Q. So --
4 A. I told him I would go to the authorities.
5 THE COURT: Mr. Swisher, just wait.
6 BY MR. NOLAN:
7 Q. So he hates you because you went to the
8 authorities?
9 A. Yes, and because I am a witness for the
10 prosecution.
11 Q. I see. So he shot at you; is that right?
12 A. I didn't say he shot at me. I merely stated
13 that I had been shot at on August 31st of this year,
14 which is a matter of the official records of Idaho
15 County.
16 Q. Now, what day were you shot at?
17 A. August 31st.
18 Q. When did you report it?
19 A. It was probably a day or two later, before I
20 could get to a phone. It was in a remote area.
21 Q. A day or two?
22 A. Huh?
23 Q. How about a week?
24 A. It's possible. I was at a remote area in
25 Idaho County with a Vietnam combat veteran friend, and

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1 involved. 1071
2 MR. NOLAN: I'm sorry. I will find what I
3 need.
4 THE COURT: That's all right. Take your time,
5 counsel.
6 BY MR. NOLAN:
7 Q. Now, when you testified before the Grand Jury
8 in April about contacts and conversations with
9 Mr. Hinkson between the time you met him in mid 2000 and
10 April, you were asked: "Did you talk to him very much
11 about an investigation, a possible investigation, that
12 was occurring in 2001?"
13 A. Where are we at, sir?
14 THE COURT: Well --
15 MR. NOLAN: I am talking about --
16 THE COURT: What do you remember, Mr. Swisher?
17 Answer the question first.
18 THE WITNESS: You are getting a little remote
19 for me. Because I have testified so many times, if I
20 can't look at it, I can't make a meaningful answer to
21 you, sir. I don't remember.
22 I am very tired. I only got about an hour's
23 sleep last night. I have a terrible head cold. I'm not
24 going to guess at something I don't know.
25

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1 we were expecting our wives to come in sometime later 1070
2 that week.
3 And we couldn't find the shooter, and it is a
4 remote area. I did report it. We took photographs of
5 it initially, right off, with the entrance and exit
6 holes. The shooter shot at me while I was sitting on a
7 tin privy, and the bullet missed me on my right side.
8 The Sheriff's Department, later, after that
9 investigation, determined that the shooter had used a
10 nine millimeter handgun approximately 35 yards from the
11 back of the outhouse.
12 Q. They also determined that there were some
13 Forest Service people in the area; correct?
14 A. We didn't know that, initially.
15 Q. Uh-huh. I'm saying --
16 A. Initially -- oh, go ahead.
17 Q. The case was closed, was it not?
18 A. I don't know. I haven't heard that. The last
19 I heard, they were investigating Forest Service
20 personnel who were there without notification, as
21 agreed, with that agency, prior to the shooting.
22 Q. And you believe, Mr. Hinkson did this because
23 you are a witness against him; is that right?
24 A. I didn't say he did it but my personal -- if
25 you are asking for my personal opinion, I believe he was

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1 BY MR. NOLAN: 1072
2 Q. Do you feel that the trustworthiness of your
3 testimony today -- that the reliability of your
4 testimony today is affected by your lack of sleep or
5 feelings right now?
6 A. Not regarding the solicitation for murder, no.
7 Q. So if there are questions about solicitation,
8 the jury can rely upon them; correct?
9 A. I would think so.
10 Q. But if it's anything else about the background
11 of this case, they shouldn't rely upon it because you
12 can't give good testimony?
13 A. That's not what I said. That isn't true.
14 Q. All right. Now, should the jury treat your
15 testimony about solicitation today differently than your
16 testimony about other matters because of your physical
17 condition?
18 MR. SULLIVAN: I object to the form of the
19 question. I object to the argument of counsel.
20 THE COURT: I will allow the witness to answer
21 that question, if he can.
22 THE WITNESS: I have testified under oath on a
23 number of occasions. At the time I testified under
24 oath, I believed what I testified to was accurate and
25 complete.

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25 include people, and that was his offer to me.

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1 I have, on several occasions, learned
2 otherwise, because of circumstances or something of that
3 nature; but that's very rare and on not very many
4 instances.
5 BY MR. NOLAN:
6 Q. Let me try the question again: Are you
7 suggesting to the jury that they may rely upon your
8 memory and your testimony about matters relating to the
9 solicitation, but they may not necessarily rely upon
10 your testimony about other matters because of your
11 physical condition today?
12 A. I'm not suggesting that either.
13 THE COURT: That's enough on that subject,
14 counsel.
15 BY MR. NOLAN:
16 Q. Okay. Now, when you first met Mr. Hinkson,
17 between mid 2000 and your testimony before the Grand
18 Jury in April of 2002, did you have discussions with him
19 about any investigations?
20 A. You will have to be a bit more specific, sir.
21 Q. You were asked before the Grand Jury: Well,
22 isn't it true that you didn't ask him -- or you didn't
23 talk to him? He talked to you during this period of
24 time about an investigation?
25 A. About which investigation? What

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1 investigation?
2 Q. Isn't it true that, on page 34, line 24, you
3 were asked the question: "You said you talked to
4 Mr. Hinkson about a possible investigation a year or so
5 ago?"
6 And your answer was: "No, I didn't talk to
7 him. He talked to me about a year ago."
8 Question: "What did he say?"
9 Answer: "And sometimes -- I don't seek
10 Mr. Hinkson out when I go there because a few times he
11 has cornered me. And he is very knowledgeable. My
12 goodness. His knowledge of chemistry is pretty
13 fantastic.
14 "But he is a very emotional young man and I
15 recall about a year ago he was talking to me about -- I
16 believe he was involved in litigation at that time. He
17 may still be, for all I know.
18 "There was a local prosecuting attorney
19 involved and things of that nature so -- and he did
20 mention that he -- I think he said he had been
21 investigated one time or the other by the IRS or other
22 agencies."
23 Was that your -- was that the questions and
24 were those your answers in April of 2002?
25 A. Yes.

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1 Q. And were they true?
2 A. Yes.
3 Q. And would that answer reflect your attitude
4 about the nature of Mr. Hinkson between mid 2002 -- 2000
5 and April of -- strike that.
6 Would that reflect your attitude of the
7 conversations -- that's a bad question.
8 Would that reflect the character of the
9 conversations about the investigation during 2001 with
10 Mr. Hinkson?
11 A. I believe so.
12 Q. Were you, sir, ever instructed by anybody that
13 you should not answer questions when put under oath?
14 A. That I should not answer questions while put
15 under oath?
16 Q. You testified at a deposition; correct?
17 A. What deposition?
18 Q. You testified at a deposition in October of
19 this year; correct?
20 A. Yes.
21 Q. At that deposition, you refused to answer
22 questions, saying that you were prohibited from
23 answering questions; correct?
24 A. Yes.
25 Q. Who prohibited you from answering the

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1 questions?
2 A. I prohibited myself on instructions I had
3 received when I appeared before the Grand Jury in a
4 secret session here in Boise.
5 I was told that everything that happened in
6 that Grand Jury Room was secret until, if and when, the
7 matter came to trial; that I should discuss nothing that
8 went before that Grand Jury at that time. And so I
9 prohibited myself from answering it.
10 Q. Who instructed you not to answer any questions
11 about what happened in that Grand Jury?
12 A. I don't recall exactly, but I know that was a
13 general instruction given to me before I appeared before
14 the Grand Jury in Boise; that Grand Jury matters are
15 highly confidential and that you are not to discuss
16 anything that went on, period.
17 Q. You were asked a question before the
18 deposition as to whether you performed any tests at the
19 request of any governmental entity on WaterOz projects.
20 You said: "I can't answer that. I'm
21 prohibited from answering that."
22 Correct?
23 A. Yes.
24 Q. You were asked: "Who prohibited you?"
25 And you said you were prohibited from saying

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1 who prohibited you from answering those questions; is
2 that right?

3 A. Yes.

4 Q. Who has now given you permission to answer
5 questions regarding that?

6 A. Well, I think, since that suit, itself, has
7 been stipulated and dismissed and we are in active
8 trial, I can probably answer any question you like.

9 Q. You have decided that yourself?

10 A. I have now, based on my previous instructions.

11 Q. You were asked a question in that deposition
12 of whether you have all records of payments, bank
13 statements.

14 And you said: "I'm prohibited from giving you
15 those answers;" correct?

16 A. I guess I'm going to have to ask for a copy of
17 that, too. It's hard for me to respond.

18 MR. NOLAN: You don't have a copy?

19 THE COURT: That's okay.

20 Counsel, do you know where he is?

21 MR. SULLIVAN: No, I don't.

22 THE COURT: You don't have a copy either?

23 MR. NOLAN: I don't have copies for them.

24 THE WITNESS: That is correct. I see there I
25 did say that I would be happy to talk to the judge in

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1 lawsuits here, would you mind reading into the record
2 what suit this is?

3 MR. NOLAN: This is in the Second Judicial
4 District, CV-35121. And I will put a staple in it, if
5 that's okay.

6 THE COURT: The Second Judicial District for
7 the State of Idaho.

8 MR. NOLAN: For the State of Idaho, in the
9 County of Idaho.

10 THE COURT: Very good.

11 MR. NOLAN: May I staple?

12 THE COURT: Yes.

13 MR. SULLIVAN: Your Honor, since the
14 Government hasn't seen this document before, we would
15 request that we break for lunch and have that
16 opportunity.

17 THE COURT: Why don't we do that? Let's take
18 a little early, if that's all right with you, luncheon
19 recess.

20 MR. NOLAN: That's fine.

21 THE COURT: Ladies and gentlemen, we are about
22 five minutes before our normal noon recess. Why don't
23 we recess until ten minutes after 1:00? Hopefully, we
24 will be able to get started at or about that time. We
25 will be in recess until 1:10.

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1 private about it.

2 BY MR. NOLAN:

3 Q. There was no judge there; correct?

4 A. Well, that wasn't of my doing. I was ordered
5 there on a weekend to give this deposition. No judge
6 was available.

7 Q. This was the lawsuit in which you were
8 claiming you were entitled to \$500,000 from Mr. Hinkson;
9 correct?

10 A. This is the lawsuit between Mr. Hinkson and
11 Mr. Bellon that Mr. Hinkson drug me into, and I made a
12 counterclaim to protect myself and my family.

13 MR. NOLAN: I just got this. I have not
14 marked it yet. May I mark it?

15 THE COURT: Yes.

16 MR. NOLAN: I would ask that the document be
17 marked as K.

18 THE COURT: K?

19 MR. NOLAN: K.

20 MR. NOLAN: Thank you.

21 THE COURTROOM CLERK: Defendant's Exhibit K.

22 MR. NOLAN: And it appears to be a five-page
23 document entitled "Answer, Cross Claim, Cross Claim and
24 Demand for Jury Trial."

25 THE COURT: Since we have so many different

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1 (Lunch recess.)

2 THE COURT: Mr. Swisher, you are still under
3 oath. Have a seat, and we will get back to work here.

4 Counsel?

5 MR. NOLAN: Thank you, Your Honor.

6 Q. Showing you what has been marked as
7 Defendant's K, would you take a look at this, please,
8 and tell me whether or not this is the document that you
9 signed and filed in court?

10 A. Yes, it is.

11 MR. NOLAN: I would offer -- excuse me. I
12 would offer Exhibit K into evidence.

13 THE COURT: Any objection?

14 MR. SULLIVAN: No objection, Your Honor.

15 THE COURT: Exhibit K is admitted. Just so we
16 are clear, why don't you give me a brief case name so
17 the jury will know which case this is?

18 MR. NOLAN: Sure. This is Bellon, Petitioner,
19 vs. Hinkson, Respondent; and Hinkson,
20 Counter-Petitioner, vs. Bellon, Counter-Respondent; and
21 Elven Joe Swisher, Third Party Respondent, and Elven Joe
22 Swisher, Counterclaimant Cross-Complainant vs. -- and
23 Cross Complainant. It is an Answer, Counterclaim, and
24 Cross Complaint in that action.

25 THE COURT: Very well. With that

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1 clarification, Exhibit K is admitted.

2 (Whereupon, Defendant's Exhibit K was received

3 in evidence.)

4 BY MR. NOLAN:

5 Q. Briefly, back to your -- you were asked

6 questions in this deposition that I've referred to of

7 October of this year regarding your claims for certain

8 property; correct?

9 A. Yes.

10 Q. And you refused to answer them, stating that

11 you were prohibited from giving out that information;

12 correct?

13 A. Yes, I believe so.

14 Q. And you were also prohibited from telling --

15 from saying who was prohibiting you from giving out that

16 information; correct?

17 A. Yes.

18 Q. If I could -- if I could, now, go back to the

19 alleged threats -- oh, by the way, before I do that, you

20 indicated that the investigation of the shooting up in

21 the mountains somewhere was done; correct? There was an

22 investigation done?

23 A. Yes. A Deputy Sheriff from Idaho County came

24 up.

25 Q. And prior to that, you had phoned FBI Agent

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1 Long; correct?

2 A. I didn't testify to that, but I believe that's

3 the sequence of events.

4 Q. And during the investigation, they went to the

5 area where they would have thought this pistol had been

6 fired; correct?

7 A. I believe so.

8 Q. They actually didn't recover a bullet, did

9 they?

10 A. No. They didn't recover a bullet or a casing.

11 Q. They found no footprints at the area where the

12 casing might be found; correct?

13 A. Well, the ground had been scuffed up there;

14 but they found no distinct prints.

15 Q. In fact, you were in an outhouse; correct?

16 A. When I was shot at, yes.

17 Q. And you were there with a friend; correct?

18 A. I was not in the outhouse with a friend, but

19 there was a friend there.

20 Q. Up in the cabin?

21 A. On the property.

22 Q. How far was the cabin from the outhouse?

23 A. Oh, about, probably, 40 yards, 45, give or

24 take.

25 Q. And you told the officer that you were there

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1 with a friend, but you told him, "Don't try to talk to

2 him because he didn't hear any shots;" correct?

3 A. No, I did not.

4 Q. Is that right?

5 A. No.

6 Q. Did you tell him that he didn't hear any shots

7 because he is almost deaf?

8 MR. SULLIVAN: I object, Your Honor, to

9 hearsay and relevance.

10 THE COURT: I will sustain the objection.

11 BY MR. NOLAN:

12 Q. Did you give him his name to confirm whether

13 there were shots fired?

14 MR. SULLIVAN: Object. Same grounds.

15 THE COURT: I will allow it.

16 THE WITNESS: Yes. Absolutely. And his

17 telephone number and address.

18 BY MR. NOLAN:

19 Q. Now, as to your state of mind as to whether

20 you were shot at, your friend told you he hadn't heard

21 anything?

22 MR. SULLIVAN: Object.

23 THE COURT: Let me see you at sidebar.

24 (Whereupon, the following sidebar discussion

25 was held outside the presence of the jury:)

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1 THE COURT: Where are we going with this? I

2 assume there is no evidence to tie Mr. Hinkson to this,

3 other than the witness's pure speculation.

4 MR. NOLAN: None at all. That was the last

5 question because he got into answering all of the things

6 that they did, and I took the report and the report said

7 that his friend didn't hear anything because he is

8 almost deaf. So it is coming from this witness.

9 THE COURT: Well, you haven't -- I don't think

10 you have established a foundation that he knows what the

11 friend told the Sheriff.

12 MR. NOLAN: No.

13 THE COURT: I am not going to allow collateral

14 impeachment on this incident.

15 MR. NOLAN: No, no. Then I said to the

16 witness -- the question was: "As to your state of mind

17 as to whether it occurred, your friend said to you that

18 he didn't hear it?" That was my question.

19 THE COURT: I am going to sustain that

20 objection. We have gone -- this is way beyond.

21 (Whereupon, the following proceedings were

22 held in open court, in the presence of the jury:)

23 BY MR. NOLAN:

24 Q. Between the time you started working at

25 WaterOz in 2000 and the time of your Grand Jury

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1 testimony in 2002, there were no threats made to kill
2 Mr. Albers, his family, or anyone else; correct?
3 A. I didn't work there.
4 Q. I am sorry. From the time you had contact
5 with Mr. Hinkson from mid 2002 to -- mid 2000 -- excuse
6 me -- to April of 2002, Mr. Hinkson made no threats in
7 your presence regarding killing Mr. Albers or his
8 family; correct?
9 A. He made many threats.
10 Q. About killing Mr. Albers and his family?
11 A. Oh, yes. Not just to me but to a whole lot
12 of people.
13 Q. I am talking about you.
14 A. Right. He made many threats.
15 Q. About killing?
16 A. He just didn't ask me during that time frame
17 to kill them.
18 Q. He made no -- did he make any threats in your
19 presence?
20 A. Yes.
21 Q. And, again, your testimony as to how many
22 times you have talked to Mr. Hinkson during that time
23 period? Approximately, how many times did you talk to
24 Mr. Hinkson from mid 2000 to April 2002?
25 A. I don't recall exactly.

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1 A. If I testified to it under oath, I believed it
2 to be true at that time.
3 Q. Do you have any reason to believe, now, that
4 it's not true?
5 A. Not really.
6 Q. When you were asked by the Grand Jury in April
7 of 2002 as to the nature of the communications that
8 Mr. Hinkson made in your presence, between the time of
9 mid 2000 until April of 2002, wasn't it your
10 testimony -- if I might read from page 42 to 43, 42,
11 line 19, to 43, line 8, I think that that -- being
12 allowed to read that would be the best way to do this
13 particular question.
14 THE COURT: Well, I -- go ahead. Go ahead.
15 If there is no objection, go ahead.
16 MR. SULLIVAN: Give me the page number again,
17 please.
18 BY MR. NOLAN:
19 Q. Page 42, line 19, to 43, line 7. You were
20 asked by a juror, during the time that you were with
21 Mr. Hinkson, whether you had any conversations of things
22 other than technical testing? For example, politics,
23 his views on taxes and so forth?
24 MR. SULLIVAN: I object, Your Honor. It's
25 been covered.

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1 Q. Isn't it true that you testified in the Grand
2 Jury on April of 2002?
3 MR. SULLIVAN: I object to the -- I object to
4 the procedure. He said he didn't recall and that
5 requires --
6 THE COURT: We are rehashing ground that I
7 thought you had covered before lunch.
8 MR. NOLAN: I didn't do the impeachment.
9 THE COURT: I will allow you to lay the
10 foundation. His testimony at this point is that he
11 doesn't recall. If you can impeach him on that, go
12 ahead. Otherwise, move on to a new area.
13 BY MR. NOLAN:
14 Q. Isn't it true you only talked to him about a
15 dozen times?
16 A. I indicated that I do not recall at this
17 point.
18 Q. Isn't it true you testified in April that you
19 had only talked to Mr. Hinkson about a dozen times?
20 A. I don't recall.
21 Q. Showing you the transcript, page 18, lines 3
22 through 7.
23 A. That's what I testified to under oath at that
24 time.
25 Q. And was that true?

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1 THE COURT: Sustained. We have been over this
2 ground.
3 MR. NOLAN: Your Honor --
4 THE COURT: No, counsel. I sustained the
5 objection. Ask another question.
6 BY MR. NOLAN:
7 Q. You told the Government that he never said
8 anything very bad at all about the Government, isn't
9 that right?
10 A. I don't recall that.
11 Q. This is --
12 THE COURT: Go ahead.
13 BY MR. NOLAN:
14 Q. You said that I haven't heard him talk against
15 the Government other than he just felt the Government
16 was too repressive. You said that under oath, isn't
17 that right?
18 MR. HOYT: It's not impeachment of anything.
19 THE COURT: That is not impeaching, Mr. Nolan.
20 BY MR. NOLAN:
21 Q. Did you hear him make any threats about
22 government officials between mid 2000 and April of 2002?
23 A. Would you repeat the question?
24 Q. Did you hear him make any threats about
25 government officials during 2001?

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1 A. Probably.

2 Q. Against Ms. Cook?

3 A. 2001? Probably.

4 Q. Against Mr. Hines?

5 A. Probably.

6 Q. Against Judge Lodge?

7 A. No.

8 Q. Against Hines and Cook, that he wanted them

9 dead?

10 A. That's possible.

11 Q. And when you testified before the Grand Jury

12 in April of 2002, you told the Grand Jury that you

13 hadn't heard him talk against the United States, other

14 than he just he felt that the Government was too

15 repressive.

16 Then you said, at one point, he mentioned

17 something about -- well, federal agents were trying to

18 build a case on honest people, things of that nature,

19 but you just kind of let it go; isn't that right?

20 A. Well, let me --

21 Q. Wasn't that your testimony?

22 THE COURT: Mr. Swisher, is that what you said

23 on that occasion? That's the question. "Yes" or "no"?

24 THE WITNESS: Yes.

25

1090

1 BY MR. NOLAN:

2 Q. Now, was that true?

3 A. Yes. At that time, I thought it to be true.

4 Q. So you believed, at that time, that his

5 comments about Cook and Hines and wanting them dead was

6 nothing more than his saying something about federal

7 agents always trying to build a case on honest people,

8 things like that?

9 A. And his wishful thinking. He was a friend at

10 that point in time. Should I have volunteered that to

11 the Grand Jury?

12 Q. Did you feel you missed --

13 A. To say --

14 THE COURT: Mr. Swisher, wait for Mr. Nolan's

15 question.

16 BY MR. NOLAN:

17 Q. Didn't you feel you were misleading the Grand

18 Jury when you testified like that on April of 2002?

19 MR. SULLIVAN: Your Honor, counsel --

20 THE WITNESS: No.

21 MR. SULLIVAN: -- did not read the juror's

22 question that this was responsive to.

23 MR. NOLAN: I will read it.

24 THE COURT: Please.

25

1091

1 BY MR. NOLAN:

2 Q. The question was: "Did you ever have a

3 conversation with Mr. Hinkson about things other than

4 the technical testing? Did you ever -- you know, did

5 you ever talk politics or his views on taxes and so on

6 and so forth?"

7 And your full answer -- may I read the full

8 answer?

9 THE COURT: You may.

10 BY MR. NOLAN:

11 Q. "I wish you hadn't asked that question. Yes.

12 That's where he is -- it's a conversation but more from

13 the standpoint of I listened while he talked, more than

14 anything else.

15 "But he has some very strong feelings about

16 the Government and the Government being too intrusive in

17 our lives and things of that nature, and he has made

18 those clear on several occasions.

19 "But I haven't heard him talk against the

20 United States ever, other than just he felt that the

21 Government is too repressive.

22 "And at one point, he mentioned something

23 about -- well, federal agents were always trying to

24 build a case on honest people, things of that nature;

25 but I just kind of let that go."

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1 That was the question and that was your

2 answer; correct?

3 A. That was my answer. Absolutely.

4 Q. Now, based upon what you are testifying here

5 today about the nature of the conversations that you

6 heard Mr. Hinkson make in the year 2001, do you feel

7 that you were being honest or were you you, in fact,

8 misleading the Grand Jury?

9 A. No. I was being honest with the Grand Jury.

10 Q. During the time that Mr. Hinkson allegedly

11 made solicitations to you, there were other people

12 around, were there not?

13 A. Would you repeat that?

14 Q. During the time that Mr. Hinkson made

15 solicitations, there were other people around; isn't

16 that right?

17 A. When he made the three direct solicitations to

18 me, they were made in private.

19 Q. Isn't it true --

20 A. To commit murder.

21 Q. Isn't it true -- page 16, line 15, through 17,

22 line 3. Isn't it true, when you were asked a question:

23 Did he make statements about trying to hurt someone --

24 I'm sorry -- about trying to hurt anyone?

25 Answer: "Oh, yes."

1093

1 "Tell us what he said to you."
2 Answer: "Well, he was so angry with the team
3 that were involved in persecuting him, is the way that
4 he put it, that he called me over to his trailer house,
5 in the privacy of it.
6 "And I think there were probably several other
7 people that were around. I don't know how much they
8 heard. I know on at least one occasion my wife was in
9 the vicinity. She didn't always enter into the
10 conversations that we have."
11 Now, was that about statements involving
12 killing somebody by you, or was that just his other
13 conversations about wanting them dead?
14 A. Again, we are at what page? This is on the
15 14th, I guess, of February? The February --
16 Q. This is February of 2004.
17 A. Okay.
18 Q. Page 16, line 15.
19 A. All right. At this particular time frame, I
20 think this was just another one of those -- I wish this
21 happened; I wish this happened, et cetera, et cetera.
22 And I think my wife was present. Whether she
23 heard anything or not -- I didn't push her on it, but
24 I'm pretty sure she was there and heard that. But that
25 was not one of the times he solicited me to do the

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1 that.
2 (Whereupon, Mr. Sullivan provided the court a
3 copy of the February 10, 2004, Grand Jury transcript.)
4 THE COURT: What page are we on, counsel?
5 BY MR. NOLAN:
6 Q. Page 21, line 11 and 12. You can start at
7 line 3. I kind of lost it there because that was the
8 context. Did you use the word "angry"?
9 A. Yes, I did here, in that testimony.
10 Q. Now, there has been testimony about a list.
11 Can you remember any other names on the list, other than
12 Mr. Albers, his children, Ms. Cook, Mr. Hines, Judge
13 Lodge? That's about five or six, I guess. Do you have
14 any -- there were others; correct?
15 A. Yes.
16 Q. Who do you remember of the others?
17 A. Well, I remember Judge Reinhardt from
18 Grangeville was on on the list.
19 Q. Who else?
20 A. Well, the first time we talked, of course, his
21 wife, Marie, was on the list.
22 Q. By the last time, her name was taken off the
23 list; right?
24 A. That's right. He had omitted her at that
25 time.

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1 killings.
2 Q. The time that you said that he lost it, that
3 was the last time; correct?
4 A. That's correct.
5 Q. And that was the time you said he was
6 pleading; is that right?
7 A. I would describe it as pleading.
8 Q. And you described it to the Grand Jury -- was
9 he angry?
10 A. He was quite upset.
11 Q. Was he angry?
12 A. I'm not sure that he was all that angry. I
13 think it was more pleading and frustration.
14 Q. Page 21, line 12 -- lines 6 through 12.
15 First of all, before I get to that -- I will
16 do that.
17 You, in fact, said to the Grand Jury, "He was
18 so angry"? Weren't those your words? Those are at
19 lines 11 and 12.
20 MR. SULLIVAN: I request that he read the
21 entire answer.
22 THE COURT: Well, I don't have a copy of the
23 transcript, so I'm handicapped. All I have is the April
24 2002 Grand Jury testimony.
25 MR. NOLAN: I will be happy to go through

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1 Q. Who else was on the list?
2 A. Oh, my. Well, we've mentioned Nancy Cook,
3 Steven Hines, their families, Mr. Albers and his family,
4 George Reinhardt and his family -- there were several
5 others, but I don't recall them right now. I didn't
6 write them down.
7 Q. Now, were there any strings attached to all of
8 the things that Mr. Hinkson had given you at that point
9 in time?
10 A. I didn't think so, up until this last meeting
11 with him.
12 Q. You testified before the Grand Jury, did you
13 not, "There was no string attached to that, you know,"
14 referring to those items; correct?
15 A. I would have to know where you are reading.
16 Q. Page 20, line 19 and 20.
17 A. Page 20? I think you have to not take that
18 out of context, sir.
19 Q. I will read the whole thing. I would be happy
20 to.
21 A. Please.
22 Q. Do you want me -- where do you want me to
23 start, sir?
24 A. Oh, I think I would start at line 7 and go
25 from there.

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1 Q. All right. Quote, "And then it was right
2 after that -- and I think this was the middle of January
3 that he signed -- finally got around to signing the
4 confidentiality form.
5 "He always wanted to know what we were doing,
6 and I wouldn't tell him until his forms were signed and,
7 even then, I was hesitant to tell him too much."
8 Right after that, he dropped in on me again
9 and --
10 MR. SULLIVAN: I want it read correctly,
11 please.
12 THE COURT: I think the words are, "He dropped
13 it on me again."
14 BY MR. NOLAN:
15 Q. I'm sorry.
16 "But right after that, he dropped it on me
17 again, that he wanted these people killed, and he done
18 all of this for me, and he knew that he had deeds coming
19 on this property for me, and all that.
20 "Of course, there was no string attached to
21 that, you know. This was mine, anyway. But he really
22 needed help because these people were pressuring him and
23 they just had -- everything was a lie except his side of
24 the story, and he repeated his offer to -- made an offer
25 to me to have them killed."

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1 and said, "I was there with you, you know. It was
2 twenty, the size of a mining claim."
3 And then it hit me that I had made a mistake
4 and said ten instead of twenty.
5 Q. He also, during the time that he was -- well,
6 let me -- let me do this: During the course of the
7 litigation after December of 2003, you received certain
8 papers at your door; correct? Somebody put legal papers
9 on your door; correct?
10 A. I don't know what kind of papers they were.
11 Somebody had hung a sack with some papers on my door
12 late at night.
13 Q. You called the police?
14 A. I did.
15 Q. You refused -- you wanted the police to take
16 them away; correct?
17 A. That's correct.
18 Q. And the police told you that this is a civil
19 matter; you deal with it yourself? Correct?
20 A. I think it was something to that effect.
21 Q. And the police, also, admonished you not to --
22 MR. SULLIVAN: I object, Your Honor, to
23 what --
24 MR. NOLAN: It goes to bias.
25 THE COURT: Sustained. Hearsay.

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1 Did I read that properly?
2 THE COURT: You left out a word. You left out
3 the word "pay." It should be, " . . . made an offer to
4 pay me . . ."
5 THE WITNESS: Right.
6 BY MR. NOLAN:
7 Q. I'm sorry.
8 " . . . he repeated his offer to -- made an
9 offer to pay me to have them killed."
10 Correct?
11 A. Yes. And what I am doing there is talking
12 about Mr. Hinkson and his comments to me because he made
13 it clear that he had done all of this for me. He had
14 all of this property he had given to me, and he had all
15 of these deeds coming my way on the property and so on.
16 And, of course, there was no string attached
17 to that, with this solicitation of murder; but he
18 mentioned it during the solicitation to murder. Of
19 course, I never got the title to any of his property
20 so --
21 Q. I am just curious. I'm not just curious.
22 That's not true.
23 Did he offer you ten acres or twenty acres?
24 A. I testified at one time that I thought it was
25 ten. My wife corrected me when I talked to her later

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1 BY MR. NOLAN:
2 Q. The week prior to that, you had also --
3 somebody tried to serve you with papers?
4 THE COURT: I will allow that answer.
5 THE WITNESS: I don't know.
6 BY MR. NOLAN:
7 Q. You called the police prior to that?
8 MR. SULLIVAN: I object, Your Honor.
9 Relevance.
10 THE COURT: I will allow the question.
11 Did you call the police more than once with
12 regard to process servers?
13 THE WITNESS: Yes, sir, I did. There was --
14 somebody showed up at the door, and I was in the middle
15 of a medical procedure. This was about 2:00 o'clock in
16 the morning, and they started tearing the hinges off the
17 door.
18 My wife went to the door, and there was a
19 gentleman who was bearded and dirty and unkempt
20 demanding to see me. Well, I was upstairs.
21 Let me explain this. I have to cath four or
22 five times a day, and I had a catheter in me.
23 THE COURT: Mr. Swisher, that's sufficient. I
24 think we get the picture.
25

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1 BY MR. NOLAN:

2 Q. 2:00 o'clock in the morning they came; is that

3 right?

4 A. About that time, yes. You know, it was late

5 at night, anyway. I couldn't -- my wife could tell you

6 the exact time. I don't recall. I was in quite a bit

7 of pain at that time.

8 Q. Was it before 10:00 in the evening?

9 MR. SULLIVAN: I object, Your Honor.

10 THE COURT: This is going way beyond, counsel.

11 Sustained. Move on to another area.

12 BY MR. NOLAN:

13 Q. Very well. Now, what involvement did you have

14 with WaterOz in October, November, and December?

15 A. Of what year, sir?

16 Q. Of 2003?

17 A. I'm trying to think exactly what day he

18 called. It was either -- probably September or October.

19 He was in jail at the time, and he called me and said

20 that he had a partnership with Rick Bellon and that he

21 had talked to Mr. Bellon and they wanted to hire me as a

22 consultant to go out to WaterOz and look the facility

23 over, make things safer for employees, and make things

24 safer in the product for the general public.

25 And in my discussion with David, I said, "Are

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1 A. Probably.

2 Q. Mr. Bellon was present at the meeting?

3 A. If you say so.

4 Q. Well, was he, sir?

5 THE COURT: Do you remember, Mr. Swisher?

6 THE WITNESS: I don't distinctly remember it,

7 Your Honor.

8 BY MR. NOLAN:

9 Q. Mr. Hinkson wanted you to become involved in

10 WaterOz again; correct?

11 A. Yes.

12 Q. He wanted you to get the place running,

13 improve the product, improve the conditions; correct?

14 A. Yes.

15 Q. And you went ahead and did that; isn't that

16 right?

17 A. I wasn't given the opportunity to do it.

18 Q. You weren't given the opportunity because

19 somebody decided they didn't want Mr. Bellon to do it?

20 They wanted Mr. Hinkson's -- the husband of

21 Mr. Hinkson's former wife to do it; correct?

22 A. I don't know about that. I know that I went

23 out as instructed, and they wouldn't permit me to look

24 over the facility.

25 There were two men there, including

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1 you sure that Mr. Bellon is your partner?"

2 And he said, "Absolutely."

3 And he said, "He will be around." And he

4 said, "No one will give you any trouble. I told them to

5 let you have free reign out there. Troubleshoot this

6 for us."

7 I said: "Okay. Fine. I was concerned more

8 about the general public at that time than anything

9 else -- and the employees."

10 Q. Did you attend a board meeting of WaterOz in

11 October of 2003?

12 A. Quite possibly.

13 Q. You don't remember attending --

14 A. I don't remember the details of it. I think

15 that I was called out for a board meeting, and I'm not

16 even sure who all was there.

17 Q. Wasn't there --

18 A. Anyway, to make a long story short, David

19 eventually came on the speaker phone, talking from jail.

20 THE COURT: Let's wait for the question,

21 Mr. Swisher. The only question was whether or not you

22 remember attending a board meeting.

23 THE WITNESS: I remember it vaguely.

24 BY MR. NOLAN:

25 Q. You brought a friend of yours, Doug Sellers?

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1 Mr. Hinkson's ex-wife's new husband, who is an ex-deputy

2 or was an ex-deputy of Idaho County, Greg something --

3 Towerton, I think -- and another gentleman who kept me

4 from going out and doing what David had asked me to

5 do -- and Bellon, both.

6 Q. So you did nothing at WaterOz after the

7 October board meeting with Mr. Bellon; is that correct?

8 A. Not until -- that's correct, until I went back

9 in December, at Mr. Bellon's request, to follow up on

10 that, via the court order.

11 Q. With Mr. Hinkson's approval; correct?

12 A. I don't know about that because he didn't call

13 me again in December on that.

14 Q. And you understand Mr. Bellon is suing

15 Mr. Hinkson; correct?

16 A. I understand that. I don't know exactly when

17 those suits transpired.

18 Q. You were hired, were you not, as an expert

19 witness by Mr. Bellon; correct?

20 A. Boy, I tell you, there's been a lot of legal

21 stuff going on today. If you will give me a reference

22 to that, maybe I can give you an intelligent answer.

23 Q. Well, do you remember being hired as an expert

24 witness by Mr. Bellon in the civil suit that involves

25 Mr. Hinkson?

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1 MR. SULLIVAN: I object, Your Honor.
 2 Relevance.
 3 THE COURT: I will permit it; but I do think
 4 we are going on a bit, counsel. Go ahead.
 5 I will overrule the objection, for the record.
 6 THE WITNESS: Okay. I don't specifically
 7 recall that. I know that Mr. Bellon definitely wanted
 8 me to go out and look the place over.
 9 If that's what you mean by being an expert
 10 witness, that's very possible. He wanted my
 11 recommendations on how to improve employee safety and
 12 public safety, as well.
 13 BY MR. NOLAN:
 14 Q. I'm specifically referring to being hired by
 15 Mr. Bellon after he was kicked out of WaterOz, to assist
 16 him against Mr. Hinkson in the civil suit?
 17 A. Well, sir, at that point in time, I had been
 18 asked by both partners, if you want to call them that,
 19 to give my input to protect employees and the public;
 20 and that's what I went out in December to do.
 21 Q. In answer to my question, were you hired as an
 22 expert witness by Mr. Bellon to assist him in the civil
 23 suit against Mr. Hinkson?
 24 A. Well, let me put it this way: Hiring involves
 25 money, and I never received a dime for going out there

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1 MR. NOLAN: I will show it to counsel.
 2 MR. SULLIVAN: Your Honor, I object. It's
 3 talking about a different case.
 4 THE COURT: Well, I don't know what you are
 5 objecting to yet because I haven't heard the question.
 6 MR. SULLIVAN: He is trying to refresh his
 7 memory regarding being hired as --
 8 THE COURT: Let me see the --
 9 MR. NOLAN: Sure.
 10 MR. SULLIVAN: I'm not talking about the civil
 11 case, Your Honor.
 12 THE COURT: You may need to clear that up on
 13 redirect. I think it's a fair question.
 14 MR. NOLAN: Let me ask -- I will ask it this
 15 that way?
 16 THE COURT: That would help, counsel.
 17 MR. NOLAN: I would be happy to.
 18 Q. Mr. Swisher, were you hired to be an expert
 19 witness in the federal case against Mr. David Hinkson?
 20 A. Against Mr. Hinkson?
 21 Q. Yes.
 22 A. Would you let me see what you are reading
 23 from, sir?
 24 THE COURT: Go ahead and show it to him.
 25 MR. NOLAN: Okay. Sure.

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1 in December.
 2 Q. After December -- I'm sorry.
 3 THE COURT: Well --
 4 BY MR. NOLAN:
 5 Q. After December, when there was a lawsuit
 6 between Mr. Bellon and Mr. Hinkson, were you hired as an
 7 expert witness by Mr. Hinkson in that suit?
 8 A. I don't think so. By Mr. Hinkson?
 9 Q. That's my fault.
 10 A. I don't recall either one of them.
 11 THE COURT: Counsel, you are getting us all
 12 confused here. If you can, clear this up. I hope the
 13 jury is following this. I am not.
 14 MR. NOLAN: I am having a lot of trouble.
 15 THE COURT: I think the witness is having a
 16 hard time following you, as well.
 17 MR. NOLAN: I will move on, Your Honor.
 18 THE COURT: Thank you, counsel.
 19 MR. NOLAN: I can't find the exact portion. I
 20 found it. May I approach?
 21 THE COURT: Yes, you may.
 22 MR. NOLAN: Take a look to see if this
 23 refreshes your recollection.
 24 MR. SULLIVAN: May I see the document that
 25 counsel is showing the witness?

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1 THE COURT: I think I now understand
 2 Mr. Sullivan's objection.
 3 Let me see counsel at sidebar.
 4 (Whereupon, the following sidebar discussion
 5 was held outside the presence of the jury:)
 6 MR. SULLIVAN: Your Honor, he has been asking
 7 him over and over again about being hired an an expert
 8 witness by Mr. Bellon against Mr. Hinkson.
 9 He shows him this document that is a question
 10 by Mr. Hoyt in this deposition, and Mr. Hoyt references
 11 something about a federal case.
 12 It's thoroughly misleading and confusing the
 13 witness. It's thoroughly misled and confused me, and I
 14 think it has the jury. I move to prohibit it.
 15 MR. NOLAN: I will be happy to clear it up
 16 because what happens is the question says: "Were you
 17 hired as an expert witness in the federal case against
 18 Mr. Hinkson?"
 19 The answer is: "Yes."
 20 "Did Mr. Bellon pay you any money?"
 21 The answer is: "No."
 22 So there is, obviously, ambiguity in that
 23 question. But the fact that he believes that he was
 24 hired as an expert witness in a federal case against
 25 Mr. Hinkson goes to his ability and credibility as a

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1 witness. That's what it's for.

2 THE COURT: The problem that I am having is

3 that we have so many different pieces of litigation, and

4 you are hopping around quickly from one lawsuit to the

5 next.

6 I read that answer, and it is ambiguous. I

7 read that answer to refer to helping Mr. Hinkson in

8 connection with the FDA case against Mr. Hinkson. Now,

9 I don't know if that's what Mr. Hoyt intended when he

10 asked him the question.

11 But we have now moved from the Bellon-Hinkson

12 case to the federal criminal case against Mr. Hinkson,

13 and so I'm not sure this is impeachment.

14 MR. NOLAN: I see. In other words, it could

15 be that it pertains to Mr. Bellon assisting Mr. Hinkson

16 in the federal FDA case.

17 Obviously, the court is further ahead on this

18 than I am. I saw it as a bias that he is working for

19 another witness, and so I will just withdraw the

20 question.

21 THE COURT: That would be the best way to

22 handle it.

23 MR. HOYT: Your Honor, off the record, can we

24 just have a discussion?

25 THE COURT: Yes.

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1 (Whereupon, an off-the-record discussion was

2 held between Mr. Hoyt and Mr. Nolan outside the presence

3 of the jury.)

4 (The following proceedings were held in the

5 presence of the jury:)

6 MR. NOLAN: I will withdraw that question,

7 Your Honor. I apologize to the jury for the confusion

8 that I may have caused with all of those questions.

9 THE COURT: That's quite all right, counsel.

10 BY MR. NOLAN:

11 Q. You believe that it's appropriate that, if you

12 wish, you can change your testimony, depending upon the

13 circumstances; correct?

14 MR. SULLIVAN: I object to so broad and vague

15 of a question.

16 THE COURT: I will sustain it as to the form

17 of the question.

18 BY MR. NOLAN:

19 Q. All right. You testified under oath that you

20 had been paid in full for the testing, correct, prior?

21 A. For what testimony?

22 Q. Earlier this morning, in response to

23 questions, we established that, on a prior occasion, you

24 testified that you had been paid in full for the testing

25 that was done on behalf of WaterOz; correct?

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1 A. I thought I had.

2 Q. And you testified at a later time, at a

3 deposition in October of this year, that you would

4 change your testimony because you didn't get the full

5 amount; correct?

6 A. That's true. It was given, but titles were

7 never issued.

8 Q. Now, hopefully, this will be the last

9 question. I'm sure the Judge has been -- I hope no one

10 else has been as anxious as the court.

11 THE COURT: That's all right. The court will

12 give you as much leeway as you need.

13 MR. NOLAN: I appreciate that, Your Honor.

14 THE COURT: It's been a long day.

15 BY MR. NOLAN:

16 Q. When you testified before the Grand Jury in

17 April of 2002 -- I'm sorry if I didn't speak up loud

18 enough -- you talked about your feelings about

19 Mr. Hinkson; correct?

20 A. Probably. Are you making a specific --

21 Q. I am just laying the foundation for the time

22 and place. At the time, in April of 2002, you believed

23 that he was a very bright man; correct?

24 A. Yes, that's true.

25 Q. A little eccentric; correct?

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1 A. True.

2 Q. Initially, he causes you to take a little step

3 back; true?

4 A. True.

5 Q. He is a bright guy? He has come up with some

6 technology that works; correct?

7 A. Correct.

8 MR. SULLIVAN: I object to reading from the

9 Grand Jury testimony. There is no impeachment, no

10 refreshment.

11 THE COURT: I will sustain it as to improper

12 form. Just rephrase your question.

13 MR. NOLAN: I will rephrase it. I will look

14 and then I will --

15 THE COURT: That would be the better way to do

16 it.

17 BY MR. NOLAN:

18 Q. You haven't had -- you didn't have any

19 problems with him; correct?

20 A. I didn't have any problems with him in that

21 time frame from 2000 to 2002.

22 Q. You didn't expect any problems with him?

23 A. Towards me directly?

24 Q. Yes.

25 A. No.

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1 Q. He never lied to you?

2 A. Well, not that I knew of at the time that I
3 gave that testimony.

4 Q. And you accept people for who they are and
5 what they are; correct?

6 A. I try to do that.

7 Q. And that was the kind of information you gave
8 the Grand Jury about Mr. Hinkson in April of 2002;
9 correct?

10 A. What you just read, correct.

11 MR. NOLAN: No further questions.

12 THE COURT: All right. Redirect?

13 MR. NOLAN: Oh, Your Honor I do have -- I do
14 have something. May I approach?

15 THE COURT: Yes, sir. I will allow you to
16 re-open.

17 (Whereupon, the following sidebar discussion
18 was held outside the presence of the jury:)

19 MR. NOLAN: This is a very difficult issue.
20 For quite sometime, we have been trying to dig into his
21 military history because we don't believe it's accurate.
22 It's one of those things where, if you make a change and
23 you are wrong, it can just kill you.

24 Because of his age and because of the time of
25 the war, we don't believe he was in the war. We also

1 don't believe that he got a Purple Heart or was in
2 combat.

3 But until one second ago, I had nothing that I
4 could rely upon to attack that until I was handed a
5 letter from the National Personnel Records Center
6 indicating that the offices had failed -- the records
7 fail to show that he ever was recommended for or awarded
8 any person decorations.

9 He is wearing a Purple Heart, as we speak.

10 MR. HOYT: Your Honor, he entered the service
11 in August of 1954, after the Korean Conflict took place.

12 MR. NOLAN: I believe I should be allowed to
13 re-open this. I'm sorry it came up at this hour. I can
14 tell the court, literally, I had no prior knowledge.

15 MR. SULLIVAN: Your Honor, are they intending
16 to call a witness?

17 MR. NOLAN: We will subpoena the witnesses if
18 he denies it. I mean, we just got this letter dated --
19 this letter is dated January 14th. It was faxed to us.
20 We got it on the 14th.

21 MR. SULLIVAN: The Government never went in on
22 its direct about winning medals or combat. I went into
23 a conversation that he had with Mr. Hinkson and what
24 Mr. Hinkson asked him about.

25 I didn't ask him anything about where he got

1 medals, if he had medals, or anything else. The
2 conversation with Hinkson wasn't about those matters.

3 So this is setting up a -- if there is any
4 basis to it, that is, this is setting up a scarecrow to
5 knock it down sometime, maybe, potentially, if they can
6 find somebody.

7 MR. NOLAN: He is wearing a Purple Heart on
8 the witness stand. He is wearing a Purple Heart on the
9 witness stand, in the presence of the jury.

10 MR. SULLIVAN: For the record, he has a
11 little -- I don't know -- you know, something stuck in
12 his lapel. If somebody knows what that is, fine. No
13 one has said what it is.

14 THE COURT: I am going to permit this. I am
15 going to permit Mr. Nolan to ask him what the lapel pin
16 is that he is wearing.

17 If he answers that it's a Purple Heart, I am
18 going to permit Mr. Nolan to ask him whether or not he
19 is telling the jury that he was awarded the Purple
20 Heart. And that's as far as I am going to allow you to
21 go, although you can certainly say isn't --

22 MR. NOLAN: On direct examination, he also
23 said he killed hundreds of people. That was on direct
24 examination. I didn't go into that. Now, I mean, I
25 would like permission to have him re-affirm that he was

1 in combat, because of the records.

2 MR. SULLIVAN: He didn't testify he killed
3 hundreds of people.

4 THE COURT: He testified he killed many
5 people.

6 Let's see how he handles the Purple Heart
7 question; and then you can ask the follow-up, depending
8 upon how he answers the Purple Heart question.

9 MR. HOYT: Can he be asked the question: Did
10 he serve during the Korean Conflict, as a predicate
11 question?

12 THE COURT: I will permit that.

13 (Whereupon, the following proceedings were
14 held in the presence of the jury:)

15 BY MR. NOLAN:

16 Q. I am sorry, Mr. Swisher. I have some
17 additional questions. Are you wearing something on your
18 lapel?

19 A. Yes.

20 Q. What is that?

21 A. It's a Purple Heart Medal.

22 Q. Is that a Purple Heart you earned?

23 A. Yes.

24 Q. It was awarded to you by the United States
25 Government?

1 A. That's correct.

2 Q. Did you serve in combat in the United
3 States -- did you serve in combat in the Korean War?

4 A. Not in the Korean War but following the Korean
5 War.

6 Q. In what field of battle did you receive the
7 Purple Heart?

8 MR. SULLIVAN: Judge, I object.

9 THE COURT: Overruled.

10 THE WITNESS: I was part of a special
11 expedition, Marine Corps Expeditionary Unit that was
12 engaged in combat after the Armistice, in an attempt to
13 free POWs still in secret prison camps in North Korea.
14 And that information still remains classified, so I'm
15 not sure how much more I can say on that.

16 BY MR. NOLAN:

17 Q. Showing you a document from the military --

18 MR. SULLIVAN: I object, Your Honor.

19 BY MR. NOLAN:

20 Q. Showing you a document --

21 THE COURT: I will allow him to show him the
22 document.

23 MR. SULLIVAN: Your Honor, we know it's not
24 his document.

25 THE COURT: Go ahead and show him the

1 document.

2 BY MR. NOLAN:

3 Q. Showing you a document from the military, I
4 ask you whether or not that might refresh your
5 recollection as to whether or not the Government issued
6 you a Purple Heart.

7 MR. SULLIVAN: I move to strike, Your Honor.
8 There is no basis for what counsel is attempting to do.

9 THE COURT: Let the witness review the
10 document.

11 THE WITNESS: Yes, I see the document.

12 BY MR. NOLAN:

13 Q. Now, sir, when you are awarded a Purple Heart,
14 are you not given a document reflecting your entitlement
15 to that Purple Heart?

16 A. Commonly.

17 Q. Were you given such a document?

18 A. Yes.

19 Q. Where is that document?

20 A. In my pocket.

21 Q. May I see it, please?

22 A. I have a replacement DD-214, if the court will
23 permit me to --

24 THE COURT: Let me take a look at it, first.

25 THE WITNESS: It is certified. We had to go

1 clear to Headquarters of the Marine Corps and all over
2 to get it. Because of the classifications, my record,
3 along with the other survivors of that Mission, had been
4 pretty much purged.

5 THE COURT: Ms. Longstreet, would you tender
6 that to both counsel, please?

7 MR. SULLIVAN: I have a copy, Your Honor.

8 THE COURT: Just hang on to it.

9 MR. NOLAN: What was that?

10 MR. SULLIVAN: I have a copy.

11 MR. NOLAN: May we approach, Your Honor?

12 (Whereupon, the following sidebar discussion
13 was held outside the presence of the jury:)

14 MR. NOLAN: I am going to -- apparently,
15 counsel for the Government knew about the validity of
16 the Purple Heart. He just said he has a copy of this.

17 THE COURT: Have you seen this document?

18 MR. SULLIVAN: He showed me this document this
19 morning, about 9:00 o'clock.

20 THE COURT: Do you have a copy?

21 MR. SULLIVAN: I have a copy of it.

22 MR. HOYT: Why didn't you tell us?

23 MR. SULLIVAN: Why should I?

24 THE COURT: Gentlemen, hold on a second.

25 For the record, we are looking at a photocopy

1 of what purports to be a Defense Department Form DD-214
2 in the name of Elven Joe Swisher with a military
3 identification number of 1517120.

4 It indicates that he was awarded the following
5 commendations: The Silver Star, the Navy and Marine
6 Corps Medal with Gold Star, a Purple Heart, and a Navy
7 and Marine Corps Commendation Medal with Bronze "V."

8 It indicates that the document replaces the
9 previously issued transfer document dated 8/3/57 and
10 that he is entitled to wear the Marine Corps
11 Expeditionary Medal.

12 Now, counsel, you have opened the door on
13 this. You can either ask him to explain it, or I am
14 going to allow the Government to redirect and have him
15 explain the significance of this document.

16 MR. NOLAN: The Government knew about this
17 when we approached the bench.

18 MR. HOYT: Your Honor, can we excuse the jury
19 and have a more full opportunity to discuss this?

20 THE COURT: Let's do that.

21 (Whereupon, the following proceedings were
22 held in the presence of the jury:)

23 THE COURT: Ladies and gentlemen, I am going
24 to need to have you take an unscheduled recess so that
25 we can take up this issue more fully.

1 Please rise for the jury.

2 (Whereupon, the jury was excused from the
3 courtroom, and the following proceedings were held:)

4 MR. NOLAN: Could the witness be excused?

5 THE COURT: Yes. Mr. Swisher, if you wouldn't
6 mind stepping out in the hallway, take a break but
7 remain available.

8 THE WITNESS: I would like to add, Your Honor,
9 if I may, that --

10 THE COURT: Let me take this up with the
11 lawyers first.

12 THE WITNESS: Okay.

13 (Whereupon, witness Elven Joe Swisher was
14 excused from the courtroom.)

15 THE COURT: Mr. Nolan, why don't you go to the
16 podium?

17 MR. NOLAN: If I may just make a record, Your
18 Honor, I finished my cross-examination of Mr. Swisher;
19 and then I was handed a document on stationery that was
20 faxed to us on the 14th of January at the hour of 2:34,
21 approximately, and it is a letter to Mr. Hoyt's office
22 from --

23 MR. HOYT: Central Standard Time.

24 MR. NOLAN: -- the National Personnel Records
25 Center. We had, apparently, been trying to get

1 Mr. Swisher's military records for about ninety days;
2 and we have very little control over when that happens.

3 It was discussed -- Mr. Hoyt discussed with me
4 the time variations between being a combat veteran and
5 the time of the Korean War. I told him that I would not
6 go into this without some proof and that I would not
7 even come close to opening up the door.

8 I noticed that the man wore a Purple Heart.
9 There is prior testimony that his hearing was affected
10 by a hand grenade. I didn't want to go into it. He
11 said he killed people. I didn't want to cross-examine
12 him on that at all.

13 At the conclusion of my cross-examination,
14 Mr. Hoyt handed me this two-page letter highlighted with
15 a paragraph -- it's actually from the personnel records
16 center. It's a one-page letter.

17 Highlighted, it says, "Mr. Swisher's Marine
18 Corps record has been carefully examined by the Military
19 Awards Branch of the Office of the Commandant of the
20 Marine Corps, and that office has stated that his record
21 fails to show he was ever recommended for, or awarded,
22 any personal decorations."

23 Based upon seeing that, I immediately
24 approached the bench before redirect examination began;
25 and I told the court I just had come into this

1 information and that we intended, depending upon the
2 witness's answer to the question, to call a witness from
3 the archives to establish these facts.

4 I requested permission to re-open. The court
5 considered that, said I could ask about whether he was
6 wearing a Purple Heart. Counsel for the prosecution
7 vehemently objected to my getting into this.

8 I was allowed to re-open. I asked the
9 question. The record will reflect what the witness
10 said.

11 And then, in the presence of the jury, counsel
12 for the prosecution said that he had -- when the
13 document was delivered to the court by the witness out
14 of his pocket, counsel for the Government indicated that
15 he already had a copy of that document.

16 Now, this case has been going quite well, in
17 terms of the behavior of the parties. I feel that what
18 occurred mandates -- I will request a mistrial.

19 It mandates serious, severe -- in my opinion,
20 serious, severe actions, based upon the fact that the
21 Government was in possession of information which we
22 were not given regarding this witness which, at that
23 point in time, the Government knew that the only thing
24 that could happen is it would be adversely taken and
25 affect the credibility of me, the credibility of the

1 defense, and adversely affect the defendant.

2 And quite frankly, Your Honor, I don't know
3 how this matter can be resolved. That's my request.

4 THE COURT: Very well. Let me hear from the
5 United States.

6 MR. SULLIVAN: Counsel should have listened to
7 me when I said, "Don't go there."

8 THE COURT: Well, let's establish for the
9 record, Mr. Sullivan, that you indicated at sidebar that
10 Mr. Swisher had shown you this DD-214 at 9:00 a.m. this
11 morning.

12 MR. SULLIVAN: That's correct.

13 THE COURT: All right.

14 MR. SULLIVAN: He showed it to me at 9:00 a.m.
15 this morning because I had asked -- he had mentioned
16 Korea, serving in Korea.

17 I said, "Wasn't the Armistice in '52?"

18 He said, "But there was still, you know,
19 combat; and it continues to this day," which I happen to
20 know to be true. There is combat to this day in Korea.

21 THE COURT: Technically, those hostilities
22 have never been officially terminated, Mr. Nolan.

23 Mr. Sullivan is correct; the war in Korea, or police
24 action, whatever you want to call it, is not over.

25 Let me first say this: First of all, I want

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1 to mark as a defense exhibit the facsimile. I also want
2 to mark a photocopy of the Form DD-214. So let's give
3 those numbers.
4 MR. NOLAN: Could we have a copy back of this?
5 THE COURT: Certainly.
6 MR. NOLAN: This is the only one we have.
7 THE COURT: Let me further say that, in
8 looking at -- well, let's give them numbers so we get
9 this clearly on the record. It would be defense Exhibit
10 L.
11 MR. HOYT: L and the next one would be M.
12 THE COURT: I am going to mark -- that's fine.
13 We can mark them both as defense exhibits. I don't
14 think it makes any difference.
15 MR. SULLIVAN: May I make my record, counsel,
16 since counsel is moving for a mistrial and severe
17 sanctions?
18 THE COURT: Yes, Mr. Sullivan.
19 MR. SULLIVAN: I didn't go into anything about
20 his combat or his medals or anything else on my direct.
21 He chose to go down this path, even when I objected to
22 it.
23 I didn't draw attention to the little pin in
24 Mr. Swisher's lapel. Lots of people wear them. They
25 could be anything. He wanted to make an issue of it.

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1 I don't think -- you know, I barely had time
2 to look at this, myself. It refers to other -- that
3 this replaces some document previously issued. I don't
4 know what that document is, and it just led me to
5 conclude that this is not a proper area to go into.
6 THE COURT: Ms. Longstreet, may I have the two
7 documents?
8 THE COURTROOM CLERK: Yes, Your Honor.
9 THE COURT: Thank you.
10 MR. NOLAN: Could I respond briefly?
11 THE COURT: Go ahead.
12 MR. NOLAN: Your Honor, we have a document
13 given to us by the Government which is false; and the
14 Government knows it's false.
15 MR. SULLIVAN: I have no evidence or reason to
16 believe that the document is false.
17 MR. NOLAN: The document -- I'm sorry. With
18 all due respect, the document says there is no record of
19 him receiving any awards and --
20 MR. SULLIVAN: I --
21 MR. NOLAN: He has government information that
22 contradicts that.
23 THE COURT: All right. Here is my ruling:
24 The motion for mistrial is denied.
25 To the extent that there was error here, it

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1 I objected that he is setting up a -- what did
2 I say -- a straw man -- I said "scarecrow" before, but I
3 meant "straw man" -- so he can knock it down if he can
4 develop some more information.
5 It is permissible to impeach -- to
6 cross-examine someone, a witness, for making false
7 statements, under Rule 608.
8 608(b) permits inquiry into conduct that is
9 deceitful, but it doesn't permit impeachment by other
10 documents. It doesn't permit the use of other evidence
11 if there is a denial of the deceitful conduct.
12 Counsel whipped out his document that he
13 received minutes ago. I believe he probably didn't have
14 enough time to read it and digest it and tried to use
15 that to impeach the witness. That was improper.
16 Under Rule 608(b), he should not have been
17 allowed to show that document. It wasn't a matter of
18 refreshing his memory. He hadn't expressed any kind of
19 doubt about his memory.
20 It was a grandstand play in front of the jury
21 that didn't -- that wasn't so grand, and he got caught
22 on it. That's where we are.
23 There is nothing the Government did that
24 caused him to go in the area he did. We tried to avoid
25 going into this area.

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1 was counsel who requested the opportunity to re-open. I
2 granted permission to re-open so that you could confront
3 him because I thought that you had a good-faith basis to
4 believe, based upon the receipt of Exhibit L from the
5 National Personnel Records Center of the Department of
6 Defense in St. Louis, Missouri, to ask the question,
7 based upon the witness's answer, to try and impeach him
8 on grounds that he has not, in fact, received the Purple
9 Heart.
10 Until that happened, there was no reason for
11 the Government to believe, with regard to Exhibit M,
12 that the contents of Exhibit M would be impeaching in
13 any way, shape, or form.
14 The court finds as a matter of fact that if
15 Exhibit M is a copy of a genuine military record -- and
16 at this point, I don't have any way to determine that;
17 but it appears to be genuine, at least in appearance.
18 It indicates consistently with how the witness
19 has testified; that he did, in fact, receive multiple
20 shrapnel and gunshot wounds in September 1955 in Korea;
21 and that he was awarded commendations and medals,
22 including the Purple Heart.
23 Now, Mr. Sullivan is correct. Under Rule 608
24 and the applicable Supreme Court precedent, particularly
25 Justice Jackson's decision in *Michaelson vs. the United*

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1 States, 335 U.S. 469, 1948, you are permitted to attempt
2 to impeach a witness in the manner that Mr. Nolan
3 attempted.

4 Ordinarily, under the rules, you are stuck
5 with the witness's answer; and the court has the
6 discretion to restrict further collateral proof of that
7 impeachment.

8 So the basis for my ruling is, essentially,
9 counsel opened the door with regard to this
10 late-received facsimile, Exhibit L.

11 The Government, until the receipt of that
12 exhibit, had no reason to believe that Exhibit M was
13 discloseable under Brady or Giglio because it was not
14 impeaching. Therefore, the motion for mistrial is
15 denied.

16 We will bring in the jury.

17 MR. NOLAN: Does the court have a remedy? You
18 know, I also think --

19 THE COURT: Hold on.

20 MR. NOLAN: -- that there was a practice that
21 counsel -- I mean, maybe I can't find the right cite;
22 but, quite frankly, I am in an awkward position and I
23 don't think it should be held against Mr. Hinkson. If
24 the court has a remedy --

25 THE COURT: Let me suggest that one remedy

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1 instruction that the area inquired into was not relevant
2 for the jury's determination and they should disregard
3 it.

4 THE COURT: How about if we do it this way? I
5 will tell them that the error was the court's in
6 permitting the area to be inquired into and, for that
7 reason, I am directing that the portion of the testimony
8 with regard to whether or not he was awarded the Purple
9 Heart is stricken, so that it doesn't make either side
10 look bad. Is that acceptable?

11 MR. SULLIVAN: It is, Your Honor.

12 THE COURT: Mr. Nolan?

13 MR. NOLAN: Yes, Your Honor. Thank you.

14 THE COURT: Very well. Let's bring the jury
15 back in, Ms. Longstreet.

16 MR. HOYT: Do you want to bring the witness in
17 first, Your Honor?

18 THE COURT: We will do them together,
19 simultaneously.

20 Go ahead. Yes.

21 (Whereupon, the following proceedings were
22 held in the presence of the jury:)

23 THE COURT: Ladies and gentlemen, it's been a
24 long day; and I now realize that I made a mistake in
25 allowing the questioning with regard to the Purple Heart

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1 that occurs to the court is that I could simply instruct
2 the jury to strike that portion of the cross-examination
3 of Mr. Swisher that relates to the Purple Heart. Just
4 tell them to completely disregard all testimony about
5 the Purple Heart.

6 MR. NOLAN: That would be appreciated. I
7 think that would be the best way. Other than that, we
8 have to bring in people to show our good faith and all
9 of that.

10 MR. SULLIVAN: Your Honor, now Mr. Swisher
11 looks like he has said something improper and done
12 something improper, because the court is striking his
13 testimony. It was responsive testimony to counsel's
14 questions.

15 THE COURT: Let me put it to you this way,
16 Mr. Sullivan. That is the only suggestion I can think
17 of. If the Government doesn't want me to instruct the
18 jury, I will leave the record as it stands; and you can
19 take your chances.

20 MR. SULLIVAN: What I would like, Your
21 Honor --

22 THE COURT: If there is a conviction,
23 Mr. Nolan may or may not have an issue here. Do you
24 want to think about it for a minute?

25 MR. SULLIVAN: All I would ask the court is an

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1 Medal.

2 So I am going to instruct you to disregard
3 completely all of Mr. Swisher's testimony with regard to
4 that military commendation.

5 You certainly are entitled to consider all of
6 the rest of his testimony. Just everything from where I
7 asked Mr. Nolan to re-open, please strike that from your
8 minds; and you are not to consider it as evidence in the
9 case.

10 With that, are we ready to proceed with
11 redirect examination.

12 MR. SULLIVAN: Yes, Your Honor.

13 THE COURT: Do you want to move that easel,
14 Mr. Sullivan?

15 MR. NOLAN: I can do that.

17 R E D I R E C T E X A M I N A T I O N

18 BY MR. SULLIVAN:

19 Q. Mr. Swisher, you may recall you were asked
20 about a particular question and answer you gave in your
21 first Grand Jury appearance in April 2002. The question
22 was -- I will put it on the screen again -- it's Grand
23 Jury testimony at page 42.

24 A question by a juror was: "Did you ever have
25 a conversation with Mr. Hinkson about things other than

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1 the technical testing? Did you ever, you know -- did
2 you ever talk politics or his views on taxes, so on and
3 so forth?"

4 Did you understand that question to require
5 any response about Mr. Hinkson hoping that federal
6 officials would die?

7 A. No.

8 Q. Did you try to answer the question as you
9 thought it was required?

10 MR. NOLAN: Objection. Leading.

11 THE COURT: Overruled.

12 Could you answer that question? The question
13 was: "Did you try to answer the question as you thought
14 it was required?"

15 THE WITNESS: As it was asked, I did my best
16 to answer it.

17 BY MR. SULLIVAN:

18 Q. You were also asked a question, again from the
19 Grand Jury testimony, about whether Mr. Hinkson's offers
20 to you were made in private or with other people around.
21 Do you recall that question?

22 A. I'm sorry. I got lost there. Would you
23 repeat that question?

24 Q. Do you recall being asked a question about
25 whether or not Mr. Hinkson made the offers to kill the

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1 other person? Judge Reinhardt?

2 A. Yes.

3 Q. Who is Judge Reinhardt?

4 A. I think he is a judge in the Fifth District
5 or, at least, he was stationed in Grangeville, Idaho
6 County.

7 Q. And do you know if Judge Reinhardt had
8 anything to do with litigation involving Mr. Hinkson?

9 A. I believe he was the trier of fact in the case
10 that Mr. Hinkson lost, and the plaintiff was awarded
11 \$100,000 then.

12 Q. Do you recall the name of that particular
13 plaintiff?

14 A. Arnette Hazelton (sic.), I think. That's
15 probably an improper pronunciation.

16 Q. You have been asked a number of questions on
17 cross-examination about your civil litigation involving
18 Mr. Hinkson; correct?

19 A. Yes.

20 Q. Did you ever sue Mr. Hinkson?

21 MR. NOLAN: Objection, Your Honor.

22 THE COURT: Sustained.

23 BY MR. SULLIVAN:

24 Q. Did Mr. Hinkson ever sue you?

25 A. Yes.

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1 federal officials to you in private or with other people
2 around in?

3 A. Yes.

4 Q. Do you recall that question?

5 A. Yes.

6 Q. And did he do that in private or with other
7 people around?

8 A. In private.

9 Q. Were there times there were other people
10 around that he said other type things?

11 A. Ch, yes.

12 Q. Such as what?

13 A. Well, he wanted to see Albers and his whole
14 family, you know, dead. He made those comments with
15 other people around; but with other people around, he
16 never made the solicitations.

17 MR. NOLAN: Objection, Your Honor. Beyond the
18 scope. I don't mean beyond the scope. Asked and
19 answered.

20 THE COURT: Overruled.

21 BY MR. SULLIVAN:

22 Q. You were also asked about people on his list.
23 Do you understand that to mean, like, a hit list?

24 A. Yes.

25 Q. And you answered there was, at least, one

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1 Q. When did he do that?

2 A. Well, I learned of it sometime after I had
3 contacted the Idaho County Assistant Prosecutor on --

4 Q. Listen to my question. Give me a date.

5 A. I don't know the date.

6 Q. When he sued you?

7 A. I'm just trying to tell you that it was
8 sometime after I had contacted the Idaho County
9 authorities regarding Mr. Hinkson.

10 MR. NOLAN: Objection, Your Honor.

11 THE COURT: Overruled.

12 BY MR. SULLIVAN:

13 Q. Was it in 2003?

14 A. Probably.

15 Q. Were you served process?

16 A. I'm not sure exactly when I was served on the
17 matter.

18 Q. How did you learn that Mr. Hinkson had sued
19 you?

20 A. Well, I did eventually get served; but I just
21 don't recall the date I was served.

22 Q. All right.

23 A. But I know that it came after I had been in
24 and talked with the authorities.

25 Q. But my question was -- all right. Let me

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1 rephrase. What were you being sued for?

2 A. As I recall -- and I might be off a quarter

3 turn here -- I was being sued for -- Mr. Hinkson was

4 stating that I had stolen his technology from him and

5 that I had attempted to take over his business.

6 Q. Was that the part of the litigation involving

7 Mr. Bellon's lawsuit against Mr. Hinkson?

8 A. I think, probably so.

9 Q. Did you countersue Mr. Hinkson?

10 A. Yes.

11 Q. What did you claim against him?

12 A. Again, the property that he had verbally given

13 me and the grader.

14 Q. In your countersuit, did you deny that you had

15 stolen his technology?

16 A. Boy, I hope so. I am not sure that I did, but

17 I certainly didn't steal his technology.

18 Q. Has that lawsuit been resolved in any fashion?

19 A. From my understanding, it had been. There was

20 a meeting with Judge Bradbury in Grangeville between

21 Mr. Hoyt --

22 MR. NOLAN: Objection, Your Honor.

23 THE COURT: If he knows if it's been settled,

24 why don't we establish that?

25 THE WITNESS: I think it has been settled.

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1 Q. What were you being asked?

2 A. Well, he was getting dangerously close --

3 MR. NOLAN: Excuse me. It's vague.

4 THE COURT: I am going to sustain the

5 objection as to the form of the question.

6 BY MR. SULLIVAN:

7 Q. What did Mr. Hoyt ask you regarding your

8 testimony as the Federal Grand Jury?

9 MR. NOLAN: I object to that.

10 THE COURT: Counsel, you got into this.

11 MR. NOLAN: That's fine.

12 THE COURT: I am going to overrule the

13 objection and allow the witness to answer.

14 MR. NOLAN: That's fine.

15 MR. HOYT: Your Honor, may we have a sidebar

16 on this?

17 THE COURT: No. We have had enough sidebars.

18 THE WITNESS: Well, he was getting into the --

19 of course, the area about the equipment that had been

20 transferred to me and the property that had been

21 transferred to me and so on and was getting dangerously

22 close to some of the questioning that --

23 MR. SULLIVAN: My question, Your Honor --

24 MR. NOLAN: Objection.

25 THE COURT: Mr. Swisher, I know it's been a

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1 BY MR. SULLIVAN:

2 Q. Did you get any of the property that you sued

3 for?

4 A. No.

5 Q. Did Mr. Hinkson get anything that he sued you

6 for?

7 A. No.

8 Q. Now, you were asked questions, also, about

9 some questions from a deposition in October. Do you

10 recall those questions?

11 A. Yes.

12 Q. Was that October of 2004?

13 A. I believe so.

14 Q. And was that a deposition in conjunction with

15 this particular civil lawsuit?

16 A. Yes.

17 Q. Who was asking you questions in that?

18 A. Mr. Hoyt.

19 Q. Was he representing Mr. Hinkson in that?

20 A. Yes, he was.

21 Q. Was he asking you about what you told the

22 Grand Jury?

23 A. I took it to be that, yes.

24 Q. What were you being asked?

25 A. I beg your pardon?

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1 long day; but bear with us.

2 Go ahead, Mr. Sullivan.

3 BY MR. SULLIVAN:

4 Q. I am asking you: What did he ask you about

5 your Grand Jury testimony?

6 MR. NOLAN: Objection to the form of the

7 question, Your Honor.

8 THE COURT: Sustained.

9 BY MR. SULLIVAN:

10 Q. Did he ask you questions about your Grand Jury

11 testimony?

12 A. Yes.

13 Q. What did he ask you?

14 THE COURT: Counsel, I think the concern is

15 with the broad nature of your questions. I will permit

16 you to ask a leading question, if you are trying to

17 establish a point here.

18 MR. SULLIVAN: Yes, Your Honor.

19 Q. Did Mr. Hoyt ask you about these offers from

20 Mr. Hinkson that you have testified to here today?

21 A. Yes.

22 Q. Did he ask you the circumstances of those

23 offers?

24 A. He did more than that.

25 Q. Like what?

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1 A. He indicated he had talked to -- the other
2 witnesses that he had talked to thought it was all a
3 bunch of bunk and that David hadn't meant anything and
4 that he was laying that on me pretty hot and heavy.
5 And he said, "You know, you probably feel the
6 same way; right?"
7 And I said, "Not necessarily."
8 Q. Another Grand Jury question from your first
9 Grand Jury testimony in April of 2002 -- you were read
10 back the quote. This was regarding your memory.
11 A. Yes.
12 Q. Do you remember this quote: "If it weren't
13 for flashbacks, I wouldn't have any?"
14 A. Yes.
15 Q. What were you trying to convey when you said
16 that?
17 A. Well, I was making an attempt at levity. Most
18 of the Grand Jury members laughed.
19 Q. Do you have any problems with your memory?
20 A. Not really.
21 MR. SULLIVAN: That's all I have on redirect,
22 Your Honor.
23 THE COURT: Mr. Nolan, anything further?
24
25

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1 THE COURT: Mr. Swisher, it's a very simple
2 question. Did you meet with Mr. Hoyt before they took
3 your deposition, and did you have a conversation with
4 him?
5 THE WITNESS: Right in the middle, when the
6 court clerk and one of the other members on Mr. Hoyt's
7 team took what I brought over to have copied, there was
8 about an hour there; and that was when all of this
9 grilling went on.
10 THE COURT: All right.
11 THE WITNESS: But it was -- the deposition
12 was, basically, in recess for that hour; but it was at
13 the deposition.
14 THE COURT: All right. Thank you.
15 Thank you, counsel.
16 BY MR. NOLAN:
17 Q. When you were asked questions under oath at
18 the deposition of October 2004, I take it, no question
19 was asked of you as to what you were questioned about at
20 the Grand Jury; correct?
21 A. Well, I felt -- the reason I refused to answer
22 some of those is I felt they were dangerously close to
23 information --
24 THE COURT: Mr. Swisher, that's not responsive
25 to the question being asked of you. The question is:

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RE CROSS EXAMINATION

BY MR. NOLAN:

Q. Isn't it true, during the deposition of
October of 2004, that Mr. Hoyt asked no questions about
what you testified to in the Grand Jury?
A. I'm trying to place this because I may have
been a bit inaccurate here. The questions were asked
prior to either the deposition or another proceeding.
I'm not sure at which time, but they were asked.
Q. So all of the questions asked of you by
Mr. Sullivan about the deposition could be in error? It
could be some other proceeding; is that correct?
A. No. I think that was the time frame, but I
think those questions took place before we went on the
record.
THE COURT: Counsel, can you establish whether
or not he met with Mr. Hoyt before he was sworn for that
deposition?
BY MR. NOLAN:
Q. Did you meet with Mr. Hoyt before you were
sworn as a witness?
A. Yes. Oh, wait a minute. I do know now -- if
I may correct that? At some point, I took a bunch of
documents to be transcribed, and I didn't mind having
those copies -- what am I trying to say -- copied.

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1 Isn't it true that Mr. Hoyt never asked you specifically
2 what you testified to before the Grand Jury?
3 THE WITNESS: Specifically, on the record, no.
4 THE COURT: Very well.
5 MR. NOLAN: Thank you.
6 THE COURT: Counsel, do you want me to give
7 the jury a 6E instruction with respect to the right of a
8 witness?
9 MR. NOLAN: Yes. Yes, especially in the
10 instructions given afterwards. I would like that. Then
11 we wouldn't have to call a witness.
12 THE COURT: Mr. Sullivan, any objection?
13 MR. SULLIVAN: I would like to discuss at
14 sidebar, Your Honor.
15 THE COURT: All right. Let's do that.
16 (Whereupon, the following sidebar discussion
17 was held outside the presence of the jury:)
18 THE COURT: What I proposed to Mr. Nolan was
19 to simply instruct the jury that, under Federal Rule of
20 Criminal Procedure 6E, a witness is permitted, at his
21 discretion, to discuss with anyone he wants to, or to
22 refuse to discuss with anyone, what he said in the Grand
23 Jury Room.
24 If there is an objection to my giving that
25 instruction now, I may entertain, with regard to the

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1 A. Four.

2 Q. So did you have any more discussion with

3 Mr. Hinkson at that time, around the table?

4 A. No.

5 Q. At some point that day, did you have further

6 discussion with Mr. Hinkson?

7 A. Later that evening.

8 Q. Would you tell us about how that came to pass?

9 A. Well, I was on my bunk; and Dave Hinkson was

10 on his bunk, talking about the feds and how he hated

11 them. Then he flagged me over there, and I sat down.

12 He started showing me why the IRS didn't exist and

13 things like that; that's how it got started.

14 Q. Did you talk about anything else that evening?

15 A. Yeah. Later that evening, we talked about a

16 guy named Swisher.

17 Q. Where were you at that time?

18 A. I was on his bunk.

19 Q. Was anybody else present?

20 A. No.

21 Q. Was this a private conversation, or could

22 other people overhear it?

23 A. They were watching TV. It was private.

24 Q. How far away?

25 A. Fifteen, twenty feet. Fifteen feet.

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1 Q. Anything more specific?

2 A. Not that day.

3 Q. Did he say anything about who Hines was?

4 A. He said he was IRS.

5 Q. I'm sorry?

6 A. He said he was IRS.

7 Q. And Judge Lodge -- did he say anything about

8 whether he had any relationship with Judge Lodge -- "he"

9 being Mr. Hinkson?

10 A. No.

11 Q. Now, over the course of the next day or so,

12 did you have further discussion with Mr. Hinkson?

13 A. The next day, yes.

14 Q. What did you talk about?

15 A. Normal stuff, how he hated the feds, wished

16 they all were dead. He talked about J. C., another guy,

17 one of his friends.

18 Q. Okay. What did he say about J. C.?

19 A. He said that he offered the same offer to him,

20 \$10,000 to get rid of Cook, Hines, and Lodge.

21 Q. Now, at some point, did you have a

22 conversation -- at that point, did you have an

23 understanding as to whether you might be able to get out

24 of prison?

25 A. Would you say that again?

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1 Q. So he had said something about Swisher?

2 A. Yeah. He is -- basically, he said Swisher --

3 he offered Swisher \$10,000 to get rid of Lodge, Cook,

4 and Hines.

5 Q. And did he say anything about whether Swisher

6 was interested?

7 A. No.

8 Q. And did you have further discussions with

9 Mr. Hinkson about his case or these sorts of facts at

10 that time?

11 A. No.

12 Q. Now, who was he offered money to kill?

13 A. Lodge, Cook, and Hines.

14 Q. Do you have the name of Lodge, the first name?

15 A. Edwin or -- Judge Lodge.

16 Q. This is the Judge?

17 A. Yeah.

18 Q. And Cook -- did Mr. Hinkson mention Cook's

19 first name?

20 A. Yeah. Nancy.

21 Q. And how about Hines? Did Mr. Hinkson mention

22 Hines' first name?

23 A. Not that day.

24 Q. Did Mr. Hinkson tell you who Nancy Cook was?

25 A. He said she was a fed.

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1 Q. At this point in time, were you thinking that

2 there was a possibility that you might get out of

3 prison?

4 A. No.

5 Q. Did Mr. Hinkson talk with you further about

6 Judge Lodge, Ms. Cook, this man -- this person Hines?

7 A. Yeah. He -- that's when he -- we had more

8 conversation. We talked more about other things; but,

9 basically, he said I would be worth \$30,000 if I could

10 eliminate Lodge, Cook, or Hines.

11 Q. Were those exact words, or are you

12 summarizing?

13 A. Those are exact.

14 Q. And roughly when was this?

15 A. It was on the 22nd, after noon.

16 Q. He said you would be worth \$30,000 if you

17 eliminated these people on -- you are certain about the

18 22nd, November 22nd?

19 A. Yes.

20 Q. So at that point, did you take any steps?

21 A. I called my attorney.

22 Q. When?

23 A. That afternoon, after that.

24 Q. Now, why did you call your attorney?

25 A. I wanted to protect myself.

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- 1 A. Idaho.
- 2 Q. You have been here your whole life?
- 3 A. Yes.
- 4 Q. Prior to being incarcerated at the Ada County
- 5 Jail with Mr. Hinkson, had you ever heard of
- 6 Mr. Hinkson?
- 7 A. No.
- 8 Q. Had you ever heard of Nancy Cook?
- 9 A. No.
- 10 Q. Had you ever heard of Steve Hines?
- 11 A. No.
- 12 Q. Had you ever heard of J. C. Harding?
- 13 A. No.
- 14 Q. Had you ever heard of this person Swisher?
- 15 A. No.
- 16 Q. Has the Government promised you that your
- 17 sentence will be reduced because of your testimony
- 18 today?
- 19 A. No.
- 20 Q. But you hope it will be reduced; right?
- 21 A. Yes.
- 22 Q. Do you have an understanding as to whether the
- 23 Government has the authority to reduce your sentence?
- 24 A. Do I understand that --
- 25 Q. Can the Government do that?

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- 1 A. No, they can't.
- 2 Q. Who has the authority to do that?
- 3 A. The judge.
- 4 Q. Do you have an understanding as to whether the
- 5 Government has filed a motion recommending that your
- 6 sentence be reduced for your testimony here today?
- 7 A. I don't think they have.
- 8 Q. I'm sorry. Would you repeat that?
- 9 A. No, I don't think they have.
- 10 Q. Sitting here today, do you have any
- 11 understanding -- do you have any belief that Judge Lodge
- 12 will be the person who decides your sentence?
- 13 A. I was told that he won't be the one.
- 14 Q. Now, did you enter into a cooperation
- 15 agreement with the Government?
- 16 A. When or --
- 17 Q. Recently, with respect to this case?
- 18 A. Yes.
- 19 Q. And do you remember when you entered into this
- 20 cooperation agreement?
- 21 A. A couple of weeks ago.
- 22 MR. TAGAY: Your Honor, may I approach?
- 23 THE COURT: You may.
- 24 BY MR. TAGAY:
- 25 Q. I have just passed you, Mr. Croner, what is

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- 1 marked as Government's Exhibit No. 6. I ask you to turn
- 2 turn to the last page. On the bottom there, there is a
- 3 signature. Do you recognize it?
- 4 A. Yes.
- 5 Q. Whose signature is that?
- 6 A. That's mine.
- 7 Q. And just above the signature, there is a date.
- 8 Do you see that?
- 9 A. Yeah.
- 10 Q. What date is that?
- 11 A. 12/22/04.
- 12 Q. Is this the agreement that you entered into
- 13 with the Government regarding your cooperation in this
- 14 case?
- 15 A. Yes.
- 16 MR. TAGAY: Your Honor, the Government moves
- 17 for the admission of Government Exhibit No. 6.
- 18 THE COURT: Mr. Nolan?
- 19 MR. NOLAN: Can we defer admission?
- 20 THE COURT: Yes. Are you going to ask him any
- 21 questions about the content?
- 22 MR. TAGAY: No.
- 23 THE COURT: Very well. We will defer on that
- 24 then.
- 25

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- 1 BY MR. TAGAY:
- 2 Q. Mr. Croner, one person I didn't ask you about
- 3 is a person by the name of -- well, actually, let me ask
- 4 you this: Did Mr. Hinkson ever mention a woman who was
- 5 living at his house?
- 6 A. Yes.
- 7 Q. Who did he mention?
- 8 A. Arnie Bates.
- 9 Q. What did he say about Ms. Bates?
- 10 A. He said that she was -- she lived in his
- 11 basement for a few weeks.
- 12 Q. Anything further?
- 13 A. He said that he was trying to get in her
- 14 pants.
- 15 MR. NOLAN: Objection, Your Honor.
- 16 THE COURT: Overruled.
- 17 BY MR. TAGAY:
- 18 Q. Anything further?
- 19 A. A lot of little stuff.
- 20 Q. Okay. Had you ever heard of Ms. Bates before
- 21 meeting Mr. Hinkson?
- 22 A. No.
- 23 Q. Do you recognize Mr. Hinkson in the courtroom?
- 24 A. Yes.
- 25 Q. Where is he?

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1 A. Right there, one over from you, to the right.

2 THE COURT: Tell us what color clothing.

3 THE WITNESS: Blue sweater.

4 THE COURT: The record will reflect that

5 Mr. Croner has identified defendant Hinkson.

6 BY MR. TAXAY:

7 Q. Did Mr. Hinkson discuss with you his case

8 here, the case that we are here for today, and the

9 evidence against him?

10 A. Yes.

11 Q. Did he discuss any particular concern about

12 any particular evidence?

13 A. Yes. He discussed a lot of stuff about it,

14 about the evidence.

15 Q. Did he mention any witnesses that he was

16 concerned about?

17 A. He was concerned about J. C. Harding and Arnie

18 Bates.

19 Q. What was he concerned about?

20 MR. NOLAN: Objection. Form of the question.

21 THE COURT: Yes. Just what he said.

22 BY MR. TAXAY:

23 Q. Did he tell you what he was concerned about?

24 A. Yes. He said that he was worried about them.

25 He thought he had everybody else -- all of the other

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1 witnesses taken care of but he was worried about

2 their -- about their testimony.

3 MR. TAXAY: Just a moment, Your Honor.

4 THE COURT: Certainly.

5 (Whereupon, an off-the-record discussion was

6 held between Mr. Taxay and Mr. Sullivan.)

7 MR. TAXAY: No further questions right now.

8 Pass the witness.

9 THE COURT: Very well.

10 Cross-examination, Mr. Hoyt?

11 MR. NOLAN: Thank you, Your Honor.

12 THE COURT: Mr. Nolan?

13 MR. NOLAN: Yes. Thank you.

14

15 CROSS EXAMINATION

16 BY MR. NOLAN:

17 Q. It's your understanding, is it not, based upon

18 how you do today on the witness stand, the Government

19 will decide what recommendation to make to a federal

20 judge in reducing your sentence; correct?

21 A. My understanding? Is that -- that was your

22 question? You'll have to repeat it.

23 Q. All right. It's your understanding that,

24 after you testify, the Government, depending upon how

25 they feel about your testimony, will consider making a

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1 recommendation to a federal judge to reduce your

2 sentence; isn't that correct?

3 A. No.

4 Q. Okay. And what is incorrect about that

5 question?

6 A. My performance.

7 Q. So in other words, no matter what you say on

8 the witness stand today, you expect the Government to

9 recommend that your sentence be reduced; correct?

10 A. No.

11 Q. So it depends upon what you say today on the

12 witness stand; correct?

13 A. I don't think so, no.

14 Q. Before Mr. Hinkson talked to you about paying

15 money to kill these people, did you give him any

16 indication that you would be interested in killing

17 people for him?

18 A. No.

19 Q. That you had any prior record with violence

20 towards individuals?

21 A. No.

22 Q. That you had any hatred for Judge Lodge?

23 A. No.

24 Q. That you had any hatred for feds or the

25 Federal Government?

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1 A. No.

2 Q. That you had any interest in overthrowing the

3 Federal Government?

4 A. No.

5 Q. That you had any interest in harming these

6 people for any amount of money?

7 A. No.

8 Q. Is there anything you said or did that you

9 believe would cause him to believe that you would

10 actually carry out a hit on these people?

11 A. I told him I was going to be possibly let out

12 to self-surrender to California. That's my only

13 thought.

14 Q. You believe that that gave him the suggestion

15 that you would consider killing these people?

16 A. I don't know what he was thinking.

17 Q. Is that what you were trying to suggest to

18 him?

19 A. I didn't suggest that to him, no.

20 Q. Were you trying to suggest that to him?

21 A. No.

22 Q. Were you trying to get any money from him?

23 A. No.

24 Q. Were you trying to get any favors from him?

25 A. No.

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1 A. Yes.

2 Q. And where were the legal papers kept?

3 A. Under his bed.

4 Q. Under Mr. Hinkson's bed?

5 A. Under Hinkson's bed, yes.

6 Q. I will put "Iph." Did you ever sit on the
7 bunk and talk to Mr. Hinkson?

8 A. Yes.

9 Q. Did you ever spend time over on the bunk with
10 Mr. Hinkson?

11 A. Yes.

12 Q. Was it a double bunk?

13 A. Yes.

14 Q. Were there other -- was there another inmate
15 in the second part of the bunk while you were there?

16 A. Yes.

17 Q. Was there an inmate in the second part of the
18 bunk the entire time you were there?

19 A. No.

20 Q. How many days, of the days that you were
21 there, was there a person in the second bunk?

22 A. Maybe four or five -- three or four.

23 Q. About how much time per day -- strike that.
24 Mr. Hinkson used the telephone at "A;" isn't that
25 correct?

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1 A. Yes.

2 Q. About how many hours per day did he utilize
3 that phone?

4 A. Maybe four. Three or four.

5 Q. And most of that time, you were able to
6 overhear those calls; correct?

7 A. No.

8 Q. Did you overhear those calls at any time?

9 A. No.

10 Q. Were you aware as to who he was calling?

11 A. I know he called his wife and his daughter.

12 Q. Do you know whether he called anybody else?

13 A. His lawyers.

14 Q. He told you he was talking to his lawyers;
15 correct?

16 A. One time he told me he was talking to his mob
17 boss or his mob attorney.

18 Q. My question was -- he referred to his lawyer
19 as a mob lawyer? Is that what you are saying?

20 A. Yes.

21 Q. So how many times did he refer to him as a mob
22 lawyer?

23 A. Maybe twice.

24 Q. Other than that, did he refer to him just as a
25 lawyer?

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1 A. I don't know. I mean, he said he was talking
2 to his lawyers.

3 Q. Did he talk to his lawyer with disrespect --
4 strike that. Did he talk about his lawyer with
5 disrespect, sir?

6 A. Not to me.

7 Q. Did he say why his lawyer was a mob lawyer?

8 A. I don't know which one it is. He just made
9 that comment twice.

10 Q. He didn't say anything more about that?

11 A. No.

12 Q. You didn't ask him about it; correct?

13 A. No, I didn't.

14 Q. Did you read any of the paperwork from his
15 case?

16 A. I had seen some motions.

17 Q. Some motions. Which motions did you see?

18 A. I don't remember them now.

19 Q. You are aware that your testimony here, as to
20 the people involved, is exact -- strike that.

21 That your testimony as to J. C. Harding is
22 what is alleged in the indictment; correct?

23 A. You have to say that again.

24 Q. You know what an indictment is, do you not?

25 A. Yes.

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1 Q. Did you see the indictment in this case?

2 A. No.

3 Q. You didn't see what he was charged with?

4 MR. TAXAY: Objection, Your Honor.

5 THE COURT: Sustained. Lack of foundation.

6 BY MR. NOLAN:

7 Q. Did you see what Mr. Hinkson was charged with?

8 MR. TAXAY: Same objection. Same question.

9 THE COURT: Sustained. Asked and answered.

10 BY MR. NOLAN:

11 Q. The motions that you read, do you remember
12 which ones they were?

13 A. No.

14 MR. TAXAY: Objection, Your Honor. That last
15 question misstates the testimony.

16 THE COURT: Well, the question and the answer
17 will stand. The jury will remember it.

18 BY MR. NOLAN:

19 Q. Let me make it clear. Did you read any
20 motions?

21 A. I didn't read them in full, no.

22 Q. Oh, you read some of the motions?

23 A. I skimmed them. He showed me motions, and I
24 skimmed through them. They were -- I didn't quite
25 understand them.

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1 Q. Were you doing time in the county jail on a
2 state case, as well as a federal case?

3 A. I don't quite understand that. I mean, I was
4 doing time in the county jail, yes.

5 Q. On a federal matter?

6 A. On the federal matter, yes.

7 Q. And on a state matter; correct?

8 A. The state matter -- they suspended the time on
9 that.

10 Q. How much of the time did they suspend?

11 A. 180 days.

12 Q. You didn't get a five-year sentence?

13 A. The way I understood it, they suspended the
14 time; so the time when I was in Ada County is on federal
15 time.

16 Q. What was the crime that you committed in state
17 court while you were awaiting going into sentencing in
18 federal court?

19 A. Insurance fraud.

20 Q. And isn't it true that the state court gave
21 you a five-year sentence and suspended most of it for
22 you to serve your federal sentence?

23 A. I thought they suspended all of it.

24 Q. Of a five-year sentence; correct?

25 A. Yes.

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1 Q. You wrote some notes, did you not, of what you
2 remember being said inside the jail; isn't that correct?

3 A. Yes.

4 Q. And those notes were made at the exact time
5 things were being said, or did you make those notes up
6 later?

7 A. The original --

8 MR. TAVAY: Objection, Your Honor. Use of the
9 words "make those notes up" implies that they are
10 fabrications.

11 THE COURT: Sustained as to the form.

12 MR. NOLAN: I didn't intend to imply --

13 THE COURT: I didn't think so. Just rephrase
14 your question.

15 BY MR. NOLAN:

16 Q. Did you create the notes at the time? In
17 other words, if you put down a date and then wrote
18 something beyond that date, was it on that date that you
19 wrote that information down; or did you, at a later
20 time, go back and try to remember what was said on a
21 particular date and write it down at a different date?

22 A. Yes.

23 Q. "Yes" what?

24 A. Yes, I wrote dates down at another time; and I
25 went back and remembered a date and remembered and wrote

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1 it down.

2 Q. And you tried to remember all of the things
3 that you thought would be important; correct?

4 A. I wrote down most everything I thought would
5 be important.

6 Q. When did you write this information down?

7 A. Maybe the next day.

8 Q. And what did you do with these notes?

9 A. The original notes -- the original notes that
10 I made to myself? I threw those away.

11 Q. I am talking about the notes that you have
12 given to the Government.

13 A. Oh, you'll have to ask that again then.

14 Q. When did you make the notes that you gave to
15 the Government?

16 A. I transferred the one notes to the notes I
17 gave the Government on the 31st or the 1st, right in
18 there.

19 Q. 31st of December?

20 A. Yes.

21 Q. So the pieces of paper that have been -- well,
22 you -- just for your benefit, the two pieces of paper,
23 you have seen those; correct?

24 A. Yes.

25 Q. Those are the notes you gave to the Government

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1 on the 31st of December; is that right?

2 A. I didn't give them to them on the 31st, no.

3 Q. When did you give them these notes?

4 A. I showed them -- I gave them those notes on
5 the 8th of January -- or the 8th of -- let me see. The
6 8th of January 2005.

7 Q. You are in custody now; correct?

8 A. Yes.

9 Q. What was the nature of the fraud that you were
10 in -- strike that.

11 When you were arrested by the federal
12 authorities, you were told -- you understood, unless you
13 agreed to cooperate with the Government, that you would
14 be bound by what are called the sentencing guidelines;
15 correct?

16 A. I don't understand your question.

17 Q. You don't understand?

18 A. Can you say it again?

19 Q. When you were arrested by the Federal
20 Government, you didn't want to go to jail, did you?

21 A. No, I didn't want to go to jail.

22 Q. When you talked to your lawyer and you talked
23 to the Government and -- you didn't want to go to jail,
24 did you?

25 A. I didn't want -- no, I didn't want to go to

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1 jail. 1185
2 Q. Somebody told you that, in fact, based upon
3 the amount of money involved in your case -- by the way,
4 how much money was involved in the fraud?
5 A. It was about \$100,000.
6 Q. You had sequestered \$100,000 in cash at your
7 mother's house?
8 THE COURT: I don't think he --
9 MR. NOLAN: I used a word I shouldn't have
10 used.
11 THE COURT: Rephrase.
12 BY MR. NOLAN:
13 Q. My apologies. You took \$100,000 in cash and
14 you hid it at your mother's house; is that right?
15 A. Yes.
16 Q. You took \$80,000 worth of weapons and hid them
17 somewhere; correct?
18 A. Yes.
19 Q. You then filed for bankruptcy, based upon
20 fraudulent activities with home loans and development
21 and contract work; correct?
22 A. I filed bankruptcy for what?
23 Q. You filed bankruptcy for creditors; correct?
24 A. Yes.
25 Q. Was it more than \$700,000 in creditors?

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1 A. Yes. 1186
2 Q. You owed over \$700,000, is that correct, and
3 couldn't pay it?
4 A. Yes.
5 Q. And you were facing up to three years in
6 prison for that behavior; correct?
7 A. Yes.
8 Q. And if you could find somebody to -- if you
9 could help the Government find somebody else who might
10 have done something wrong, then the Government would
11 recommend to the court that you get a shorter sentence;
12 correct?
13 A. You'll have to say that again.
14 Q. You worked for the Government; correct?
15 A. No.
16 Q. You worked with the Government; correct?
17 A. I cooperated with the Government, yes.
18 Q. It was your request to cooperate with the
19 Government; correct?
20 THE COURT: Are you talking about on the
21 original case?
22 MR. NOLAN: Yes. I'm talking about the
23 original case.
24 THE WITNESS: My request?
25 BY MR. NOLAN:

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1 Q. Yes. 1187
2 A. No. I guess I don't understand.
3 Q. I will try -- you entered into an agreement
4 that you would -- you would assist the Government;
5 correct?
6 A. Yes.
7 Q. And that you would actually, possibly, carry a
8 body wire to implicate other people?
9 A. Yes.
10 Q. That you would infiltrate or tell them
11 everything you knew about false loans, false borrowing,
12 and a fraud in the construction industry; correct?
13 A. Yes.
14 Q. And this was in the white collar field;
15 correct?
16 A. I guess.
17 Q. And you placed your relationships with other
18 people at risk by doing so; isn't that correct?
19 A. I don't know if I can answer that. I don't
20 know.
21 Q. You were out of custody while you were
22 cooperating with the Government; isn't that right?
23 A. I was never in custody. They didn't arrest
24 me.
25 Q. You pled guilty to a federal offense; correct?

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1 A. Yes. 1188
2 Q. And your sentencing was delayed so you could
3 remain out of custody while you helped the Government;
4 correct?
5 A. I was supposed to self-surrender on a certain
6 date, yes.
7 Q. Wasn't it a period of at least two years that
8 you worked with the Government and avoided going to
9 prison?
10 A. No. I don't -- I don't believe that's true.
11 Q. How long did you fight the case before you
12 pled guilty?
13 A. I didn't fight it.
14 Q. How long was it from the time you were
15 arrested until you pled guilty?
16 A. I wasn't arrested.
17 Q. How long was it from the time a search warrant
18 was executed until the time you pled guilty?
19 A. Maybe a year.
20 Q. During that time, you had a lawyer; right?
21 A. Yes.
22 Q. And during that time, you were negotiating
23 with your lawyer and the Government; correct?
24 A. Yes.
25 Q. And then how much longer after you pled guilty

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1 did you finally start cooperating with the Government?

2 A. A few months. A month. I don't remember.

3 Q. Your house was searched in the Fall of 2001;

4 isn't that right?

5 A. Yes.

6 Q. And you didn't have to go to jail until

7 November of 2004; correct?

8 A. I thought it was 2002.

9 Q. When did you go to jail?

10 A. November 10, 2004.

11 Q. So you were out of custody from the time of

12 the search warrant in 2001 until November of 2004;

13 correct?

14 A. I don't know if that first date is correct.

15 Q. When was the search warrant?

16 A. I don't know. Do you have it?

17 Q. I take it, it wasn't easy for you to go into

18 jail; correct?

19 A. Was it easy? No.

20 Q. You tried to delay it for a long time, didn't

21 you?

22 A. I didn't try to delay it, no.

23 Q. Did you make motions to delay your surrender

24 to the authorities?

25 A. I had some medical issues, yes.

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1 Q. And were you happy with that reduction?

2 A. I don't know if I was happy or not. I don't

3 remember how I felt.

4 Q. You don't have any recollection of how you

5 felt about whether or not the judge gave you a good

6 enough break for your behavior?

7 A. I don't remember how I felt, no.

8 Q. I take it, you had no problems turning

9 yourself in and starting to do your 21 -- what you

10 thought was 21 months?

11 A. I had no problem turning -- no, I didn't.

12 Q. You wanted out to surrender yourself, though;

13 isn't that correct?

14 A. Yes.

15 Q. How much time do you expect to have reduced

16 from your sentence as a result of your testimony here?

17 A. I'm not expecting any.

18 Q. You don't expect any?

19 A. Just whatever the judge -- whatever the judge

20 recommends, I guess.

21 Q. You have no expectations at all?

22 A. I'm not expecting anything. I don't want

23 to --

24 Q. So I take it that --

25 A. I don't want to be disappointed, I guess, is

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1 Q. How many lawyers did you hire to request

2 extensions of time for you to surrender into court?

3 A. I had two attorneys -- well, one at a time.

4 Q. The Government opposed, saying that you were

5 delaying unnecessarily; isn't that correct?

6 A. I don't remember seeing that but --

7 Q. You don't remember that?

8 A. I remember the last motion, but I didn't see

9 it.

10 Q. The last motion to the judge says: Look it,

11 this is enough. No more.

12 A. I don't know what he said. I didn't talk to

13 him.

14 Q. You don't have any idea about that?

15 A. My attorney said it was denied. That's all I

16 was told.

17 Q. When you went for your reduction of sentence

18 for cooperating with the authorities, instead of getting

19 somewhere between 30 and 37 months, you got 24 months;

20 isn't that right?

21 A. I got 21 months.

22 Q. Are you talking about, if you do well in

23 prison, you will get good time; or are you talking about

24 the sentence you received?

25 A. No. I thought I got 21 months.

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1 what I'm saying.

2 MR. NOLAN: I think, at this time, Your Honor,

3 I ask that the document be admitted.

4 THE COURT: I think that's a good idea.

5 Exhibit 6 is admitted into evidence.

6 (Whereupon, Exhibit No. 6 was received in

7 evidence.)

8 BY MR. NOLAN:

9 Q. It is a rather lengthy contract you have with

10 the Government, isn't that right?

11 A. I don't know.

12 Q. I'm sorry. Did you read the agreement?

13 A. Yes, I did. I don't know what a standard --

14 if standard is long or short. I don't know.

15 Q. You read the agreement; correct?

16 A. Yes.

17 Q. And you signed the agreement?

18 A. Yes.

19 Q. And it says that the court may reduce your

20 sentencing in the amount consistent with the value of

21 your cooperation; correct?

22 A. Yes.

23 Q. And you understand that the value of your

24 cooperation depends upon what these prosecutors

25 recommend; correct?

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1 A. I didn't -- I didn't know that.

2 Q. Who is going to tell the judge about the value
3 of your cooperation?

4 A. I thought my attorney did that.

5 Q. You don't think the Government makes a
6 recommendation?

7 A. I wasn't aware of that, no.

8 Q. Doesn't the document say that the Government
9 cannot -- all right. I started reading the wrong
10 paragraph, Your Honor. The government's final decision
11 whether to --

12 MR. TAXAY: Where are you reading from?

13 BY MR. NOLAN:

14 Q. Line 8, page 4. The government's final
15 decision of whether to file a Rule 35 will be made after
16 evaluating your cooperation; correct?

17 A. Yes.

18 Q. About the significance and usefulness of your
19 cooperation here in this courtroom; correct?

20 A. Yes.

21 Q. The truthfulness, completeness, and
22 reliability of any information or testimony provided by
23 you; correct?

24 A. Yes.

25 Q. And they are the ones that are going to decide

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1 that, not me; right?

2 A. Yes.

3 Q. You wouldn't want me to decide that and make a
4 recommendation, would you?

5 A. Do you want me to answer that?

6 Q. Yes.

7 A. I wouldn't want you to do it, no.

8 Q. No. And then there are a couple of other
9 issues, but they're all related to the nature of your
10 cooperation, et cetera; correct?

11 THE COURT: Counsel, I didn't understand that
12 question.

13 MR. NOLAN: I know. I didn't want to be
14 accused of not reading them all.

15 THE COURT: The result was a question that
16 nobody but you understood.

17 BY MR. NOLAN:

18 Q. I will go ahead and read all of them. The
19 nature and extent of your assistance; correct?

20 A. Yes.

21 Q. Any injury suffered or danger or risk of
22 injury to you or your family resulting from your
23 cooperation; correct?

24 A. Yes.

25 MR. TAXAY: Objection, Your Honor. He is

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1 reading the document at this point.

2 THE COURT: Overruled.

3 MR. TAXAY: He is asking if this is what the
4 document said.

5 THE COURT: I think he is trying to establish
6 whether the witness understood what he signed when he
7 signed it. I think that's a fair question. Overruled.

8 BY MR. NOLAN:

9 Q. And there was a figure mentioned about what
10 they expect to recommend and what they expect or hope
11 that the judge will grant; isn't that correct?

12 A. I think it says no more than six months.

13 Q. So you knew that when you signed this piece of
14 paper; isn't that right?

15 A. Yes.

16 Q. And right now, you are an optimistic guy,
17 aren't you?

18 A. I don't know -- in whose opinion?

19 Q. You certainly have been working the system
20 pretty well for the last four years, haven't you?

21 MR. TAXAY: Objection, Your Honor.

22 THE COURT: Sustained.

23 BY MR. NOLAN:

24 Q. You have been working the system, have you
25 not?

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1 THE COURT: Counsel, I just sustained that.

2 MR. NOLAN: I thought it was the form of the
3 question.

4 THE COURT: No, no. It was the question,
5 itself, that was bad.

6 MR. NOLAN: I thought it was the form. I
7 apologize.

8 THE COURT: That's all right. Just ask
9 another question.

10 BY MR. NOLAN:

11 Q. All right. You are hopeful to get at least
12 six months off your sentence; correct?

13 A. Yes.

14 Q. And you would like to get even more; isn't
15 that right?

16 A. Yes.

17 Q. And you know that some new judge is going to
18 decide whether or not you should get more time off your
19 sentence; correct?

20 A. More or less.

21 Q. And it won't be this judge; correct?

22 A. Yes.

23 Q. And it won't be Judge Lodge; correct?

24 A. Yes.

25 Q. But some federal judge is going to hear that

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1 you came into a courtroom and assisted the Government in
2 the prosecution of someone soliciting to kill a federal
3 judge; correct?
4 A. Yes.
5 Q. And you know enough about the system to know
6 or to believe that that's valuable information, isn't
7 it?
8 A. I don't know who values that.
9 Q. What's that?
10 A. I'm not sure who values that.
11 Q. You are sure hopeful it's valuable, aren't
12 you?
13 A. I think anybody would.
14 Q. Anybody would, wouldn't they? Isn't it true
15 your state five-year sentence was reduced to seven days?
16 A. I thought it was all suspended, but I may be
17 mistaken.
18 THE COURT: Counsel, let me ask you: How much
19 longer do you anticipate?
20 MR. NOLAN: Can I just have one moment?
21 THE COURT: Yes, of course.
22 MR. NOLAN: Is the court --
23 THE COURT: I'm thinking about adjourning a
24 little early tonight, since it's Friday night.
25 MR. NOLAN: I know I'm close but I'm not close

1198

1 enough to finish.
2 THE COURT: We will bring Mr. Croner back. I
3 don't know what the Government's intents are on
4 redirect.
5 MR. NOLAN: Thank you very much, Your Honor.
6 THE COURT: That's fine.
7 Ladies and gentlemen, we are going to start
8 our weekend recess. I remind you, again, that Monday is
9 a holiday. Please, don't come Monday morning. Be back
10 here Tuesday morning at 9:00 a.m.
11 I do want to remind you of the instructions
12 that I gave you earlier. Until the trial is over, you
13 are not to discuss this case with anyone, including your
14 fellow jurors, members of your family, people involved
15 in the trial, or anyone else, nor are you allowed to
16 permit others to discuss the case with you.
17 If anyone approaches you and tries to talk to
18 you about the case, please let me know about it
19 immediately.
20 Do not read or listen to any news reports of
21 the trial. Do not do any outside research, such as
22 Internet or Dun & Bradstreet searches, relating to the
23 people or entities discussed during the trial.
24 Finally, you are reminded to keep an open mind
25 until all of the evidence has been received -- we are

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1 not there yet, so be patient -- you have heard the
2 arguments of counsel, the instructions of the court, and
3 the views of your fellow jurors.
4 With that instruction in mind, have a very
5 nice weekend. We will see you Tuesday morning at 9:00
6 a.m. We are in recess.
7 (Whereupon, the court stood in recess.)
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1
2 **C E R T I F I C A T E**
3
4 I, LORI A. FULSIFER, certify that I made a
5 shorthand record of the matter contained herein, and
6 that the foregoing typewritten pages contain a full,
7 true, and accurate transcript of said shorthand record,
8 done to the best of my skill and ability.
9 DATED this 27th day of March 2005.
10
11
12 LORI A. FULSIFER, CSR, RMR, CRR
13 Certified Shorthand Reporter
14 Idaho Certificate 354
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1 Please rise for the jury.

2 (Whereupon, the jury was excused from the

3 courtroom, and the following proceedings were held:)

4 MR. NOLAN: Could the witness be excused?

5 THE COURT: Yes. Mr. Swisher, if you wouldn't

6 mind stepping out in the hallway, take a break but

7 remain available.

8 THE WITNESS: I would like to add, Your Honor,

9 if I may, that --

10 THE COURT: Let me take this up with the

11 lawyers first.

12 THE WITNESS: Okay.

13 (Whereupon, witness Elven Joe Swisher was

14 excused from the courtroom.)

15 THE COURT: Mr. Nolan, why don't you go to the

16 podium?

17 MR. NOLAN: If I may just make a record, Your

18 Honor, I finished my cross-examination of Mr. Swisher;

19 and then I was handed a document on stationery that was

20 faxed to us on the 14th of January at the hour of 2:34,

21 approximately, and it is a letter to Mr. Hoyt's office

22 from --

23 MR. HOYT: Central Standard Time.

24 MR. NOLAN: -- the National Personnel Records

25 Center. We had, apparently, been trying to get

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1 Mr. Swisher's military records for about ninety days;

2 and we have very little control over when that happens.

3 It was discussed -- Mr. Hoyt discussed with me

4 the time variations between being a combat veteran and

5 the time of the Korean War. I told him that I would not

6 go into this without some proof and that I would not

7 even come close to opening up the door.

8 I noticed that the man wore a Purple Heart.

9 There is prior testimony that his hearing was affected

10 by a hand grenade. I didn't want to go into it. He

11 said he killed people. I didn't want to cross-examine

12 him on that at all.

13 At the conclusion of my cross-examination,

14 Mr. Hoyt handed me this two-page letter highlighted with

15 a paragraph -- it's actually from the personnel records

16 center. It's a one-page letter.

17 Highlighted, it says, "Mr. Swisher's Marine

18 Corps record has been carefully examined by the Military

19 Awards Branch of the Office of the Commandant of the

20 Marine Corps, and that office has stated that his record

21 fails to show he was ever recommended for, or awarded,

22 any personal decorations."

23 Based upon seeing that, I immediately

24 approached the bench before redirect examination began;

25 and I told the court I just had come into this

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1 information and that we intended, depending upon the

2 witness's answer to the question, to call a witness from

3 the archives to establish these facts.

4 I requested permission to re-open. The court

5 considered that, said I could ask about whether he was

6 wearing a Purple Heart. Counsel for the prosecution

7 vehemently objected to my getting into this.

8 I was allowed to re-open. I asked the

9 question. The record will reflect what the witness

10 said.

11 And then, in the presence of the jury, counsel

12 for the prosecution said that he had -- when the

13 document was delivered to the court by the witness out

14 of his pocket, counsel for the Government indicated that

15 he already had a copy of that document.

16 Now, this case has been going quite well, in

17 terms of the behavior of the parties. I feel that what

18 occurred mandates -- I will request a mistrial.

19 It mandates serious, severe -- in my opinion,

20 serious, severe actions, based upon the fact that the

21 Government was in possession of information which we

22 were not given regarding this witness which, at that

23 point in time, the Government knew that the only thing

24 that could happen is it would be adversely taken and

25 affect the credibility of me, the credibility of the

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1 defense, and adversely affect the defendant.

2 And quite frankly, Your Honor, I don't know

3 how this matter can be resolved. That's my request.

4 THE COURT: Very well. Let me hear from the

5 United States.

6 MR. SULLIVAN: Counsel should have listened to

7 me when I said, "Don't go there."

8 THE COURT: Well, let's establish for the

9 record, Mr. Sullivan, that you indicated at sidebar that

10 Mr. Swisher had shown you this DD-214 at 9:00 a.m. this

11 morning.

12 MR. SULLIVAN: That's correct.

13 THE COURT: All right.

14 MR. SULLIVAN: He showed it to me at 9:00 a.m.

15 this morning because I had asked -- he had mentioned

16 Korea, serving in Korea.

17 I said, "Wasn't the Armistice in '52?"

18 He said, "But there was still, you know,

19 combat; and it continues to this day," which I happen to

20 know to be true. There is combat to this day in Korea.

21 THE COURT: Technically, those hostilities

22 have never been officially terminated, Mr. Nolan.

23 Mr. Sullivan is correct; the war in Korea, or police

24 action, whatever you want to call it, is not over.

25 Let me first say this: First of all, I want

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1 to mark as a defense exhibit the facsimile. I also want
2 to mark a photocopy of the Form DD-214. So let's give
3 those numbers.

4 MR. NOLAN: Could we have a copy back of this?
5 THE COURT: Certainly.
6 MR. NOLAN: This is the only one we have.
7 THE COURT: Let me further say that, in
8 looking at -- well, let's give them numbers so we get
9 this clearly on the record. It would be defense Exhibit
10 L.

11 MR. HOYT: L and the next one would be M.
12 THE COURT: I am going to mark -- that's fine.
13 We can mark them both as defense exhibits. I don't
14 think it makes any difference.

15 MR. SULLIVAN: May I make my record, counsel,
16 since counsel is moving for a mistrial and severe
17 sanctions?

18 THE COURT: Yes, Mr. Sullivan.
19 MR. SULLIVAN: I didn't go into anything about
20 his combat or his medals or anything else on my direct.
21 He chose to go down this path, even when I objected to
22 it.

23 I didn't draw attention to the little pin in
24 Mr. Swisher's lapel. Lots of people wear them. They
25 could be anything. He wanted to make an issue of it.

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1 I don't think -- you know, I barely had time
2 to look at this, myself. It refers to other -- that
3 this replaces some document previously issued. I don't
4 know what that document is, and it just led me to
5 conclude that this is not a proper area to go into.

6 THE COURT: Ms. Longstreet, may I have the two
7 documents?

8 THE COURTROOM CLERK: Yes, Your Honor.
9 THE COURT: Thank you.
10 MR. NOLAN: Could I respond briefly?
11 THE COURT: Go ahead.
12 MR. NOLAN: Your Honor, we have a document
13 given to us by the Government which is false; and the
14 Government knows it's false.

15 MR. SULLIVAN: I have no evidence or reason to
16 believe that the document is false.

17 MR. NOLAN: The document -- I'm sorry. With
18 all due respect, the document says there is no record of
19 him receiving any awards and --

20 MR. SULLIVAN: I --
21 MR. NOLAN: He has government information that
22 contradicts that.

23 THE COURT: All right. Here is my ruling:
24 The motion for mistrial is denied.
25 To the extent that there was error here, it

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1 I objected that he is setting up a -- what did
2 I say -- a straw man -- I said "scarecrow" before, but I
3 meant "straw man" -- so he can knock it down if he can
4 develop some more information.

5 It is permissible to impeach -- to
6 cross-examine someone, a witness, for making false
7 statements, under Rule 608.

8 608(b) permits inquiry into conduct that is
9 deceitful, but it doesn't permit impeachment by other
10 documents. It doesn't permit the use of other evidence
11 if there is a denial of the deceitful conduct.

12 Counsel whipped out his document that he
13 received minutes ago. I believe he probably didn't have
14 enough time to read it and digest it and tried to use
15 that to impeach the witness. That was improper.

16 Under Rule 608(b), he should not have been
17 allowed to show that document. It wasn't a matter of
18 refreshing his memory. He hadn't expressed any kind of
19 doubt about his memory.

20 It was a grandstand play in front of the jury
21 that didn't -- that wasn't so grand, and he got caught
22 on it. That's where we are.

23 There is nothing the Government did that
24 caused him to go in the area he did. We tried to avoid
25 going into this area.

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1 was counsel who requested the opportunity to re-open. I
2 granted permission to re-open so that you could confront
3 him because I thought that you had a good-faith basis to
4 believe, based upon the receipt of Exhibit L from the
5 National Personnel Records Center of the Department of
6 Defense in St. Louis, Missouri, to ask the question,
7 based upon the witness's answer, to try and impeach him
8 on grounds that he has not, in fact, received the Purple
9 Heart.

10 Until that happened, there was no reason for
11 the Government to believe, with regard to Exhibit M,
12 that the contents of Exhibit M would be impeaching in
13 any way, shape, or form.

14 The court finds as a matter of fact that if
15 Exhibit M is a copy of a genuine military record -- and
16 at this point, I don't have any way to determine that;
17 but it appears to be genuine, at least in appearance.

18 It indicates consistently with how the witness
19 has testified; that he did, in fact, receive multiple
20 shrapnel and gunshot wounds in September 1955 in Korea;
21 and that he was awarded commendations and medals,
22 including the Purple Heart.

23 Now, Mr. Sullivan is correct. Under Rule 608
24 and the applicable Supreme Court precedent, particularly
25 Justice Jackson's decision in Michaelson vs. the United

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1 States, 335 U.S. 469, 1948, you are permitted to attempt
2 to impeach a witness in the manner that Mr. Nolan
3 attempted.
4 Ordinarily, under the rules, you are stuck
5 with the witness's answer; and the court has the
6 discretion to restrict further collateral proof of that
7 impeachment.
8 So the basis for my ruling is, essentially,
9 counsel opened the door with regard to this
10 late-received facsimile, Exhibit L.
11 The Government, until the receipt of that
12 exhibit, had no reason to believe that Exhibit M was
13 discloseable under Brady or Giglio because it was not
14 impeaching. Therefore, the motion for mistrial is
15 denied.
16 We will bring in the jury.
17 MR. NOLAN: Does the court have a remedy? You
18 know, I also think --
19 THE COURT: Hold on.
20 MR. NOLAN: -- that there was a practice that
21 counsel -- I mean, maybe I can't find the right cite;
22 but, quite frankly, I am in an awkward position and I
23 don't think it should be held against Mr. Hinkson. If
24 the court has a remedy --
25 THE COURT: Let me suggest that one remedy

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1 instruction that the area inquired into was not relevant
2 for the jury's determination and they should disregard
3 it.
4 THE COURT: How about if we do it this way? I
5 will tell them that the error was the court's in
6 permitting the area to be inquired into and, for that
7 reason, I am directing that the portion of the testimony
8 with regard to whether or not he was awarded the Purple
9 Heart is stricken, so that it doesn't make either side
10 look bad. Is that acceptable?
11 MR. SULLIVAN: It is, Your Honor.
12 THE COURT: Mr. Nolan?
13 MR. NOLAN: Yes, Your Honor. Thank you.
14 THE COURT: Very well. Let's bring the jury
15 back in, Ms. Longstreet.
16 MR. HOYT: Do you want to bring the witness in
17 first, Your Honor?
18 THE COURT: We will do them together,
19 simultaneously.
20 Go ahead. Yes.
21 (Whereupon, the following proceedings were
22 held in the presence of the jury:)
23 THE COURT: Ladies and gentlemen, it's been a
24 long day; and I now realize that I made a mistake in
25 allowing the questioning with regard to the Purple Heart

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1 that occurs to the court is that I could simply instruct
2 the jury to strike that portion of the cross-examination
3 of Mr. Swisher that relates to the Purple Heart. Just
4 tell them to completely disregard all testimony about
5 the Purple Heart.
6 MR. NOLAN: That would be appreciated. I
7 think that would be the best way. Other than that, we
8 have to bring in people to show our good faith and all
9 of that.
10 MR. SULLIVAN: Your Honor, now Mr. Swisher
11 looks like he has said something improper and done
12 something improper, because the court is striking his
13 testimony. It was responsive testimony to counsel's
14 questions.
15 THE COURT: Let me put it to you this way,
16 Mr. Sullivan. That is the only suggestion I can think
17 of. If the Government doesn't want me to instruct the
18 jury, I will leave the record as it stands; and you can
19 take your chances.
20 MR. SULLIVAN: What I would like, Your
21 Honor --
22 THE COURT: If there is a conviction,
23 Mr. Nolan may or may not have an issue here. Do you
24 want to think about it for a minute?
25 MR. SULLIVAN: All I would ask the court is an

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1 Medal.
2 So I am going to instruct you to disregard
3 completely all of Mr. Swisher's testimony with regard to
4 that military commendation.
5 You certainly are entitled to consider all of
6 the rest of his testimony. Just everything from where I
7 asked Mr. Nolan to re-open, please strike that from your
8 minds; and you are not to consider it as evidence in the
9 case.
10 With that, are we ready to proceed with
11 redirect examination.
12 MR. SULLIVAN: Yes, Your Honor.
13 THE COURT: Do you want to move that easel,
14 Mr. Sullivan?
15 MR. NOLAN: I can do that.
16
17 R E D I R E C T E X A M I N A T I O N
18 BY MR. SULLIVAN:
19 Q. Mr. Swisher, you may recall you were asked
20 about a particular question and answer you gave in your
21 first Grand Jury appearance in April 2002. The question
22 was -- I will put it on the screen again -- it's Grand
23 Jury testimony at page 42.
24 A question by a juror was: "Did you ever have
25 a conversation with Mr. Hinkson about things other than

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1 the technical testing? Did you ever, you know -- did
2 you ever talk politics or his views on taxes, so on and
3 so forth?"

4 Did you understand that question to require
5 any response about Mr. Hinkson hoping that federal
6 officials would die?

7 A. No.

8 Q. Did you try to answer the question as you
9 thought it was required?

10 MR. NOLAN: Objection. Leading.

11 THE COURT: Overruled.

12 Could you answer that question? The question
13 was: "Did you try to answer the question as you thought
14 it was required?"

15 THE WITNESS: As it was asked, I did my best
16 to answer it.

17 BY MR. SULLIVAN:

18 Q. You were also asked a question, again from the
19 Grand Jury testimony, about whether Mr. Hinkson's offers
20 to you were made in private or with other people around.
21 Do you recall that question?

22 A. I'm sorry. I got lost there. Would you
23 repeat that question?

24 Q. Do you recall being asked a question about
25 whether or not Mr. Hinkson made the offers to kill the

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1 other person? Judge Reinhardt?

2 A. Yes.

3 Q. Who is Judge Reinhardt?

4 A. I think he is a judge in the Fifth District
5 or, at least, he was stationed in Grangeville, Idaho
6 County.

7 Q. And do you know if Judge Reinhardt had
8 anything to do with litigation involving Mr. Hinkson?

9 A. I believe he was the trier of fact in the case
10 that Mr. Hinkson lost, and the plaintiff was awarded
11 \$100,000 then.

12 Q. Do you recall the name of that particular
13 plaintiff?

14 A. Arnette Hazelton (sic.), I think. That's
15 probably an improper pronunciation.

16 Q. You have been asked a number of questions on
17 cross-examination about your civil litigation involving
18 Mr. Hinkson; correct?

19 A. Yes.

20 Q. Did you ever sue Mr. Hinkson?

21 MR. NOLAN: Objection, Your Honor.

22 THE COURT: Sustained.

23 BY MR. SULLIVAN:

24 Q. Did Mr. Hinkson ever sue you?

25 A. Yes.

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1 federal officials to you in private or with other people
2 around in?

3 A. Yes.

4 Q. Do you recall that question?

5 A. Yes.

6 Q. And did he do that in private or with other
7 people around?

8 A. In private.

9 Q. Were there times there were other people
10 around that he said other type things?

11 A. Oh, yes.

12 Q. Such as what?

13 A. Well, he wanted to see Albers and his whole
14 family, you know, dead. He made those comments with
15 other people around; but with other people around, he
16 never made the solicitations.

17 MR. NOLAN: Objection, Your Honor. Beyond the
18 scope. I don't mean beyond the scope. Asked and
19 answered.

20 THE COURT: Overruled.

21 BY MR. SULLIVAN:

22 Q. You were also asked about people on his list.
23 Do you understand that to mean, like, a hit list?

24 A. Yes.

25 Q. And you answered there was, at least, one

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1 Q. When did he do that?

2 A. Well, I learned of it sometime after I had
3 contacted the Idaho County Assistant Prosecutor on --

4 Q. Listen to my question. Give me a date.

5 A. I don't know the date.

6 Q. When he sued you?

7 A. I'm just trying to tell you that it was
8 sometime after I had contacted the Idaho County
9 authorities regarding Mr. Hinkson.

10 MR. NOLAN: Objection, Your Honor.

11 THE COURT: Overruled.

12 BY MR. SULLIVAN:

13 Q. Was it in 2003?

14 A. Probably.

15 Q. Were you served process?

16 A. I'm not sure exactly when I was served on the
17 matter.

18 Q. How did you learn that Mr. Hinkson had sued
19 you?

20 A. Well, I did eventually get served; but I just
21 don't recall the date I was served.

22 Q. All right.

23 A. But I know that it came after I had been in
24 and talked with the authorities.

25 Q. But my question was -- all right. Let me

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1 rephrase. What were you being sued for? 1137
2 A. As I recall -- and I might be off a quarter
3 turn here -- I was being sued for -- Mr. Hinkson was
4 stating that I had stolen his technology from him and
5 that I had attempted to take over his business.
6 Q. Was that the part of the litigation involving
7 Mr. Bellon's lawsuit against Mr. Hinkson?
8 A. I think, probably so.
9 Q. Did you counter-sue Mr. Hinkson?
10 A. Yes.
11 Q. What did you claim against him?
12 A. Again, the property that he had verbally given
13 me and the grader.
14 Q. In your countersuit, did you deny that you had
15 stolen his technology?
16 A. Boy, I hope so. I am not sure that I did, but
17 I certainly didn't steal his technology.
18 Q. Has that lawsuit been resolved in any fashion?
19 A. From my understanding, it had been. There was
20 a meeting with Judge Bradbury in Grangeville between
21 Mr. Hoyt --
22 MR. NOLAN: Objection, Your Honor.
23 THE COURT: If he knows if it's been settled,
24 why don't we establish that?
25 THE WITNESS: I think it has been settled.

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1 BY MR. SULLIVAN: 1138
2 Q. Did you get any of the property that you sued
3 for?
4 A. No.
5 Q. Did Mr. Hinkson get anything that he sued you
6 for?
7 A. No.
8 Q. Now, you were asked questions, also, about
9 some questions from a deposition in October. Do you
10 recall those questions?
11 A. Yes.
12 Q. Was that October of 2004?
13 A. I believe so.
14 Q. And was that a deposition in conjunction with
15 this particular civil lawsuit?
16 A. Yes.
17 Q. Who was asking you questions in that?
18 A. Mr. Hoyt.
19 Q. Was he representing Mr. Hinkson in that?
20 A. Yes, he was.
21 Q. Was he asking you about what you told the
22 Grand Jury?
23 A. I took it to be that, yes.
24 Q. What were you being asked?
25 A. I beg your pardon?

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1 Q. What were you being asked? 1139
2 A. Well, he was getting dangerously close --
3 MR. NOLAN: Excuse me. It's vague.
4 THE COURT: I am going to sustain the
5 objection as to the form of the question.
6 BY MR. SULLIVAN:
7 Q. What did Mr. Hoyt ask you regarding your
8 testimony as the Federal Grand Jury?
9 MR. NOLAN: I object to that.
10 THE COURT: Counsel, you got into this.
11 MR. NOLAN: That's fine.
12 THE COURT: I am going to overrule the
13 objection and allow the witness to answer.
14 MR. NOLAN: That's fine.
15 MR. HOYT: Your Honor, may we have a sidebar
16 on this?
17 THE COURT: No. We have had enough sidebars.
18 THE WITNESS: Well, he was getting into the --
19 of course, the area about the equipment that had been
20 transferred to me and the property that had been
21 transferred to me and so on and was getting dangerously
22 close to some of the questioning that --
23 MR. SULLIVAN: My question, Your Honor --
24 MR. NOLAN: Objection.
25 THE COURT: Mr. Swisher, I know it's been a

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1 long day; but bear with us. 1140
2 Go ahead, Mr. Sullivan.
3 BY MR. SULLIVAN:
4 Q. I am asking you: What did he ask you about
5 your Grand Jury testimony?
6 MR. NOLAN: Objection to the form of the
7 question, Your Honor.
8 THE COURT: Sustained.
9 BY MR. SULLIVAN:
10 Q. Did he ask you questions about your Grand Jury
11 testimony?
12 A. Yes.
13 Q. What did he ask you?
14 THE COURT: Counsel, I think the concern is
15 with the broad nature of your questions. I will permit
16 you to ask a leading question, if you are trying to
17 establish a point here.
18 MR. SULLIVAN: Yes, Your Honor.
19 Q. Did Mr. Hoyt ask you about these offers from
20 Mr. Hinkson that you have testified to here today?
21 A. Yes.
22 Q. Did he ask you the circumstances of those
23 offers?
24 A. He did more than that.
25 Q. Like what?

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1 A. He indicated he had talked to -- the other
2 witnesses that he had talked to thought it was all a
3 bunch of hunk and that David hadn't meant anything and
4 that he was laying that on me pretty hot and heavy.
5 And he said, "You know, you probably feel the
6 same way; right?"
7 And I said, "Not necessarily."
8 Q. Another Grand Jury question from your first
9 Grand Jury testimony in April of 2002 -- you were read
10 back the quote. This was regarding your memory.
11 A. Yes.
12 Q. Do you remember this quote: "If it weren't
13 for flashbacks, I wouldn't have any?"
14 A. Yes.
15 Q. What were you trying to convey when you said
16 that?
17 A. Well, I was making an attempt at levity. Most
18 of the Grand Jury members laughed.
19 Q. Do you have any problems with your memory?
20 A. Not really.
21 MR. SULLIVAN: That's all I have on redirect,
22 Your Honor.
23 THE COURT: Mr. Nolan, anything further?
24
25

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1 RE CROSS EXAMINATION
2 BY MR. NOLAN:
3 Q. Isn't it true, during the deposition of
4 October of 2004, that Mr. Hoyt asked no questions about
5 what you testified to in the Grand Jury?
6 A. I'm trying to place this because I may have
7 been a bit inaccurate here. The questions were asked
8 prior to either the deposition or another proceeding.
9 I'm not sure at which time, but they were asked.
10 Q. So all of the questions asked of you by
11 Mr. Sullivan about the deposition could be in error? It
12 could be some other proceeding; is that correct?
13 A. No. I think that was the time frame, but I
14 think those questions took place before we went on the
15 record.
16 THE COURT: Counsel, can you establish whether
17 or not he met with Mr. Hoyt before he was sworn for that
18 deposition?
19 BY MR. NOLAN:
20 Q. Did you meet with Mr. Hoyt before you were
21 sworn as a witness?
22 A. Yes. Oh, wait a minute. I do know now -- if
23 I may correct that? At some point, I took a bunch of
24 documents to be transcribed, and I didn't mind having
25 those copies -- what am I trying to say -- copied.

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1 THE COURT: Mr. Swisher, it's a very simple
2 question. Did you meet with Mr. Hoyt before they took
3 your deposition, and did you have a conversation with
4 him?
5 THE WITNESS: Right in the middle, when the
6 court clerk and one of the other members on Mr. Hoyt's
7 team took what I brought over to have copied, there was
8 about an hour there; and that was when all of this
9 grilling went on.
10 THE COURT: All right.
11 THE WITNESS: But it was -- the deposition
12 was, basically, in recess for that hour; but it was at
13 the deposition.
14 THE COURT: All right. Thank you.
15 Thank you, counsel.
16 BY MR. NOLAN:
17 Q. When you were asked questions under oath at
18 the deposition of October 2004, I take it, no question
19 was asked of you as to what you were questioned about at
20 the Grand Jury; correct?
21 A. Well, I felt -- the reason I refused to answer
22 some of those is I felt they were dangerously close to
23 information --
24 THE COURT: Mr. Swisher, that's not responsive
25 to the question being asked of you. The question is:

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1 Isn't it true that Mr. Hoyt never asked you specifically
2 what you testified to before the Grand Jury?
3 THE WITNESS: Specifically, on the record, no.
4 THE COURT: Very well.
5 MR. NOLAN: Thank you.
6 THE COURT: Counsel, do you want me to give
7 the jury a 6E instruction with respect to the right of a
8 witness?
9 MR. NOLAN: Yes. Yes, especially in the
10 instructions given afterwards. I would like that. Then
11 we wouldn't have to call a witness.
12 THE COURT: Mr. Sullivan, any objection?
13 MR. SULLIVAN: I would like to discuss at
14 sidebar, Your Honor.
15 THE COURT: All right. Let's do that.
16 (Whereupon, the following sidebar discussion
17 was held outside the presence of the jury:)
18 THE COURT: What I proposed to Mr. Nolan was
19 to simply instruct the jury that, under Federal Rule of
20 Criminal Procedure 6E, a witness is permitted, at his
21 discretion, to discuss with anyone he wants to, or to
22 refuse to discuss with anyone, what he said in the Grand
23 Jury Room.
24 If there is an objection to my giving that
25 instruction now, I may entertain, with regard to the

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1 closing instructions, a defense instruction that says
2 the same thing. So however you want to handle, I will
3 leave it up to you.

4 MR. SULLIVAN: I just don't think it's an
5 issue in the case the jury needs to be concerned with.

6 THE COURT: The problem is that the state of
7 the record is now such that Mr. Hoyt's integrity has
8 been placed in issue and I think it unfair to
9 Mr. Hinkson's counsel to suggest that Mr. Hoyt did
10 anything improper in questioning a witness that had
11 previously testified in the Grand Jury to try and learn
12 what he might know about the facts in the case.

13 Under Rule 6E, there is absolutely nothing
14 improper with a defense lawyer asking a Grand Jury
15 witness those questions. We will handle it however you
16 want.

17 MR. NOLAN: The other thing is, Judge, I think
18 that he cannot refuse to answer the question on the
19 basis that he doesn't want to reveal something he
20 revealed in the Grand Jury, if he is under oath and the
21 question is otherwise relevant.

22 THE COURT: You and I both know you have to
23 move to compel the answer.

24 MR. NOLAN: I agree. But I am just saying
25 that, you know -- yes, I agree.

1 MR. HOYT: It never happened. It never
2 happened. I would appreciate it if you could make an
3 instruction orally to the jury at this time while it is
4 fresh in their minds. I think this could be a lingering
5 issue.

6 MR. SULLIVAN: This is another one of those
7 straw men that they go into on their cross-examination.
8 They are not happy with the answers, and they want some
9 relief from it.

10 It's not a making of the Government. Just
11 because this witness has some misunderstanding about the
12 law is not the problem -- or the court or the Government
13 or the jury either, for that matter.

14 THE COURT: I am going to, now, give a Rule 6E
15 instruction. I am very concerned, if I do not, that the
16 jury will be left with a misimpression as to the
17 integrity of the conduct of Mr. Hinkson's lawyer. I am
18 not going to permit that to stay on the record.

19 (Whereupon, the following proceedings were
20 held in open court, in the presence of the jury:)

21 THE COURT: Ladies and gentlemen of the jury,
22 you are instructed that, under the Rules of Criminal
23 Procedure which attend Federal Grand Jury proceedings,
24 it is permissible for a witness, after he or she has
25 testified in the Grand Jury, to either talk to people

1 about what they said in the Grand Jury or to refuse to
2 talk to people. It is entirely up to the witness.

3 Anything further, counsel?

4 MR. NOLAN: No, Your Honor.

5 THE COURT: May Mr. Swisher be excused?

6 MR. NOLAN: No, Your Honor.

7 THE COURT: You want to keep him under
8 subpoena?

9 MR. NOLAN: Yes, Your Honor.

10 THE COURT: Mr. Swisher, I am going to allow
11 you to step down. We are finished with you here today,
12 but you are still under subpoena. Please stay in touch
13 with the United States in case the defense wishes to
14 recall you at a later time.

15 THE WITNESS: I will do that, Your Honor. One
16 question, sir?

17 THE COURT: No questions of me. I get to ask
18 the questions, all right? Why don't you step down now?
19 I think we are finished. Thank you.

20 THE WITNESS: Someone has my DD-214.

21 THE COURT: We will get the DD-214 or, at
22 least, a copy of it back to you.

23 All right. Ladies and gentlemen, I think we
24 are close enough to the afternoon recess. The court
25 would like to take a recess for fifteen minutes. We

1 will see you back here in fifteen minutes.

2 (Recess.)

3 THE COURT: The clerk will administer the oath
4 to the witness.

5 THE COURTROOM CLERK: Please stand and raise
6 your right hand.

7 * * *

8 CHAD CRONER,
9 having been called, sworn, testified as follows:

10 THE COURTROOM CLERK: Thank you. Please be
11 seated. You will need to speak right into the mic.

12 If you would, state your name and spell your
13 last name for the record.

14 THE WITNESS: It's Chad Croner, C-r-o-n-e-r.

15 THE COURT: Counsel, you may proceed.

16 MR. TAVAY: Thank you, Your Honor.