

United States District Court

FOR THE DISTRICT OF NORTH DAKOTA

Southeastern Division

CR NO. C77-3003-01

UNITED STATES OF AMERICA,	*	
	*	
Plaintiff,	*	
	*	U.S. District Court for the District
v.	*	of North Dakota,
	*	Southeastern Division
LEONARD PELTIER,	*	
	*	
Defendant.	*	

Pages 270-299 placed by Clerk in sealed envelope in file, upon order of the Court.

VOLUME II

Pages 55-299 [Original; 147 pages herewith]

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THURSDAY MORNING SESSION

March 17, 1977

W h e r e u p o n, the following proceedings were had and entered of record on Thursday morning, March 17, 1977, at 9:00 o'clock, a.m., the Defendant being present in person, with the following further appearance for the Defendant of Mr. Bruce Ellison, Rapid City, South Dakota:

THE COURT: Are counsel ready to have the jury brought in?

MR. HULTMAN: The Government is ready, your Honor.

THE COURT: Are counsel ready to have the jury brought in?

MR. LOWE: Yes, sir.

THE COURT: The jury may be brought in.

(Whereupon, at 9:02 o'clock, a.m., the jury entered the courtroom; and the following further proceedings were had in the presence and hearing of the jury:)

THE COURT: The United States may proceed.

MR. SIKMA: Your Honor, the Government calls J. Gary Adams.

J. GARY ADAMS,

being first duly sworn, testified as follows:

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DIRECT EXAMINATION

By MR. SIKMA:

Q Mr. Adams, what was your occupation on the 25th -- or the month of June, 1975?

A I was a Special Agent with the Federal Bureau of Investigation.

Q And is that still your occupation?

A Yes, it is.

Q How long have you been a Special Agent of the FBI?

A Approximately seven and a half years.

Q Where were you -- where was your place of assignment in June of 1975?

A I was assigned to the Rapid City, South Dakota, resident agency which covers the Pine Ridge Indian Reservation in South Dakota.

Q And how long have you been assigned to Rapid City as the --

A (Interrupting) I have been assigned just over three years.

Q You indicated that you had an assignment there of the Pine Ridge Indian Reservation. Would you tell the jury where that is located?

A It is in the southwest corner of the State of South Dakota, south and east of Rapid City.

Q And about how far is it from Rapid City?

A Approximately 120 miles.

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Q How does it come about that as a Special Agent of the FBI that you work on an Indian Reservation or assigned to --

A (Interrupting) The FBI investigates 13 major felonies, some 13 major felonies and some misdemeanor violations on the Indian Reservation.

Q And to your knowledge is this an assignment by Statute?

A Yes, it is.

Q If you will look on the map to the far left of the jury there, to your right, do you see the Pine Ridge Indian Reservation on that map?

A Yes, I do.

Q O.k. There is a pointer on the other map, would you take that pointer and point out to the jury where the Pine Ridge Indian Reservation is?

A Yes. May I step down?

THE COURT: Yes. During this trial the Court will permit witnesses to step down when necessary to illustrate evidence, and it may be done without requesting permission.

THE WITNESS: Thank you, your Honor.

MR. SIKMA: May the record reflect that the exhibit is numbered 70 which is the exhibit to the far left, to my far left.

A (Continuing) Referring to Government Exhibit No. 70, this is the Pine Ridge Indian Reservation which is lined out in {58} the southwest corner of the area depicting the State of South Dakota.

Q How large is the Pine Ridge Indian Reservation?

A It is approximately a hundred miles long and sixty miles wide, and a hundred miles this way to the east and west, and sixty miles to the north and south.

Q And you indicated that you were assigned to work cases on the Reservation. Are there other cases or other agents assigned to other various areas in South Dakota?

A Yes. The Rapid City resident agency covers the whole western edge of South Dakota from the North Dakota clear to the Nebraska border.

Q And how far in -- how far to the east did the jurisdiction go?

A Well, we have another office in Pierre so it would have been roughly through this area here (indicating), including the Pine Ridge Indian Reservation.

Q Right at the eastern edge of the Pine Ridge Indian Reservation, is that correct?

A That is correct. We have Washabaugh County which is in this part of the Reservation (indicating), and we do not cover Philip. That is covered out of Pierre, and we go up in this area here (indicating).

Q Now, on the Pine Ridge Indian Reservation, are you familiar with the town of Pine Ridge?

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A Yes, I am.

Q And where is that located?

A It is on the southwestern corner of the Reservation. That is the principal town on the Reservation.

Q And do you know about what its population is?

A I have no idea.

Q About how far is it from the Nebraska-South Dakota border?

A Pine Ridge is north of the Nebraska-South Dakota border approximately two miles.

Q Are you familiar with the town of Oglala, South Dakota?

A Yes, I am.

Q And where is that in relation to Pine Ridge, South Dakota?

A Oglala is north and west of the town of Pine Ridge.

Q Would you point that out on the map, if you can?

A It would be up in this direction here (indicating).

Q Approximately how far is it from Pine Ridge?

A It is approximately 16 miles from Pine Ridge.

Q Now, would you point out -- would you look at Government Exhibit 71? Is there a highway -- that's the map directly in front of you -- is there a road on that map which connects Pine Ridge and Oglala?

A Yes.

Q And what is that?

A U.S. Highway 18 here (indicating) connects Pine Ridge and Oglala.

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Q O.k. Which direction on the map is Pine Ridge?

A Pine Ridge would be in this direction (indicating), it extends out here (indicating).

Q That's to the top of the map?

A The top and to the right of Government's Exhibit 71.

Q And Oglala then would be to the bottom and to the left, is that correct?

A Yes, over here to the southwest (indicating) -- this is in a north -- or to the north and west.

MR. SIKMA: You may resume your seat.

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THE COURT: Mr. Sikma, I wonder for the record if those exhibits should not be received in evidence.

MR. SIKMA: Your Honor, I would offer them in evidence, Government's Exhibit 70 and Government's Exhibit 71.

I believe, Your Honor, that it has been stipulated --

THE COURT: It was stipulated but I believe for the record they should be formally offered.

MR. SIKMA: I agree, Your Honor.

THE COURT: 70 and 71?

MR. SIKMA: Yes, Your Honor.

MR. LOWE: No objection, Your Honor.

THE COURT: Very well. Exhibits 70 and 71 will be received.

Q (By Mr. Sikma) Mr. Adams, are you familiar with a special agent of the FBI, Ronald Williams?

A Yes. I am.

Q And how long did you know Ron Williams?

A I knew Ron Williams approximately two years.

Q And could you tell me what his assignment was.

A Ron Williams was also assigned to the Rapid City office of the FBI.

Q Now while he was assigned there what were his assignments generally?

A When I, when I first knew Ron he worked in Rapid City and the surrounding counties investigating cases in which we had {62} jurisdiction.

Q Okay. That's Pennington County?

A Including Pennington County which contains the town of Rapid City.

Q Was he ever assigned to the Pine Ridge Indian Reservation?

A Yes. During the latter part of 1974, the first part of 1975 Agent Williams was assigned to Pine Ridge.

Q Do you know how long he was a special agent of the FBI?

A Agent Williams had been with the FBI approximately five years to the best of my recollection.

Q Did you ever work with Ron Williams on any case?

A Yes. I did.

Q Was that frequently or infrequently?

A We worked on occasion in cases that he had, we had jurisdiction, in Pennington County and around Rapid City and also on the Pine Ridge Indian Reservation.

Q Did you know Ron Williams outside of work as well as at work?

A Yes. We were close personal friends too.

Q Now when you would go to the reservation and work on the reservation where did you generally stay?

A We either stayed in the motel in Rushville, Nebraska, or Gordon, Nebraska.

Q And approximately how far were you generally, when you were working on the reservation how far were you from your home in {63} Pine Ridge, or excuse me, in Rapid City? How far was the reservation from Rapid City?

A Approximately one hundred twenty miles from Rapid City.

Q Did Ron Williams have an automobile assigned to him?

A Yes. He did.

Q What kind of an automobile was that?

A It was a 1973 Rambler.

Q That was in June of 1975?

A Yes. It was.

Q And what kind of radio equipment did that vehicle have?

A Agent Williams in that car had a, had two radios.

One was the five channel FBI radio which we communicated from car to car or from our office in Rapid City to, from the car.

The other was a, what we call a State radio. We could talk with the State Highway Patrol dispatcher or we could also talk with the Bureau of Indian Affairs.

Then there was a government channel which the Pine Ridge police department had for government work from our cars or from the law enforcement service in Rapid City.

Q Did you ever talk with Ron Williams on the radio?

A Yes. I did. Many times.

Q Did you recognize his voice on the car radio?

A Yes. I did.

Q Do you know a Special Agent, did you know a Special Agent {64} Jack R. Coler?

A Yes. I did.

Q And how long had you known Jack R. Coler?

A Approximately one month.

Q How did it come about that you met Jack Coler?

A Agent Coler was assigned to the Pine Ridge Reservation on temporary assignment and we worked, he worked on the reservation and was there at times when I was there.

Q How long was his temporary assignment?

A Agent Coler was assigned there for sixty days.

Q Okay. And what was the nature of his assignment?

A Agent Coler was to go along with five other agents present to the Pine Ridge Reservation to work all the new cases that were generated at that time.

We had a heavy case load every time there's a violation of cases open and those of us who were assigned there had a heavy case load and we hadn't finished before so they sent six agents in to help with our work load so we could get caught up.

Q What kind of cases?

A They were primarily all felony violations which occurred near the Pine Ridge Indian Reservation.

Q By a felony do you mean such as robbery --

A Robbery, kidnapping, assault, rapes, murders.

Q What date or what time did Jack Coler arrive in Rapid City to work on the reservation?

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A Agent Coler arrived in Rapid City either on Memorial Day or the day after Memorial Day in 1975 which would have been the latter part of May.

Q Did you have occasion to discuss cases with Jack Coler?

A Yes. I did.

Q Did you work any cases with Jack Coler?

A Not to my recollection.

I know we discussed a few of the cases down there and he asked me about where certain people lived and that but I don't recall ever working cases with him.

Q You were quite familiar with a number of people as a result of your work on the reservation, is that correct?

A That is correct. I had several friends and had met a lot of people on the reservation.

Q What kind of radio equipment did Jack Coler have in his vehicle?

A Jack Coler also had a radio which he was able to communicate car to car with, on our FBI frequency and to our office in Rapid City.

Q Did --

A He could have had another radio. I don't recall if he did or not.

He could have also had another radio but it was a Colorado car and I would not be familiar with what other agency he could communicate with on the FBI radio if in fact he had one.

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Q So Jack Coler then, although he came from another FBI office he came with his car, is that correct?

A That's correct; yes.

Q And what kind of car was that?

A It was a Chevrolet, four door. I believe it was a 1972 model with a light vinyl roof, gold in color.

Q And he could communicate with FBI agents such as yourself and Special Agent Williams, is that correct?

A He could.

Q Do you know where he stayed in June of 1975 --

A Yes.

Q -- when he was working on the reservation?

A Yes. He was staying at the Hacienda Motel in Gordon, Nebraska.

Q Do you know whether Jack Coler and Ronald Williams worked together on cases?

A Yes. They had on occasion worked together down there.

Q Do you recall or are you familiar with any cases that they were assigned to at that time on the 25th or the 24th of June of 1975?

A Not specifically.

I know Or a case that they were working on that was assigned to Agent Dean Hughes.

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Q And what case was that?

A That was an assault and robbery case that occurred, to the best of my recollection, on the weekend before the 26th of June, 1975.

Q And how many persons were charged in that incident?

A There were four individuals charged in this crime.

Q Do you know who they were?

A Yes. I do.

Q And who were they?

A They were Teddy Poirier, Hobart Horse, Herman Thunderhawk and James Theodore Eagle.

Q On the 25th of June, or rather the 26th of June had any of these persons been arrested?

A Yes. Teddy Poirier had been arrested.

Q Now speaking in generally, not specifically necessarily of this case, what were your duties with regard to charges filed against individuals?

A Well, after the violation occurred the case would be discussed with the United States Attorney's office.

At that time if he authorized prosecution Or the individual or individuals, either a Complaint would be filed. If a Complaint was filed at that time an arrest Warrant would be authorized. The case might go to the Federal Grand Jury and an indictment returned; at that time a Warrant issued and the individual would be, attempt to be apprehended.

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Q If a warrant was issued, did you have any duties with regard to that warrant which were part of your assignment?

A Yes, we did. We would affect the warrant and attempt to apprehend the individual.

Q Is that true of every FBI agent?

A Yes. That is part of our assignment as an agent of the Federal Bureau of Investigation.

Q Warrants are out for people, you are assigned to go out and apprehend these individuals, to locate and apprehend them?

A Yes.

Q Are you familiar with the warrant that was outstanding for James Theodore Eagle?

A Yes, I am.

Q Would you recognize it if I showed it to you?

A Yes, I would.

Q I will show you what has been marked for identification as Government Exhibit 5 and ask you to tell me whether or not you recognize that document.

A Yes. Referring to Government Exhibit No. 5, this is a copy of the arrest warrant for James Theodore Eagle issued in the United States District Court in Rapid City, South Dakota.

Q Now is this the James Theodore Eagle which Ronald A. Williams and Jack Coler, the case they were working on on the 25th and 26th of June, 1975?

A Yes, it was.

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MR. SIKMA: Your Honor, I would offer into evidence Government Exhibit 5.

MR. TAIKEFF: No objection, Your Honor.

THE COURT: Exhibit 5 is received.

Q (By Mr. Sikma) On the 25th, what was the last time that you saw Ronald Williams on the 25th of June, 1975?

A It was about between 7:00 and 7:30 P.M. in the evening.

Q And where were you at that time?

A I was enroute from Whiteclay, Nebraska north of Pine Ridge with the officers of the Nebraska Highway Patrol and the Sheridan County sheriff's office. We were going to a law enforcement meeting in Pine Ridge.

Agent Williams was driving south on the highway in his 1973 green Rambler.

Q You recognized him?

A I did. And we waved.

Q What time of the day was that?

A That was sometime between 7:00 and 7:30. The meeting was at 7:30 and we were enroute and he was headed to his motel, I presume.

Q Do you recall what the weather was like on that night?

A Sometime between 7:30 and 9:00 or 9:30 there was a severe thunderstorm. They had high winds and heavy rain.

Q On the following day did you have occasion to be in the area between Pine Ridge and Oglala, South Dakota?

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A Yes, I did.

Q And did you see any evidence of that rain?

A Yes. There was, in the low places and the rest of the road and places like that there was still water standing.

Q Was this true throughout the day?

A Yes. Even on into the evening.

Q On the 26th of June, 1975, what was your assignment? What were you doing?

A I was working some of my cases on the Pine Ridge Indian Reservation.

Q And did you have occasion to go to Pine Ridge that day?

A Yes, I did.

Q About what time were you in Pine Ridge, South Dakota?

A I arrived in Pine Ridge, South Dakota around 11:00 A.M. in the morning.

Q And at that time did you have occasion to see Special Agent Williams?

A Yes, I did.

Q Where was he at that time?

A He was parked outside the Pine Ridge jail in his 1973

Q And with whom, was he with anyone?

A He was seated in the car and Agent Hughs was standing out side talking to him.

Q Do you know what case they were discussing?

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A No. I do not.

Q Did you have knowledge at this time that they were working on the Jimmy Eagle case?

A Yes. I understood they were working on this particular case.

Q Do you know what the individuals were charged with in that particular case?

A I believe agent, or James Eagle was, and Herman Thunderhawk were charged with, I believe they were charged with robbery and Hobart Horse was charged with assault and Teddy Palier was charged with assault.

Q What kind of assault was that?

A That would be assault with a deadly weapon.

Q How long did you remain in Pine Ridge that time?

A I was there about 45 to 50 minutes.

Q What did you do after you were there?

A As I saw Williams and Hughs, I went into the jail, conducted an interview, returned to the Bureau of Indian Affairs office there. Everyone was going to lunch so I got into my car and started to Whiteclay, Nebraska for lunch.

Q Do you know Special Agent Hughs at that time had, did he have someone with him at that time?

A Yes, he did. He was in the process of transporting Teddy Paul Palier to Rapid City. He had been arrested the day before.

Q And what did you do at that time?

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A After I left the Bureau of Indian Affairs office, I got in my car and started to Whiteclay, Nebraska for lunch.

Q That was at about what time?

A About 11:45 or 11:50 A.M.

Q And how far did you go toward Whiteclay?

A About two miles. Well, I just got to the Nebraska-South Dakota line which is approximately two miles south of Pine Ridge.

Q And what happened at that time?

A I had been monitoring some radio communications from Agent Williams and I found that he needed some help so I went back towards Pine Ridge.

Q What was the first radio communication that you heard?

A The first radio communication I recall is he said, "Looks like there's some guys around that house. It looks like they're going to get into that pickup. Looks like they're going to take off"

Q And about how long a time was it between the first communication that you monitored and the second?

A It was just a matter of minutes.

Q Matter of minutes?

A Yes. Two or three minutes.

Q And what was, let's say from the second to the third communication, how long was it?

A It was, from the first to the second communication was again one or two minutes. It was just all in sequence.

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Q Very, very close together?

A Yes, it was.

Q Just a matter of a few minutes from the beginning until you stopped, is that correct?

A Yes.

Q What was it after the communication that "It looks like they're getting in that vehicle," what was the communication that followed that?

A Hell, after he said, "Looks like they're going to get into that pickup, looks like they're going to take off," then he said, "I hope you've got a lot of guys" or something to that effect.

Q What was the next thing that happened?

A Then he said, "Looks like they're going to shoot at us." Then he said, "We've been hit."

Q Did you hear anything on the radio besides voices when they said, "It looks like they're going to shoot at us"?

A Yes. There was sounds of gunfire over the Bureau radio.

Q How long was it from the time that he said, "It looks like they're going to shoot at us" to "we've been hit"?

A It was just one communication after the other.

Q Just a few seconds?

A Seconds; yes.

Q Did you have occasion to contact him at this time?

A At that point I picked up my radio, my microphone and I {74} attempted to call him to find out what his location was.

Q And did you talk with him?

A Yes. He finally told me that he was at some houses behind Jumping Bull Hall.

Q Did he say he was at some houses?

A Yes. He was at some houses in the vicinity of Jumping Bull Q Did you know where Jumping Bull Hall was?

A No. I did not. I did not know the specific location. I knew generally it was between Pine Ridge and Oglala, South Dakota.

Q What did you do then?

A I turned my car around and started to drive toward Oglala, South Dakota.

Q Now you were about how far from Oglala?

A At that point I would have been about 18 miles.

Q And so you headed to the northwest?

A Yes, I did.

Q What highway were you on?

A I went through Pine Ridge and started on U.S. Highway 18.

Q And during this time did you stay on the FBI radio at all times?

A No, I did not. After I talked to Williams and heard the firing, I tried to raise the Pine Ridge Police Department on the other radio.

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Q Were you able to do so?

A No. I was not.

Q What did you do then?

A Well, I tried on two different channels and then I heard the state police in Rapid City call the Pine Ridge Police Department on the government channel one and advised them there was trouble north of Pine Ridge.

Q And did you have to drive through any towns on the way to Oglala?

A Yes. I did drive through Pine Ridge and then proceeded northwest on Highway 18.

Q Did Ron Williams try to direct you to any particular place?

A Yes. I tried to call him back on the radio because I did not know the specific location of the Jumping Bull Hall. Then he finally came back and said, "Get on a high hill and give us some fire cover. We'll be killed." And he said, he did relate, he said, "Come to a house," that was some distance, a house that has an outhouse some distance from it, but he did not give any specific location yet.

Q Did he indicate to you whether or not he was in a valley at that time?

A Not that I recall.

Q He told you to get on the high ground?

A Yes. Get on the high hill and give us some fire cover.

Q Where was that high hill located?

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A At that point I did not know.

Q How far did you drive after that before stopping?

A I drove eight or nine miles northwest of Pine Ridge, then I stopped my car.

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Q O.k., and why, would you explain why you stopped?

A I stopped my car to get a bullet-proof vest and my rifle out of the trunk.

Q And you didn't have a rifle in the car with you?

A I had a shotgun in the front seat with me.

Q But not a rifle?

A No, I did not.

Q What kind of a firearm did you carry?

A I had a 3.57 Magnum revolver, and then I had the shotgun in the front seat with me. The rifle was in the trunk.

Q When you stopped your car, did you hear anything?

A Yes, I did. I heard shooting from the distance.

Q And did you see anyone at that time?

A No, I did not.

Q Did you meet anyone on the way toward the Jumping Bull Hall area?

A Yes. After I got back in my car and started on the road, there was a Pine Ridge police car came with two officers in it.

Q And who were those officers?

A Frank Two Bolts and James Pacer.

Q Now, approximately, did these -- excuse me. Did these two BIA police know where Jumping Bull Hall was?

A Yes, sir, they did. We had a brief conversation. Apparently they had received word via their radio frequency as to what was going on.

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Q And what did you do next?

A I agreed to follow them into the area because they knew where they were headed.

Q And where did you go?

A We then went on down Highway 18, and they turned off of Highway 18 and I followed them into this area.

Q O.k. Would you go back to the map now and point out where it was on Government 71?

A Referring to Government Exhibit 71, we came down Highway 18, turned off the road here (indicating), and drove up into the vicinity of this house right here (indicating).

MR. SIKMA: May the record reflect that the witness identified the last road to the left of the map on Government Exhibit 71, the main road going off of Highway 18.

Q (By Mr. Sikma) Now, what -- it is also marked on the map there, is it not -- what house?

A Yes. This house is referred to as a tan and red house. It is the far left residence on Government Exhibit 71.

Q O.k., and whose house is that?

A That house was occupied -- residence there, by Wallace Little, Jr., and Wanda Sears.

Q Did you have occasion to gain this information later as to whose house that was?

A Yes, I did.

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Q So at that time you didn't know who the people were that lived in that residence?

A No, I did not.

Q And at that time, I take it that you did not know the whereabouts specifically of Jumping Bull Hall?

A No, I still did not know the exact location of Jumping Bull Hall.

Q Tell what happened next.

A Well, we stopped our cars here (indicating). The Pine Ridge Police Department stopped just in front of me. I stopped to their right or to the west, referring to Government Exhibit 71, and I started to get out of my car.

Q And now, how far was that from the Wanda Sears' residence?

A I would estimate I was 50 to 75 feet from the residence,

Q Is that to the east?

A That would be to the east, northeast.

Q And what happened at that time?

A Just as I started to get out of my car a shot rang out.

Q And did that shot strike anything?

A Yes. It appeared to hit the right front tire of the Bureau of Indian Affairs' police car.

Q Now, what happened after that?

A As soon as the shot rang out, I got back in my car and I yelled at them, "They are shooting at us."

Q Where were the shots coming from, could you tell?

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A To the best I could tell, they were coming from the south or the southwest.

Q Please continue.

A And as soon as I got back in my car, right after the first shot, another shot rang out.

Q Where did that shot come from?

A It again appeared to come from this area over in here (indicating). I had the window down, and I could just hear the sound. I didn't see anyone shooting at me.

Q What did you do then -- or excuse me.

First of all, what happened, did that shot hit anything?

A Yes. The second shot appeared to hit the left front tire of my Bureau car.

Q What kind of car was that?

A That was a 1972 Ford.

Q And what happened next?

A We both proceeded to back out across this open area here (indicating).

Q And that's an area between the first and the second road, the roads that are on either side of the sign, 18, is that correct?

A Yes.

Q And you back into that open field?

A Yes. We both proceeded to back in a zigzag fashion across here (indicating).

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Q And how far did the other police officers go, how far did they go?

A The Bureau of Indian Affairs' car backed toward Highway 18, and there is a crest of the hill. This area (indicating), between this triangle formed by the two roads, referring to Government 18 -- and Highway 18 is flat open area, and just to the west, southwest, and more or less parallel to

Highway 18 is a crest of a plateau that goes down through here (indicating). The Bureau of Indian Affairs' car got just over the edge of the crest.

Q And how far did you get?

A Again referring to the triangular area, there is an old roadbed right along the top of this crest (indicating). I was having trouble. I was in the zigzag fashion. My car was going down, and I started into this dip (indicating). I happened to see it coming up, and I knew it was deep enough that I would probably upset, so I swerved and tried to avoid this old roadbed here and slid into the roadbed sideways.

Q At that time were you receiving any fire, was anyone shooting at you?

A Yes, we were. As we started to back from the vicinity of the red and tan house, there were individuals in the vicinity of these residences here (indicating), referring to the log house, the white house and the green house -- were firing at us as we backed from the area.

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Q And what happened to you as you were backing away from that area?

A After I slid into the old roadbed there with the front tire flat, I could not go any further.

Q So you were stalled there, is that right?

A Yes, I was stuck in that particular location. It would be -- referring again to the triangular area just off the curve of the road which is on the far northwest side of the triangular area.

Q I take it then there is an old roadbed that runs parallel to Highway 18, is that correct?

A Yes, that is correct. I don't know -- two or three feet deep, that runs parallel to Highway 18.

Q And is that roadbed at the edge of the plateau?

A Yes, more or less. It does set up on top of the plateau in this particular area here (indicating).

Q And the plateau, I take it, also runs parallel to Highway 18?

A The crest of the plateau, yes.

Q Now, did you talk with Special Agent Williams at this time?

A No, I did not. The last communication I had with him was way back up Highway 18 before I stopped my car to get my bullet-proof vest and rifle out of the trunk.

Q Did you talk to him, did you say anything to him at this time?

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A After --

Q (Interrupting) No, initially when you were back on the road.

A No, I did not. He had told me at that time to come to the house with an outhouse, some distance from him, and to get on a hill and give him some fire cover or he would be killed.

Q What, if anything, did you say to him?

A I just -- if anything, I just told him I was -- I don't know if I said anything to him.

Q Did you indicate to him that you were on the way?

A Yes, I did, to the best of my recollection.

Q Did you receive any communication after that, did he say anything?

A No, I did not.

Q What was the last thing that he said that you recall?

A To the best of my recollection it was that he directed me to the house, with the outhouse some distance to it, and to get on the high hill and give him some fire cover or he would be killed.

Q Did you hear any sounds other than voices on the radio?

A Yes, I did. During the conversation there was also, what appeared to me, the sound of shots over the Bureau radio.

Q When you arrived at the residence called Wanda Sears' residence, did you hear anything at that time?

A No, it was all quiet when I stopped at this location here {84} (indicating).

Q Now, while you were driving up, did you have your window down?

A Yes, I did.

Q Did you hear any shots as you were driving up that road?

A No, I did not.

Q You may resume your seat. Would you describe what happened next?

A I crawled out of the side of my car. I took my rifle, and I fired -- started firing toward the individuals that were shooting at me.

Q And they were in the area marked "residences" up there, is that correct?

A Yes. On Government Exhibit 71 it would be in the vicinity of the white house.

Q And approximately how far were they from the white house, in which direction from it?

A They were around the white house and in the trees to the west of the white house.

Q Could you see individuals at that time?

A Yes, I could.

Q And what, if you can say, did they appear to be -- what did they look like?

A They appeared to be Indian males.

Q When you got out of your car, you indicated that you fired {85} two shots in that direction, is that correct?

A Yes, I did.

Q How many shots did you fire?

A I fired, to the best of my recollection, four shots, one clip, and they just continued to shoot at me. I didn't appear to be getting close. I looked down, and this rifle -- I had had a scope on it, and the scope was ajar on the mount, so I took -- it had a release type mount, so I took the scope off and fired two or three more rounds with the iron sights or the open sights.

Q Were they shooting at you up to that time?

A Yes, they were.

Q When you took the sights off, did they continue to fire at you?

A After I fired the two or three rounds, they disappeared into the trees or behind the residence.

Q How long did you stay in that position?

A I was in the vicinity of my car there until -- most of the afternoon, until about 6:00 p.m.

Q Were you receiving any fire during this time?

A Yes. We received fire off and on all afternoon.

Q Did anyone else arrive at the area?

A Yes. There was other Bureau of Indian Affairs' policemen and also members of the South Dakota Highway Patrol and some of the surrounding Sheriffs' offices and city police.

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Q O.k. Who was the first person to your knowledge to arrive after you arrived at the area?

A There would have been the Pine Ridge Police Department representative -- I don't know which one would have been there -- their acting agency Special Officer that was on the scene, then the Acting Bureau of Indian Affairs' Superintendent for the Reservation also came to the scene.

Q O.k. Did anyone at this time go toward the houses at any time during the afternoon, go in toward those places where the shots were being fired?

A Yes, they did.

Q What time, do you remember, was that?

A At approximately 12:30 there was a non-Indian female entered the area.

Q And who was that?

A JoAnn Ladeau.

Q Do you know why she was going in the area?

A Yes. I received radio transmissions that she had talked with Acting Bureau of Indian Affairs' Superintendent, Kendall Cumming; and she wanted to go in in an attempt to negotiate with the individuals who were shooting at us.

Q And did you see her go into that area?

A Yes. After the radio communication, I saw her enter the area of the tan and red house, referring to Government Exhibit No. 71.

{87}

Q Did she stay at that place while you were there?

A She drove in on the road which passes the Jumping Bull Hall, stopped in the vicinity of the tan and red house; and when she got out of the car and started to the house, I got on the loudspeaker and told her they were to her left, and then she walked to the vicinity of the three houses, the log house, the white house and the green house on Government Exhibit No. 71.

Q And could you see her at that time?

A I saw her off and on, yes, while she was in there.

Q And approximately how long did she stay there?

A I estimated that she was in there about an hour.

Q Did you fire toward those houses at any time?

A No, I did not. After I fired my sixth or seventh shot, I did not fire again that afternoon.

Q And this was during the time of a truce?

A Yes. Mr. Cumming told me that she had agreed to enter the area and attempt to negotiate with these people, and he asked for a cease fire; and at that time I was the only individual in that area. There was no one firing towards the individuals at the residences.

Q During this time did you receive any gunfire?

A Yes, I did. As I stated, I received intermittent gunfire at my location during the afternoon.

Q And this was during the time that she was in this area?

{88}

A To the best of my recollection, I also received fire while she was in the vicinity of those houses.

Q How long did she stay in this area?

A To the best of my recollection she stayed about an hour.

Q O.k. Did you see or observe during this period of time where she was, where she went or anything like that?

A At one point she was talking with some individuals in the vicinity of the white house and the trees, to the west of the white house. I also saw her walk back to the northwest and go in a westerly direction down off the crest of the plateau.

{89}

Q Now have you since that time walked to the area where she was?

A Yes. I have.

Q Now tell me, what could you see if you were standing in the area where you saw her walking?

A After you get off the crest of the plateau you can see the entire area including the vicinity of the area marked Coler's car.

Q So from that, now from where you were could you at any time see the area which was, which is marked Coler's car and bodies as SA Williams and SA Coler?

Q Could you see it from where you were, where you were in your car?

A No. I could not.

The crest of that plateau and the plateau which extends back to Highway 18 is approximately twenty to thirty feet higher in elevation than the plateau in which is marked Coler's car and bodies of SA Williams and SA Coler.

Q Is that a relatively abrupt drop down the plateau?

A You can drive off of it but it does taper right off.

Q Are there some roads there that you can drive to the bottom that are indicated?

A Yes. As exhibited on Government's Exhibit 71, there are some roads that pass, they're trails is all they amount to that {90} pass into that area.

Q Approximately how long did JoAnn LaDeau stay in this area?

A She was in there about one hour.

Q So did you see anyone else go into this area that afternoon?

A Yes.

To the best of my recollection after she left the area there was another individual who entered the area.

Q Okay. Who was that? Did you receive an announcement that he was coming into the area?

A Yes. There was a, a radio communication that an elderly gentleman was going to come into the area. He also wanted to try to negotiate.

Q And who was that?

A Wallace Little, Sr.

Q Is he related to the Wallace Little, Jr. that was living in that residence to the west, or to the northwest?

A Wallace Little, Sr. is the father of Wallace Little, Jr. and also June Little who lived in the tan and red house on Government Exhibit 71.

Q You observed him driving into this area, is that correct?

A Yes. I did.

Q And where did you go when you saw him go into the area? Did you --

A He also drove into the house, or to the, on the road that runs alongside Jumping Bull Hall, drove past the tan and red {91} house and stopped in the vicinity of some vehicles which were parked just outside of the log house.

Q And where did he park if you could please point it out with the pointer on the map?

A There are, there were two other vehicles parked in the vicinity of this, this little black object which is north of the log house and to the best of my recollection he stopped right in the vicinity of those two other vehicles.

Q And approximately how long did he stay there?

A He was in there just a few minutes and turned around and left.

Q Okay. And which direction did he go out?

A He came back out, passed the tan and red house and back out this direction and went to the southeast on Highway 18.

Q And that by indicating, he went again by the road called Jumping Bull Hall?

A Yes. Past the road which passes by Jumping Bull Hall and then he continued on.

Q Did you see him get out of his car while he was there?

A I don't recall seeing him get out of his car; no.

Q But you saw his vehicle, you saw it go in and you saw it go out, is that correct?

A Yes. I did.

Q Now did you have any conversation with the, with other people on Highway 18 at the time he drove out?

{92}

A Yes. At that time I tried to get someone south of that area, or southeast of that area to stop this pickup.

Q And did they stop it?

A No. I had received no media of communication that they were able to stop the pickup.

Q Did you see him go on past the roadblock?

A I could not see a roadblock from my location; no.

Q Now what time approximately was that that he left the area?

A I estimate it to be around 1:30 p.m.

Q Approximately how long did you stay before anyone else went into that area?

A I was there for the remainder of the afternoon and it was about 3:00 o'clock in the afternoon when the next individual entered the area.

Q And who was that?

A Edgar Bear Runner.

Q Okay. At 3:00 o'clock in the afternoon you indicate that Edgar Bear Runner went into the area?

A Yes.

Q And he was permitted to go into the area?

A Yes.

Again he had talked with Mr. Cumming and the acting agency special officer, Neil Moore, and he was allowed to enter the area and attempt to negotiate.

{93}

Q So he was going in to talk to the people in the residence, is that correct?

A Yes. This is -- yes.

Q Approximately how long did he stay in the area?

A He was in there the first time about twenty to thirty minutes.

Q And where was he, or could you see him while he was there?

A Yes.

Again he went to the vicinity of the white house on Government Exhibit No. 71.

Q Was he on foot?

A Yes. He walked in.

Q And did he stay, did he go into the house or stay outside the house? What did he do?

A To the best of my recollection he just talked with the individuals outside of the house.

Q And what did he do next?

A He turned around and came back out to our location.

Q At what time did he leave on the first occasion?

A About, he came back to our area about 3:30 p.m.

Q I want to back up.

When JoAnn LaDeau left the area, did anything happen at that time?

A Yes. After she left the area they attempted to talk with her. She'd only stopped briefly and said she couldn't negotiate {94} with her people and refused to talk with the officers and left the area.

Q Now at that time did anything happen concerning you and the people at the houses?

A Yes. After she left, then they started firing again at our location.

Q And what was the nature of the fire: was it a few shots or --

A At times it would be heavy fire and then it would just be a shot now and then.

Q During this time did you return any fire?

A No. I did not.

No one from my location there fired toward the residences during the entire afternoon.

Q And why didn't you fire in that direction?

A Primarily because we didn't know what the status of Agents Williams and Coler was. We didn't know if they were hostages, if they were in the house or what their situation was.

Q After Edgar Bear Runner came out the second time you indicated he had been there about twenty minutes, is that correct?

A Yes.

Q How long later was it before he went in the second time?

A He talked briefly with Mr. Cumming and Mr. Moore and he was asked if he had seen the agents and what their condition was {95} and he said he had and they appeared to be dead.

Q That was the first time or the second time?

A That was the first time.

Q Okay. And did he indicate where they were?

A No. He did not.

Q Approximately what time was it that he gave that indication?

A It would have been 3:30 or 3:45.

Q And did he have occasion to go back into the area?

A Yes. At that point Mr. Cumming volunteered to go in with Mr. Bear Runner to determine the specific condition of Agent Coler and Agent Williams.

Q And what happened next?

A They walked into the area. I saw them walk by the tan and red house off the crest of the plateau.

They had returned a short time thereafter and Mr. Cumming told me that, that Ron and Jack were dead.

Q Did he come up to where you were at that time?

A Yes. I was there when he came back out.

Q Did Edgar Bear Runner ever go back toward the residences?

A Not on the second trip; no.

Q What happened next?

A We were attempting to get organized so we could secure those houses.

Mr. Bear Runner wanted to have Mr. Cumming contact the Bureau of Indian Affairs in Washington and Aberdeen before {96} any assault was made and there was some negotiation around there.

Mr. Cumming and I had a discussion concerning jurisdiction in this operation.

Q Tell me, did anyone else come out of that area?

A Yes. They did.

Q And would you tell us what, approximately what time that was and who you observed.

A Just prior to Mr. Bear Runner's appearance on the scene at 3:00 o'clock I received a radio transmission from the State police that there was a young individual walking on the crest of the plateau with his hands up.

Q Would you point out where that was.

A When I first observed this individual it would have been in the vicinity, in this vicinity right here.

MR. HULTMAN: And that is, Your Honor, may the record reflect that that's approximately one foot directly to the left of the tent city area on the chart, a distance of one foot?

THE COURT: The record may so reflect.

MR. HULTMAN: Thank you, Your Honor.

Q (By Mr. Sikma) And would you direct which direction this individual was walking.

A Yes. This individual walked along the plateau along the edge of the plowed field and to the vicinity of three residences so marked on Government Exhibit No. 71.

{97}

Q And where if anyplace did he go from there?

A He was around there when Mr. Bear Runner was in there and him and Mr. Bear Runner walked out to our location.

Q And did he have any indication, did he talk with anyone or make any statement?

A Yes. We attempted to, to interrogate him as to what the situation was in there and he only related that there were some armed individuals in the trees and Mr. Bear Runner told him not to talk with us.

Q What happened next? First of all, what time was this approximately?

A When Mr. Zimmerman and Mr. Bear Runner left?

Q Yes.

A Sometime around 3:30 or 3:45.

Q Are you sure about that time?

A That's strictly an approximation. I hadn't made no notes at any time that entire afternoon.

Q So this was sometime later in the afternoon, is that correct?

A Yes. Yes. It was.

Q Where did you go from the, did you eventually leave this particular area?

A Yes. The, the houses were eventually secured by law enforcement personnel and after I received word that they were secured I entered the area of the houses.

{98}

Q Okay. And where did you go?

A I first drove to the vicinity of the white house referred to in Government Exhibit No. 71.

Q Did you at that time have occasion to go to the bottom of the hill?

A Yes. After I was in the vicinity of the white house and the green house I walked to the vicinity of what is marked on Government Exhibit 71 as Coler's car.

Q Did you, have you seen any photographs that reflect what you observed at that time?

A Yes. I have.

Q I will show you what are marked for identification as Government Exhibits 6A, 6B, 6C and 6D.

MR. TAIKEFF: May we approach the side bar, Your Honor.

THE COURT: Yes. (Whereupon, the following proceedings were had at the bench:

MR. TAIKEFF: Your Honor, at this time we thought it would be appropriate to state to Your Honor the purpose for which we filed a trial memorandum which listed the various objections we intend to make as the Government offers evidence.

We trust that the understanding with the Government is that we file it both for the Court's guidance and for the prosecution's guidance so that they would understand that our {99} position is that we think that there is certain prejudice involving those exhibits and in the showing of those exhibits in any way in an effort to introduce them into evidence. I don't know that these particular photographs are on the list because I haven't seen them at this particular moment but I'd like to make clear that we believe that the memorandum will reserve any of these objections in the hope that we make sure that Your Honor has ruled on those particular items before any revelation of them is made to the jury.

MR. HULTMAN: Well, Your Honor, we certainly are willing to hear in good faith and counsel I know understands that and we, there in this case has been no showing to the jury at all.

MR. TAIKEFF: I understand.

MR. HULTMAN: But we're going to go forward at this time and we'll hope that you will at least, you know, Elliot will come forward as to, on each of the issues because until that time we're not going to know for certain what your posture is which I don't know so in some compartment in the file, but at the present time I think we're --

MR. LOWE: Your Honor, the normal procedure is to show opposing counsel the exhibit before you show it to a witness and then we will know in advance and can approach the bench before a possible objectionable item is in evidence and I think --

{100}

MR. HULTMAN: Fine. Everybody is familiar with this, Your Honor, and we'll follow it.

MR. SIKMA: I am certain opposing counsel knew precisely what I was dealing with.

MR. TAIKEFF: The exhibits are all marked so we will all know which, we each have a list of them.

MR. HULTMAN: I didn't make any remarks to the following until you mentioned to the Court what the specific function of that memorandum was and we wanted to make sure what it was.

MR. SIKMA: We have also filed a memorandum in this regard, with regard to these exhibits and this is in response to the defendant's motions.

THE COURT: That was filed last night?

MR. SIKMA: Yes, Your Honor.

MR. HULTMAN: Generally speaking I think the --

MR. TAIKEFF: The position of our memorandum, but to make it clear to the Government, our position is that we do not wish to restrain the Government's effort to prove any fact which it thinks it has a legitimate purpose in proving and in order to avoid any prejudice we're prepared to stipulate to any fact which any of the evidence would place before the jury in order to avoid the prejudicial impact that we believe is inherent in certain of the exhibits and those are the exhibits which are listed in our memorandum.

We have in some instances made a legal objection and {101} in the alternative, we make the objection and if Your Honor should find that our legal objection is not sufficient, that there is a prejudicial basis for objecting.

Where we make that claim of prejudice in every instance we are prepared to make an appropriate stipulation so that the Government will not be hampered in proving facts.

All we wanted to do is to avoid undue emotional impact on the jury and we are prepared to make essentially any stipulation necessary to satisfy the Government's needs except their need to raise the emotional level of this case.

MR. LOWE: May I point out, Your Honor, that this is, a fairly important issue is going to be dealt with in other pictures. I don't know if Your Honor has had a chance to see any of these other pictures.

I might offer a suggestion that Your Honor may want to take a midmorning recess so the jury can be excused and we can deal with the memorandum because your ruling in this instance is going to affect substantially the rulings on the later matter also and I think Your Honor would want to see those pictures in order to get a sense of them. I think it's very difficult for you to decide with all of us clustered around.

THE COURT: What is the Government's response?

MR. HULTMAN: Well, Your Honor, our position is that we would not accede that the request of counsel not as to procedure but as to the ultimate issue, I mean there's no sense {102} of putting them in evidence as the jury, I mean that if the ultimate issue and evidentiary items that we have

submitted and that are on the exhibit list and the counsel has agreed to in discussion back and forth.

The Government, one, intends to enter them as evidence and, two, we believe there is a legitimate basis for every, D, for example, just starting with these four photos, these are four photos, these are four photos of the exact situation in the case of this as the bodies were found and this is, if there's any piece of evidence that ought to be admissible, it certainly ought to be this.

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These photos then show at the moment here when the bodies are turned back, as you can see, to see all the various wounds and a number of items of evidence that are going to come into testimony here, that's the purpose itself as it is as gory as it is that is the facts and we don't think that the Government ought to be deprived of showing this is the crime of murder.

This goes to the very things that are pictured here and key evidence is involved here and this is the posture we take on all of the items of evidence, Your Honor.

MR. SIKMA: One other thing, Your Honor.

The Government cannot be expected and should not be expected to stipulate its case away.

There are obviously things which have more of an impact and it's a legitimate purpose to show this evidence to the jury rather than being required to stipulate to it.

I believe we cited in our Brief on a certain case in this regard and when the Government stipulates to certain things merely because, like the defense counsel is willing to write out a stipulation to it, this affects the effectiveness of our case which is a legitimate purpose of presentation of a case and advocacy and it's one of the things that are necessary in order to give the jury a true picture of what occurred and not merely a picture in black and white and a reading of some stipulation which does not give them an indication as to what {104} actually happened and that's why it's necessary.

THE COURT: What's the specific issue before the Court at this moment?

MR. LOWE: Whether those pictures should be admitted under Rule 403, prejudice, overwhelming prejudice or relevance.

MR. TAIKEFF: It seems, Your Honor, if I may have those photographs for a moment, Mr. Sikma, my understanding of the evidence and this is what the agent came upon when they discovered the dead agents, this is a true depiction of what the scene was as they found it.

Now we have these subsequent photographs. This one I would identify. The first one I refer to is 6A. That's what they came upon when they arrived at the scene.

6D, Your Honor, is a photograph made when the agents were turned over by other agents or other law enforcement people and as Your Honor can see, it's a close-up which does not reveal anything that the first photograph doesn't reveal except gore, to use a single word.

Likewise 6B and 6C are further close-ups of the individual agents.

Now there's no aspect of the pathology of this case which is in dispute. We are prepared to stipulate that any of the findings of any pathologist concerning the number of wounds, the impact of the wounds, the type of wounds, whether they were fatal or nonfatal, whether they were disabling. None of that is {105} in issue as far as we are concerned, Your Honor.

The only issue is, in this case is whether Leonard Peltier participated in these deaths, in the killings.

The fact that the agents are dead is not in dispute. The fact that they were on official duties is not in dispute.

To show somebody these two photographs, 6B and 6C, establishing and substantially showing where the agents were or that they were dead is totally unnecessary to this. It is prejudicial; it is prejudicial because it was horrifying.

Now it may be that it is necessary for them to position the agents relative to the car, et cetera. For that purpose I'd say photograph 6A is perfectly appropriate but the remaining photographs, Your Honor, are there for one purpose only and that is they're for their emotional impact and the answer to that question, I think, is clear and I would ask that the Government state what specific fact Exhibits 6B, 6C, and D would establish that 6A doesn't establish.

MR. HULTMAN: Many things.

MR. LOWE: May I make one clarification.

We only got the memorandum of the Government last night and we haven't had a chance to do a lot of research on it but from what I read and from what I would guess, I suspect that in none of the cases that are cited for the proposition of gory pictures coming in, in none of those cases was the defendant willing to stipulate the ultimate fact of pathology and that's {106} what we're saying, as far as I know, as to what is in the ultimate pathology that, we are not willing to stipulate to high-powered rifles, distance that they were fired.

If the Government would tell us, make an offer of proof we'll stipulate to it I'm quite sure and I think that's the big distinction and then we'll proceed on Rule 403 which at least says that the probative value must outweigh the prejudice and we can stipulate to the probative value. It's difficult to see how these pictures would meet that test.

MR. SIKMA: Your Honor, there are a number of things that can be shown but we choose and in the light of being effective in our presentation of this case to show things that the pathologist will be able to use with regard to these bodies only.

The pathologist who is examining the bodies and who did not conduct the autopsies, examines the photographs during the course of the autopsies. They're, of course, necessary but he must also have things that he can see and compare with what he has observed in the photos of the autopsies as well as the bodies at the time so he can see if there's any substantial difference and

he needs this in order to make a valid comparison and I believe that they're legitimate for this purpose.

The chain of evidence, custody of all the evidence as far as it's concerned with regard to this agent who has made this observation can testify simply that he made those obser- {107} vations and that the only thing that took place on these photographs is that the agents were turned over.

Now we don't see the necessity to show these photographs to the jury but we do see the necessity to show them at a later date after our pathological evidence is brought in.

In the last trial it was stated that all things would be stipulated to and also, but in the closing argument some things came up which were precisely the different. Mr. Lowe is the one who brought that up.

I'm not going to agree to go along with it at this time for that reason because I thought we had substantial agreements in that regard.

After our witness was gone and we had agreed to stipulate to those things, the stipulation did not take place.

Then in addition to that an argument came up which was a very good argument on the closing argument because we didn't have an opportunity to precisely put these things into the record and that's what we should do, Your Honor, on this occasion.

MR. HULTMAN: Your Honor, -- just a minute. You guys have had an opportunity.

In addition, Your Honor, there are evidentiary items that are in these photographs at the moment which have to do with the types of wounds, how the wounds are, the relationship of the bodies to the car, the items that you can see in those {108} photos 6B, C and D that will be connected up and for which I will at least make a disclosure right now since counsel wants evidently an indicational disclosure, ammunition pouches, for example, shown specifically in these photos that do not show in other photos.

Now if I know you want to stipulate, but I don't have to accept that stipulation, but it goes and that's my point, Your Honor. Throughout this trial we're going to be faced with constant stipulation and that, that one of the purposes for stipulation, of course, a very legitimate one, and the Government has agreed to this and will try to continue, that we remove issues and matters in order to shorten the trial but the Government has no duty, in fact it has an obligation not to stipulate to those things which have probative value to a jury and we're going to retain that right from the very beginning and I'm going to fight extremely hard to have that opportunity because we are concerned with the crime of murder here.

Now we're not talking about photos by comparison, Your Honor, not those at the immediate place within seconds or two or how they're found but we're talking about autopsies where bodies are cut apart and things of this kind which don't have the same probative value of photographs of this kind do and we are taking it one step removed and it's for these reason, Your Honor, that the Government must insist that in all instances it has an opportunity to take its case forward to the {109} jury for the probative values that are involved and only if the Court would find under the Rules and under the cases that whatever the item is is of such a nature and so shocking in such a

way to go beyond the probative value, it is then the responsibility of the Court and rightly so to make that determination, that it's going to resolve to get an unfair result far as the jury consideration is.

But I submit to the Court, no matter how shocking these photos here may be, that the jury has a right to see those exactly as they are. That is how those bodies were found, when turned over those are the conditions that it was in and it has to be, they are items that are involved in this case.

MR. LOWE: Let me just make a factual correction.

Mr. Sikma misstates what took place last summer, I think, in the statement but the defendants last summer were not willing to stipulate to the ultimate pathological facts. As a difference we tried to stipulate to some of the pathology at what stage we made it or broke it down but they're, as to the offer to stipulate the ultimate facts, we are willing to stipulate everything. If they want to have a stipulation that a person was stabbed at a certain place and someone held a certain weapon at a certain level and --

MR. HULTMAN: We're going --

MR. LOWE: Let me finish, Mr. Hultman. They're willing to stipulate as such to who, anything {110} of that and the probative value of the evidence being prejudicial is crucial.

MR. SIKMA: Your Honor, with regard to that, I don't think the jury could understand what we're saying about a pathological stipulation if they can't see the photographs to which they're, we are stipulating about the pathological findings. I don't think they would understand what we are talking about.

THE COURT: Which of those photographs do you wish to support your pathological findings?

MR. SIKMA: All of them.

THE COURT: All of them?

MR. SIKMA: Yes. But in addition, additional photographs, not all of them, some of them in the book show the bodies in relation to the house and which show the automobiles and certain things like blood on the automobile, Coler's automobile and how they were found in relationship to the various houses which are on Government Exhibit 71.

THE COURT: What were you proposing to do right now?

MR. SIKMA: Right now I plan to show this witness -- I would offer 6A. I would, well, I guess I could at this time offer 6D, 6, excuse me, 6B, C and D also because this is what the bodies looked like when they were turned over and that, I think we have already sufficient evidence to show this but I {111} could wait with that until the, until the pathologist or other witnesses who moved the bodies testify.

MR. HULTMAN: There will be no objection to 6A, Your Honor. This is fine.

MR. TAIKEFF: If I may add one comment, I do not believe the Government has in any of its argument presented anything to the Court by way of saying what is contained within these photographs they intend to prove.

There is nothing in these photographs that is in dispute. Mr. Sikma speaks in terms of being effective with the jury, a very general statement which I suspect is a euphemism for getting a guilty verdict by showing them horrible photographs.

I don't know what it is that the Government thinks they will be inhibited from proving if they don't show these photographs other than the fact that it was horrible evidence and I think, Your Honor, the ultimate issue in this case is who was standing there when these agents were shot and who pulled the trigger, not whether they were shot at close range and not whether someone pulled the trigger because we all know that that occurred and it's not in contention and it will not be disputed in this case.

MR. SIKMA: On the contrary, Your Honor, we can't show the things to which we stipulate clearly without the jury being able to see what we are talking about because it is just {112} not understood what, you're talking about something, vaguely about someone in a certain condition. It just isn't the same. It doesn't have the same effect as understanding what it actually is and I can speak in that regard from experience after having worked with these photographs from a standpoint of reconstructing a crime scene.

The more that you're able to see them, in fact the more there is available to see for the jury, the more access they have to them, the more they will be offended by the, by the effectiveness of them as well.

MR. HULTMAN: Your Honor, might I suggest that we take a recess in order to give the Court an opportunity and also the jury a rest. I think we're at that time of the morning. That's the only reason I suggest it.

THE COURT: Well, we are about due for a recess.

But it is the ruling of the Court that in view of the seriousness of the offense that is charged in this case that the relevancy of these four exhibits outweigh any possible prejudice and they will be received.

{113}

(Whereupon, the following proceedings were had in the courtroom in the hearing and presence of the jury:)

Q (By Mr. Sikma) First I will ask you, you have had an opportunity to go to the bottom of the hill to observe the bodies of Special Agents Williams and Coler, is that correct?

A Yes, I did.

Q I want to show you Government Exhibit 6A, B, C and D and ask you whether or not you recognize these photographs and whether or not you can tell me whether or not you've seen the circumstances under which those photographs were taken?

A Yes, I have.

Q Do they fairly depict what you observed at the time you observed Special Agents Williams and Coler?

A Yes, they do.

Q Are they photographs of Special Agents Williams and Coler as you found them at that time?

A Yes, they are.

MR. SIKMA: Your Honor, I would offere into evidence Government Exhibits 6A, 6B, 6C and 6D.

MR. TAIKEFF: May I examine on the voir dire, Your Honor?

THE COURT: You may.

MR. TAIKEFF: I think you just said those photographs depict the agents as you saw them when you arrived at the scene, is that correct?

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THE WITNESS: Yes, sir.

MR. TAIKEFF: Would you look at photograph 6A.

THE WITNESS: Yes, sir.

MR. TAIKEFF: Is that statement true with respect to photograph 6A?

THE WITNESS: Yes, it is.

MR. TAIKEFF: Would you look at photograph 6B.

THE WITNESS: All right.

MR. TAIKEFF: Is that true, is that statement true with respect to photograph 6B? Yes or no?

THE WITNESS: I'd like the question again. I'd like the question again.

MR. TAIKEFF: Is that statement you made that the photographs depict the agents as you saw them when you arrived at the scene true with respect to 6B?

THE WITNESS: Not as I found them; no.

MR. TAIKEFF: Is that statement true with respect to 6C?

THE WITNESS: No.

MR. TAIKEFF: Is it true with respect to 6D?

THE WITNESS: No.

MR. TAIKEFF: No objection with respect to 6A, Your Honor. We object to the others.

MR. SIKMA: Your Honor, I have a couple of further questions.

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Q (By Mr. Sikma) What is the difference with regard to 6B, C and D?

A Photograph 6B, 6C and 6D are a depiction of the condition of the agents after they were turned over. They were found facedown. After they were turned faceup the photograph 6B, 6C, 6B, 6C and 6D depict the agents' conditions after they were turned over.

Q Is that the only difference? Was anything else changed?

A No, it was not. They were rolled over on their backs.

MR. SIKMA: I make the reoffer, Your Honor.

MR. TAIKEFF: May I examine further on the voir dire?

THE COURT: You may.

MR. TAIKEFF: Were you present when the agents were moved?

THE WITNESS: To the best of my recollection, sir, I was.

MR. TAIKEFF: Did you have anything to do with the moving of the agents or the supervising of those who moved the agents?

THE WITNESS: No, I did not.

MR. TAIKEFF: Did you have anything to do with the determination as to which views would be taken, which views would be photographed?

THE WITNESS: No, I did not.

MR. TAIKEFF: Did you have anything to do with how the {116} photography was to be made?

THE WITNESS: Yes, I did.

MR. TAIKEFF: What role did you play in that connection?

THE WITNESS: I wanted, I insured and I had discussions with other agents concerning an adequate number of photographs of the crime scene.

MR. TAIKEFF: And were you the one who determined how many photographs would be made?

THE WITNESS: Not personally; no.

MR. TAIKEFF: Do you know who made that decision?

THE WITNESS: It was a mutual decision, to the best of my recollection, between myself and Agent Dean Hughs.

MR. TAIKEFF: Was Hughs the person who made the photographs?

THE WITNESS: These particular photographs, sir?

MR. TAIKEFF: Yes, sir.

THE WITNESS: I don't recall. I'd have to do some research on that. They were photographs made with my camera and at least two other cameras at the crime scene that afternoon.

MR. TAIKEFF: Can you tell us who made the decision as to whether the close-up photographs would be made? Two of those photographs are close-up photographs, aren't they?

THE WITNESS: Yes. At least two, sir. No. Like I say, we discussed it and we wanted to take as many photographs as we could so we'd get an accurate depiction {117} of the crime scene as we found it on that afternoon.

MR. TAIKEFF: Turning over the agents, did that introduce some inaccuracy?

THE WITNESS: We were concerned with the wounds that they had suffered. That was the primary reason for turning them over.

MR. TAIKEFF: You knew there was going to be an autopsy, didn't you?

THE WITNESS: Yes.

THE COURT: I believe those questions go beyond the voir dire as a basis for objection.

MR. TAIKEFF: Yes, Your Honor.

THE COURT: Mr. Adams, did you actually see the bodies turned over?

THE WITNESS: Yes, I did, Your Honor.

THE COURT: And those 6A, 6B, 6C, are they a fair and accurate portrayal of those bodies as they appeared after they were turned over?

THE WITNESS: Your Honor, it would be 6B, 6C and 6D are a fair and accurate representation of the bodies after they were turned over; yes.

THE COURT: The Exhibits 6A, 6B, 6C and 6D are received in evidence.

The Court will recess until 11:00 o'clock.

(Recess taken.)

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(Whereupon, at 10:50 o'clock A.M. the following proceedings were had in judge's chambers:)

THE COURT: The reason I asked Counsel to come in is because the Clerk of Court received a call this morning from a Patricia O'Day relating to one of the jurors and I instructed the Clerk to have her present it in affidavit form which has been done. I will pass it around to Counsel.

MR. HULTMAN: Just read it, Elliot.

MR. TAIKEFF: May I do that, Your Honor?

THE COURT: Surely

MR. TAIKEFF: It's dated 3/17/77. "I hereby swear that on the 10th day of March, 1977 I in the presence of two witnesses at a coffee break heard Shirley Klocke say these words during our conversation about her eminent jury selection process in the Peltier case: She said, quote "I am so prejudiced against Indians." unquote. She also made this statement back in the office in more general terms.

I swear this statement to be true as I was prompted by no one to make this statement and make it as a matter of principle to my own conscience." Signed Patricia O'Day, witness to the conversation. And it is sworn to before a notary public of this state.

THE COURT: She names two persons who apparently were witnesses to the conversation.

MR. TAIKEFF: I'm sorry. I did not read that correctly.

{119} It doesn't say to the conversation it says, "witnesses to the conversation," and then two people have signed their names. They appear to be Margaret Loss, L-o-s-s and Carol Schatzke, S-c-h-a-t-z, or S-c-h-a-t-z-k-e.

May I return it to Your Honor?

THE COURT: Unless you wish to.

MR. HULTMAN: Could I look. Fine. Thank you.

Your Honor, could I at least make a query or a response of some kind introductory?

THE COURT: That's the reason I asked Counsel to come.

MR. HULTMAN: First of all, Your Honor, of course, I know nothing about what we're looking at and I would like to inquire, and again with no, certainly no reflection on Counsel, and Counsel understands this, but --

MR. TAIKEFF: The answer to the question is no, we know nothing about it.

MR. HULTMAN: Your Honor, see, the problem is we went through exactly the same thing when you have a juror forced out, as I understand just from the discussions that have gone on, and things that have been said and done up to this time. I have no knowledge of it other than what I've learned in the courtroom and discussion with Counsel.

When you have two groups, as Counsel has indicated, and, one, I'm not sure who makes up one and certainly the second one is so large that maybe it's 500 or 1,000 people that have {120} an interest in this case of some kind that are all over the courthouse, they are all over the community, I run into them every place I go, which have to do, as I say, and it's no reflection or any way directed in terms of counsel or control. I clearly understand that and Elliot Taikeff and I understand that he has no control over that. But it seems to me, Your Honor, that if an inquiry of this kind is to be made, there are two precautionary matters and one is, and that's the reason for my motion I filed a little bit ago with reference to the sequestration as far as witnesses from this point and looking to people that are in the courtroom, that I in no way am implying that searching matters of this kind and interposing is going on. But because of the numbers of people that are involved and their interest in it, in the case out here, it seems to me that the Court has to be doubly cautionary in the terms of, one, finding out the source and how matters of this kind are generated, and I'm not suggesting, because I have no knowledge, that is the case here and I don't want the inference of that kind. I know Counsel understands that that's the motive in which I state what I state now.

I think unless a careful approach is made from that kind, and maybe even some precaution from the Court's standpoint alone, and that's the very reason why again the government requested the sequestering of this jury, because of the opportunity of people to interject themselves and create a problem of the {121} kind here where there is a response of some kind which then leads to a hearing and leads to discussions and so forth. So all I'm saying is, Your Honor, one, I have no knowledge of any kind as to what this event is, but, two, I wanted to state to the Court the genesis of a general problem because it was the same kind of problem that, John, if you remember, we had a discussion --

MR. LOWE: That's a complete misstatement of what happened last summer. We never had that last summer.

THE COURT: I'm, excuse me. I'm not going to get into what may or may not have happened last time.

Let me make a comment at this point. The only thing I'm concerned about is whether or not this juror did actually make that statement at the time. That's the reason I asked for a sworn affidavit from this person as to whether or not this juror did in fact make such a statement and unless Counsel have some different ideas, I propose that she be brought in sometime today in chambers and shown this statement and asked to comment on it.

MR. TAIKEFF: I have an idea in conflict with that, Your Honor.

THE COURT: All right.

MR. TAIKEFF: I think we should not confront the juror now that she's a sitting juror because it may have some affect upon her as a juror.

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I would propose that instead we bring in the three people whose names appear there. That would accomplish two purposes: first, it would avoid the necessity of, or possibly avoid the necessity of any confrontation with the juror unless it becomes absolutely necessary. Secondly, it would allow defense counsel to discover for the first time the identity of this person and exactly who she is and what relationship, if any, she has to the defendant supporters, if I may use a term of no great precision, and perhaps satisfy Mr. Hultman that the defendant or the defense team did not come here with legions who have infiltrated this state. There is an implication of a sinister conspiracy --

MR. HULTMAN: I didn't mean that.

MR. TAIKEFF: Not that Counsel has any connection with it or responsibility for --

THE COURT: I think I understood what Mr. Hultman said and I understand what you're saying.

What is your response to the suggestion made by Mr. Taikeff? MR. HULTMAN: I have no objection, Your Honor. I think the Court --

THE COURT: Well, I'm not going to bring anybody in without the lawyers being present.

MR. HULTMAN: I understand.

MR. TAIKEFF: I understand.

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THE COURT: So I do think --

MR. HULTMAN: I have no objection, Your Honor, to that.

THE COURT: Mr. Taikeff's solution is probably a better solution than mine.

If there are three persons that will, if the other two people substantiate or corroborate what has been said here, then I think my duty is to make a decision as to what should be done as far as this juror is concerned.

MR. HULTMAN: Your Honor, could I ask a question? I would take it from the procedure that's been suggested that it would be the Court that would first make the inquiry of these particular witnesses in the presence of all of us.

THE COURT: Yes.

MR. TAIKEFF: I would hope so.

THE COURT: That is my intention. I would make the inquiry.

MR. HULTMAN: Yes.

THE COURT: I want it to be done on the record and the lawyers be present.

MR HULTMAN: Government would have no objection and join in it.

MR. TAIKEFF: I would like to voluntarily bind myself not to contact those people or to have any of my investigators or other legal workers contact them. I'd like these people to come into the courthouse without any interference or inquiry { 124 } made of them until such time as they appear before the Court.

MR. LOWE: Are you willing to make a similar offer?

MR. HULTMAN: No question.

THE CLERK: I wonder, Your Honor, would you like to go to the extreme of having Summons issued for these three persons and served upon them by the marshals to appear before you at a certain time?

THE COURT: I don't think I have any authority to issue Summons.

MR. TAIKEFF: Your Honor, a Subpoena could be issued. I would think if these people were asked to come they undoubtedly would come. They apparently did this as a voluntary act.

THE COURT: As long as you're here, I have been thinking about the request made by Mr. Lowe yesterday.

We'll follow that procedure and I'll leave it up to you to see if you can arrange for them to come in at some time. And I assume then that Counsel are agreeable that this juror will remain on the jury until I get these people in? We'll try to get them in today.

MR. TAIKEFF: Yes, Your Honor.

THE CLERK: Any particular time of the day, Judge?

THE COURT: Find out when they can come in. We may have to accommodate the court proceedings accordingly.

MR. CROOKS: I would suggest that be done after court and after the jury has left. If these are fellow employees, { 125 } that in itself might create a problem. I would suggest it be done with as few spectators as possible.

MR. LOWE: It won't be a problem if they're brought to chambers. The jury will be in their jury room. It can't create problems possibly.

THE COURT: Ralph, would you find out when they can come. I would like to see all three of them.

Just one thing more. I have given some thought to the suggestion made by Mr. Lowe that the marshals be required to monitor the TV shows to exclude any police shows and I think the only authority, I have kind of concluded the only authority the Court has on sequestration is to prevent the jury from reading or hearing any report on the case and I don't really believe that I have got any authority to move into the area of normal TV programming that they might otherwise be entitled to watch.

MR. LOWE: Would you be willing to receive from authority from that, Judge, other than -- there's a district court decision that just recently did that. Would you be willing at least to tell the jury in your judgment it would be wiser for them not to do that because it might, you asked them as a matter of grave not to do it?

THE COURT: The other thing is the jurors do not have a TV, they do not have radios, they do not have the TV in their room.

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(Whereupon, at 10:50 o'clock A.M. the following proceedings were had in judge's chambers:)

Pages 118-125 placed by Clerk in sealed envelope in file, upon order of the Court.

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THE COURT: Ralph, would you find out when they can come. I would like to see all three of them.

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THE COURT: The other thing is the jurors do not have a TV, they do not have radios, they do not have the TV in their room.

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MR. LOWE: I did not know that.

THE COURT: If they're going to watch TV they have to go down to the marshal's control post and watch it.

MR. LOWE: Maybe I have a suggestion, Your Honor. You certainly have control over the marshals. Order the marshals not to watch television programs that are of violence, police and detectives. It may knock out 85 percent of the programming, I know.

We feel strongly about this, Judge. There is a lot of psychological studies and I'd like to make an offer of showing on it.

THE COURT: You may make a showing on it.

One thing more. A motion has just been handed to me for a sequestration of witnesses. I presume this is a rule of evidence 615 motion for exclusion of witnesses.

MR. CROOKS: I might inform the Court this has been filed moments before coming in.

THE COURT: Have you seen it?

MR. TAIKEFF: We have a copy of it.

Does that mean to exclude them from the courtroom?

MR. HULTMAN: That's correct.

MR. TAIKEFF: I'm sorry it was necessary for the government to put that in writing. We would have stipulated.

MR. HULTMAN: I thought we had an understanding. Really had not put down and the Court had not so ruled.

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THE COURT: As I read the Rules, if either party asks the Court shall --

MR. TAIKEFF: There's no objection to it being done in any event.

THE COURT: Very well.

How to implement it now. Are there witnesses sitting --

MR. CROOKS: We don't know.

MR. HULTMAN: There are none as far as the government. I think merely if the Court would, as well as Counsel know maybe, the Court would make an announcement from the bench to those people that if there is somebody that Counsel has not contacted that is anticipating being a witness, they will be aware.

MR. TAIKEFF: There's no one in the audience, Your Honor.

THE COURT: Very well.

I also am planning to follow the procedure during this trial of having the jury brought in after I have gone in and after everybody's ready to proceed. By that time the spectators have cleared the corridors and I think it will work much smoother. And then occasionally I'm confronted with matters by Counsel which the jury shouldn't hear and if the jury is in when I come in, then we have got the problem of either going to the bench or sending the jury back out again.

MR. TAIKEFF: Would Your Honor suggest a time, I realize { 128 } it's after 11:00 now, it would not be appropriate, when Counsel could see Your Honor about a matter relating to a marshal's office that I don't think concerns the government. It has to do with the problems that the defense team is having.

MR. HULTMAN: Would you want to take it up now?

MR. TAIKEFF: My question is, it needs about three minutes. I don't mind if the government stays.

MR. HULTMAN: We have no reason --

THE COURT: If you don't mind if the government stays, let's take care of it right now.

MR. TAIKEFF: Your Honor, I understood that the order which Your Honor issued in connection with our motion to modify the visitation arrangements said in essence, if not in words, that the matter was wholly within the discretion of the Clay County Law Enforcement officials who run the jail, subject to what their needs were and their desires were, keeping security in mind, et cetera, and that we would therefore be in a position to negotiate with the jailer as to visitation hours and things of that sort.

Yesterday a matter came to my attention that the defendant was trying to have a medicine man come into the jail and perform a pipe ceremony for him. As reported to me, I can't tell Your Honor by firsthand knowledge, but as reported to me the jailer said, "We would like to do it. We have no objection, perfectly all right, except the federal authorities { 129 } wouldn't like it," or, "Have told us not to do it, You get their okay." So I went to see a Mr. Warren last night who was very cordial in his demeanor but who said, "I can't allow that to happen." I said, "It's my impression that the judge's attitude towards the jail is that it's to be run by the jail officials and if they want to permit something it isn't necessary for us to keep going back to bother the judge for an order for some nominal thing that's of really no importance and shouldn't take the Court's time." He said, "That's not my understanding. You have to get everything you want through the Court." I said, "Are you aware of the fact that the Judge has in essence superceded the letter to the sheriff with his order which says," and then I repeated to him what my interpretation of Your Honor's order was. He said, "No, I'm not aware of that." So I brought him a copy of Your Honor's order with attached the letter to the sheriff and he and he said as far as the subject matter of counsel's visitation is concerned he does not read that order as saying that counsel have a right or an opportunity to negotiate with the sheriff for visitation hours which are acceptable to the sheriff. Now if he doesn't read that order that way, then truly the role he's playing in preventing

our client from having this religious ceremony is inconsistent with what we think is Your Honor's attitude on the subject.

THE COURT: The problem as reported to me by the {130} marshal's service is that this person that came down to have this ceremony or powwow, or whatever they call it, went down and told, or at least, of course this is second or thirdhand now, told the sheriff that the Court had ordered that he would be permitted to have a powwow down there.

MR. TAIKEFF: Your Honor, that is inconceivable. I know the conversation I had with Mr. Warren and I know he was unambiguous about it. He said, "You cannot change." I was trying to use that as a stepping stone to persuade him up to a certain point Your Honor didn't want to be bothered with certain things and I tried to persuade him that we had a right to change the visitation hours from 7:30 A.M. to 8:30 instead of from 9:30 to 10:30 without consulting with him, or with you because that's how we read Your Honor's order. He said, "That order doesn't say that." Now if his limitation with the English language or his attitude toward the defendant is such that he has trouble understanding what that order says, we can't get the simplest thing done without bothering Your Honor.

THE COURT: I did not intend that order would change that, I simply intended if you were to be given access to the defendant in addition to those times that were set out in that order and if it was consistent, security would have to be worked out with --

MR. TAIKEFF: That's exactly -- when I first approached {131} Mr. Warren last night, I said, "Mr. Warren, you're probably going to get a call from the sheriff's office because we're about to deliver a certified copy of this Order to the sheriff with a verbal explanation by one of the attorneys on the defense team that we believe that order is a signal to the sheriff when it comes to minutia, as long as the sheriff has been asked and he's willing to accede to it, subject to the necessary security arrangements that it's all right for us to deal with the sheriff on minor matters." He said, "No. That's not true," and that's what brought us to a discussion of the order.

When we got to the order itself he showed an understanding of the order which was wholly inconsistent with its plain language which I can only attribute either to his attitude or to his limitation with the language.

THE COURT: The other thing is I had discussed the matter with him before the order was, I had discussed it with him informally here in chambers, whether he remembers that or not, because I wanted to be sure I was not suggesting anything that was in any way going to interfere with the relationship between the marshal's service and the Clay County Law Enforcement Center.

MR. TAIKEFF: There's no problem about the relationship except as those problems are generated by Mr. Warren when he says there is a problem. He creates a problem when he says {132} there is a problem. Your Honor's orders seem to be clear cut. We would go to the sheriff and say, "Would you mind if we had a conversation between 9:00 P.M. and 10:00 P.M. tonight?" If the sheriff thought it would be okay there would be no intrusion upon the Court's intention. Mr. Warren says that's not true. We have to come to you and ask you if we can make such an arrangement. That seems to be wholly inconsistent with Your Honor's order.

THE COURT: I'll talk to Mr. Warren.

MR. TAIKEFF: Thank you, Your Honor.

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(Whereupon, at 11:12 o'clock, a.m., the Court reconvened in the courtroom; and the following further proceedings were had out of the presence and hearing of the jury, the Defendant being present in person:)

THE COURT: The record may show that pursuant to Rule 615 of the Rules of Evidence, witnesses who are to be called to testify in this case are excluded from the courtroom until after they have testified, and they are excluded from the courtroom after they have testified if there is any probability that they will be recalled for rebuttal or for any purpose.

The jury may be brought in.

(Whereupon, at 11:14 o'clock, a.m., the jury returned to the courtroom; and the following proceedings were had in the presence and hearing of the jury:)

THE COURT: You have just experienced an example of the inability of the Court to keep the time schedule that it sets. I had originally stated that we would reconvene at 11:00 o'clock, but some matters came up which had to be handled and so we are 15 minutes late.

You may proceed.

(Witness resumes witness stand.)

MR. SIKMA: Your Honor.

Q (By Mr. Sikma) Mr. Adams, I want to go back with you a little bit -- during the course of the afternoon, the things {134} you testified to.

Earlier you testified that Wallace Little, Sr., had driven into the area of the houses, is that correct?

A Yes.

Q Would you describe the type of vehicle he was driving?

A It was a red and white pickup. I believe it was a Ford.

Q And when he went out, did he have anyone with him?

A Yes. There were at least two individuals seated in the front seat of the pickup with him.

Q Do you know who those people were?

A No, I do not.

Q During the course of the afternoon were there any sounds other than gunshots?

A Yes. At some time during the afternoon I heard some loud explosions.

Q And where did these sounds come from?

A They came -- it appeared to me they came from in behind the -- south of the three residences, the log house, the white house and the green house, referring to Government Exhibit No. 71.

Q To the southeast of that direction?

A Yes. Yes, the south or southeast. I couldn't tell. They were loud explosions, shaking type of explosions, appeared to be dynamite.

Q Shaking types, you mean the ground shook?

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A Yes.

Q I had one other question about the warrant that you had earlier.

When you would go out to make an apprehension, do you have the warrant with you on all occasions?

A No. We are not required to have the physical warrant in our possession.

Q You indicated earlier that you had observed the area of the crime scene where the bodies were found and so on. Were a number of photographs taken?

A Yes, they were.

Q And are these photographs compiled in any book or anything?

A Yes, they are.

Q Are you familiar with these items?

A I have examined them, yes.

Q I would show you what is marked as Government Exhibit 54, and ask you whether or not -- I ask you to look at Government Exhibit 54 for identification, and ask you whether or not you do recall those photographs and whether they depict what you observed?

A (Examining).

MR. SIKMA: Your Honor, these matters, most of these photographs the Government and the Defendants have stipulated as to certain foundation. There are questions of relevancy, but otherwise stipulations have been made; {136} and we have a written stipulation prepared which has not been signed by all counsel.

MR TAIKEFF: We have so stipulated, your Honor, and we will sign the written stipulation.

THE COURT: Very well. This is as to the foundation?

MR. TAIKEFF: Yes, that's correct, your Honor.

THE COURT: Thank you.

Q (By Mr. Sikma) Do you recognize these photographs?

A Yes. The photographs depicted in Government Exhibit No. 54 are a fair representation of the crime scene as we found it.

MR. SIKMA: I would offer into evidence Government Exhibit 54.

MR. TAIKEFF: May I examine briefly, your Honor?

THE COURT: You may.

MR. TAIKEFF: Agent Adams, you can recall, can you not, the contents of Exhibits 6-a, b, c and d which are already in evidence as photographs?

THE WITNESS: Yes, sir.

MR. TAIKEFF: Are there any duplicates of those photographs?

THE WITNESS: Yes, I believe there are, sir.

MR. TAIKEFF: To the extent that they are duplicates, your Honor, I object.

THE COURT: Are there duplicates of the photographs?

MR. SIKMA: Yes, your Honor, there are duplicates; { 137 } but as a matter of using them, we can take them out insofar as later on going to the jury, but it is easier with regard to some witnesses who will testify to these items if we may maintain some of the photographs in a book and some independently as separate exhibitis for identification purposes.

MR. TAIKEFF: Perhaps, your Honor, it would be simplest if Exhibits 6-a, b, c and d were withdrawn, and the entire book taken into evidence; and then there would be one complete set of photographs.

MR. SIKMA: We would withdraw them -- we would like to use them for identification at certain times.

MR. TAIKEFF. We would have no objection.

MR. SIKMA: You are indicating to withdraw the duplicates, is that correct, in the album?

MR. TAIKEFF: I was suggesting that the easiest thing would be to put the entire album in, withdraw the others from evidence; and they could be used for identification purposes because it would be more convenient to handle the individual photographs than the entire album.

MR. SIKMA: Your Honor, we would rather withdraw the duplicates from the album because the others are exhibits and we will be using them for identification purposes.

THE COURT: Exhibit 54 will be received with the {138} exception of any pictures in that exhibit which are duplicates of 6-a, 6-b, 6-c and 6-d.

(Plaintiff's Exhibit No. 51, having been previously duly marked for identification, so offered in evidence, was received.)

Q (By Mr. Sikma) O.k. Would you go through and describe on each page of that exhibit what the exhibits portray?

MR. TAIKEFF: Objection, your Honor. The photographs are in evidence, and they speak for themselves.

MR. SIKMA: Your Honor, I think that the witness should tell what each of these exhibits are and also should be able to testify, to identify them to the jury.

THE COURT: The witness may testify relative to the identity or what the pictures are. Otherwise the pictures would be meaningless, it would seem to me.

MR. TAIKEFF: That is not what I was I objecting to. I thought we were going to take a photograph at a time and give a detailed description. In view of the observation of many years ago that a picture speaks a thousand words, it is not necessary.

MR. SIKMA: I propose to have him tell generally for the jury, your Honor, what the pictures are so that the jury would be able to later look at the photographs and know what he is talking about.

MR. TAIKEFF: No objection, your Honor.

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THE COURT: That procedure will be permitted, and you may proceed.

Q (By Mr. Sikma) Would you do that, Mr. Adams?

A Referring to Government Exhibit No. 54, Photograph No. 1 is taken from the rear of Agent Coler's car. It shows Coler's car as it was found and the two bodies of the two agents alongside the car.

Q Would you indicate where it was found and where that picture was taken from, by pointing to the map there, 71?

A Agent Coler's car was found in this location (indicating). The bodies of the two agents were found immediately to the northeast of the car. The car was facing toward the direction of the

houses, the log house, white house, green house on Government Exhibit No. 71. This photograph was taken from the rear of the car looking in a southerly direction.

Q Would you go to Page 2, please?

A Again referring to Government Exhibit No. 54, Page 2 is blank. Page 3 is a duplicate.

Q And which one is that?

A I believe 6-a.

Q Thank you.

A Photograph No. 4 --

Q (Interrupting) Would you remove that photograph of 6-a then?

A Photograph No. 4 is again of Agent Coler's car in the {140} condition we found it on that afternoon, and it shows the remains of Agent Williams and Agent Coler. It is taken from the northeast side, from just about where the arrow is that points from SA Williams and SA Coler, toward the car.

Photograph No. 5 is a duplicate of Government Exhibit 6-d as in "David".

Photograph No. 6 is a duplicate of Government Exhibit No. 6-b as in "boy".

Photograph No. 7 is a duplicate of Government Exhibit No. 6-c.

Photograph No. 8 is a photograph of Agent Coler's car as taken from the -- essentially the corral. That would be the southwest of the area marked Coler's car on Government Exhibit No. 71.

Photograph No. 9 is a photograph of the rear area of Agent Coler's car -- shows the bodies of Agent Coler and Agent Williams, looking in a southeasterly direction toward the residence.

Photograph No. 10 is a photograph of the front end of Agent Coler's car taken from more or less an easterly direction from the area marked Coler's car on Government Exhibit No. 71.

Photograph No. 11 is a photograph of the rear window of Agent Coler's car taken from the left side of the car, left rear side of the car.

Photograph No. 12 is a photograph of Agent Coler's car, {141} and that would be looking in the direction of the tan and red house as depicted on Government Exhibit No. 71. It would be again back from where there would be a small corral there then.

Q On that photograph what is the condition of the trunk of the vehicle?

A The trunk lid of Agent Coler's car was open when we found it.

Q This was taken from the side. Would you point out to the jury, by holding the photograph up in front of them so they can see where it is, and what the car is, so they will recognize this?

A I might continue, that Photograph 13 appears to be an enlargement of Photograph No. 12; and this is the side view of the car. The trunk is open, and you can see through the window the driver's door is open.

Q O.k. On the photograph on Page 1, would you go back to the photograph on Page 1, and also hold that up so that the jury will know the general area -- yes?

A This is the -- as I stated earlier, from the rear of the car. You see the trunk door is open, the driver's door is open, and you see the remains of the two agents on the side.

Q Would you hold it in various directions so that the jury is able to see it?

A (Indicating). As I stated, it appears Photograph No. 13 is an enlargement of Photograph No. 12.

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On Page 14 there are two photographs, both depicting the rear of Agent Coler's car, and looking up toward the residences marked "log house, white house and green house" on Government's Exhibit No. 71.

On Page 15 there are four photographs. A is a close-up photograph of the trunk interior of Agent Coler's car. Photograph B is a -- it appears to be the windshield, a close-up of the windshield of Agent Coler's car. Photograph C is a photograph of the green house which is the far right house in the group of three houses on Government Exhibit 71. This shows also the remains of Joe Stuntz, and Photograph D is a photograph of a revolver which was -- and it is on a blanket or quilt, which was taken or was with the remains of Mr. Stuntz.

On Page 16 there is a -- it is a photograph of a -- appears to be a hubcap, and it has several spent cartridge casings in it.

Photographs B, C and D are of Mr. Stuntz, and it depicts he has a jacket with the insignia "FBI" on the pocket. It is a green military fatigue type jacket.

The photograph on Page 17, there is one photograph, and it is of the white house, the Jumping Bull residence which is in the middle of the three residences on Government Exhibit No. 71.

On Page 18 there are three photographs. A is the -- A {143} and B both appear to be garments that were found in the vicinity of the crime scene, and Photograph C is the checkbook and some other papers belonging to Agent Ronald Williams.

Q In the afternoon did you have occasion -- you indicated earlier that you had occasion to go to the area of the residence. About what time of the day was this that you went to the residence?

A I estimate the time to be about 6:00 p.m., when we went into the residences.

Q O.k. Was anyone there other than law enforcement officers when you arrived?

A No, there was not.

Q Did you -- you indicated that on one of the pictures you observed a -- the remains of a Joe Stuntz?

A Yes.

Q Would you describe to the jury where he was -- where you found him in relationship to Government Exhibit 71?

A Referring to Government Exhibit No. 71, Mr. Stuntz was found right on the northeast corner of the green house.

Q O.k. Now, there is an indication on the map there, is it, that says "body of Joseph Stuntz"?

A Yes, that's correct. That's printed on Government Exhibit No. 71.

Q And would you indicate how his body -- what position it was in?

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A His body was face up, and to the best of my recollection his head was facing in a northerly direction.

Q And what was he wearing at that time?

A He had on -- to the best of my recollection he had levi trousers on, and he had one of our FBI Squat jackets.

Q Did it have anything to identify it as FBI?

A Yes, it did on the pocket. In the vicinity of -- the left-hand side, in the vicinity of the pocket it had the letters stenciled "FBI".

Q Can you state whether or not you observed any firearms in this area of Joseph Stuntz' body?

A Yes. He had a revolver, and there was a 3.30 rifle in the immediate vicinity of his body.

Q Where was that rifle in relationship to his body?

A To the best of my recollection it was on his left-hand side. I don't really recall that, but it was right alongside the body.

Q Approximately how long did you stay in the area of the -- in the area of the houses?

A I was only there a brief time, and then I went down to the vicinity of the area of Coler's car and the remains of the two agents.

Q Now, I would direct your attention to earlier in the afternoon. Did you have occasion to see any other persons in the area to the southeast and across Highway 18 to the east, { 145 } any other persons in that vicinity?

A Yes.

Q Approximately what time was that?

A It was about a quarter to 6:00.

Q And would you describe for the jury what you saw and how it came about that your attention was directed to that time and place?

A Yes. I received a radio communication over the State radio that there were some individuals fleeing out of the south -- well, out of the south end of this wooded area; and I at that time heard gunshots, appeared to be firing. I looked up and saw some individuals fleeing up the side, across this area (indicating), up on to the south.

Q And how many did you see?

A I personally counted six or seven. The radio communications said there were 11 or 12, or 11 to 15, I don't recall. I just glanced up there and happened to see six or seven people running out of the area.

Q Were they carrying anything?

A It was about a mile and a half or so away. I didn't pay too much attention to them because we were attempting to secure the residences at that time.

Q Where did you go after you left the residences?

A After I was in the vicinity of the residences and Agent Hughes was going to secure the crime scene area, I, along with { 146 } some other law enforcement people, decided to sweep the wooded area to the south of the residences and attempt to locate the persons who were the perpetrators of the crime.

Q Is there anything in the wooded area -- describe the wooded area, first of all, for the jury, if you will.

A It is heavily wooded. There is a lot of underbrush in there, and through the area, which is marked "wooded area". The White Clay Creek flows in a zigzag fashion. It empties into Oglala Dam which is in the northwest area, and it goes back and crosses the highway in the southeast area.

Q What is the elevation of the ground at the treeline or just below the treeline on the map?

A Again the area drops off into the creekbed. There is a plateau in the vicinity of Agent Coler's car to the -- where it is marked "plateau", and it rises up to Highway 18; and similarly, to the treeline the area again drops down to the creek area.

Q How far does it drop down to the creek area, is it a sudden drop?

A In places it is rather severe, and I would estimate it to be about 10 feet. It varies throughout the location. Some places it is deeper, and other places it is not so deep.

Q Is it fair to state -- you can tell me whether or not it is fair to state -- if you are in the wooded area you can't see out onto the plateau or up higher?

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A That's correct. It is heavily wooded in most of the areas, and it is difficult to see in or out.

Q Approximately how long did you stay in the wooded area, and tell us what you did while you were in the wooded area?

A There were 10 or 15 law enforcement officers with me. We left the area, entered into the wooded area. As I said, the creek zigzags across the wooded area, referring to Government Exhibit 71.

Q You entered where, what is on the map that would indicate approximately where you entered?

A To the best of my recollection we just came down from the three houses here as indicated and into the area right here (indicating).

Q That's at the top of the plowed field?

A Yes, little area marked "plowed field" here (indicating), which is southwest of the three residences. To the best of my recollection we entered into that immediate vicinity there and proceeded down the creek area.

Q And what, if anything, happened while you were there?

A We spread out through here (indicating), and proceeded to work this area. Somewhere in this area here (indicating) -- I don't know the exact location -- I crossed the creek several times with other individuals where the water was about waist deep, and one time when I was crossing the creek I slipped and received a severe cut to my hand. At that time they decided {148} that I should have medical attention because it was bleeding quite severely, so I left the group and proceeded to what I thought to be Highway 18.

Q Which direction did you go?

A I went more or less in an easterly or northeasterly direction. From my orientation I had when I was in the trees, I felt that the Highway 18 would have been in a northeast direction and so I headed that way.

Q O.k. Now, you were in the area there which is a larger square "plowed field", is that correct, to the west of that?

A Yes. I was past that because when I walked out, I walked out through the trees and I came out in this vicinity right here (indicating).

Q In that vicinity where you are pointing is SA Williams' car?

A Yes, that's correct, so indicated on the map.

Q O.k. Tell the jury what you observed as you were going through the area back to Highway 18.

A As I was leaving the wooded area here (indicating), my attention was drawn as I proceeded out of the area to some loud radio transmissions.

Q And tell the jury what happened.

A I came into this area here (indicating), and I first observed a red and white van parked in the area. Then I observed some tents in the area. I saw a green car parked {149} behind the van. I didn't know what it was, or if anyone was there. From an examination of the area from the edge, it appeared there was no one around there. I then proceeded around here (indicating), and found Williams' car.

Q O.k. You are speaking then of the area which is marked "tents" and it is a cross-hatched area on the upper right-hand corner of the map in the wooded area, is that correct?

A Yes, on Government Exhibit 71.

Q O.k. Would you describe to the jury what the red and white van -- what the condition of it was?

A It was parked in front of the green car and facing -- it was on a little road in there (indicating), and it was facing in a west or southwesterly direction. The back gate of the van was open, and there was a lot of items stacked in the back of the van.

Q O.k. You have indicated there by a movable red magnetic object, is that correct?

A Yes, that is correct.

Q O.k. The other object which is green, which is directly behind it, is the green car that you observed?

A Right. On that particular afternoon I only recall -- I don't remember it to be a Ford. All I remember, there was a green car parked behind the red and white van.

Q Would you recognize it if you saw a photograph of it?

A Subsequent to that I found the same car in the same {150} location, yes.

Q Would you describe -- tell the jury whether or not you saw any items in the red and white van?

A Yes. There were several items, a lot of various items stacked in the rear of the van. I didn't at that point, didn't pay too much attention. I was concerned if somebody was in there, and I didn't scrutinize in any -- spend any time determining what was in the back of the van.

Q Would you describe where the other automobile, you said you heard the radio, the sound of a radio. Tell the jury where that was.

A There is a rise out of the treeline up on another plateau here (indicating), and Agent Williams' car was parked right up at the edge of the treeline, visible from both these two cars and the tents that were situated in the area.

Q And you say from back in the area of the tents you could hear the radio communications?

A Yes. They were on rather loud. The windows were down or either shot out. You could hear the radio transmissions for some distance.

Q Was there a door open on the car?

A To the best of my recollection, the right front door may have been open, yes.

Q And would you further describe the car as you observed it?

A There were numerous bullet holes in the car all the way { 151 } around the car. The glass was shot out. The car had numerous bullet holes in it. There was on the front seat floor -- his briefcase was there, and the papers were strewn around; and in the back seat his clothing was strewn around, and possibly a suitcase had been opened.

Q Are there photographs of this automobile which will depict what you observed?

A Yes, there are.

Q And its general condition?

A Yes.

Q Are there photographs also of the area of the tents which you were familiar with?

A Yes.

Q I will show you first what is marked Government Exhibit 55. I ask you to look at Government Exhibit 55.

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Did you have occasion on the following date to go the area which is marked "tents" on Government Exhibit 71?

A Yes. I did.

Q And when you returned to the area that following day were things in the same substantially, or in the same condition that you found them the day --

A It appeared to be in the exact same condition as when I left it that night before.

Q What did you do as far as the car was concerned, Special Agent Williams' car? Did you do anything with it?

A Yes. I went, as I left the area I went to the driver's side of the car, reached in, turned the keys off which activated, which would deactivate the radios and then I left the area.

Q In the Government exhibit for identification which you have in front of you, does that, do those photographs represent what you observed in your investigation of the area of the tents on the following day and on the day before?

A Yes.

Referring to Government Exhibit 55, they depict the area as I saw it initially on the night of the 26th and again on the early morning hours of the 27th of June, 1975.

MR. SIKMA: Your Honor, I would offer into evidence Government Exhibit 55.

MR. TAIKEFF: May counsel have a moment to look at it, {153} Your Honor.

THE COURT: Yes.

MR. TAIKEFF: Your Honor, there are many photographs in here. Most of them are not objectionable from the point of view of the defense. A few are.

Does Your Honor wish at this time to hear counsel or should we reserve that for a convenient time when the jury is not present?

THE COURT: Are you able to identify the photos which at this time you may have some objection?

MR. TAIKEFF: Yes. I am.

THE COURT: Would you state that for the record.

MR. TAIKEFF: Yes, Your Honor. I would.

Yes. I think it would be appropriate, Your Honor, if we approached the side bar even for the identification purposes.

THE COURT: You may approach the bench.

(Whereupon, the following proceedings were had at the bench:)

MR. TAIKEFF: Our objection, Your Honor, I want to state that if we identify it when we object and Your Honor overrules our objection, the jury would then specifically know what our concern was.

THE COURT: Very well.

MR. TAIKEFF: Your Honor, on page 13 there are two photographs marked C and D.

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MR. LOWE: The picture with the three, maybe they can explain --

MR. TAIKEFF: Well, let's pass that for the moment.

Those two photographs depict homemade explosive devices.

On page 15 there are four photographs which are of a similar nature or relate to those devices.

On page 16 there are four more photographs depicting those devices.

On page 17 there are two photographs which are A and B depicting those devices. I can't tell what --

MR. LOWE: That's a compass and that's a canteen unless you want -- can you represent what this is?

MR. SIKMA: I believe it is a flare.

MR. TAIKEFF: Could you tell us what photograph B on page 19 is?

MR. SIKMA: Yes. That is from the area just across the creek by where the individuals, I believe the evidence will later show, went, are cartridge casings which are found and marked and I don't have on the top of my head the exhibit number.

MR. TAIKEFF: They're not explosive components?

MR. SIKMA: No. They are not. It's an empty shell casing.

MR. LOWE: I think we should add a general statement {155} to the extent that any of these pictures depict such an explosive device that are not immediately, some of these pictures are not immediately, we would object to them at least so far as they describe in such terms

MR. TAIKEFF: I think we identified them all to Your Honor.

Our position is that they're not relevant to any of the charges in the indictment.

MR. LOWE: There's no showing that they were used, there's no showing that the defendant had any knowledge that they existed in the camp.

MR. TAIKEFF: It makes no difference. Even if he did, Your Honor, the point is that they're not relevant to any of the issues in the case and in any event they would constitute proof of a connection of another crime if the jury should connect them to the defendant, a crime not charged in the Indictment and they are prejudicial.

MR. SIKMA: Your Honor, the defendants have indicated clearly that they intend to show that the defendant was living in this area, that he was in the area on the afternoon in question, that he's agreed that they were there but they were there for a friendly purpose, a, to help various people.

It certainly does go to show the state of mind, the defendant is in this area where these are filled with gasoline and the record will show they are Molotov cocktails, common term, {156} and I think that if the state of mind of the defendant is going to come up, that these sort of things are certainly relevant to the issues before this Court. They do show his state of mind.

Molotov cocktails are generally not used in defensive means to protect oneself. They are generally used more in an offensive manner than a defensive manner to protect someone from massacre or something of this nature and therefore we would think that they are very relevant and they are also relevant to show the place as it was left, found at the time the incident occurred or shortly thereafter.

THE COURT: What was your last statement?

MR. SIKMA: They show the general nature and condition of the area as it was left immediately after the incident.

MR. TAIKEFF: There is one point I'd like to respond to, Your Honor. The Government has articulated our position in a way that does not describe our position.

We do not take the position that the defendant and his associates were unarmed or that they were peaceful people in a way that they would not touch any instrumentalities or violence or guns or anything of that sort. Quite the contrary.

I can issue to Mr. Sikma and I represent to the Court that our proof will be that our client and his fellow workers were heavily armed and there will be no effort to deny that or to adduce proof to the contrary by the defense.

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The point we're making is that within the spectrum of instrumentalities there are certain instrumentalities, the possession of which is a separate federal crime and since there is going to be and there's already on the record an admission of being heavily armed it is not necessary for the Government to prove the contrary because we're going to admit to the heavy armament but to introduce that instrumentality which is a separate crime under Federal law is prejudicial if it is relevant to be in with and that's proof of another crime that is not related to the charges in this Indictment in any way.

THE COURT: Well, how is it prejudicial if the jury doesn't know that it's proof of another crime?

MR. LOWE: Well, it is because it tends to indicate something -- first of all bypass for the moment whether it's relevant to the charge. Unless there is, some mention is created where Mr. Peltier, that he knew they were there, Mr. Peltier will be unfairly charged with the knowledge of them.

Now if you are going to introduce a witness that says that Leonard Peltier knew they were there and, but I ask for an offer of proof from the Government that they intend to introduce such testimony and tell us who it is because I think that might change the Court's ruling on it.

But it's highly prejudicial. The word Molotov cocktail means a lot of terms but I think it's one of the scariest { 158 } terms in the English language for most low-class people and Mr. Sikma is the only one who contends that it's primarily offensive and not defensive.

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In fact in the history they've been defensive. For example, in history the Russians came in with their tanks and they used them. In almost all of history they've had guerrillas who were resisting the strong force but in any event it's simply not, it's inflammatory and at least the prejudicial value outweighs the motive value, particularly where I think we're making it clear to Your Honor that the only issue that's going to be in dispute in this case is what the identity of the actors was out in the Pine Ridge area where these agents met their deaths and these can not be probative of these facts.

MR. CROOKS: Well, Your Honor, it seems to me that the very fact that the defendant is objecting to this proves the relevance of the thing, that counsel is, counsel is in effect conceding with us that it is relevant. Otherwise they wouldn't be concerned about it and as Mr. Sikma said, we are talking in this case about state of mind and that's going to be the defense. They've indicated that numerous times already on voir dire and on opening statement and certainly the fact that these items were items which were in the place where he was living, which he would have had access to is very definite and the specific relationship to his state of mind to refute in effect any argument that this is more or less a peaceful camp.

We're talking about, we're talking about a camp that's armed with numerous deadly weapons and that's the way the camp was left and I think it certainly is a factor which the jury can { 160 } consider in determining whether or not they were reacting to a quote, unquote, "self-defense initiative" or whether they were simply there in an aggressive posture.

This has a very direct bearing on state of mind.

MR. HULTMAN: Your Honor, might I enter just one sentence. Counsel in opening statement indicated with a number of statements what he expected to prove, that there was a peaceful encampment.

MR. LOWE: I did not say that. I specifically avoided that.

MR. HULTMAN: Let me refer to it.

MR. LOWE: Well, at least be accurate.

MR. HULTMAN: He specifically referred to the fact that there was some types of bath activity, there was a number of other things.

This proof goes to clearly refute the primary propositions that counsel has indicated are a critical part of their defense and the Government certainly has the opportunity and the right and it's relevant for that reason if no other reason.

MR. SIKMA: It's also there, to say that they're simply armed and not show how is misleading. It's misleading.

MR. LOWE: You can show all the guns you want.

MR. SIKMA: Well, of course, but they weren't only {161} armed with guns.

MR. LOWE: Are you making an offer or proof that anybody used one of those on that day? Will you make --

MR. SIKMA: No. I don't need to.

MR. LOWE: The tent area is about two hundred yards long and a hundred yards wide. This is not a little patch ten yards by twenty yards with a couple people in pup tents.

To attribute the knowledge of information or items in one part of that forty thousand square yard area to Mr. Peltier without evidence would be the worst possible form of prejudice without any basis of fact so that even if Your Honor says, well, it would be relevant, if you connected to Mr. Peltier, at least an offer of proof how they're going to connect it to Mr. Peltier or to somebody else in this case. They can always at least offer --

THE COURT: How will you be connecting this defendant?

MR. SIKMA: Your Honor, one way and a couple of ways. Number one, I think our evidence will show that he was a leader of the people that were here; number two, his fingerprints are all over the area on a number of items and I don't know --

MR. TAIKEFF: On any of these items?

MR. SIKMA: I don't know specifically but these were left right out in the open. They were laying out in the open when they were found just as they're seen there and as a result of this he was in that area that day, slept there for, stayed {162} there for days and it would be from the photographs, looking at all the photographs it would be inconceivable that he would, he would not know that these items were here if he was in the position that he maintains, he was one of the leaders there.

MR. TAIKEFF: It shows a Cola 6-pack which overall is not more than twelve by seven by ten inches high in an area of several hundred yards by --

MR. SIKMA: No. Wrong.

MR. TAIKEFF: We're talking about --

MR. LOWE: That's what it depicts, your exhibit, Mr. Sikma.

MR. SIKMA: No. Look at the photographs and you'll see --

MR. LOWE: Look at your exhibit you've introduced and you vouched for the foundation or the accuracy within five per cent.

MR. SIKMA: We'll check with the witness.

MR. TAIKEFF: This is the entire objection we're talking about, Your Honor, which is depicted on page 13 in photograph D. It's a very small object. We don't know who left it there, which individual or even whether that individual was a member of that encampment.

If any, any other person leaving the area in passing through that zone, there has already been testimony and it will be elaborated upon in cross-examination that there were large {163} numbers of people including the number of people who are living in the, or staying in the area who were seen coming through or leaving the area. We don't know who put that there and whether that person was a member of the community, if I can call it that, that was living in tent city and just because it was there they wanted to introduce it and it is a highly prejudicial thing to show to the jury, not in any way connected with the evidence offers which are under scrutiny.

If it were charged or alleged that in the process of attacking the agents such devices were used against the agents, then most assuredly that would be proof, that would be quite relevant and quite significant but the mere presence of that in that location, because the defendant had stayed there, is not a basis for offering it.

MR. SIKMA: There were explosions there also, Your Honor, some other types of things and there will be other evidence that the explosions came from this area.

THE COURT: I will reserve ruling on the pictures to which objections have been made and will rule on it and they may be reoffered later when there's been some --

MR. LOWE: In rebuttal, Judge, we may open the door to them. That's another possibility.

THE COURT: At this time I'm reserving ruling.

MR. SIKMA: May I retain these in the book?

MR. TAIKEFF: We have no objection.

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THE COURT: You may retain them.

(Whereupon, the following proceedings were had in the courtroom in the presence of the jury:)

THE COURT: Exhibit 44 with the exception of photos 13, 15, 16 and 17 is received and the Court reserves ruling on the photos on the pages enumerated.

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Q (By Mr. Sikma) Mr. Adams, would you take this book and set the pages which are indicated, I believe it's 13.

THE COURT: 13, 15, 16 and 17.

Q (By Mr. Sikma) 13, 15, 16 and 17. Indicate what you observed on those pages in the book.

A Referring to Government Exhibit No. 55.

Q Would you also on these larger photographs make it so that the jury can get an idea what you're talking about then.

A On the photograph on page 1 is an aerial photograph through the trees into what is referred to on Government Exhibit 71 as the tent area. If you look closely you can see part of one tent there. Likewise to the photograph depicted on page 2.

The photograph depicted on page 3 is a teepee, one of the tents I referred to that were located in the tent area.

Photographs on 4 and 5 are also of the tents which we found in that area.

The photographs on page 6 and 7, this is of the tents in the general area. This is looking into the interior of the teepee, I believe, at least one of the tents in the tent area.

The photographs on page 8 is looking into the interior of one of the tents.

On page 9 there are four photographs so identified by the letters A,B,C and D. They are all of the tents in the general area there.

The photographs on page 10 marked A, B, C and D are {166} again photographs taken in the tent area. There was one little red and white, or orange nylon tent in photograph A. There's a wall tent in photograph B and photograph C was a cooking area, fire pit and a, appears to be the making of a shade, a structure they use, put poles up on stilts, lay tree boughs across the top and it keeps the sun from penetrating underneath. The photograph identified by the letter D is a, appears to be a lodge type tent. This was located some short distance from the other tents and was by the creek.

The four photographs on page 11, there are three photographs, A, B and C -- excuse me, A,B and D are photographs of tents. The photograph marked C is of the green Ford automobile located in the tent area and some items that were found on the hood of that car.

The photograph on page 12, four photographs marked A, B, C and D. Photograph A and C are photographs of some rifles and weapons we found in the vicinity of the tents. Photograph B is again of the green Ford automobile and photograph D is a photograph of a backpack.

THE COURT: On page 13 I believe the objection went only to C and D.

A All right.

Photographs A and B on page 13 are of, photograph A is of some weapons that were stashed in the underbrush there. Photograph B is a photograph of a knapsack or some kind of a {167} backpack or bag that has some ammunition in it.

THE WITNESS: 14 was all right, is that correct, Your Honor?

THE COURT: There was no objection to 14.

A On the four photographs on page 14 marked A,B,C and D are all of rifles that were recovered in some of the underbrush area.

Q (By Mr. Sikma) Would you tell where those rifles were found generally?

A I believe these pictures depict rifles that were found in the, in the trees between the tent area and the creek, the best of my recollection.

15 is -- on 17 I guess.

THE WITNESS: The whole page 17?

THE COURT: The objections on 17 went to A and B.

THE WITNESS: All right.

A The photograph marked C and D on page 17, photograph C is a stick of dynamite that was found in the area and photograph 2 is a, D is a photograph of the canteen that was found in the area.

18 is again, there are three photographs, A, B and D. A is is the markings on one of the tents in the area, B is the photograph of the general area showing the teepee and photograph D is on the neck scarf, or appears to be a red handkerchief, neck scarf, something, and some items of clothing {168} which were found away, found in an area leading from the tent area.

On page 19 there are four photographs. Photograph A is a red shirt that was found in the area. Photograph B is a cartridge casing, appears to be a 44 caliber which was found in the area. C and D appear to be a couple address books.

On page 20 there are three photographs, two marked with the letter A and the one B. The first one is, it shows the name Joseph B. Stuntz on a Delta Airlines, some kind of a Delta Airlines card. It has a photograph and also marked A appears to be that of Mr. Stuntz and on photograph B marked B is a selective service card for Joseph B. Stuntz.

The photograph on page 21, here, the big photograph, is of two new tires that were taped together that were in Williams' car that were recovered out of the back of the van.

Q They were found where?

A In the back of the red and white van.

The photograph on page 22 is a shipping tag or an address tag that were on the tires that apparently was placed on there by the office in Minneapolis and the tires have been sent to us in Rapid City.

Q Whose tag is that?

A It says, "Special Agent, FBI, U. S. Courthouse, 260 Federal Building, 515 Ninth Street, Rapid City, South Dakota." That would be our office in the courthouse in Rapid City.

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Photograph 23 is again of the green Ford with the items as found on the car.

Q Now is that the way you observed, can you tell whether or not that's the way you observed those items on the 26th when you went through there in the late afternoon?

A As I stated, I saw the car in there and I know there was a rifle on the hood of the car and as far as identifying the other items on that night, that's as far as I could go.

The photographs on 24 is of a Commando Mark 3 which was found under bark and brush in the vicinity of the tent.

The photograph on page 25 is of, again of some kind of canvas type bag which contains some ammunition.

Both photographs 26 and 27 are again photographs of some rifles which were found in the vicinity of the tent.

Photographs on 28 is a stick of dynamite. This was a compass that was placed there by the agent or one of the agents that was taking the photograph showing the size of the stick.

The other one, photo 29 on page 29 is a canteen that was found in the area.

Photo 30 is again of the red handkerchief, possibly neckerchief type thing and some other items of clothing that were found in the area.

Photograph 31 is a picture of the red and white van. This photograph was taken after the vehicle was removed from the tent area and in a compound in Pine Ridge. It's B & U Compound, the {170} location.

32 and 33 are again photographs of the van, 32 being the front end of the van with the license plates, 33 is a side shot of the van.

34 again is a side shot of the van.

35 has six pictures. Photograph A is the front of the van, photograph B the rear of the van, photograph C, D, E and F are all photographs of items removed from the rear of the van. It appears to be some kind of electronics gear.

36, six photographs. Photograph A is again of the rear of the van with some of the items of electronic gear in the van. Photograph B is the rear of the van, photograph C is the side of the van and the same way with D, E and F. Photographs of the side of the van.

On page 37 all six photographs are of items removed from the rear of the van. There is electronic gear again, the photograph of the tires that were in the back of Ron Williams' car.

Page 38, one photograph marked A of tires belonging to the FBI.

Photograph on page 39, photograph A, F and I, also E are of various shots of Agent Williams' car as it was found on the 25 and 26th of June, 1975.

MR. TAIKEFF: Your Honor, may we approach the bench?

(Whereupon, the following proceedings were had at {171} the bench:)

MR. TAIKEFF: Your Honor, the application is made upon the assumption that the misstatement of fact by Mr. Sikma was inadvertent and not to be interpreted otherwise.

When we went through the book of photographs which the agent has just finished describing, I asked Mr. Sikma what a certain object was and he said it was a flare. I believe indeed he thought it was and I thought it was but I wasn't sure, and it may very well be. As a result it now appears that that object which apparently appears in two places was a stick of dynamite. Now under the circumstances I think it would be appropriate the government would recognize its error was the basis for that piece of testimony and if Your Honor would instruct the jury that the witness was mistaken and that government concedes what he thought was dynamite was a flare and leave the matter at that.

MR. SIKMA: Your Honor, the defense counsel has seen these pictures and had opportunity to look at them last night and go over them. It's agreed that I made a mistake on it. He's testified already that he heard dynamite being exploded.

I wasn't sure what it was. It was a mistake on my part but I don't think -- I think I can get experts to come in and show there was dynamite there.

There is one thing with the defendant saying, "We'll admit that these defendants were armed," but throughout the {172} entire proceedings they're trying to leave a false impression with this jury. The true impression is they weren't merely armed, there was dynamite there, there were Molotov cocktails there.

MR. TAIKEFF: Your description can be heard.

MR. SIKMA: I think it's important there were hand grenades in the various areas in possession of people involved in these events and I think that it's important to note and make the jury aware of what the state of mind of these individuals was.

We're not contending that one individual committed this offense, we're contending that the defendant aided and abetted in that offense and that he was a part of a conspiracy involved in this event. I think that these things are relevant. I don't think this, I think there is sufficient showing at this time that the defendant, and from the proffer made by the defense counsel that this man, they objected to what I said in opening statement that he lived there a couple weeks, indicated that he had lived there for a couple months instead of a couple weeks.

We have seen the number of tents there are. I'll go into that. It wasn't a city of tents. There were about, I think, five or six tents there at the very most.

Now I think the evidence will show later on that there {173} were only about at most ten people living there. Many of the witnesses who lived other places will indicate they didn't go down there. It wasn't something that was generally known, something that surprised this witness. He didn't know it was, so for this reason I would say that there is absolutely no prejudice and it's essential this information come before the jury in light of the lines that have been drawn by defense counsel in their presentation of this case.

THE COURT: On the basis of the testimony that there were explosions, what objection do you have to this evidence, this testimony standing?

MR. TAIKEFF: The explosions may have occurred but that doesn't tell anyone what the source of those explosions were.

THE COURT: It would be a reasonable inference that dynamite would be a source.

Your objection is overruled.

MR. LOWE: I'd like to make a record. You said you would reserve ruling on a motion and that this testimony was brought out in direct violation of this ruling. I think that's a bad precedent to set this early in the trial that Counsel would be insensitive to being sure that would not happen.

THE COURT: I reserved ruling on specific pictures to which objections were made.

MR. LOWE: Yes, sir. I specifically objected to any {174} other pictures which depicted explosive devices and were not readily identifiable as such.

MR. TAIKEFF: Specifically had the answers been correct, I most assuredly would have included that picture in the list of pictures. That was the purpose of asking that --

MR. LOWE: I wonder if we could offer proof. Maybe it is a flare.

MR. SIKMA: We'll go into it later with another witness.

MR. LOWE: I want to know if it's proved. Make an offer of proof.

MR. SIKMA: I don't have to make an offer of proof, Your Honor.

Counsel's demanding I make an offer of proof at this time. I think there is sufficient evidence to show in this area right by the crime scene individuals were running out of here from the opening statement. Unless the opening statement is not any indication at all what the defendant's theory is.

MR. LOWE: You missed my point. I made an offer of proof to show --

THE COURT: The Court has reserved its ruling on the pictures to which specific objections were made. There is no way that the Court can act on an objection on any other pictures that might show thus and so.

MR. LOWE: Judge, I think it's reasonable to ask the government represent to you that at some time during this trial {175} they will testify that object was a stick of dynamite. That's very reasonable.

THE COURT: This witness has just testified to that.

MR. HULTMAN: A lay witness can, if a stick of dynamite was sitting there right now --

THE COURT: You may cross-examine, but this witness has testified to that and that's all that's required, the testimony of one witness.

MR. LOWE: This is the purpose of our making such motion. I would hope in the future the government would obey the Court's order.

MR. SIKMA: We have had some other things here. You've indicated that a stipulation for the last three weeks, that you are stipulating to foundation. We get up here and foundation objections are made to these very photographs.

MR. TAIKEFF: Not yet. You might be watching another trial, Mr. Sikma.

MR. HULTMAN: Your Honor, just so there is no misunderstanding, one, all of the exhibits that are involved here are not new to Counsel. In fact they have been exhibits in another trial. Two, we set down weeks ago an exhibit list specifically with the items which Counsel has had an ample opportunity through their investigators and through Counsel themselves to view every single one of those. Last night again we sat down. {176} Counsel had still another opportunity. Today in this courtroom Counsel has had an opportunity to specifically look at the photos, make whatever objections that they had and that is the manner in which we agreed to proceed.

MR. LOWE: That's the entire description right there.

MR. SIKMA: They had been available to you all the time.

MR. LOWE: We take your representation --

MR. HULTMAN: Look at the rest of the photos today one more time, John.

MR. TAIKEFF: Anyone who read our trial memorandum could not misunderstand that our position was that every item of that nature was objectionable, so if the government accurately represents the kind of pretrial activity that went on and consistent with that and in the spirit of which it occurred, we gave advance notice of virtually 75 or maybe 90 percent of our objections in the course of the trial in advance, in writing so there'd be no misunderstanding about it. Now that doesn't mean we're limiting ourselves only to those objections, but surely an examination of that memorandum would show every single explosive device identifiable was indicated and an item we would object to and we took the precaution of coming to the side bar in advance. So to the extent that the government is saying we have not objected properly, I don't think that they make a proper statement and I think that our position is clear that the devices which in and of themselves are of a crime to {177} possess, if they are not directly connected with the defendant and with the issues of this case we first and foremost object on the grounds of relevancy and in the alternative object on the grounds of prejudice and we're willing to stipulate any fact necessary to avoid the prejudice.

MR. LOWE: May I suggest something: we're three minutes from the lunch recess. Could we excuse the jury and have a voir dire?

MR. HULTMAN: The government objects to any voir dire.

MR. LOWE: Perfectly proper voir dire when you have a foundation issue raised. That will clear the issue up for the record whether it is or not.

MR. HULTMAN: That question has been asked and answered already, Your Honor.

THE COURT: The Court will recess at this time and we will reconvene. Of course, the jury would not be brought in under the procedure that I have set up. At that time you'll be permitted to voir dire this witness.

MR. LOWE: Thank you, Judge.

(Whereupon, the following proceedings were had in the courtroom in the hearing and presence of the jury:)

THE COURT: This Court is going to recess at this time until 1:30 this afternoon and I remind you of the admonishment that I have mentioned a few times on preliminary instructions. That is, you must keep an open mind in this case, not to form {178} any conclusions until after you have heard the entire case and have been instructed on the law, heard the arguments of the lawyers. And furthermore, you should not discuss it with anyone. I realize that because of the sequestered nature of the jury you have limited opportunity to discuss it with anyone, but you shouldn't discuss it among yourselves.

Court is in recess until 1:30.

(Recess taken.)

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AFTERNOON SESSION

(Whereupon, at the hour of 1:30 o'clock, p.m., the trial of the within cause was resumed pursuant to the noon recess heretofore taken; and the following further proceedings were had out of the presence and hearing of the Jury, the Defendant being present in person:)

MR. LOWE: Your Honor, may I make a report to the Court? I have not been able to locate that witness that I was going to report on yesterday primarily because of some mixup on the witness room and everything; and as soon as I can locate the witness, I will make the inquiry and report back. As a matter of fact, Mr. Hultman and I both tried to find him a little earlier today, and there was a confusion as to where they would sit.

THE COURT: Very well, You wanted to voir dire the witness?

MR. TAIKEFF: I wondered whether the Government wishes at this time to address the Court. I think an objection may be resolved by agreement between counsel.

MR. SIKMA: Your Honor, we discussed with defense counsel during the noon hour objectionable photographs in the Government Exhibit 55, and they were those on which the Court reserved rulings on. The Government has decided, for reasons discussed with defense counsel, to withdraw them to avoid any conceivable error of prejudice.

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THE COURT: Very well.

MR. SIKMA: And so we are going to withdraw those photographs and I will take them out of the Government exhibit.

THE COURT: Have you withdrawn your offer then also?

MR. SIKMA: Yes, we have at this time. If we have other evidence during the course of trial, when it comes in, we may reoffer them. We will withdraw our offer at this time.

MR. HULTMAN: Could I make one other observation? Your Honor, by this withdrawal, I would want to make it clear to the Court that the Government is not taking any different position legally on similar items that we have just decided in this particular instance. I would want that made very clear to the Court.

THE COURT: Very well.

MR. TAIKEFF: May I inquiry, your Honor?

THE COURT: You may.

MR. TAIKEFF: There remains the photograph or photographs that were identified.

MR. SIKMA: Your Honor, may the record reflect that I am withdrawing photographs (C and D on Page 13, and I will also withdraw the stickers that say "Ruling reserved". Pages 15 and 16, and Photographs A and B on Page 17.

MR. TAIKEFF: May I inquire, your Honor?

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J. GARY ADAMS,

having been previously duly sworn, resumed the stand and testified further as follows:

MR. TAIKEFF: May I approach the witness?

THE COURT: You may.

MR. TAIKEFF: Mr. Adams, I am placing before you Government Exhibit 55, and in particular calling your attention to two photographs, one of them is Photograph C on Page 17 --

THE WITNESS: (Interrupting) Back, I believe.

MR. TAIKEFF: (Continuing) -- and the photo on Page 28. Now, the second photo is an enlargement of the first photo, is that correct?

THE WITNESS: It appears that way, yes, sir.

MR. TAIKEFF: And in your testimony before the jury you identified an object as being a stick of dynamite, is that correct?

THE WITNESS: Yes, I did.

MR. TAIKEFF: Have I correctly identified the photographs that you were looking at when you said you saw a stick of dynamite?

THE WITNESS: Yes, you have.

MR. TAIKEFF: What is the basis of your understanding or knowledge that depicted in those photographs is a stick of dynamite?

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THE WITNESS: This particular -- I am referring to, there is a stick of dynamite here (indicating), and then it was -- which I related to the jury which was laid there for identification of size. This particular stick of dynamite was found in a sweep of the area south of the tent area where we saw the individuals leaving on the night of June 25th.

MR. TAIKEFF: For the guidance of the Court, as well as counsel, would you be kind enough to point with the pointer to the area, as close as you can identify it, where that stick of dynamite was found -- assuming for the moment that it is a stick of dynamite?

THE WITNESS: Sir, the only thing I know, in reviewing the FD-302 of the individual who picked up this particular stick of dynamite, there was some red components given, from his description given it was south or southwest of the tent area, and that's all I can recall in that particular area, and it was brought back to the area of the tent and our demolition expert took the sample of the dynamite, preserved the wrapper and it was retained as evidence.

MR. TAIKEFF: Can you indicate on the chart in light of what you have said, as best as you can, where the item was found?

THE WITNESS: The only thing I would attempt to say { 183 } would be in either this area (indicating) -- it was an open area or off the edge of the map here (indicating).

MR. TAIKEFF: How wide approximately is that so-called open area going in a southerly direction?

THE WITNESS: The area is open to the trees on top of the bluff a mile or so away.

MR. TAIKEFF: So far as you know as of this time, that stick of dynamite, if it is a stick of dynamite, could have been found as much as one mile away from the tent city area, correct or incorrect?

THE WITNESS: Yes, it could have been.

MR. TAIKEFF: You may return to the witness box.

MR. SIKMA: I have a couple of questions.

MR. TAIKEFF: I am not finished. I am just getting started.

THE COURT: Well, I think maybe you have gone as far as you need go as far as the Court is concerned.

MR. TAIKEFF: I accept the Court's suggestion.

THE COURT: As far as that particular photo -- that would be Photo C on Page 17 -- and also the enlargement of that on Page 28 -- now, have you withdrawn those photos?

MR. SIKMA: No, I have not, your Honor; and I have one other one that I will show and make an offer to connect up with this photograph and also with the Defendant in this case.

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THE COURT: Well, at the moment the ruling of the Court is that there is insufficient foundation on those photos to be received as a part of this exhibit.

MR. SIKMA: Your Honor, when we went into that, we were prepared to go into that sort of thing; but there was a stipulation as to foundation as to these various items, at least that was my understanding. If we need the witnesses present to testify to those things and draw the chain, we

can do that and will do that; but that's why I went about it through this witness because he was in, as I understood, in charge of that particular aspect of the investigation.

THE COURT: It seems to me the relevancy is going to depend somewhat on the location where this particular piece of evidence was found,

MR. SIKMA: Well, I didn't cover that with him specifically at this time because I understood as to the foundation stipulation -- there is one other thing I would like to ask some questions about, another photograph here which I believe will connect it up.

MR. TAIKEFF: Could we clarify or finish with one point at a time, your Honor? I don't want Mr. Sikma to be insecure about the good faith or the text of our verbal understanding about foundation and chain of custody which we have already indicated, with rare exception and { 185 } we have identified the exceptions, will not be in issue in this case and many witnesses need not come; but Mr. Sikma may have suggested to the Court that we were making some sort of chain of custody objection. We certainly were not.

I understood the witness' testimony to be that the book in question contained photographs of what he saw, more specifically objects which he saw when he entered tent city, and it was offered on that basis; and the argument at the side bar went to the assumption that it was in tent city, and then the various arguments which followed because there was no connection between the objects shown and the Defendant.

Now, I think we have shown that it is totally removed from tent city, and I would ask that your Honor strike those two photographs for that reason at this time and give the jury an appropriate instruction because they have heard the word "dynamite", and an effort was made at the side bar to make sure that a separate ruling was had as to any explosive device that may come up.

It came in because of a good faith misunderstanding between counsel. Now it appears it shouldn't have been in there in the first place, so I think some curative instruction at the very least should be presented to the jury at this time.

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MR. SIKMA: Your Honor, I believe I indicated, and I have in the past indicated as to the whereabouts of these various items as being across the culvert which is understood as the -- during earlier testimony and statements and so forth as being the escape route or the area from which the Defendant and various individuals left; but if your Honor will permit me to ask a question about one other thing, I think that the other photograph -- thing here will connect up with this particular photograph if you will let me ask a further question.

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THE COURT: You may ask the question.

Q (By Mr. Sikma) I will direct your attention to photograph D on page 12 and photograph B on page 12, also to the photograph on page 22. With relationship to photograph B and D on page 12, would you relate what you see on page 23.

MR. TAIKEFF: Your Honor, before the answer is given may Counsel look at the photograph so testimony can be followed?

THE COURT: You may.

Was that B and D on page 12?

MR. SIKMA: Yes, Your Honor.

A Referring to Government Exhibit No. 55, photographs B and D on page 12 and photograph on page 23, contained in this photograph is a canvas bag, or canvas sack, backpack type thing.

This bag was found just exactly as depicted in the photograph.

THE COURT: Excuse me. How was it depicted in the photograph?

THE WITNESS: It is just to the right front, just beside or in the immediate vicinity of the right front tire of the green Ford automobile in the tent area.

THE COURT: Very well.

A Examination of this bag revealed there was some dynamite, some wires and some other items in the sack. This was found on the morning of the 27th. It was carefully removed from this area, placed to the side of the tent area and we got a, one of { 188 } our FBI laboratory men, a demolitions expert came in and they disassembled the contents of this bag, and in fact there were several sticks of dynamite, some wire and other items, tape and other items in the bag.

Q Now can you tell me whether or not the stick of dynamite resembled the stick of dynamite which was found out the side of the culvert area on the way which has been referred to as an escape route?

A Yes. Both appear to be the exact same thing, appear to me to be the exact.

Q There's one other photograph in here that contains an item which was found there, is there not, one other item which was found not in the tent city, which was found along that same place?

A Yes.

Q Would you point out what that is.

A Referring to Government Exhibit No. 55, photograph No. A on page 17 and the photograph on page 29. The photograph on page 29 is an enlargement of the photograph on page 17, photograph A. This is a canteen that was found in the same general vicinity of the stick of dynamite.

Q Do you know about how far that was found off of the, past the culvert?

A No, I do not. All I know it was along the escape route where I saw the individual fleeing the night before.

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THE COURT: Mr. Sikma, do you intend to have, expect to have an explosives expert, too?

MR. SIKMA: We had not intended to, your Honor.

THE COURT: To tie up the similarity of the dynamite found in the knapsack by the automobile and so-called tent city and the dynamite found along the trail?

MR. SIKMA: We had not intended to, Your Honor, because we had intended to have other testimony concerning persons as to the facts, if that's what it was, who was there in the vicinity. Eyewitnesses, Your Honor.

MR. TAIKEFF: Could I amend my application, Your Honor, for an instruction and ask that at this time given the state of the record as it presently exists that Mr. Sikma when the jury is back in the courtroom ask the witness to identify those objects which contrary to the way the record presently stands were not found in tent city but were found elsewhere and identify those photographs. That's my first application.

My second application is that the government withhold any testimony concerning the content of the canvas bag until Your Honor rules on the application he made earlier with respect to the other devices which the photographs, which have been removed because I believe the exact same arguments would be made with respect to that testimony, and Your Honor's ruling presumably would cover the objects discussed earlier as well as the contents of the canvas bag.

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MR. SIKMA: Your Honor, I can ask the questions. I would ask one other question of this witness concerning the matter of the dynamite, his knowledge of it.

THE COURT: You may.

Q (By Mr. Sikma) Had you prior to this time ever seen dynamite before?

A Yes, I have.

Q Were you familiar with what it looked like?

A Yes, I am.

Q Was there any writing or anything on this?

A Yes. There was some writing on that particular stick and it was noted and it is on record in our office.

Q And what was that writing? I mean, was there any writing that indicated what it was?

A The only thing I can recall is it had Trojan Brand of dynamite, had the percentage on there, the exact notation I cannot recall.

Q Are you familiar with that brand of dynamite?

A Yes, I am.

THE COURT: What then is your position, Mr. Sikma?

MR. SIKMA: Your Honor, my position is with regard to this matter that it is, dynamite is not a thing that is identity as such. It's a type of item that needs an expert to identify. In light of the testimony of the explosions, in light of the testimony of this witness' familiarity with it, in light of his {191} presence during the examination of it and so forth and in light of the other items that were found with it, wires and so forth, Your Honor, I think that there is sufficient evidence to establish that this item was in fact a stick of dynamite.

THE COURT: What is your response to Counsel's suggestion that the situation is not any different than that which exists on the exhibit which you have withdrawn, at least temporarily?

MR. SIKMA: Your Honor, those exhibits were not brought before the jury, number one. Number two, these items were found along the trail which will be established later in evidence with the escape route which I don't believe is denied by either party. In addition to that, that fact, this matter has already been before the jury and that's why I think our establishment of it and the evidence of the explosions and so forth which are before the jury make it unnecessary to withhold those items.

I believe that there is sufficient evidence on those items at this time.

Also, Your Honor, I would agree with Counsel, I will go back and indicate the items which were not found in the tent area.

MR. TAIKEFF: Your Honor, Mr. Sikma suggests that there is some contest as to whether or not the substance was dynamite. That's not the issue and not the basis of our objection.

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THE COURT: That was a concern of mine, however.

MR. TAIKEFF: It is not contested. If the government, we have not specifically conferred with them about it, but as in the case of many other technical things, if Mr. Hultman represents to us that he has an expert who would testify, that's all he has to say to get a stipulation out of us, and I think he will confirm that that's the way we have done business during the pretrial phase of this case. Whether it's dynamite or not is not the issue. The issue is is it relevant to the charges and if relevant, is it prejudicial to introduce it. As Your Honor has heard at great length, I need not press that point further.

I'm approaching the witness, Your Honor, in order to look at the exhibit and as Mr. Lowe suggested I might observe.

The book which is Government Exhibit 55 is entitled "Tent City" and I think in the interest of clarity and getting everything straight in a case that's going to have many exhibits, we ought to see objects not found in tent city are not depicted in the book entitled "Tent City."

MR. SIKMA: Your Honor, I might add one other thing: defense counsel, to answer the Court's question, has had opportunity to have the expert's reports concerning these items. They have had them available to them.

THE COURT: The ruling of the Court on this particular item, these particular items, based on the foundation and {193} information that has been put in the record to this point first by counsel on opening statement, that it is not disputed that Mr. Peltier was making his home, at least temporarily, in this area. Secondly, based on the testimony of this witness, that this bag of dynamite was found by the Special Agent Williams' automobile which was found also in the immediate proximity; and that it did contain dynamite, and his testimony that the dynamite in the bag was similar to the dynamite depicted in that picture, the Court's ruling is that that evidence is received and will be admitted. Now whether or not Mr. Peltier had anything to do with the dynamite is simply something to be brought out on cross-examination or the defendant's case, if the defendant puts in a case, and goes to the weight of the evidence and not the relevancy of it. So the Court's ruling is that it is relevant, it will be received, except Counsel will be required to identify those objects depicted in Exhibit 55 which were not in fact found in the proximity, of the immediate proximity of Tent City as was testified to by this witness. I mean by that this witness testified that those objects were found in the proximity of Tent City and it is now developed that some of them were not.

MR. SIKMA: Very well, Your Honor.

THE COURT: You may bring in the jury.

(Whereupon, the following proceedings were had in the courtroom in the hearing and presence of the jury:)

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THE COURT: Members of the jury, the Court did in fact reconvene at 1:30. I give you this just for your information. But we have been involved on legal problems which, as I have previously indicated to you, will arise during the course of this trial and that accounts for the delay in the jury coming in.

THE COURT: You may proceed.

MR. SIKMA: Thank you, Your Honor.

Q (By Mr. Sikma) I will show you what is marked and received into evidence as Government Exhibit 55. Now it's entitled "Tent City." Would you state for the jury if there are items in there which were not found right in the area, in the tent area itself?

A Yes, there are.

Q Would you point those out to the jury, please, and tell the jury what they are.

A Referring now to Government Exhibit No. 55. On page 17 the two photographs marked A and B, excuse me, C and D and there are enlargements of these photographs on pages 28 and 29.

The photograph on 28 corresponds to the photograph on page 17 marked C. and the photograph on page 29 is an enlargement of the photograph marked 17A.

The photograph on page 28 is of the dynamite, one piece of dynamite. The photograph on page 29 is of a canteen. Both of these items were found away from the tent area to the {195} south which I described earlier as the escape route where the individuals were seen, I saw fleeing up the side of the hill.

Also the photograph 18D as in David and 19B as in boy, some articles of clothing and a shell casing. They were also found in the same area where the dynamite and the canteen were found on the escape path.

A photograph on page 30 is an enlargement of photograph on page 18 marked with the letter D as in David. Now I haven't described the remainder of this album so do you want me to continue with that now?

Q Yes. Would you please.

A I believe I concluded with, I was on page 39. On page 39 are six, excuse me, nine photographs. Photograph marked A, E, F and I are photographs of Agent Williams' car as it was found on the night of the 25th or 26th of June and again on the morning of the 27th of June.

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Q Before we go on I will show you Government exhibits marked for identification as Government Exhibit 9A and 9B. Would you identify these as well.

A Yes. Referring to Government Exhibit 9A, this is a photograph of Agent Williams' car as I found it on the night of the 26th.

It is taken from the right rear side. It shows the trunk lid to be open and the door open.

9B is taken from the left front -- excuse me. I think I said 9A was from the right rear. It's from the left rear.

And 9B is from the left front depicting the front side of the car.

MR. SIKMA: I would offer 9A and 9B into evidence, Your Honor.

MR. TAIKEFF: No objection.

THE COURT: 9A and 9B are received

Q (By Mr. Sikma) I would also show you 9C.

MR. TAIKEFF: No objection if offered.

MR. SIKMA: Since there's no objection, Your Honor, we will offer and let the witness explain to the jury what it is.

THE COURT: 9C is received.

A 9C is a photograph taken from the front of Agent Williams' car as it was found on the 26th of June.

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Q (By Mr. Sikma) I will show you Government Exhibit 13A and 13B.

MR. TAIKEFF: No objection if offered.

MR. SIKMA: And would offer them into evidence also, Your Honor.

THE COURT: 13A and 13B are received.

Q (By Mr. Sikma) Would you describe to the jury what Government Exhibit 13A and 13B portray.

A Yes. 13A and 13B --

Q Would you hold them also so the jury can see them.

A --are pictures of the Ford, I believe it's a 1967 Ford automobile which was located in tent city and you can see there are items on the hood of the automobile as I saw it on the 26th and again on the, 25th and 26th.

Q Now when you came upon the tent city on the 26th can you tell the jury whether or not it appeared to be as it is portrayed in the photographs that you have just shown of the vehicle, the Ford, green Ford?

A Yes. It appears to be the same way.

As I stated earlier, I saw a green car in there and I saw a, a rifle on the hood of the car and that's the extent of my examination of that particular area.

Q I will show you what is marked, I've shown it to defense counsel, Government Exhibits 12 and they've indicated there's no objection to Government Exhibits 12.

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MR. SIKMA: I'll offer that into evidence, Your Honor. The defendant has no objection.

THE COURT: Is there no objection?

MR. TAIKEFF: That's correct, Your Honor.

THE COURT: Thank you. Exhibit 12 is received.

Q (By Mr. Sikma) Would you tell the jury what that is.

A Government Exhibit No. 12 is a photo of the red and white van.

Q And did you see that red and white van?

A I saw that in the tent area.

This photo was taken at the B and U complex in Pine Ridge.

Q Will you point that out on Exhibit 71.

A Referring to Government Exhibit No. 71, this marker here, the red and white van, depicts the location of the van and the car was parked to the rear of the van. The car was found parked on the rear of this road at the edge of the tent area.

Q Now is that a red and white pickup that you observed going into the Jumping Bulls' residence?

MR. TAIKEFF: Objection to the form of the question, Your Honor. It assumes a fact not in evidence.

THE COURT: Sustained.

Q (By Mr. Sikma) You testified earlier that you observed a red and white vehicle going into the Jumping Bull residence earlier. J. {199}

MR. TAIKEFF: Objection to the form of the question. It assumes a fact not in evidence.

The testimony was it was a pickup.

MR. SIKMA: I indicated a vehicle.

MR. TAIKEFF: The witness did not say vehicle. Only Mr. Sikma said vehicle. The witness has been saying quite clearly a pickup.

THE COURT: The objection is sustained.

You may rephrase your question.

Q (By Mr. Sikma) You indicated you saw a red and white pickup going into that area, did you not?

A Yes. I did.

Q Now can you tell the jury that there is any difference, if that's the same kind of vehicle that you see in that photograph?

A No. They're entirely two different vehicles.

Q Have you ever flown over this particular area, the tent area and the Jumping Bull Hall area in an aircraft?

A Yes. I have.

MR. SIKMA: I show defense counsel Government Exhibit 56 for their objection and, possible objection before showing it to the witness.

MR. TAIKEFF: Your Honor, if these photographs are offered, there will be no objection from the defense.

THE COURT: Very well.

{200}

MR. SIKMA: I would offer them at this time.

THE COURT: You are offering Exhibit 56?

MR. SIKMA: Yes, Your Honor.

THE COURT: Exhibit 56 is received.

Q (By Mr. Sikma) Would you, Mr. Adams, please explain to the jury what Government Exhibit 56 consists of.

A Referring to Government Exhibit 56, the photographs contained herein are all aerial photographs of the area of Jumping Bull, in the vicinity of Jumping Bull Hall and the tent area there as referred to on Government Exhibit 71.

Q During the course of the afternoon, or excuse me, during the course of the following day did you have occasion to examine Special Agent Williams' car?

A Yes. I did.

Q And during that examination did you look at the back part of the car, --

A Yes. I did.

Q -- taillight area?

A Yes. I did.

Q And what if anything did you observe?

A There was, to the best of my recollection there were at least two bullet holes into the taillight assembly.

Q Was anything, can you tell whether or not anything was missing from the taillight?

A Some of the glass particles, yes, from the taillight were {201} missing.

MR. TAIKEFF: Your Honor, I'm referring to Government, Counsel, Government Exhibits 57 and 58. If offered there would be no objection from the defense.

THE COURT: Very well.

MR. SIKMA: Your Honor, I will then offer Government Exhibits 57 and 58.

THE COURT: Exhibits 57 and 58 are received.

Q (By Mr. Sikma) I will show you first Government Exhibit 58 since we're talking about Government Exhibit 58 at this time.

Now does one of those areas show the taillight section of Special Agent Williams' vehicle?

A Yes, sir.

There are two photographs here that show the rear end of Agent Williams' car. They are photograph number 7 and photograph number 17.

Q Okay. Now at that time what was the condition of the taillight section of the vehicle?

A On photograph number 7, this was taken at the B and U compound at Pine Ridge after the vehicle was towed from the vicinity of the tents.

The photograph on page 17 is a photograph taken at the National Guard Compound in Rapid City, South Dakota.

MR. TAIKEFF: Your Honor, Government has shown the defense Exhibit 14B. If offered there will be no objection.

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MR. SIKMA: Your Honor, we'll offer into evidence Government Exhibit 14B.

THE COURT: Exhibit 14B is received.

{203}

Q (By Mr. Sikma) Would you examine 14B and tell the jury what it is.

A Referring to Government Exhibit 14B, this is the left portion of the taillight assembly which was removed from the car and which is shown as a blank or bare area on Government Exhibit, on the photograph number 17 of Government Exhibit No. 58.

Q And you, can you describe the condition of that particular item for the jury.

MR. LOWE: Your Honor, we can save an awful lot of time. We are perfectly willing to stipulate that that vehicle at any time was located by Agent Coler's vehicle if the Government will just make a representation. There's no need to go through the process of, identifying process of the car.

MR. TAIKEFF: There's no dispute about that fact.

MR. SIKMA: That's something I didn't know we had an agreement to stipulate to, Your Honor.

MR. LOWE: Well, I will so offer now. There's no dispute on that and Mr. Sikma, I've talked about this with him in the past and Mr. Sikma can just make a representation of where the car was found and where this would purport to show early in the day. There's no dispute on this. That's fine with us. No dispute on this.

MR. SIKMA: Your Honor, I might indicate that the vehicle, Special Agent Williams' car which is designated here by {204} a small magnetic square piece. If the jury can see, it indicates, it says on the top there, "SA Williams' car."

I would represent, Your Honor, that the vehicle was found, or would have been in a location somewhat similar to this, running parallel to the area from the tan and white house, to the road from the tan and white, tan and red house, excuse me, marked "residence" directly above the sign that says "bodies of Williams, SA Williams and SA Coler" on Government Exhibit 71 to the area of Coler's car here, that it was parked, or at some time would be in a position where it was parallel to that, slightly to the front of or forward of the position of SA Coler's car.

MR. TAIKEFF: We'll stipulate to this, Your Honor.

THE COURT: Very well.

The jury will remember that when counsel has stipulated to a fact, factual matter the jury may take that as having been proved.

MR. SIKMA: Could I have the Court's indulgence for just a moment, please.

THE COURT: Okay.

MR. SIKMA: Your Honor, the Government and the defendant stipulate that the car was in this position at the time of Special Agent Williams and Coler's death at approximately 12:00 noon on the 26th of June, 1975.

MR. TAIKEFF: It is so stipulated, Your Honor.

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THE COURT: The record may show and the jury will know the stipulation.

Q (By Mr. Sikma) Mr. Adams, Government Exhibit 57 is also in front of you. It has been admitted into evidence.

Would you describe for the jury what Government Exhibit 57 consists of.

A The photographs contained in Government Exhibit No. 57 are photographs taken of Agent Coler's car.

Q And are those photographs taken from a number of different angles?

A Yes. They are. Almost every direction.

Q And those photographs I take it were made after the vehicle was removed from the scene as it's portrayed on Government Exhibit 71, is that correct?

A Yes. All of the photographs were taken after the vehicle was removed from the area where it was found at Jumping Bull Hall.

Q In the tent area you indicated that you observed a firearm on the hood of a car. Can you describe that firearm.

A Yes. It was a 22 bolt action rifle.

MR. SIKMA: I'll show the defense counsel Exhibit 41A, Your Honor.

MR. TAIKEFF: No objection if offered in evidence, Your Honor.

MR. SIKMA: Your Honor, we would offer Exhibit 41A.

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THE COURT: Exhibit 41A is received.

Q (By Mr. Sikma) Would you examine this and tell the jury what it is and if you know where it was found.

A Yes. This is the 22 caliber rifle with scope.

It was found on the hood of the 1967 Ford in the tent area.

It was tagged by Agent Robert Thompson as so reflected on this tag here.

Q Special Agent Adams, after leaving the tent area on the -- or can you tell me what areas you examined on the 27th, the day following the date of the murders of Special Agent Williams and Coler.

A Pursuant to Search Warrants I was involved in the examination of the log cabin and the white house and the, the residence here, the little residence which lays between the log cabin and the red and tan house.

Q And would you state what it was that, what kind of an examination you conducted.

A We examined the houses in the area and around the houses for any proof of the crime and anything we might use to identify the individuals that there, were there the night before that were involved in the murder Agents Williams and Coler.

Q What kind of items did you look for and what kind of items did you find?

A We found several shell casings, empty cartridges, shell {207} cartridges and some, then we picked up paper or anything that could identify people by name that might live in the area at that time.

We didn't know exactly who was living there or who might have been there.

Q I will show you Government Exhibit 32C, 33G, 34E, 41B and 69E. I will first show them to the defense counsel for their inspection.

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(Counsel examine documents.)

Q (By Mr. Sikma) I will show you, first of all, Government Exhibit 32-C, and ask you whether or not you can identify Government Exhibit 32-C?

A (Examining) Yes, I can.

Q And do you recognize it?

A Yes.

Q Is this an item that you found during the course of your examination?

A Yes, it was.

Q Can you tell the Court whether or not this was coming from a -- you found this in an area from which shots were being fired on the 26th of June, 1975?

A Yes. These items did come from that area.

MR. SIKMA: Your Honor, I would offer into evidence Government Exhibit 32-C.

MR. TAIKEFF: I have just one question on the voir dire, your Honor, if I may.

THE COURT: Very well.

MR. TAIKEFF: Agent Adams, did you find those items personally?

THE WITNESS: Yes, I did.

MR. TAIKEFF: No objection.

THE COURT: Exhibit 32-C is received.

(Plaintiff's Exhibit No. 32-C, having been previously {209} duly marked for identification, so offered in evidence, was received.)

Q (By Mr. Sikma) Could you tell the jury where it was exactly that you found them?

A Yes. These two shell casings were found in the vicinity of the white house, so depicted on Government Exhibit No. 71.

Q O.k. Would you point it out on the map, Government Exhibit 71?

A It was found in the vicinity of this house right here, white house (indicating).

Q I would show you what is marked for identification as Government Exhibit 33-G, and ask you whether or not you can identify Government Exhibit 33-G?

A Yes, I can.

Q And are these items which you found on the 27th of June, 1975?

A Yes, they are.

Q And can you tell the Court whether or not these were found in an area from which you observed shooting on the 26th?

A Yes, they were.

MR. SIKMA: I offer into evidence Government Exhibit 33-G, your Honor.

MR. TAIKEFF: Your Honor, my understanding from the testimony is that the agent found them personally, and if that's the case, there is no objection; and that would be {210} true of the additional exhibits which are about to be offered.

THE COURT: You did testify you found them personally?

THE WITNESS: Yes, your Honor, I did.

THE COURT: Very well. Exhibit 33-G is received.

(Plaintiff's Exhibit No. 33-G, having been previously duly marked for identification, so offered in evidence, was received.)

Q (By Mr. Sikma) Now, what are these items which you have in Government Exhibit 32-C and 33-G?

A 33-G are two .44 Remington Magnum shell casings, expended cartridges.

Q What was their condition when you found them?

A They were laying on top of the ground as if they had been recently fired and in a shiny, new condition.

Q Now, earlier is it correct that you testified that on the night of the 25th there was a severe rainstorm in that area?

A Yes, there was.

Q Is this true of all the shell casings which you found?

A Yes, it is.

Q I would show you what is marked for identification as Government Exhibit 34-E and ask you whether or not you can identify Government Exhibit 34-E?

A Yes, I can.

Q And is it also true that Government Exhibit 34-E was {211} found, as the others were found, in the general area in which you observed shooting on the 26th?

A Yes. As a matter of fact, this particular cartridge was found in the vicinity of the log house.

Q O.k. Would you point out to the jury where it was that that was found?

A Referring to Government Exhibit 71, it would be in the vicinity of the log house here (indicating).

Q Which side was it on?

A To the best of my recollection, this particular cartridge, was found -- the entrance of the house is on the northeast corner, on the east side, and it was found in the general vicinity of the entrance to that house.

MR. SIKMA: Your Honor, I would offer into evidence Government Exhibit 34-E.

MR. TAIKEFF: No objection, if personally found.

THE COURT: 34-E is received.

(Plaintiff's Exhibit No. 34-E, having been previous duly marked for identification, so offered in evidence, was received.)

Q (By Mr. Sikma) Is it true about this shell casing, that you indicated about the other shell casings, as far as their condition at the time they were found?

A Yes. It was in the same condition as the others.

Q I will show you Government Exhibit 41-B, and ask you to {212} identify this -- and you will have to take it out of the package unless you know what it is inside it.

A (Examining) Yes, I know what this is.

Q And what is it?

A It is a .22 caliber cartridge.

Q And where was this found?

A It was found in the vicinity of the white house.

Q And who found it?

A I found it personally.

MR. SIKMA: I would offer into evidence Government Exhibit 41-B.

MR. TAIKEFF: May I have a question or two on the voir dire, your Honor?

THE COURT: You may.

MR. TAIKEFF: Did you say it was a cartridge or a casing?

THE WITNESS: It is a casing. It is an expended casing.

MR. TAIKEFF: No objection.

THE COURT: 41-B is received.

(Plaintiff's Exhibit No. 41-B, having been previously duly marked for identification, so offered in evidence, was received.)

Q (By Mr. Sikma) Would you point out to the jury on Government Exhibit 71 where it was that you found it?

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A Referring to Government Exhibit 41-B, I found this in the vicinity of the white house, as so depicted on Government Exhibit 71.

Q And which side of the white house was it?

A To the best of my recollection it was on the southwest corner, in the vicinity of the southwest corner of this house.

Q Your Honor, I show the witness Plaintiff's Exhibit 69-E for identification. Would you examine that and tell the jury what that is and whether or not you can -- first tell the jury whether or not you can identify it?

A Yes, I can.

Q And did you find that particular item?

A Yes, I did.

Q And would you tell the jury approximately the general area in which you found it?

A I found this in the vicinity of the white house.

Q What was the condition of this item when you found it?

A It again was laying on top of the ground. It was not covered in any way. It appeared to be in a recently fired condition.

MR. SIKMA: Your Honor, I would offer into evidence Government Exhibit 69-E.

MR. TAIKEFF: No objection, your Honor.

THE COURT: 69-E is received.

(Plaintiff's Exhibit No. 69-E, having been previously {214} duly marked for identification, so offered in evidence, was received.)

Q (By Mr. Sikma) Would you tell the jury exactly where it was on the map, on Government Exhibit 71, where it was that you found this item?

A Plaintiff's Exhibit 69-E was found, to the best of my recollection, on the south and west side, southwest, in the vicinity of the southwest corner of the white house as depicted on Government's Exhibit 71.

Q I would direct your attention to what has been marked or has been designated as Government Exhibit 20 which is to my far right, which appears to be a mock-up, to the right side of the courtroom. Have you examined the mock-up?

A Yes, I have.

Q And do you recognize what area that mock-up covers?

A Yes, I do.

Q In general terms -- and what is that area?

A That is the Jumping Bull Hall area which is near Oglala, South Dakota.

Q And that's the area which is also in part depicted on Government Exhibit 71, is that correct?

A Yes, it is.

MR. TAIKEFF: Excuse me, your Honor. Did I understand Mr. Sikma to say that that area was depicted in part on that exhibit?

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MR. SIKMA: Yes.

MR. TAIKEFF: I had the impression that Exhibit 71 was more comprehensive in scope than the mock-up. The question seemed to put it the other way around.

MR. SIKMA: I beg your pardon, your Honor. I guess perhaps I did.

Q (By Mr. Sikma) I understand that Government Exhibit 71 covers a greater area than the mock-up, Government Exhibit 20, is that correct?

A Yes, it is.

MR. SIKMA: Very well.

May we approach the bench, your Honor?

THE COURT: You may.

(Whereupon, the following proceedings were had at the bench:)

THE COURT: Mr. Lowe, I did not want to mention it to you, but you violated my rule against two counsel on one witness.

MR. LOWE: What rule?

THE COURT: On this witness. It was my understanding Mr. Taikeff would handle this witness.

MR. LOWE: I didn't think I did.

THE COURT: Well, that was the stipulation.

MR. LOWE: I thought this stipulation would not cover that. In many instances I am familiar with the evidentiary {216} matters because of my involvement with the matter, and Mr. Taikeff is not. I think the stipulation facilitates so much time saving, I would hope your Honor would allow that as an exception, the only exception.

THE COURT: It would be very simple for you to simply lean over and whisper something to Mr. Taikeff.

MR. LOWE: Except many of the stipulations will be limited in scope. I would like to think that that would be enough of a time saving, Judge, that you would allow that as an exception. We did it last summer very successfully.

THE COURT: Well, I do not allow two counsel on one witness.

MR. LOWE: All right. I will certainly abide by your ruling.

THE COURT: Thank you.

MR. SIKMA: Your Honor, this is at the Defendant's request, we intend at this time to offer into evidence, which was found in the white house, Government Exhibits 50-A and 50-B which are handi-talkies, about the white house which Special Agent Adams found; and I would like to let them know. They have a standing objection to it, and I would like to let them know at this time -- the jury is aware of it -- we are going to offer these to show as was indicated -- will be indicated by an offer of {217} proof, your Honor, that the handi-talkies will be evidence to corroborate the fact that -- as one witness will testify -- that they had a means of communication from the area of the houses to the area of the tent area.

MR. LOWE: Your Honor, may I just inquire as to the nature of the extent of the offer of proof? There are two handi-talkies. They were each in a recharger when found. To my knowledge they were in the house. There were no handi-talkies found anywhere else in this case.

Do I understand there will now be evidence that there was in existence another handi-talkie somewhere the area of the tent city?

MR. SIKMA: There was all kinds of radio equipment in the red and white van.

MR. LOWE: Operative?

MR. SIKMA: Yes, all kinds of it.

MR. LOWE: Operative?

MR. SIKMA: Yes. I have understood all the time it was.

MR. TAIKEFF: Do you know the frequency of the handi-talkies?

MR. SIKMA: Just a minute here.

(Counsel confer.)

MR. SIKMA: This is a common channel, your Honor, at 23, a 23 channel unit that was found there. That {218} would have the same capabilities as these handi-talkies would have.

MR. TAIKEFF: Well, your Honor, if there is a sufficient foundation that there was an operable radio in the tent city area and an operative radio that worked on the same frequency in the white house, I don't think that the same -- there would be a lack of sufficient foundation or lack of relevancy because it is clear that the Government would be entitled to make the argument that flows from that. However, until such time as they have laid that foundation, I think it would be prejudicial to admit, subject to further evidence, because if that evidence never develops, the jury has seen the object.

Now, we will stipulate at a later time that this witness found those handi-talkies so that the Government will in no way be prejudiced by waiting until they have a proper foundation.

MR. LOWE: We have stipulated foundation already.

MR. SIKMA: I will indicate one other factor, your Honor, that the Government will offer testimony that there was capability of communicating, you know, between this area where they were found and the tent area; and that the Government with its offer of proof will have sufficient evidence to show the capability. It is very well conceivable that the Defendants -- the Defendant and {219} his companions could have carried out items to communicate without the Government ever finding them, but I think that the evidence is relevant.

This goes again to what it is relevant to show as to the capability of the area in question, that that is an important matter of proof, and the prejudice to it, if it is so easily attached, is not that great because this witness is not going to testify that he knows of the capability or anything of this nature; and so at that point if it is later excluded, it shows no great prejudice, but I think that it is important that we establish -- this is the last, these are the last exhibits that I have with this witness.

MR. TAIKEFF: This is not an argument concerning prejudice, this is an argument concerning the fact the picture is not the home of the Defendant or the home where he stayed. They take two units which can communicate with each other and try to show the existence of those two units in one house. It's possible that someone in another house could have communicated with the other area. It is just improper to make that offer and offer that evidence on that basis.

MR. LOWE: We have already stipulated as to the foundation on it. If they just wanted to offer it, they could go ahead on the stipulation made at that time. We {220} are not fighting that.

MR. SIKMA: We would request the opportunity to proceed at this time by offering evidence as to where they found it.

THE COURT: You are offering them at this time?

MR. SIKMA: Yes. We are showing them to establish that the witness found them there, at the white house, that he found them in the white house. Your Honor, we would not -- yes, we would offer them at this time.

MR. LOWE: We would stipulate at the appropriate time later if it is connected up by the evidence.

THE COURT: I think the proper method probably -- if you are unwilling to go along with counsel's proposed stipulation -- would be for you to have this witness identify them and withhold offering them until you have additional evidence to tie it up with something or some similar equipment at tent city.

MR. SIKMA: We will do that, your Honor.

MR. TAIKEFF: Your Honor, we have to object to that because the mere bringing of them into the courtroom in the presence of the jury accomplishes what we are trying to avoid.

We would stipulate that this witness can identify them, where they were found and what they are, but not for the jury to see them and start wondering about them {221} or consider them, until such time as the Government has made a sufficient showing to warrant the introduction into evidence.

THE COURT: On that theory, if you have a piece of equipment here viewed by one person and a piece of equipment over here viewed by another person, there is no way that you could ever get that evidence.

MR. TAIKEFF: That's not true, your Honor. We are giving them the foundation.

THE COURT: I know there is no way --

MR. LOWE: (Interrupting) When they come in with the second piece of evidence, well, sometimes the first piece gives the foundation for the second piece.

MR. TAIKEFF: There isn't going to be the second piece of equipment. This is a bushwhacking operation.

MR. SIKMA: There is going to be testimony.

MR. TAIKEFF: As to the act of communicating, they can do that with smoke signals.

MR. SIKMA: There is substantial radio equipment the evidence, and the testimony will be that that was loaded up into the van from the tent city area in preparation for running the roadblocks. There will be that testimony later in the trial, your Honor, so they wouldn't carry this additional equipment if it was inoperative.

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MR. LOWE: There is no conceivable prejudice to the Government. There is conceivable prejudice to the Defendant if this testimony does not materialize, and it seems to me that makes the decision clear.

THE COURT: What prejudice do you see for the Defendant if they simply identified the equipment as the equipment that was found?

MR. LOWE: Last year, Judge, there was an allegation of ambush. It was a wild allegation that somehow, something, 35 miles away in Aldrich, South Dakota, there might have been another

unit. They might have been transmitting and setting up the agents. It was so farfetched they never did produce another unit, and it was very prejudicial.

The prejudice here is to suggest some sort of preplan. The charge is nothing like that.

MR. SIKMA: Your Honor, he is talking about evidence in another trial which was evidence -- which was an admission by one of the Defendants, perfectly admissible -- I mean, if the witness testified that the Defendants said that to him, why, it was evidence of this kind that the Government would be violating its obligation to its case if we didn't present that kind of evidence -- that was being set up.

We cannot offer that evidence this time because {223} that witness was against another Defendant, and it was an admission by another Defendant after the close of the conspiracy much later; and it didn't relate to this Defendant, so we cannot offer that kind of evidence in this case and we don't intend to use it.

MR. TAIKEFF: I think your Honor has been taken away from the main point. There can be no prejudice to the Government by waiting with this. We have already acknowledged if they produce the other unit, we recognize that this is relevant. Of course, it is an argument that they should be permitted to make to the jury; but until they can show some connection between either the Defendant or the area in which he was known to be with an equipment -- or the equipment in somebody else's house, I think it is improper for them to parade it in front of the jury.

THE COURT: Well, it won't be paraded in front of the jury, and there is no way that I can require one side or the other to proceed on the basis of a suggested stipulation unless both sides are willing to stipulate.

MR. TAIKEFF: And maybe the witness could be shown the unit in an enclosed container, and asked: "Anywhere did you find what is in this bag that is marked for identification?" and let it rest at that, unless the Government's real motive is only to want to inform the {224} jury of the existence of something that is not in evidence.

THE COURT: Mr. Sikma, what is your response?

MR. SIKMA: Your Honor, I think that's absolutely ridiculous. We intend to proceed in an orderly manner. We are offering it in good faith.

THE COURT: How will you tie it up?

MR. SIKMA: We will tie it up by testimony there was a capability by an eyewitness. There was a capability of communicating between this area and the area of the houses, and I expect that we will also be able to connect it up with the radio equipment; but I haven't recently looked at it, but I was definitely going to because I am quite certain that the radio equipment was substantial. If you review the photographs you will see that there was not only communication with this but also, your Honor, the radio in the FBI Agents' vehicle was also -- those radios were also turned up.

MR. TAIKEFF: It is the Government's responsibility to have a physical examination of that equipment to see that it is not operative.

MR. LOWE: May I ask, your Honor, that the witness be identified?

MR. SIKMA: I didn't hear.

MR. LOWE: The name of the witness who is going to {225} testify for the offer of proof.

MR. SIKMA: One of the witnesses is Draper, your Honor.

MR. LOWE: Any other one?

MR. SIKMA: It is possible, your Honor.

THE COURT: Well, on counsel's representation that it will be tied up, the witness will be permitted to identify the object as being an object that he found. It will not be received in evidence at this time.

MR. SIKMA: I understand.

THE COURT: It seems to me that is a regular standard procedure and --

MR. LOWE: (Interrupting) Would this be an appropriate time for your Honor to instruct the jury as to the distinction between an object which is simply identified and one which is received as far as their consideration is concerned?

THE COURT: I will give the jury such an instruction.

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(Whereupon, the following proceedings were in the courtroom in the hearing and presence of the jury:)

Q (By Mr. Sikma) I will show you what has been marked as Government's Exhibit 50A and 50B and ask you whether or not you can identify these items.

A Yes, I can.

Q And can you tell the Court and jury where you first saw those items?

A I saw these items in the white house as depicted on Government Exhibit 71 as we were inside the white house searching pursuant to a search warrant.

Q Where were they in the white house?

A On a table inside the white house.

Q And do you remember what the room of the house was?

A To the best of my recollection it was a kitchen or eating area. A kitchen type table.

Q And what did you do with them after you found them?

A I was in the company of Fred Coward. Agent Coward put his initials and a date on each one of the four units and we retained them as evidence.

Q What condition were they when you found them? Were they out of the unit or were they as you see them?

A The Handi-Talkie was in the charger and as I recall, the chargers were plugged in.

Q And were they operative?

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A They were.

Q At the time you found them?

A Yes, they were.

THE COURT: Members of the jury, I want to caution you that, as I mentioned in my preliminary instructions, when this case is finally submitted to you you will consider all the evidence in the case and that will be testimony of witnesses, exhibits received in evidence and any matters which may be stipulated between the lawyers. There are times because of, required by the orderly, in order to have an orderly procedure in the trial that certain objects must be identified but are not offered in evidence at that time. They may be offered later. If an object should during the course of the trial be identified and not later received in evidence, the jury must disregard that item entirely, attach no significance at all to it because you can only give consideration and weight to any exhibits that the Court actually admits in evidence. As I say, I give you this caution because there may be items, as in this case, this item which was just identified which has not been offered and if subsequently it should not be received in evidence, then it would have no significance at all insofar as your consideration is concerned.

MR. SIKMA: Your Honor, I might ask if the jury might have some time to look at the photographs and question. If the Court would rather reserve that for a later time, but I {228} think it might be helpful for the jury to observe and look at these photographs prior to cross-examination. I have completed my examination on direct of this witness.

THE COURT: My procedure is to permit Counsel that offers an exhibit, or even if it's offered by the other side, any exhibit that's been received that I permit that exhibit to be circulated to the jury. My only restriction is that there would be no interrogation of the witnesses while the jury is viewing photographs or any other exhibits. If you desire have the jury view the photographs, it may be done at this time.

MR. LOWE: May we stand easy while this is going on and confer about cross-examination and so forth?

May we approach the bench.

(Whereupon, the following proceedings were had at the bench:)

MR. LOWE: From the beginning of this trial Mr. Hultman has raised objections about procedures which tend to emphasize one exhibit or part of a testimony or issue. We believe that the gun racks which are set up on the right are calculated to, and in fact do affect, they do that exact thing, they present continuously to the jury certain exhibits but not all exhibits; namely, the guns. To the extent that it is handy to have the guns readily available in the courtroom, we can understand using such a rack, but we believe that racks should be turned {229} facing the walls so that an agent can go over and retrieve the guns but so they're not constantly in the view of the jury while they're in the courtroom or moving in and out of the courtroom.

THE COURT: I thought we had resolved that.

MR. LOWE: I don't know if we have. It's my understanding it would not be in view of the jury.

THE COURT: I remember that the matter was discussed, I think last Friday afternoon.

MR. LOWE: Unless I misunderstood.

THE COURT: You heard my suggestion that, somebody suggested, I don't know if Mr. Hultman or who it was suggested they could be turned toward the wall.

MR. HULTMAN: Turned toward the wall.

MR. LOWE: That's all I'm asking.

THE COURT: They'll be turned to the wall.

MR. HULTMAN: In fact, I would ask the Clerk to do what he can in terms of handling them that way.

MR. LOWE: Fine. That's all it was.

THE COURT: You may ask the bailiff --

MR. LOWE: I would like to raise an issue. I don't know if it will come up with Mr. Taikeff, I don't know how he feels about this particular witness. We have had a considerable amount of flap last summer about these green stick ons on Exhibit 71. I take the position, certainly as to some witnesses I do {230} not want the green magnetic items on the board.

THE COURT: Certainly as to what?

MR. LOWE: Certainly as to some witnesses.

Both because it would suggest to them what their testimony should be or what previous testimony has been and also because at some point it starts to clutter a lot of lines because you have all these stickers around. Secondly, as to some of the witnesses, I think there may be dispute as to where one item was found or another. They have to look to the board when they

assume the stand or while they're sitting there and see the item marked. It suggests what their testimony should be. I don't know whether you have any feelings of how that would be. Last year Judge McManus allowed us to remove them prior to cross-examination if we chose. I don't know if we want to do that each time.

MR. HULTMAN: John, I think we could do that. I think we ought to put them up because they do have, what it saves, Your Honor, is normally we would have the witness examine and examine on the board and so forth and we're pretty much all of us agreed there is no real issue on basically most of those items so we prepared these to put on one exhibit once they come in, once a weapon comes in. It's been testified where it was found, it then goes on the board, on Exhibit 71. The problem then that Counsel is raising, he feels there are times when in order to properly examine his witness on cross he would like them {231} removed. What I would suggest is we put them, I strenuously resist anything else, we put them up and leave them there except in those instances when you want to do it. I have no objection.

MR. LOWE: Fine.

THE COURT: There is an understanding?

MR. LOWE: Yes. Thank you.

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MR. TAIKEFF: Your Honor, could we approach?

THE COURT: You may.

(Whereupon, the following proceedings were had at the bench:)

MR. TAIKEFF: Your Honor, I thought we could possibly take advantage of the lull and call Your Honor's attention to the fact that amongst the things listed in our trial memorandum is an objection to the manner in which certain objects have been numbered.

Mr. Lowe just called my attention to the possibility that in fairness to the Government and to make sure there are no undue delays in the trial, perhaps Your Honor would want to rule on that at the earliest possible time.

Very briefly to state our position, some objects are numbered with the same numerical reference followed by a letter where apparently the Government is not in a position to prove the connection between the item whose number we object to and the principal item to which it is ostensibly related and we believe that as to those items there should be renumbering.

The Government can offer whatever proof is appropriate, make whatever argument is appropriate but it is, there is some prima-facie nexus shown. We believe that it is improper to label it that way because it constitutes an unfair advantage.

The jury is also hearing a number in connection with a principal item whose numerical designation is the same.

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In fact it is our understanding that it is the, generally the proceeding of this Court to number all exhibits numerically and consecutively and to have these letter exhibits constitute both the deviation from the normal practice here and a suggestion by the very numbering that there's a relationship.

Now we do not object to most of the items being numbered in letter because in fact we recognize that there is indeed a connection and we're not disputing that.

But where there is not at least a prima-facie evidence showing we feel that the use of the same number gives the Government an advantage it does not have.

MR. LOWE: May I just add, Mr. Sikma told the jury in his opening that they would notice Exhibit 34A and 34B were so numbered because it will be shown that Exhibit 44B was fired from Exhibit 34A and now a logical extension would be that every time they see Exhibit 34G they would draw a similar conclusion when in fact the items we complain of are items which I believe the Government will candidly say will only be shown as possibly having been fired from that weapon or many other weapons. In other words, there is no unique connection to the weapon that is numbered so we feel that while it is relevant for them to give that testimony, that it ought to have a different number so that the jury does not have an unwarranted inference merely from the number of the exhibit.

MR. HULTMAN: Your Honor, the Government objects for {234} a number of reasons.

First of all the system of numbering, and I don't mean that as a result of this that counsel committed to anything but to, just to show the background and the history because there has been a previous trial and there were literally very, very few exceptions. All of the exhibits in this case, or exhibits in the last trial, I gave them the number again, the same as the last trial because if I had not nobody would have been able to understand the transcript from last time.

I did that with the knowledge of counsel from the beginning because if they had a problem I wanted to know it early and I think generally speaking as counsel's agreed, they agreed it was a good idea because there would be no way --

THE COURT: As I recall, the Briefs that were filed in this matter, there are only about four --

MR. LOWE: Three or four, Your Honor, and all four of them are bullets.

MR. TAIKEFF: That's all we address ourselves to at this time.

THE COURT: And I have not had an opportunity to fully read the Government's Brief so I would --

MR. HULTMAN: Why don't I leave it at this time, at this point rather than argue the matter and we're only talking about a limited item and I think without a question that counsel with the evidence can make it very clear as you know they will {235} do, that either this exhibit is related to this exhibit in some measure but only to that degree. I mean I have full confidence that there's going to be no question that unless a round is fired from that specific weapon, that's going to be

made very clear by both the Government and if not by the Government by the defense. But that there is a relationship, for example, that will be shown that it is capable of being fired from this particular weapon and when placed with the rest of the evidence there is at least this much of a connection and that's the only reason. There is a probability and that's the only --

MR. LOWE: Possibility.

MR. TAIKEFF: I agree with Mr. Hultman that counsel is going to endeavor to do as good as possible and that's exactly why this application is made.

THE COURT: I will probably rule on it tomorrow morning.

MR. TAIKEFF: Thank you, Your Honor.

(Whereupon, the following proceedings were had in the courtroom in the hearing and presence of the jury:)

THE COURT: I suppose everybody has been sitting long enough -- oh, I'm sorry. I thought you were through with the pictures.

Everyone has been sitting long enough so that we should take a recess before we commence the cross-examination of this witness so the Court will recess at this time and {236} reconvene at five minutes to 4:00.

(Recess taken.)

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(Recess taken.)

(Witness resumes witness stand.)

(Whereupon, the following proceedings were had in the courtroom, out of the presence and hearing of the jury, the Defendant being present in person:)

THE COURT: Are you ready to proceed with your cross examination?

MR. TAIKEFF: I am, your Honor.

THE COURT: You may bring in the jury.

(Whereupon, at 3:56 o'clock, p.m., the jury returned to the courtroom; and the following further proceedings were had in the presence and hearing of the jury:)

MR. TAIKEFF: May I inquire, your Honor?

THE COURT: You may.

CROSS EXAMINATION

By MR. TAIKEFF:

Q Mr. Adams, you are familiar with the model that's on the far side of the courtroom, are you not?

A Yes, I am.

Q Do you know, as you sit there, what its scale is?

A Not off the top of my head, no, sir.

Q If I told you that the scale was one inch equals ten feet, that is to say one inch on the model equals ten feet in real life, would you have any quarrel with that?

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A I believe it is marked on the scale on the mock-up. If that's what it reads, I would accept that.

MR. TAIKEFF: Would the Government accept my observation in that regard?

MR. HULTMAN: Yes.

Q (By Mr. Taikeff) Would you very generally -- I don't expect you to be precise in any way -- for the benefit of the Court and the jury tell us approximately where in this courtroom the center of tent city would be if it were placed on the same scale and relative to the model, do you understand the question?

A No, I do not.

Q Would you turn around and look at the diagram?

A All right.

Q No. 71?

A All right.

Q It shows the area called the Jumping Bull Hall area, does it not?

A Yes, it does.

Q That's roughly at the center of the diagram?

A Yes.

Q In the upper right-hand corner it shows an area that is shaded darkly which we call, or everybody has been referring to as the tent city area, is that right?

A Yes.

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Q Now, the model which is beyond the defense table only portrays a portion of Exhibit 71, is that right?

A Yes, it does, that's correct.

Q And it is that central portion around the houses?

A Yes.

Q And in front of the houses?

A Yes.

Q Could you -- and I don't expect you to be precise or accurate in any way -- just roughly using a pointer, demonstrate for the Court and jury what part of Exhibit 71 is represented by the model?

A All right. It would be an area --

Q (Interrupting) If you will just put your pointer down there so I can describe it for the record --

A (Continuing) -- start with the north boundary.

Q All right, close to Highway 18, in the upper left-hand part of the diagram, coming straight down, keep going, to a point somewhat below, I would say, about six inches below the white house and about two feet to its left on the diagram?

A That's the tan and red house there.

Q That's the red house?

A Tan and red, yes.

THE COURT: Excuse me. Did he say two feet?

MR. TAIKEFF: Yes, I said two feet on the diagram. Yes, your Honor.

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A (Continuing) Then we go on the west quarter.

Q (By Mr. Taikeff) You are now moving the pointer about a foot above the lower edge to the right, into the trees?

A (Indicating).

Q And you stopped -- can you describe the point where you stopped?

A Well, actually it would be in the wooded area, south and west of the small plowed field that is in that general area.

Q All right, and then coming up?

A (Indicating).

Q And then can you close it?

A Right across here (indicating), and up to the Jumping Bull Hall area.

Q Would you say that a very rough verbal description is that it is the lower two-thirds of the middle third of Exhibit 71?

A That would be fairly accurate, yes.

Q Roughly, all right. Would you mind taking the seat again, please?

What is the distance approximately, not on the diagram but in real life, between the white house and the center of tent city?

A I think about a thousand yards.

Q All Q All right, a thousand yards, one inch equal -- excuse me. (Counsel confer.)

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Q (By Mr. Taikeff) Mr. Adams, Mr. Sikma has kindly advised me that the pointer has a scale on it.

A Yes, it does.

Q You can use the pointer to measure it. Would you prefer to measure it?

A A thousand yards would be a guess on my part, sir.

Q Do you want to check that?

A (Examining) About -- be about sixteen hundred feet.

Q O.k. Five hundred yards roughly?

A Right.

Q Now, according to the scale employed in making the model, sixteen hundred feet would be a hundred sixty inches, do you agree with that?

A Yes.

Q And that would be about 13 feet in this courtroom, would be the equivalent to the distance between the white house and the center of tent city?

A Yes.

Q Now, the only thing that remains is for you to tell us in which direction you would measure off the 13 feet to locate tent city in this courtroom, if the model were expanded, is what I am saying, so that it included tent city, where would tent city be in this courtroom?

A It would be over to the left, left side here (indicating).

Q I am going to move, if I may, your Honor?

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THE COURT: You may.

Q (By Q (By Mr. Taikeff) Tell me whether or not I am now standing in a position approximating where tent city would be.

A I think it would be back behind you more.

Q Well, let me ask you this: Is tent city not southeast of the white house?

A Yes, it is.

Q And isn't this the white house (indicating)?

A Yes, it is.

Q Right here (indicating)?

A Yes.

Q And isn't the direction north, this way (indicating)?

A If so depicted, yes, I would accept that.

Q Well, if that's north, then that's south, and southeast would be this way (indicating), wouldn't it?

A All right.

Q So then you agree that I am standing at a point that would approximate where tent city would be if we expanded that model?

A Yes.

MR. TAIKEFF: May the record reflect that I am to the left of Mr. Hanson, approximately four feet.

Q (By Mr. Taikeff) Mr. Adams, what is a 302?

A It is a document or piece of paper that we transcribe notes or our recollection of a certain event on it. It remains, {243} it is a part of a file that we have in our office.

Q Is it fair to say that a 302 is an FBI report?

A No, it is not.

Q It is not an FBI report?

A No, it is not.

Q What am I incorrect about it, isn't it something that the FBI uses?

A Yes, it is, but the 302 in no way is a report. It is strictly a piece of paper which contains a certain incident and a report contains numerous 302's.

Q Oh, I see. The information which is recorded in the 302, does that reflect activities of an agent?

A It can.

Q Well, tell us all the things generally that go into a 302.

A Well, you can use it to show the results of an interview. You can use it to show the results of some activity you did. Some of them are used -- a signed statement is reproduced on them. Anything that we want to make a record of, we usually put it on our standard FD-302.

Q If you were to interview a witness and the witness were to tell you certain things, that fact or those facts would end up in a 302 most likely, isn't that true?

A Yes, usually they would.

Q And if you made observations when you went some place, you would probably record that and preserve that information {244} in a 302, wouldn't you?

A Yes.

Q Now, you have a file for each case as a rule, do you not, each case that you are working on?

A Well, your terminology "file" disturbs me. If that's how you want to refer to it --

Q (Interrupting) What is your terminology? I would be happy to use your terminology.

A Well, there could be -- on some cases there are numerous files -- a file.

Q I mean folders. I am talking about a case file.

A Each folder can contain several files which to me is the bound portion of numerous 302's or reports, or whatever it might be.

Q When an incident occurs and it appears that the FBI has authority under the law to investigate, that incident becomes a case, that gets a number, isn't that correct?

A Yes, that is correct.

Q And everything that's done in connection with investigating that case is, as a general rule, if it has any importance or value, is written down, is it not?

A Yes.

Q And as a general rule it is written down on a 302?

A Yes.

Q And those 302's are kept perhaps in several places, but {245} at least in the case file, if I may refer to it as that, where you collect all of the 302's concerning a particular separately numbered case?

A Yes.

Q What are the reasons for doing this?

A Just to maintain a record of what was done in this particular case.

Q Well, is it so that you can get your paycheck or so that you can make some other use of it?

A Well, primarily so the record is there if we need it for Court purposes, whatever it might be, to review for other leads in the case, or whatever purpose it might serve.

Q So you use it to refresh your recollection?

A Yes, I do.

Q To analyze what has been done up to a certain point?

A Yes.

Q Perhaps to allow your co-workers or supervisor to catch up on what has been happening in a particular investigation?

A Yes.

Q Do you as a general rule use or reread the 302's in order to refresh your recollection before you testify in court?

A Yes.

Q Do you make use of 302's in the course of the trial to interview or otherwise refresh the recollection of a potential witness?

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A No, I don't personally.

Q Does anybody that you know of?

A I think --

Q (Interrupting) I don't mean an individual by name, just generally speaking.

A Yes, I think the attorneys probably do.

Q In fact, one of the additional functions of the 302 is to provide the attorney who will ultimately try the case with some idea of the kinds of information available in connection with that case, isn't that right?

A Yes.

Q So the 302 serves an important and official function,
isn't that correct?

MR. SIKMA: Your Honor, I would object to this, first of all, as irrelevant. 302's are generally inadmissible.

MR. TAIKEFF: I am not offering any in evidence, your Honor. I may use them in the course of this examination. I want to establish what they are.

THE COURT: Overruled.

THE WITNESS: May I have the question again, your Honor?

MR. TAIKEFF: May the question be repeated?

THE COURT: The question may be repeated.

(Question was read by the reporter.)

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A Yes.

Q (By Mr. Taikoff) And because of that fact, is it not true that 302's, as a general rule, are to be prepared accurately and truthfully?

A As a general rule, yes.

Q Now, I understand that in connection with the events that you personally participated in, in the early part of June 26, 1975, you were not taking notes?

A That is correct.

Q Do you sometimes take notes of what you do in order to be able to write up your 302's?

A Yes, usually I take notes.

Q And then you use those notes and your memory to write the final report?

A Yes, that is correct.

Q Do you type your own report?

A No.

Q Do you see them after they are typed?

A Yes.

Q If you find any mistakes in them, do you correct those mistakes?

A Usually, yes.

Q You mean you sometimes find a mistake which you don't correct?

A Yes. Under some circumstances on occasion there might {248} be a mistake or something might be left out that doesn't get

taken care of.

Q Maybe you don't understand my question. Do you ever identify the existence of a mistake in a 302 so that you are conscious of it and not correct it?

A Yes, I have.

Q And you purposely don't correct it?

A Not purposely. It is under the circumstances that it doesn't get corrected.

Q Well, give me an example of what kind of circumstances would cause you to read a typed report that you had given to typist to prepare, and you would recognize a mistake and you would not see to it that it was corrected before you either signed it or put it in the case file?

A Are we talking about a report or a 302?

Q I am talking about a 302, and I apologize for making that mistake.

A All right. The instance I can think of offhand is when the 302 has been prepared and has been disseminated to different areas and perhaps even the original is in the file before we get to see it.

Q Well then, perhaps you misunderstood my original question. I said that after you have given your writing to the typist and you get back now the 302 in typewritten form, you read it over, don't you, to see that it is correct?

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A There are occasions when we don't get a chance to read it over before it is placed in the file.

Q Do you keep a log of those that you don't read?

A No.

Q So you couldn't say with any certainty which 302's in the course of your history, as an FBI Agent, you did not read after typing, isn't that correct?

A That is correct, yes.

Q And if I showed you a 302 with an error in it, you wouldn't be able to tell the Court and jury now that, "Oh, that's one I didn't read," generally speaking?

A I might recall a certain 302, yes.

Q I said, generally speaking.

A Generally speaking, I think I could, yes.

Q You could tell us which ones you didn't read?

A Yes, I could.

Q O.k. Tell us the 302's that you haven't read.

MR. SIKMA: Your Honor, I would object to that form of the question. The witness indicated that there might be a number of occasions which he might be able to recall if he were shown a particular 302. However, he is asking him now to recite from recollection all those that he didn't read.

THE COURT: Objection sustained.

Q (By Mr. Taikeff) Did you say that shown a certain 302 {250} you might remember that that was one that you did not read?

A Yes.

Q All right. Now, I ask you, other than the possibility of your memory of a specific event being triggered, are you able now to tell us about the 302's in the course of your career that you have not read?

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MR. SIKMA: I would object again, Your Honor. The same question essentially has been asked.

THE COURT: He just asked if he's able to tell.

MR. TAIKEFF: I'm not going to ask him to tell us, Your Honor.

THE COURT: Overruled.

THE WITNESS: Could I have the question again, please.

THE COURT: The reporter may read back the question.

(Whereupon, the last question was read back.)

A Yes.

Q (By Mr. Taikeff) Do you sign or initial the 302s after they are typed when you see them?

A Yes. We usually initial them.

Q I'm not asking you about more than one person, I'm asking about you.

A Yes.

Q And if your initials are on a 302, is that an indication that you've read it after it was typed?

A Generally; yes.

Q What's your current assignment?

A I'm in the process of being transferred to the Phoenix division of the Federal Bureau of Investigation.

Q You Q Your most recent assignment prior to the transfer?

A Rapid City, South Dakota.

Q And does that place you on the Pine Ridge Reservation?

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A Yes, it does.

Q And when did that assignment begin?

A I first started working the Pine Ridge Reservation in June of 1973.

Q So for a period of approximately three and a half years you worked that particular area?

A Yes, I did.

Q Your jurisdiction, of course, was outside the reservation as well as inside the reservation?

A Yes, it was.

Q How much of your time did you spend on the reservation, would you say, during that three and a half years?

A Probably 90 to 95 percent of my working time.

Q Did you have any senior status? Were you an agent in charge or anything other than a special agent of the FBI as far as the Pine Ridge Reservation was concerned?

A No. I did not.

Q How many fellow agents worked with you in that capacity, the capacity in which you worked?

A What period of time are you speaking of?

Q Well, if it varied, did it vary very much as to the number of colleagues you had?

A Within 10 to 15 agents; yes.

Q Let's say during the year 1973, the average figure for the year. I'm looking for a qualitative answer, not a quantitative.

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A That's 15 to 17 agents.

Q And during '74?

A The figure dropped to about 11 agents.

Q And during the first half of 1975?

A Again, around 10 or 11 agents.

Q And during the second half of 1975?

A It went up to 26 or 27 agents.

Q Now you have certain equipment supplied to you by the Federal Bureau of Investigation, do you not?

A Yes, I do.

Q You have a 357 magnum revolver?

A No, I do not. Excuse me, supplied to me by the Bureau?

Q No. The question was do you have a 357 magnum?

A Yes, I do.

Q That's personal property?

A Yes, it is.

Q How about the shotgun you were carrying on June 26th, 1975?

A That was FBI issue.

Q And the rifle?

A FBI issue.

Q And the bulletproof vest?

A FBI issue.

Q Where did you receive each of those items?

A From our office in Rapid City.

Q And when?

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A I checked them out on the Monday prior to the 25th or 26th of June, 1975.

Q And when prior to that Monday had you checked out any of those three items?

A I usually carried a shotgun and the vest with me.

Q So it was the rifle that you picked w on that Monday?

A No. I checked them out on a weekly basis.

Q The beginning of your work week you checked them out --

A When I was going on a road trip out of town I'd check them out. Yes. That's usually the way it worked.

Q When you say out of town, is that a euphemism for going to the reservation?

A Anywhere. If I was going to leave Rapid City area for an overnight trip I'd usually take them with me, wherever it might take me. To the northern part of the state, eastern part of the state, I usually carry them with me.

Q That is the shotgun, the rifle and the vest?

A Shotgun and the vest.

Q How about the rifle?

A On occasion I would check a rifle out and this happened to be one of the occasions.

Q Is there any special reason for taking that much equipment with you, let's say, when you go out of Rapid City into the northern part of the state?

A No. It was just habit I got into and I just followed that {255} pattern.

Q Did you feel then any particular necessity to carry that kind of protection on the reservation as opposed to what you would carry in Rapid City?

A No. It was no different as far as I was concerned.

Q Why didn't you carry it with you when you were in Rapid City?

A Because it was immediately available.

Q Where did you usually carry the shotgun?

A Usually in the front seat.

Q In Rapid City, too?

A If I had a shotgun with me in Rapid City, yes, it would be in the front seat.

Q Where did you usually keep the rifle?

A It was usually in a case in the trunk.

Q And the bulletproof vest?

A In the trunk.

Q Now in connection with the investigation which took place beginning at approximately 4:00 o'clock on June 26, 1975, did you play any role in that investigation?

A No, I did not.

Q Did you conduct any of the interviews of prospective witnesses or people who had information about this matter?

A No, I did not. On June 25, 1975?

Q And afterwards?

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A After that? Yes.

Q Did you have any special role in connection with that investigation?

A No, I did not.

Q You were just another special agent working on that case?

A Yes, I was.

Q In your years on the reservation, did you see many pickup trucks?

A Yes, I did.

Q Did you see many vans?

A I saw -- yes. I guess I could say many vans.

Q Would you say that pickups were more prevalent than vans?

A Yes, I would.

Q Would you say that pickups were a rather common sight on the reservation?

A Yes, they are.

|| Q Q Would you say you know the difference between a pickup and a van?

A Yes.

Q You made reference to a jacket that was found on the body of Mr. Stuntz which said "FBI" on the left breast area.

A Yes.

Q Was that an official piece of property issued by or belonging to the FBI?

A Yes. I think I could say that.

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Q Do you know where it came from immediately before it was on Mr. Stuntz' body?

A I know now; yes.

Q Of your own personal knowledge?

A Yes.

Q Where did it come from?

A The trunk of Jack Coler's car.

Q In connection with qualifying as a special agent of the FBI, did you attend any school?

A Yes, I did.

Q For how long?

A 14 weeks.

Q Was that in Virginia?

A Part of it was in Virginia.

Q And the other part of it?

A Washington, D.C.

Q And as part of your training to prepare you to be a special agent of the FBI, did you receive any instruction or training and/or practice in testifying in court?

A Yes. Some.

Q Until what time was there gunfire in the Jumping Bull area on June 26th?

A I would say about, it would be recollection, 4:00 o'clock. Q And is it fair to say that from the time you got there until 4:00 o'clock, except for that one hour truce, I think you {258} referred to it, that there was firing at all times during that period? Not every minute that intermittently throughout that period there was firing?

A Yes.

Q Would you be kind enough to use the pointer and show the Court and jury based on your observation or any investigation you subsequently conducted the several places by area where firing came from?

A Toward my direction?

Q Well, you can identify each place and tell us specifically what you know about the firing from that place and then we don't have to do it by categories.

|| A A There was firing from the vicinity of the log house and the vicinity of the white house and the trees to the west of the white house (indicating). I also observed individuals around this house, the red and tan house (indicating).

Referring to Government Exhibit No. 71.

Q Now so far you have mentioned three places. Do each of those places represent places from which in your opinion firing was directed at you?

A I can state for record that, I was fired upon from the log house, from the white house and from the vicinity of the trees adjoining the white house (indicating).

Q Now how about that fourth place, the red and tan house?

A I saw individuals around there during the afternoon. To {259} the best of my recollection they never fired at my direction.

Q You saw them firing though?

A Well, I saw them in the area and I heard the shots from what appeared to be this general vicinity in the course of the afternoon (indicating).

Q How many such people?

A It appeared to me to be two different people.

Q Could you say whether they were Indian or white?

A No. They appeared to be Indian to me.

Q Were they carrying long guns or rifles?

A I don't recall seeing a weapon with either one of them.

Q You mean you don't recall seeing the kind of weapon but you know they had weapons?

A I don't recall seeing either one of them with a weapon. There was trees. I could see them walking between the edge of the house and in the trees here and I can't state positively that I saw them with a weapon (indicating).

Q Were there any other places from which firing came that you can identify?

A As I stated, when I pulled in here and parked it appeared to me that the first shot just from sound came from this direction down here somewhere (indicating).

Q Now there's no house there. Let's see if we can describe that direction in some way for the record.

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A I would say just to the south of the area marked "Coler's car," Government Exhibit 71.

Q Would you say ten inches away on the chart?

A Can I state it appeared to me by the sound it came from this area (indicating).

Q Did you see any people down there?

A Not when I came in; no.

Q Did you see any people down there at any time?

A No. I did not.

Q Are there any other areas from which you're able to identify firing?

A Except for the area of where, as we referred to as the escape route.

Q Yes. Putting that aside.

A That would be it.

Q Would you be kind enough to take your seat again.

Now in your direct testimony I believe you made reference to the areas of jurisdiction that the FBI has on Indian reservations and although you don't use the phrase you were referring to the act known as the Major Crimes Act, were you not?

A I believe it's referred to as that; yes.

Q And I think you alluded to it by saying there are certain categories of crime such as robbery, murder, rape, I don't remember all the examples you gave.

{261}

A Yes.

Q And that's the category of crimes which the FBI is authorized by law to investigate on Indian land, isn't that correct?

A As I understand it; yes.

Q Now murder is in fact included amongst those crimes?

A Yes, it is.

Q And in the course of your duties while assigned to the Rapid City office, you had occasion to work on a certain number of murder cases, did you not?

A Yes, I did.

Q Did you have in the course of your official work some idea or indication of the number of cases, irrespective of whether you personally were working on them?

MR. SIKMA: Your Honor, I would object to this as irrelevant and immaterial.

MR. TAIKEFF: The matter was opened on direct, Your Honor. I'm going to just explore it briefly.

THE COURT: Very well. Proceed.

Q (by Mr. Taikoff) Do you have any information as a special agent to the amount of business the FBI had, to put it that way, on the reservation?

A Yes. I have general knowledge.

Q In 1974 how many killings were there on the reservation?

A Just be a guess. I'd have to say 10 to 12.

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Q And one final question. What would your guess be for 1975?

A It would still be a guess. 12 to 15 maybe.

Q I believe in your direct examination you said that you understood that Coler and Williams were working on Jimmy Eagle's case. That's James Theodore Eagle. Did you give that testimony?

A Yes, I did.

Q And that was in connection with the question put to you as to whether or not you saw either Coler or Williams or both early in the day, do you recall that?

A Yes.

Q What's the basis of your understanding?

A It was just in my brief conversation I had with Agent Price outside the Pine Ridge jail.

Q That morning?

A Yes.

Q He said something to you which made you believe that Coler and Williams were working on the Eagle matter?

A Yes.

Q In your official capacity as a special agent working on this case, have you been Keeping up with the 302s in connection with the case and reading them in addition to the ones that you yourself authorize?

A No. I am not.

Q Did you yourself ever discover, I'm only talking about what {263} your own investigative efforts have uncovered, not what somebody else may have uncovered or not uncovered, whether or not Jimmy Eagle was at the Jumping Bull Hall area on June 26th?

A What I personally found?

Q Yes.

A I don't think anything that I personally did indicated to me that he was there; no.

Q Did you not testify on direct examination that there came a time when a person by the name of Wallace Little with two people in the front seat with him were in your immediate vicinity?

A Yes.

Q What time was that?

A I estimated it to be about 1:30 in the afternoon.

Q And he was driving away from your area, was he not?

A Yes, he was.

Q As opposed to arriving in the area?

A He arrived alone and departed with two occupants, at least two occupants in the vehicle.

Q That departure was approximately 1:30 in the afternoon?

A That was an estimate of the time.

Q I mean approximate time, 1:30?

A Yes.

Q What time did you arrive at the Jumping Bull area?

A I estimated my arrival to be about noon.

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Q And what time was the transmission from either Coler or Williams that you heard referring to the red pickup?

A I do not, there was no transmission that I can recall of either one of them referring to a red pickup.

Q Did you ever have any communication from them in any form indicating that they had some contact with or perceived a red pickup?

A No.

MR. TAIKEFF: If I might have a moment, Your Honor, please.

THE COURT: Okay.

Q (by Mr. Taikoff) Let me modify my question to eliminate the word red from the question. Or do I have to repeat the entire question?

A No. I would accept pickup. I recall him saying something about a pickup.

Q What time was that?

A I'd estimate that to be about 11:50 A.M

Q Where were you when you first heard that transmission?

A Somewhere between Pine Ridge and Whiteclay, Nebraska.

Q How many miles from the Jumping Bull area would you say you were?

A 12 to 14 miles.

Q And what would you say your average rate of speed was, including and taking into account any stops that you made?

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A At what time?

Q Getting there?

A What time period are we talking about, sir?

Q You received a radio transmission, you were 14 or more miles away from the scene, you drove to the scene, perhaps you stopped along the way and you arrived. That's the time period I'm talking about.

A Well, when I first received the transmission I was going south and then later I turned around and went back north and there was two different speed elements there.

Q Well, from the time you first heard that transmission at approximately 11:50, what did you do first?

A I was enroute to Whiteclay, Nebraska for lunch.

Q Were you traveling, generally speaking, in a southerly direction?

A Yes, I was.

Q Then you heard the transmission?

A The first transmission; yes.

Q You turned around?

A After I heard "We had been hit."

Q But those two transmissions came very close to each other?

A Within a minute or so; yes.

Q Now at the time you heard the second transmission, what's your best estimate as to how many miles you were from the Jumping Bull area?

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A That might have been 12 to 14 miles. Probably 14.

Q Probably 14?

A Yes.

Q What would you say the time was then?

A 11:52, 11:53.

Q Did you stop before you got to the Jumping Bull area?

A Yes, I did.

Q For how long?

A Just long enough to get in the trunk to get my rifle and vest and get back in the car.

Q How much time did that take?

A I would say less than that.

Q Could we say a minute?

A Minute would be fair.

Q For an estimate. That would be the equivalent of starting back at 11:55 and not stopping or 11:54 and not stopping?

A Yes.

Q Did you stop at any other time?

A No.

Q Other than to get your weapon?

A No, I did not.

Q And how fast did you drive? I know you weren't driving the exact same speed every moment, but how fast were you driving?

A I probably averaged between 80 and 90 miles an hour.

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Q And so you would cover the 15 miles in about ten minutes?

A Yes. That would be a fair estimate.

Q So then your arrival would be sometime around 12:00 to 12:05?

A Yes.

Q When you got there, did you see any other vehicles?

A Just the BI police car that was with me and the two cars that were parked in the vicinity of the log house.

Q Would you point out the log house.

A (Indicating.)

Q Thank you.

Now there was a roadblock somewhere in the vicinity, was there not?

A Later that afternoon; yes.

Q How much later?

A Well, I would say within the first half hour. I know the police units arrive there were, as I understood, were dispatched to both north and south of the area to set up a roadblock.

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MR. TAIKEFF: May I have a piece of paper marked for identification, Your Honor?

THE COURT: You may.

Q (By Mr. Taikeff) I'm placing before you Defendant's Exhibit 75 for identification and I'm putting it face down.

Do you know a person by the name of George D. O'clock?

A Yes. I do.

Q Would you tell us who he is.

A Who he is?

Q Yes.

A He's a retired FBI agent.

Q And on June 26, 1975 was he a retired FBI agent?

A No. He was not.

Q What was he then?

A He was an agent assigned to the Rapid City office of the FBI.

Q Did you have any occasion to speak with him on the FBI radio that day?

A Yes. I did.

Q And from these communications do you know where he was during the time of the transmission?

A Yes. I did.

Q And where was he?

A He was in the office in Rapid City.

Q And there are radio facilities there that can both hear your {269} transmissions from your car and send transmissions to your car, isn't that correct?

A Yes.

Q Now let's go back to the question of the vehicles.

You say that when you got there there was your vehicle and a BIA vehicle.

A Yes.

Q BIA means Bureau of Indian Affairs?

A Yes.

Q Was it a BIA vehicle or a BIA police vehicle?

A Well, it had, it was a police car; yes.

Q It was a police car belonging to the Bureau of Indian Affairs?

A Yes.

Q Now you saw certain vehicles near a house.

A Yes. As I recall there were two vehicles parked in the vicinity of the log house there.

Q During that afternoon or at least the first few hours that you were there those vehicles didn't move, did they?

A No. They did not.

Q And did you see any other vehicles moving?

A Moving, no.

I saw Miss LaDeau drive in and I saw --

Q That was later in the afternoon?

A 12:30 or so; yes.

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Q All right. Let's talk about 12:29 or earlier in this particular area of inquiry.

A Not as I recall; no.

Q Did you make a transmission on your radio announcing that you were receiving or had been receiving heavy fire from the vicinity of the Jumping Bull Hall?

A Yes. I did.

THE COURT: Mr. Taikeff, excuse me.

I'm going to have to interrupt you at this point because we will have to recess fifteen minutes earlier today due to another matter that I have scheduled.

MR. TAIKEFF: Thank you, Your Honor.

THE COURT: Members of the jury, we will reconvene tomorrow morning at 9:00 o'clock.

I will not repeat this every time we recess now but I will, not at the beginning of the trial, but I again ask you that you might not discuss the case or form an opinion until after the entire case has been presented.

The Court is in recess until 9:00 o'clock tomorrow morning.

(Whereupon, the following proceedings were had in the Judge's chambers, the Defendant being present in person:)

THE COURT: There are three persons -- I think most of you are aware of why we're here. There are three persons who have alleged that one of the jurors in this case prior to

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The Court is in recess until 9:00 o'clock tomorrow morning.

(Whereupon, the following proceedings were had in the Judge's chambers, the Defendant being present in person:)

THE COURT: There are three persons -- I think most of you are aware of why we're here. There are three persons who have alleged that one of the jurors in this case prior to {271} being selected as a juror made a statement in their presence that she was prejudice against Indians and so I've asked those three persons to be brought in and it is my intention to question them about it.

You may have them brought in.

MR. HULTMAN: Your Honor, could I make a request of the Court, Your Honor?

THE COURT: Yes. Just a moment.

MR. HULTMAN: Your Honor, as is normally the case and as I indicated, we had an experience of this kind before and I would make a request to the Court that the Court interview each of these three individuals, not singularly but not in the presence of each other because on a previous experience we found that the observations as happens in the courtroom, likewise when you set three people down in a group you get a group discussion but when you get three individuals individually you get what they heard without two others then having heard what one of them said.

MR. TAIKEFF: We have no objection, Your Honor.

MR. HULTMAN: So I would request of the Court that the Court deal with them individually.

THE COURT: Well, okay. Bring in, it looks like Margaret Foss.

MR. TAIKEFF: Would Your Honor among the questions being asked include the question what relationship if any this {272} person has to the courthouse or any of the participants.

MR. HULTMAN: And also we would make a request, Your Honor, that if it would be Your Honor's wish, that you pursue the chain. We think that it is very important.

THE COURT: Pursue what?

MR. HULTMAN: The chain of individuals, Your Honor, on how this came about that, the event itself plus who overheard and then how does it end up being brought to the Court's attention, whether or not there has been any communication of any kind that may have in any way contributed to this act.

MR. TAIKEFF: We concur, Your Honor.

MR. HULTMAN: It's a very unusual act. That's what I'm attempting to go beyond, whether it was an act that had no influence or not.

THE COURT: Have a chair. Are you Margaret Foss?

MARGARET FOSS: Yes, sir.

THE COURT: The people in the room here are lawyers and the defendant in this lawsuit and other persons connected with the case.

Patricia O'Day called the Clerk of this court this morning and gave the Clerk a message and I ask that she reduce it to a sworn statement and she did do that and I have the statement in my hands.

And what she has said is that one of the jurors, Shirley Klocke, in the presence of her and you and one other {273} made a statement with reference to her possible jury, her possible, the possibility of her being selected on this jury.

Do you recall that that happened?

MARGARET FOSS: Yes, sir.

THE COURT: And where did it happen?

MARGARET FOSS: In the cafeteria of Blue Cross-Blue Shield.

THE COURT: And when did it happen?

MARGARET FOSS: The day I'm not sure. It was in the afternoon, coffee break.

THE COURT: Who was present?

MARGARET FOSS: Patty O'Day, Shirley Klocke, Carol Schatzke and myself.

THE COURT: What was said by Miss Klocke?

MARGARET FOSS: At the time she said that she was very prejudice against Indians.

THE COURT: What caused her to say that? I mean, what led up to her saying that?

MARGARET FOSS: That I don't remember.

THE COURT: What were you talking about at the time?

MARGARET FOSS: It was just general things at the time.

THE COURT: Do you remember any other part of the conversation?

MARGARET FOSS: Just that and that she didn't, and {274} Patty O'Day started defending them, the minority and Shirley said that she didn't want to talk about it. "Let's just drop the subject."

THE COURT: Who opened the subject?

MARGARET FOSS: As far as I remember it was Shirley.

THE COURT: And you don't remember what you were talking about when it was opened?

MARGARET FOSS: No. Because at our coffee breaks we, everybody in general and --

THE COURT: How do you happen to remember that she made this comment that she was prejudice?

MARGARET FOSS: Because I was shocked at the time that she said it.

THE COURT: Did Carol Schatzke say anything?

MARGARET FOSS: Yes, sir. I believe she did.

THE COURT: What did she say?

MARGARET FOSS: That I don't remember either.

THE COURT: Did Patty O'day say anything?

MARGARET FOSS: Yes. She was the one that did the most talking.

THE COURT: And what did she say?

MARGARET FOSS: Well, to the effect that there are good and bad in all nationalities and why should be pick on this one particular person or --

THE COURT: You don't remember who initiated the {275} conversation or do you remember who initiated the conversation?

MARGARET FOSS: No, sir, I do not.

THE COURT: I got the impression that you did not.

Was there any other conversation among this group?

MARGARET FOSS: Not on this particular subject; no.

THE COURT: On this subject at this time or any other particular time?

MARGARET FOSS: No.

THE COURT: Not to your recollection?

MARGARET FOSS: No.

THE COURT: Do you work with Miss Klocke?

MARGARET FOSS: I work with them but I am not socially involved with them so whatever is said after work I do not know.

THE COURT: Mr. Hultman, do you have anything else you want to ask this lady?

MR. HULTMAN: Are you saying that this is the only part that you recall of the conversation concerning this matter or are you saying this is all that was said concerning this matter?

MARGARET FOSS: At coffee break this is about all that was said.

Like I say, I am not socially involved with these people. What is said after --

MR. HULTMAN: What do you mean by the response that "I am not socially involved with these people"?

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MARGARET FOSS: Because of our age differences, these other people and myself, I do not chum around with them let's say.

I am workers with them.

MR. HULTMAN: Did you feel it was something at that time that was just a matter of conversation?

MARGARET FOSS: No. She was very strongly, she was very emphatic on her statement.

MR. HULTMAN: But you don't remember anything else about the conversation other than that one statement, is that right?

MARGARET FOSS: That's right.

MR. HULTMAN: Were you the one then, I'm asking a question, were you the one that brought the matter to the Court's attention?

MARGARET FOSS: No.

THE COURT: No. No. I wanted to question the two witnesses before I --

MR. HULTMAN: All right.

Who have you had conversation with since -- what time of day approximately did this take place?

MARGARET FOSS: About 3:00 o'clock in the afternoon.

MR. HULTMAN: And approximately when was this, what day was it?

MARGARET FOSS: Well, it was last week. Wednesday or {277} Thursday I assume.

I'm not sure on the date but it was in the afternoon.

MR. HULTMAN: Who else was present? It was in a coffee room you say?

MARGARET FOSS: Yes.

MR. HULTMAN: Who were all the people that were present?

MARGARET FOSS: You mean just at our particular table?

MR. HULTMAN: Yes. First, who was at your table?

MARGARET FOSS: The four that I named previously.

MR. HULTMAN: Were there other people in addition to the four of you that were at your table?

MARGARET FOSS: No. There was just the four of us.

MR. HULTMAN: So you were the only ones in the room, is that --

MARGARET FOSS: Yes. Well, not in the room.

We have a big cafeteria. There's several employees down at this time having their coffee break.

MR. HULTMAN: But you don't remember who initiated the conversation in any way or any discussion about it?

MARGARET FOSS: No. I'm sorry, sir. No.

MR. HULTMAN: Who have you talked to since that afternoon around 3:00 p.m. about --

MARGARET FOSS: Myself?

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MR. HULTMAN: -- this statement? Yes.

MARGARET FOSS: No. Nobody.

MR. HULTMAN: You had no further conversation with anybody about it?

MARGARET FOSS: No .

MR.HULTMAN: This is a conversation that only took place last week, is that correct, and yet I'm just trying to probe, ma'am, but it seems to me that you would remember something beyond the one statement that was said, what may have led up to the discussion or something else about it.

MARGARET FOSS: The only thing that I can vaguely remember, if it is correct, is that she was going to be called for jury duty. That was about the only thing.

MR. HULTMAN: Do you recall whether anybody asked her any questions about the fact that she was being called as a juror?

MARGARET FOSS: No, sir.

MR. HULTMAN: I have no further questions, Your Honor. Thank you.

THE COURT: Mr. Lowe or Mr. Taikeff, do you have any?

MR. LOWE: No.

MR. TAIKEFF: I have --

MR. HULTMAN: Could I have just one -- go ahead.

MR. TAIKEFF: I have one question.

You said that you did not speak with anyone about this. {279} Did anyone attempt to speak with you or to otherwise contact you about this subject --

MARGARET FOSS: No, sir.

MR. TAIKEFF: -- since the time it occurred?

MARGARET FOSS: No.

MR. HULTMAN: Do you know, has there been anybody at your place of business to your knowledge at Blue Cross-Blue Shield asking questions about prospective jurors at all?

MARGARET FOSS: Not to my knowledge.

MR. HULTMAN: Did you respond in any way to the conversation?

MARGARET FOSS: No. I didn't because we were shocked when she said it and we just tried to kind of, I myself do not want to get involved in that because I have my own feelings.

MR. HULTMAN: Well, when you say you have your own feelings, what are your feelings?

THE COURT: I'm not, we're going too far.

MR. HULTMAN: All right. I just wanted to know, I wanted to know whether or not this conversation had in fact, did you in fact hear this conversation?

MARGARET FOSS: Yes. I did.

THE COURT: All right. Ralph, you may, Mrs. Foss, you may leave.

Bring in --

MR. LOWE: Do you want her to stand by, Your Honor?

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THE COURT: Yes. Have her stand by and bring in Carol Schatzke.

You are Carol Schatzke?

CAROL SCHATZKE: Yes.

THE COURT: The people in this room are the defendant, the lawyers and some other people connected to this case which is now being tried.

The reason you were asked to come down here is that Patricia O'Day has made a statement concerning one of the witnesses, or one of the jurors in this case and that she states that at a coffee break apparently sometime in the latter part of last week she made a reference to Indians and apparently had something to do with her prospective service on the jury and apparently it was made in the presence of you and Margaret Foss. Do you remember such an incident?

CAROL SCHATZKE: Yes. I do.

THE COURT: Who was present?

CAROL SCHATZKE: It was Margaret and I and Patty and Shirley.

THE COURT: And what was the occasion; how did you happen to be together?

CAROL SCHATZKE: Oh, it was coffee time.

THE COURT: Who initiated the conversation related to jury or Indians or trial?

CAROL SCHATZKE: I can't really remember but I think {281} Shirley must have started it. Yeah. I think Shirley started it.

THE COURT: And what did she say?

CAROL SCHATZKE: I really can't remember exactly.

Other than the fact that she disliked Indians, she really didn't like them and she was prejudice against and Patty said, "Well, why," and she said, "Well, I just don't know but I am," and that was about it.

And then they ended the conversation. It wasn't much more to go on.

THE COURT: Have you heard any other conversation around -- you work for Blue Cross-Blue Shield?

CAROL SCHATZKE: Yes.

THE COURT: Have you heard any other conversation around there with reference to Miss Klocke being a juror in this case?

CAROL SCHATZKE: No.

THE COURT: Do you know of any people that came around to investigate her background or anything?

CAROL SCHATZKE: No.

THE COURT: Do you know anything other than what you've told me?

CAROL SCHATZKE: No.

THE COURT: Mr. Hultman.

MR. HULTMAN: Have you talked with anybody since that {282} afternoon about the event that the Court has just asked you some questions about?

CAROL SCHATZKE: Not until today when all this came about.

MR. HULTMAN: Who have you talked to today?

CAROL SCHATZKE: Well, Patty and Margaret and a couple of the girls at work. That's about it. It's all been in one area.

MR. HULTMAN: Did, what was the name of the lady, Your Honor, that was just here? I'm sorry.

THE COURT: Margaret Foss.

MR. HULTMAN: Did you talk to her today about it?

CAROL SCHATZKE: Yeah.

MR. HULTMAN: What did you talk to her today about it?

CAROL SCHATZKE: Oh, we've been talking about it all day at different times.

MR. HULTMAN: Did, do you remember how the conversation started with reference to this particular matter?

CAROL SCHATZKE: No. I really don't.

MR. HULTMAN: Do you remember what any of the other people said in the conversation at all?

CAROL SCHATZKE: No. I -- just that Shirley said she was prejudice and Patty said why and Shirley said she didn't really know, that she was and that was about it.

MR. HULTMAN: Now what was the last sentence that you {283} said? Would you repeat that? I'm sorry.

CAROL SCHATZKE: Oh, she said that she was and she didn't really know why she was prejudice but she just was.

MR. HULTMAN: She was but she really didn't know why, is that it?

CAROL SCHATZKE: Yeah.

MR. HULTMAN: Did she make any other explanation of any kind?

CAROL SCHATZKE: No.

At that time she said she didn't want to talk about it any more so then we just dropped it.

MR. HULTMAN: When, when did this conversation, what day did this take place, do you recall?

CAROL SCHATZKE: I think maybe it was Thursday of last week.

MR. HULTMAN: And what, what was the occasion?

CAROL SCHATZKE: We had coffee break at work.

MR. HULTMAN: What time of day then: would this have been in the morning or the afternoon?

CAROL SCHATZKE: I think it was morning coffee. I'm not too sure. I can't remember.

MR. HULTMAN: But there's no question that the four of you have discussed it today, is that right?

CAROL SCHATZKE: There's three of us that discussed it today.

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MR. HULTMAN: Three of you discussed it. I'm sorry.

Who emanated that discussion? How did that start about?

CAROL SCHATZKE: Well, we found out that Shirley was on the jury and then Patty got upset and said she didn't see how she could be on the jury if she was prejudiced against Indians and she made a few phone calls and we got to talking about it and she was told to write a statement.

MR. HULTMAN: Whom did she call? In your conversations today who did she say she called?

CAROL SCHATZKE: Well, she said this morning that she had talked to the Clerk. She called here and I don't know who else, she must have talked to Judge.

THE COURT: No. She didn't. Excuse me.

It was reported to me that she called my chambers. My secretary referred her to the Clerk.

MR. HULTMAN: Beyond the Court or anything that happened as far as the courthouse, who else did she say she called or had conversations with about it?

CAROL SCHATZKE: She had, well, I don't know. She had the thing notarized.

I suppose she said, she talked to one of our supervisors and one of the notary publics and that's about it.

MR. HULTMAN: No further questions, Your Honor,

MR. TAIKEFF: I believe I have only one question, Your {285} Honor.

At the time of the coffee break when the conversation took place, either at the beginning or at the end of that conversation, or that coffee break, did you know that Miss Klocke was a prospective juror in the case?

CAROL SCHATZKE: No.

MR. TAIKEFF: I have no further questions.

THE COURT: Thank you.

And would you ask Patricia O'Day to come in.

MR. TAIKEFF: While that's happening, Your Honor, may I ask Your Honor to take judicial notice of the fact that in today's Forum there is a front page article on the trial and at the end of the article is a list of the names and addresses of all the jurors, the last being on page 2 of the Forum.

THE COURT: When I see the paper I'll take judicial notice of it. Thank you.

MR. TAIKEFF: All right. I was speculating on the chance that Your Honor had already read the paper.

THE COURT: All right.

You are Patricia O'Day?

PATRICIA O'DAY: Yes.

THE COURT: The people in this room are the defendant and lawyers and others who are connected with the trial that's going on here.

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Is that your statement?

PATRICIA O'DAY: Yes. It is.

THE COURT: Would you just tell us what led up to this conversation that you had with Miss Klocke

PATRICIA O'DAY: We were just discussing the trial and stuff. She was on, going to be selected, or not selected for the jury but she was in the jury process and we just talked about the trial and we talked about Indian people in general and she had made the statement that, "I am so prejudiced against Indians," and I felt that she meant it, you know. Now whether, I don't mean that maliciously or anything. Okay.

But she just said, "I'm so prejudiced against Indians," and I said, "Well, do you understand the background for do you understand what's going on or", I just kind of felt around as far as compassion or whatever, what I felt. Okay.

And she just said she didn't want to talk about it any more.

So then we just left it at that. We were starting to fight.

THE COURT: When did this happen?

PATRICIA O'DAY: Last Thursday at coffee in the afternoon.

THE COURT: To your knowledge has there been anyone checking on her background or anything about it --

PATRICIA O'DAY: No.

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THE COURT: -- with reference to her prospective jury service?

PATRICIA O'Day: No.

THE COURT: Did you have any further conversation with her?

PATRICIA O'DAY: No.

THE COURT: What do you mean in that statement when you stated that later discussion about general terms?

PATRICIA O'DAY: Oh, when we got back from coffee we were up in the offices and all, there was maybe five or six girls and we were all talking at one time about it, you know.

THE COURT: Was she in the group?

PATRICIA O'DAY: Yeah.

THE COURT: What was said there?

PATRICIA O'DAY: I don't remember exactly because I really wasn't listening.

There are other girls that had heard some of the conversation. They made that known to me today, that they had heard some of the conversation, you know, that she was saying. It was obvious to everyone that her feelings towards Indian people wasn't in the best judgment as far as I was concerned and, that's the impression I got.

THE COURT: Are you having any problems, are there any problems between you and her at work?

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PATRICIA O'DAY: No. I consider her one of my best friends. She probably won't be any more though.

MR. HULTMAN: You drew a comparison and you said your feelings or your position. What are your feelings or your position as different from hers, vis-a-vis her position?

PATRICIA O'DAY: My feelings?

MR. HULTMAN: Yes. And your discussion.

PATRICIA O'DAY: More of an objective point of view I think.

I, I would rather deal with people on a one-to-one basis as people rather than race or creed.

I believe in human rights very strongly and I don't think it matters whether a person is an Indian or a black or whatever.

MR. HULTMAN: Did the other, did Mrs. Foss say anything in response to what was said?

PATRICIA O'DAY: Did she say anything?

MR. HULTMAN: Yes.

PATRICIA O'DAY: No. We discussed it today and they agreed that, well, at that time, you know, we all generally felt that Shirley felt this way. Okay.

But today they agreed that they felt that she had meant it when she said it, you know.

MR. HULTMAN: Well, did you, is it fair for me to conclude that -- what did you conclude from the statement that {289} she made?

PATRICIA O'DAY: That she was prejudiced against Indians, that she had a greater sense of bias towards the Indian point of view rather than the man being on trial.

I think she -- that's the impression I got.

MR. HULTMAN: Would it be fair for me to conclude that you have just the opposite feeling?

PATRICIA O'DAY: I would say that I do but I, consciously.

MR. TAIKEFF: Which feeling may I ask Your Honor is Mr. Hultman inquiring about?

MR. HULTMAN: The reverse of the attitude that was expressed because she brought it up in her own words.

MR. TAIKEFF: No. Your Honor I think two attitudes have been spoken about. One of them is the consensus of the three workers. The other --

MR. HULTMAN: I'm referring to this woman and the woman that made the statement.

MR. TAIKEFF: Oh. I understand. Thank you.

MR. HULTMAN: Would you feel then with the feeling and the attitude that you have that you could not come into a courtroom and set aside that feeling that you've expressed on that occasion to her and be fair and impartial to someone who is not?

PATRICIA O'DAY: No. I'm not saying that at all.

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I'm saying that I questioned, I questioned the process because I didn't know what process, legal process you go through to select a juror and I was just wondering if her, I don't know if Shirley can separate the two. That's your judgment or that's the Judge's judgment. That's not my judgment to make.

I'm merely stating my point of view and what I heard and I felt it was relevant. It was something that I had to say, something I had to question.

MR. HULTMAN: Well, that's good. That's good.

I have no further questions.

MR. TAIKEFF: I have but one question.

THE COURT: All right.

MR. TAIKEFF: Did you read the Forum today?

PATRICIA O'DAY: No. I haven't yet.

MR. TAIKEFF: How did you know she was on the jury?

PATRICIA O'DAY: I work with her and she had to call in and tell that she was going to be gone. Word travels fast in an office.

MR. TAIKEFF: And what motivated you to call the Clerk? Not general principles. What immediate specific fact?

PATRICIA O'DAY: I felt it was unfair. I felt that, I had heard her make the statement and I didn't want there to be any question as to the credibility of any juror that I knew of as to how they were going to try that man.

MR. TAIKEFF: Has anyone contacted you and motivated {291} you in any way to take the action which you took?

PATRICIA O'DAY: No.

MR. TAIKEFF: I have no further questions, Your Honor.

MR. HULTMAN: May I just ask one more, Your Honor.

What is your relation; how good a friend are you?

PATRICIA O'DAY: Very good friends.

MR. HULTMAN: How long approximately have you known Miss Klocke?

PATRICIA O'DAY: Five years, going on five years.

MR. HULTMAN: I have no other questions, Your Honor. Thank you.

THE COURT: I have just one additional question.

In the five years that you've known her have you had any other discussion about the Indian race of people or bias or prejudice or human rights?

PATRICIA O'DAY: Well, in the, saying many generalities certainly. Probably there are many things that go on in society and we try to discuss them, you know, and we try to be as intelligent in some things in life as we can.

THE COURT: No. I mean you and Miss Klocke.

PATRICIA O'DAY: Oh. No. Not specifics; no.

THE COURT: May I have the statement. Thank you for coming.

MR. LOWE: Your Honor, before these three witnesses are released I would suggest that the appropriate, I would like {292} the Court to extend thanks to these ladies for coming forward. It's certainly an act of bravery for coming forth in the peer pressures in society and secondly I would think there could be some measure taken to the extent possibly to keep them from being embarrassed by this.

THE COURT: You may leave the room.

Mike, would you contact whoever's going to appear in this sentencing and tell them we're going to be a little late.

MICHAEL NELSON: I just did.

THE CLERK OF COURT: Can they leave the building, Your Honor, the witnesses?

THE COURT: Just have them stand by for a moment. It will just be a moment.

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THE COURT: I now have to decide what to do with reference to Miss Klocke's service on the jury. Do you desire to express yourself on that?

MR. HULTMAN: No, Your Honor. The government certainly knows the seriousness of a matter of this kind. I think there is a good question that goes to whether or not one single remark and the circumstances and from the point of view, and without knowing the total conversation and remarks as just made, she's evidently shown no prejudices of any kind in any other conversations. But at the same time I want to in no way minimize the impact. So I would certainly indicate to the Court that I think the Court should give the highest consideration to the impact of what the juror has said and the government will certainly in no way resist in any way whatever the Court's decision is.

THE COURT: Mr. Taikeff, do you have any thoughts on that?

MR. TAIKEFF: If Your Honor is asking generally what we think should be done, I would have an answer, but I think Your Honor is asking whether we are specifically asking whether she should be stricken from the jury. If that's Your Honor's question, we are not able to say yes or no at this time. Then that would bring me to the answer of the other question; namely, what I think we should do.

THE COURT: What do you think we should do?

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MR. TAIKEFF: I think we should have a voir dire of her after which defense will take a position on it.

THE COURT: I have concluded that certainly if she is released that she should be told why she's being released.

MR. TAIKEFF: I would have no objection to that.

THE COURT: I don't know what Mr. Lowe feels about that.

MR. LOWE: I only know the difficulty in getting people to come forward to do something like that and unless there is some purpose to be gained in the trial, if the decision is made eventually to release her, I wonder whether there is really any need to release her. Didn't we last summer with that woman, did the Court tell her why or was there just --

MR. HULTMAN: He brought her in and questioned her, remember, John.

MR. LOWE: I have real apprehensions when those three people are going to be on the spot but I don't take a firm position.

MR. CROOKS: Your Honor, if I could make an observation. This is a rather perplexing thing, obviously. If in fact what this woman has said is true and if in fact that is an opinion, then she has at the very least placed her responsibility on the question and creates a serious problem and my suggestion would be that whether she's going to be {295} released or not, the matter should be taken up with her. If for no other reason than fairness to her.

THE COURT: I feel that.

MR. CROOKS: Because certainly this is on the face of it a very devastating type of thing to have to go on without an opportunity of some sort to explain.

MR. SIKMA: Your Honor, it's possible she may not even remember the conversation.

THE COURT: There's no question about it. I'm going to bring her in and -- is she still here?

THE CLERK: I asked the marshal to retain the jury.

MR. TAIKEFF: Your Honor, while that's happening, I would like not just by way of making small conversation but because I recognized that we take a small legal position at the early stages of this case to most respectfully call to Your Honor's attention how difficult it is to root out this kind of fact of life in spite of the fact that Your Honor spent a most generous portion of the Court's time in a thorough voir dire and allowed Counsel to inquire. I say this not so much by way of making a record, I'm motivated primarily by the opportunity to perhaps plant the seed in Your Honor's mind for future cases where some attorney may come forward and suggest to Your Honor that although there are some and many very fine citizens in the city, there are some serious problems along these lines.

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THE COURT: Mrs. Klocke, we asked you to come in to show you this statement.

Do you care to make any response to that?

MRS. KLOCKE: Yes. Your Honor, I did say this. And like I said in court that I would put all prejudices aside and I would render a fair verdict and I still mean that, too.

THE COURT: Okay. Thank you.

Do you have any questions?

MR. TAIKEFF: Could I confer with Mr. Lowe and the defendant for a moment.

THE COURT: Yes.

MR. TAIKEFF: I would like to put a limited number of questions to the juror, Your Honor.

THE COURT: You may.

MR. TAIKEFF: Do you understand that you will have to make a very serious, conscious effort to make sure that the opinion which you have and expressed does in any way come to play in this case because of the seriousness of the consequences?

MRS. KLOCKE: Yes, I do.

MR. TAIKEFF: We're satisfied, Your Honor.

THE COURT: Mr. Hultman. Do you desire to examine?

MR. HULTMAN: Yes, I would just like to have a few questions, Your Honor.

Mrs. Klocke, were you expressing something on that occasion which was a feeling that you had and is a feeling that, {297} as you expressed in the court, that without any question you could set aside, as I think I asked a number of questions about it, all having various feelings and emotions and so forth in varying degrees, that that expression that you made at that time is not so deep rooted or so strong or so firm with you that in a matter of this kind that you could honestly and fairly --

MRS. KLOCKE: Yes, sir.

MR. HULTMAN: -- do what the Court has discussed and the lawyers have discussed?

MRS. KLOCKE: Yes, sir.

MR. HULTMAN: Without the fact that the experience now that you in effect, somebody said something and returned it here, would that in any way have any impact now on you in going back to the jury room?

MRS. KLOCKE: No.

MR. HULTMAN: Would you now, feeling that you might have some compunction to do something for the defendant that otherwise maybe had this occasion not occurred that you would be feeling different about?

MRS. KLOCKE: No, I don't. I would still base any verdict on the evidence and the court alone and I really feel I could do it.

MR. HULTMAN: I have no further questions.

THE COURT: Thank you for coming in. I will have to {298} make a decision as to what your status will be and for the time being you can return to the jury and I would suggest you just not comment on it.

The jury may now be taken back to their rooms.

MR. TAIKEFF: Your Honor, so that the record is clear, when we said we're satisfied, we not only meant with the scope of the inquiry but we do not wish to move to exclude the juror.

THE COURT: I interpreted your remark that way. I have some concern in my own mind about this juror.

MR. CROOKS: Your Honor, could the government have overnight to fully make a response? I think it was pointed out with Mr. Hultman, this experience of coming in here may have adverse consequences to the United States and we are not really prepared to say whether or not we might not at this point want to challenge the juror.

MR. HULTMAN: She now may feel an obligation, Your Honor, in order to purge herself from what others have now accused her of, this would be her genuinely and honestly, I'm just saying the impact of genuinely trying to purge herself and this experience and the accusation would have an impact upon what her decision would be.

MR. LOWE: May I make two comments. First of all, it is interesting to hear Mr. Hultman make that argument because he was making the other argument when we uncovered prejudiced, and although it would interfere -- but secondly, we had a {299} potential problem, in any case, where we only have two alternates that we could end up with a mistrial if more than two people become disabled or sick or anything of that nature. That is one of the facts that the defendant at this early stage of what will be a long trial is considering. And we feel he has a constitutional right not to have that juror removed without his motion in a situation that could lead to a constitutional detriment. We're not just waiving the fact, we're objecting to people with prejudiced during the voir dire and now we say we want to keep the juror. There are different factors that play.

THE COURT: I'm aware of that. That is why I said I wanted to think about it overnight.

MR. CROOKS: I realize, obviously, there are considerations on both sides. A normal reaction from strictly the government wishes of a to win position would be this is a great juror, but obviously that's not our concern. Our concern is a fair juror and contrary to what Mr. Lowe may believe. Secondly, as we expressed the possible rebound affect which would in effect affect our outcome and have just a reverse consequence. I simply ask we be allowed to think about it overnight.

THE COURT: I suppose if I think about it overnight you will have an opportunity to think about it overnight.

Thank you for coming in.

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