VOLUME XIV

{2830}

MONDAY MORNING SESSION

APRIL 4, 1977

WHEREUPON, the following proceedings were had and entered of record on Monday morning, April 4, 1977, at 9:15 o'clock, A.M. without the presence of the jury and the defendant being present in person:

THE COURT: There probably are one or two matters that should be touched on before the jury is brought in. One of the matters that was left on Friday was the offer of paragraph four of Defendant's 166.

Mr. Hultman, do you have any more information on that?

MR. HULTMAN: Your Honor, I have made inquiry, I have searched my files and I can't come up with anything as to who the author is. I will do my best to give, and I think probably the info is better within the purview of the defendant's counsel than it is within the government.

What it appears to me that this is either, it's information first that came to my attention in the courtroom here for the first time. It appeared along with a series of documents that clearly came from Canada when you examine the remainder of the documents with the exhibit we're now talking, the proposed documents. It is also obvious in the lower left-hand corner that a specific date was written in back in February of '76 and it's clear it's done by one and the same person, and it would appear to me it's done one and the same {2831} time because the writing is in the very same spot, it's the very same type of writing and so forth.

What I am postulating, Your Honor, And so the Court will know and this is purely a postulate on my part and it's only a conclusion is that, one, this material came from Canada. I am convinced in my own mind because it would be the only source of any kind.

We would have no knowledge of any kind of any of the items that are included there, including the exhibit.

Secondly, I am wondering if possibly it came from the early proceedings and in fact came from the extradition proceedings and came to the defendant's counsel through those proceedings rather than from the United States of America.

So that is the best, Your Honor, that I can indicate. One, I have

never seen them before and I have no knowledge of any kind; two, I think it's evident on the face of them that they are Canadian in nature and they came from the same source because of what is written in the lower left-hand corner; thirdly, because it is Canadian material I'm postulating that it did come from Canadian source and as to where exactly it was obtained I'm only postulating but only because I can't find anything of any kind on any of the documents because I have not, did not see the documents, any of them until here in the courtroom, that possibly they came to Counsel's representatives. I'm not saying Mr. Lowe and Mr. {2832} Taikeff but I'm referring primarily to Mr. Ellison or the group that Mr. Ellison worked with. That it may possibly have come from the Canadian authorities and Canadian proceedings but I'm only postulating because I can't come up with anything.

MR. TAIKEFF: Your Honor, may I offer some suggestions and possibly some information.

First of all, I think I should attempt to clarify our position. Namely, that that document has its origins not with the defense, either the defense team that was in the last trial or the present defense team, and not with the public at large but either, now that I hear Mr. Hultman's suggestion, either with the United States' attorney's office, it having been turned over as part of Brady material in the last case which is what Mr. Ellison informed me and I asked that Mr. Ellison come into the courtroom. I assume he'll be here shortly. Maybe he can shed some light on that particular factor.

After hearing Mr. Hultman, I would be prepared to say that either it was prepared by Canadian authorities who were interested in some phase of this case or by the United States' attorney's office in the course of fulfilling some pretrial obligation with respect to the last trial, whether it was a Rule 16 obligation or Section 3500 obligation or a Brady obligation. The point is, Your Honor, that it's origins are {2833} with either the United States Government or the Canadian government and, hence, its authenticity is not therefore in dispute.

I think what it represents is fairly apparent on its face and at this time I will make no effort to argue what its meaning and relevance are. But I think its authenticity, its source is not in dispute, even

considering the expansion of the possibilities as just recently articulated by Mr. Hultman. So much for that particular point.

Now Mr. Hultman and I observed together the writings in the lower left hand of other documents and in general terms I agree with his statement.

I would like to be more specific about that. Defendant's Exhibit 169 for identification as one of those documents and I'm coming forward to the clerk so the clerk may hand them up to Your Honor if Your Honor wishes to see them. That has a date 2/16/76-1 in the lower left hand. I do agree unqualifiedly with Mr. Hultman that they all appear to be written in the same hand except we don't know whose hand. I also suspect he's correct when he suggests it may be a Canadian source because the 7 in every place where it appears has a cross member, a horizontal cross member which is a European method of writing a 7.

The document which is defendant's exhibit 170 has a {2834} similar date except it's February 7.

171 has a similar date, namely, February 6.

167 has no date in the lower left hand corner and 168 has no date in the lower left hand corner.

Yes. On Defendant's exhibit 171 there are two things to be noted. The year is listed as '75, possibly a mistake in writing it, followed by a dash 4, one of the documents having, a dash 1. I suspect that indicates a series of some kind.

So in the main I have no quarrel with Mr. Hultman's actual suggestion. I think, though, they add up to the fact that either the Canadian government or the United States government, probably if it's the latter based on information supplied by the, information supplied by the Canadian government in one form or another prepared the document in question and therefore since it is fairly clear that it was never prepared by the defense or the rest of the population other than Canadian officials or United States officials, its authenticity will not be questioned.

THE COURT: Well, the other problem the court sees on this proposed exhibit is that Mr. Parlane on cross-examination was not asked whether or not the statement was made to him.

MR. TAIKEFF: That's most significant, Your Honor, that was not asked. It was not asked by the government. The {2835} defense only asked whether

or not that was in his report. The government chose not to ask whether the statement was ever made to him.

Your Honor, we have a suggestion, I have no personal knowledge that we may know who wrote those dates in the lower left hand, and Mr. Ellison just informed me that Mr. Nadler who amongst other things maintains the files, says that that's his handwriting. Now if Your Honor wishes a more formal presentation of that fact, of course, we could do so immediately.

THE COURT: No.

MR. TAIKEFF: Apparently this was some form of notation to keep track of the date which it relates to and apparently the '75 was a miswriting and the dashes apparently indicate the number of documents in question, apparently there were four such documents.

Also Mr. Ellison informs me that Mr. Nadler just said that those documents were received in connection with the last case as part of Brady material, that's the Butler and Robideau case.

Now I think it's significant of that fourth paragraph, assuming, if I may for the moment, and I trust there is no serious dispute about this, that the source is the government, whether it be the Canadian government or the United States government, that we heard no testimony {2836} from Parlane on his direct concerning an admission or a statement by the defendant that he would have shot at the police officers given a chance to do so, that there was no such recordation in his report and the government chose not to ask Parlane whether such a statement was ever made to him.

{2837}

That's the state of the record as far as Parlane is concerned.

When you compare that to the testimony of the other Canadian police officer, where in essence he offers testimony which says, "Given a chance, I would have shot at you police officers, if I knew police officers were coming," which is also not recorded in his report or not seen by him to be included in someone's report.

We have what I think is an interesting and perhaps a peculiar situation. Non-recorded statements in a situation where there are hundreds and hundreds and hundreds of words carefully preserved in specially prepared reports concerning conversations with the Defendant are testified

to. One officer testifies to a statement which is nowhere recorded, which he claims to have suddenly remembered while reminiscing about the events, and it follows a parallel track of the statement which purportedly Parlane would have testified to at an earlier time. Yet it is not in Parlane's report. He doesn't testify to it on direct or that he was called to testify to statements made by the Defendant, and the Government asks him on redirect when he is on the stand the second time, "Was such a statement ever made to you?"

Now, I think the fact that the Canadian Government or the United States Government was asserting at one time {2838} that the Defendant allegedly made such a statement to Parlane, under the circumstances as they evolved in this courtroom makes the existence and the content of that assertion relevant for the jury's consideration of whether or not the testimony concerning the overheard, the alleged overheard conversation between the Defendant and the elder, whether that earlier statement, the first one testified to should be believed, whether in fact it really occurred. Obviously we take the position it did not occur.

The other fact sheds some light on the question of whether or not the jury should believe the testimony concerning the elder man and the Defendant, and it was offered in that connection.

MR. HULTMAN: Might the Government respond just briefly, your Honor?

THE COURT: You may.

MR. HULTMAN: First of all, your Honor, I think it is clear and indisputable on this item, that this is an item which has been in -- and I am not going to, you know, decide what is the old case and what is the new case -- but the same investigator that was in the last case and has been in it ever since and is in this case is the one that produced this document. It has been within the purview, the knowledge and in fact they were the ones that {2839} brought it to the Court's attention, and very frankly, brought it to my attention for the first time.

I think we are all in agreement on that, that that is some time -- at least I believe certainly at some time back in February or March, because I would have knowledge of it had it been in April when I became someone who was a party to and counsel in this case. I think Mr. Lowe and I have both been aware of it from that point on if that had been the case, so

first of all, we are dealing with information as a part of 16, as a part of Brady, as a part of 3500, whatever it is. The basis for it is of no significance. It is information in the hands of the defense to properly prepare for whatever it is they then want to do with it.

Now, the document itself, in no way is it a signed statement or any significance of that kind. I think on the face of it, one would conclude that it is somebody putting down on a piece of paper what they feel or appear to be what certain information is.

Now, possibly it is an oral inquiry of some kind. That we do not know. It is obvious that it is not in any -- certain parts of it are not in any report of any kind because they have never appeared in any place at any time in the reports of anyone, so then we are faced with the issue: All right, what then in the posture of the trial {2840} itself does 166 take on? And it seems to me, your Honor, that the document itself until and unless it can be shown to be the statement of Constable Parlane, or specifically not to be, it has no particular significance of any kind.

Now, for the defense to say, "Well, the Government didn't choose to ask him this question, and so thus we raise it," I say, your Honor, that the significance here is that if there is some use concerning a possible statement that Constable Parlane did or did not make, that you can't leave it in the posture of a ghost as far as the witness on the stand. I don't think he made such a statement, from what he said on the witness stand and so forth. Defense had the opportunity, if they wanted, to ask that question, if they wanted to go into it in any way. If they wanted to pursue with the Canadian witnesses in any way a possible source of this statement, that was their opportunity, and I say to the Court by not pursuing it in some ways and without a showing beyond what they made at this point, that 166 is not the best evidence. It is not admissible here, and it has no probative value.

Further, there is no showing of any kind that it is a recent -- I mean if you are going to say it is a fabrication or a recent truthful statement, that it is something of recent origin. It is something by all the parties which will agree to something that goes back {2841} somewhere at least to the early part of 1976 because it has been within the possession of the -- if not Mr. Ellison, Mr. Adler whose now penmanship is that the

dates are in. It is something that goes back at least to that time frame. It is not something then that has been a surprise or something which is new which has appeared on the scene.

So it is for these reasons, your Honor, that the Government objects to the introduction into evidence of Defendant's Exhibit 166.

MR. TAIKEFF: Your Honor, I don't understand whether Mr. Hultman is now backing away from the proposition that this was a Government prepared document. I agree with him it appears to be a recordation tending to illustrate what will be asserted, and that is precisely how we characterize it.

We claim that this document was prepared either by the Canadian Government after consultation with their own police officials or the police officials' reports, or it was prepared by the United States Government after similar consideration or consultation, and that it constituted an assertion that they were giving notice of.

There are four paragraphs on that document, three of them contained admissions allegedly made to Canadian Police Officer Tweedy, and the last one--

{2842}

MR. HULTMAN: (Interrupting) Two to Tweedy and one is Mitchell.

MR. TAIKEFF: I stand corrected. Altogether the document contains statements allegedly made to the three police officers, two to Tweedy, one to Mitchell and one to Parlane.

We characterize it exactly the way Mr. Hultman characterizes it, as a document which gave notice to somebody of an assertion that the testimony would be as indicated on the document.

Now, that's precisely our point. Mr. Hultman and I are not in disagreement on that fact. The Government prepared document giving notice of an asserted or purported fact.

The point is that came from some place, some Government official had some reason to believe that testimony was going to be offered, that the Defendant Peltier made certain statements. That is exactly what we offer it to be, precisely, so we have no factual dispute as to its origin or what it meant when it was prepared.

That I think covers the last portion of Mr. Hultman's remarks.

Excuse me one second, your Honor.

(Counsel confer.)

MR. TAIKEFF: The subsequent failure of the {2843} Government to elicit any such statement from Parlane, either when he originally testified or on his continued redirect when he returned to the stand for the second time, is probative of the believability of a very similar statement but couched in different terms made to another or in the presence of another Canadian Police Officer, both statements going unrecorded, notwithstanding the large number of documentation, recorded statements made, allegedly made by the Defendant.

So I think that Mr. Hultman in the main has conceded the authenticity of the document. I think primarily what remains for your Honor's consideration is whether we should have a legitimate opportunity to attack the alleged statement of the Defendant on as many grounds as possible, including the fact that the Canadian authorities were apparently planning to offer essentially the same testimony out of the mouth of a different witness under apparently different circumstances.

{2844}

MR. TAIKEFF: I'm also advised by Mr. Ellison in the last few moments that the document was received while the last defense team was in Cedar Rapids. And so apparently that would not be the early part of the year.

Excuse me one second.

(Defense counsel conferred.)

MR. TAIKEFF: It would have to be in the latter part of April or later of last year. In case that information helps Mr. Hultman pin it down.

I would also like to point out to Your Honor that one of the things that the Government was supposed to do was check its files over the weekend. And Mr. Hultman has not said whether indeed he looked in his files, and whether if he did he found the copy of that document in his files.

MR. HULTMAN: Well, I will respond to that, Your Honor. I'm not trying in any way to not fully respond. I tried to say that at the outset in my beginning remarks that I have never seen the document, either before or since except in the courtroom when it was brought out to the attention, and I have done the very best to search my files over the weekend to find it.

But I don't think that has anything to do with anything at this particular point anyway. I still think it comes back to the final question, and that is whether or not it has any probative value in this particular case, and whether it's {2845} admissible. And I won't address that any further.

THE COURT: Well, I'm not going to rule on it at this moment.

Second matter before the Court is the Oregon state police report. I've examined that. Frankly I see little or nothing in there that couldn't be disclosed, but because of the request of the Oregon official the Court will honor that request and not disclose the entire document.

The copy will be sealed and made a part of the record in this case for possible appellate review.

The matter related to the question arose as to when the certain firearm was found. On page 2 of the document, the last sentence of the third paragraph cites "At 4:20 P.M.," and from reading the document as a whole it's obvious that 4:20 P.M. relates to the date of November 15, 1976. {2846}

"At 4:20 P.M. under the power of the search warrants, the search of the vehicles began at Art's Service. Sergeant Zeller from the Oregon State Police I.D. Bureau stated his search for fingerprints in the motorhome."

"At approximately 6:00 P.M.," this again would still be the 15th, "under the request of FBI agents, the station wagon was opened for a quick search for weapons. At this time it was determined that there was a quantity of dynamite in the station wagon. The cases of dynamite had been concealed in the rear of the station wagon by being covered with green plastic, sleeping bags, clothing and other items. At this same time a .44 magnum pistol was found under the right front seat of the station wagon. It was noted by writer at this time that both vehicles were equipped with citizen band radios and both radios were set on Channel 11. The station wagon was relocked to preserve any fingerprints and Sergeant Zeller continued his search of the motorhome. At 7:00 P.M. writer contacted Lt. McCullum in Milwaukee State Police in charge of the arson division and advised him that the vehicle contained a quantity of dynamite. Writer requested that Lt. McCullum contact Trooper Bill Fettig, advise him of the dynamite and

see if he would be able to come to this area to dispose of the dynamite. During the search of the motorhome on this date there were several boxes of ammunition and several rifles found. These items will be listed under {2847} exhibits on this report."

Next paragraph, "At 9:40 P.M., the vehicles were secured and the search was discontinued at this time due to the search warrant limiting search between the hours of 7:00 A.M. and 10:00 P.M. It was also determined that the search would not be continued on this vehicles until Trooper Fettig of the arson squad arrived in this area to dispose of the dynamite which was in the station wagon."

The report goes on, "At 3:15 P.M." that is the fourth paragraph on page 3, and that 3:15 P.M. would obviously be the 16th of November, yes, the 16th of November, "writer, Trooper Fettig, Sergeant Zeller, Corporal Kramer and two FBI agents contacted Art's Service to remove the dynamite from the Plymouth station wagon. Writer photographed the dynamite as it was being removed. The dynamite was transported to a location north of Ontario where Trooper Fettig set off one stick first, then a combination of three sticks and then burned the remaining seven boxes of dynamite. Photographs were taken of this. Writer obtained a wrapper from a stick of dynamite from each of the seven cases."

"During this time, Sergeant Zeller remained at the scene and continued processing the vehicle. At 5:20 writer returned to Art's Service and continued searching the vehicles and inventorying the items seized. At 9:00 P.M. the vehicles and building were secured. It was decided that the vehicles {2848} should be moved to a safer location to preserve the evidence. Writer contacted Sergeant Robert Mullins of the National Guard Armory, obtained permission to store these vehicles at that location. At 10:00 P.M. the transfer started, and at 10:35 P.M. the vehicles were secured at the armory. They were towed to this location by a wrecker operator from Art's Service."

On page 4 on the first paragraph, "At 11:25 A.M. writer contacted the National Guard Armory and continued the search of the vehicles. At 12:05 P.M. writer had finished the search of the motorhome and turned it over to the FBI agents for their search. Writer inventoried the items seized from the motorhome and then re-searched the Plymouth station wagon; and

at 3:45 P.M. writer turned the station wagon over the FBI for their search. Most of the items seized by writer during the search of the vehicles have been photographed and turned over to Special Agent Steven Hancock. A list of these items is contained on an information report and receded to Agent Hancock. The entire list of items seized from the two vehicles, from the four suspects taken into custody and found at the scene, will be contained in this report."

"On November 19, 1975 at 1:40 P.M. writer made return of search warrant to Ontario justice court judge Nita Bellows." {2849}

Now, there is attached here a list of exhibits. I don't know what the Government's position on that is, on the list of exhibits.

MR. CROOKS: I believe that counsel already has that. I have no objection at all, and I don't think the Oregon State Police, in view of that list, were simply copied and supplied to them.

I believe that that is the same list substantially they already have in the 302 form.

THE COURT: Very well. The list of exhibits will be copied, photocopied, and a copy made available to counsel.

MR. TAIKEFF: Your Honor, as to the last point commented on by Your Honor, when Your Honor started reading from the report which the Government says the Oregon State Police had asked them not to reveal because of some sensitive or secret information that's contained there, it became apparent to myself that I had the document which Your Honor was reading from and previously turned over to the defense in connection with the last trial.

I'm holding that document in my hand.

MR. CROOKS: That apparently --

MR. TAIKEFF: The big secret wasn't a big secret. Last year it suddenly became a big secret. That's my first point.

MR. CROOKS: I don't know that it's a big secret. If they had it they have it.

{2850}

MR. TAIKEFF: We didn't steal it, I can assure Your Honor of that.

THE COURT: Well, as I commented, I saw nothing in the report that would have --

MR. TAIKEFF: I just wanted to underscore Your Honor's observation.

THE COURT: I appreciate that.

MR. TAIKEFF: So Your Honor would be secure that the defense joins with Your Honor's observation about there being nothing secret in this document.

Secondly, Your Honor, I would ask the government to produce any 302 by Hancock other than the one that I'm now holding which shows a date of transcription of 11/21/75, date of dictation, same date, and interviewed on 11/18/75, which is a one paragraph 302 to which is attached three sheets which appear to be copies of a schedule, the contents of which are the same as the report which Your Honor was reading from but which in fact is not that same schedule because the schedule which Your Honor was looking at is typed in such a way that the paper is held with the 11 inch dimension running from left to right. The schedules which are attached to the 302 have the paper held so that the eight and a half dimension runs from left to right. So obviously there are two Oregon State Police reports and Your Honor only has one of them. The 302 of Hancock dated {2851} November 21, 1975 became a portion of the other as yet unrevealed Oregon State Police report.

MR. CROOKS: Well, apparently we're off on a wild goose chase, Your Honor. I have no knowledge that we have any other 302's than what were turned. I would assume that Officer Hancock simply retyped the list when he prepared it to the form, or more probably that is his own list that he prepared in the usual course of his logging in of evidence.

We've given them everything that Mr. Hancock has had that pertains to that matter.

MR. TAIKEFF: Your Honor, I would like to have that particular 302 of Agent Hanson marked for identification. I'm sorry. It's Agent Hancock. It makes reference to a Mr. Hanson.

I'd like to have that marked for identification should at some future time it be necessary to docket that item or otherwise mark it a part of the proceedings.

THE COURT: It may be marked.

The government I presume will make a search to see if there is additional 302 prepared by, dictated by Agent Hancock.

MR. CROOKS: Your Honor. I will look.

But the best record we have now, they have got every one that we have got. If there are some other ones we'll certainly give it to them, but I'm not aware of any.

{2852}

MR. TAIKEFF: It may be, Your Honor, in order for the search to be fruitful that it would be appropriate for Mr. Crooks to ask the FBI if they have supplied him with all the 302's which may exist on this subject.

THE COURT: I didn't suggest but I felt that's probably what he would do.

MR. TAIKEFF: He said he would look in his file and I thought in the event he intended to look only at what he had he might also make the inquiry of the FBI.

MR. CROOKS: This is ridiculous. I don't know what other conclusion they can make. If I'm going to go back to FBI and ask them if there is any 302's. Stupid remark.

MR. LOWE: I think that point is important for Your Honor to be aware of. Last summer in the trial there came an occasion whether there was a 302 with regard to a witness for the government, James Harper. Mr. Sikma made a representation to the Court and at this point I don't in any way characterize it as a knowing misrepresentation or willful or ignorance representation, he said there was no other 302. It later developed that a Special Agent Chapman of the Cedar Rapids office of the FBI did have such a 302 and the government's position was that Mr. Sikma was not aware of that. Taking that at face value, what came out there and in subsequent discussions with the government is {2853} that the FBI has many documents and 302s and apparently the FBI culls out of all those many documents those which it believes are relevant and provides the U.S attorney with copies, perhaps on other occasions the government attorneys asked for other copies. But it's quite apparent that a situation existed at least once during last summer's trial when the FBI had a 302 which the government was not aware.

Judge McManus got rather upset when it came out there was such a 302 and there had been representation that there was not. That is why we made these specific requests we do not fall into some pitfall that the government counsel in good faith may believe there are no 302s simply because they are not aware of their existence.

MR. HULTMAN: Your Honor, let me just respond to that.

First of all, any given agent maybe deals with any innumerable number of 302s during his lifetime and I think there is somewhat an attack here in the sense that it's an attack that somebody was not dealing in good faith in terms of providing materials.

On the one hand, when we provide every last single scrap of piece of paper that could possibly in any way have any relevance and I get accused, I have been accused, the government is accused, the FBI is accused we're giving them {2854} so much they can't find what it is they're looking for. Then I get it turned around the other way on the documents Counsel is referring to, I'll use his remarks now, one time or another he said, "We hope the last trial was passe," and I would agree but we do keep coming back, both of us. On the specific item the Court ruled that had no relevancy, if I remember very quickly, Mr. Lowe, that it had no relevancy of any kind. IT was such an innocuous 302 it had no relevance.

I'm representing in good faith the disclosure that's been made in this case, every scrap of paper that even came close to having anything to do with anything or any possibility of anything I have disclosed and I haven't disclosed it on the grounds that Mr. Hultman has searched two little personal documents of his file. My disclosure has been on the basis of my every cotton picking piece of paper or any information that anybody anywhere has got any knowledge of any kind concerning this case. In fact, on Friday I saw about six documents for the first cotton picking time myself.

Now the point I want to resist, Your Honor is any inference that the government in any way is doing anything but going back and seeking to the best of its ability whoever's got what in any files anyplace period, and that I want made very clear on the record. And I think this record of disclosure from the first day on the part of the government and {2855} on the part of any other authorities that have any relationship to the government has been that, totally open, forthright in every sense of the word.

WE will go back again, as I have in the past, and Counsel will, Your Honor, on anything, but that doesn't mean, Your Honor, that I'm not going to continue to resist the probative value of whatever those items may be and whether or not they're proper items to be entered into evidence here.

That I want made very clear.

MR. LOWE: I want to make sure again, underscore we are not suggesting government counsel is making any improper selection of some sort. The only discussion in this trial has been with regard to the FBI and all we're saying is there may be in existence documents we're entitled to and we're asking an inquiry be made of the FBI. It's quite apparent, for example, on Defendant's Exhibit 166 that that was given to us as Brady material and my recollection that we were required to initial all papers we got for 3500 material of Brady material that if a question later came up that we were given that last summer, the government could prove it my coming up with an additional copy.

It seems to me they can go back to that file of all those initialed documents and look through their Brady material documents. Defendant's Exhibit 166 should be there. That's the kind of inquiry we're making. {2856}

We're not suggesting bad faith on Mr. Hultman at all, and Mr. Taikeff on several occasions has made that point quite clear and we make it clear again that that's the case.

THE COURT: I think the record is very clear on both sides.

We'll move on to the request for any additional fingerprint charts that the government might have on the defendant. Do you have any response to that, Mr. Hultman?

MR. HULTMAN: I could not check, Your Honor, only because the report hasn't got back to me yet.

THE COURT: Very well.

MR. HULTMAN: I should have it before the day is over, Your Honor.

THE COURT: The matter of inquiry relative to whether any explosive devices inventoried were supplied by the government agents or their informants. I 'm not going to ask for such a certificate from the government absent of showing that there is some basis for believing that it might have been supplied by the government agents or their informants. The Court will withdraw and vacate its order sealing this information report. Obviously there is no need to seal it.

The clerk will at some point examine the copy of the information report which Mr. Taikeff indicated he had and if it's identical to the

information report that I was {2857} reading from earlier this morning than the information report I was reading from may be returned to the United States.

MR. HULTMAN: Your Honor, I have another matter I'd like to take up with the Court if you've finished with the other matters.

THE COURT: Proceed.

MR. HULTMAN: Your Honor, I just now filed and served on Counsel in response to a letter that was served on me on Thursday evening, and I don't want to get in and argue the law or anything on it. I just want to indicate that procedurally on Thursday at the end of the day I was served with a letter which is appended to this motion from Mr. Ellison in which he stated, "We intend to consider calling," that's the way the letter starts out to me. I don't know what that means but I know it means something.

Then it indicates later in that paragraph that I have to have available the following one, two, three, four, five, six, seven, eight, nine, ten, thirteen, individuals who are governmental employees ready and available to testify on Monday, April 4 at 9:00 A.M., which is this morning, until such time as they in fact do take the witness stand or are released.

Now the reason for my motion then is twofold: first of all, I indicated at that time, one, that they would not be available and I want that made very clear. The reason was, {2858} I indicated at that time, first of all, was because on Monday morning I was sure we were still going to be dealing with the government's case, and I have so indicated that to Counsel from the beginning of time, almost at the beginning of this trial until as late as even this morning. That appeared to me that today and tomorrow and probably Tuesday this week would be the time when the government would complete its case. I felt that's been an appropriate date for quite some time and it would appear last week as well as this morning that that would be the case.

So my reason for them not being here this morning at 9:00 o'clock is that reason, first. But secondly, the then issuance, and that's what I'd file my motion on, that, one, there are evidentially additional people even beyond this list and Counsel did indicate to me this morning, Mr. Taikeff did, that possibly another government witness would possibly be called and we had a little discussion about that, he and I. But the point

I'm trying to get at, Your Honor, is that, one, I think there ought to be a showing of some kind and pursuant to the Rules and then, two, that at least some type of scheduling be outlined in such a way that I don't have these employees sitting here, one, in a status where Counsel is saying they are intending to consider calling. I would hope they not be called at such time until they have made up their mind they are going to call them and, secondly, {2859} to give the government at least the opportunity, one, of such a hearing determination and then if it so determined by the Court that such individuals to be called that again we be given at least a target time so that I don't have people just sitting around for a lengthy period of time because I don't control when and if counsel of the defendant is going to put any given witness of theirs on the stand.

That leads then to what Counsel and I, Mr. Taikeff and I discussed for a moment this morning. I think it puts it ultimately in the posture, Counsel is requesting, or at least thinks at this time they may well, if I misstate in any way, Elliot, certainly correct me, that possibly the Director of the FBI, Mr. Kelly, is one whom possibly that they are going to call. I would hope that we would follow the procedure then that Mr. Taikeff has indicated and that my posture would be only at this time that I would make the inquiry and I would want the record to show I'm going to resist it certainly. But I would make the inquiry as to an available time so that with a witness of this kind that we would not be in the posture that, on 24 hours notice that he would have to appear and we have complications of which Mr. Lowe and I are familiar, at least, that did happen on a previous occasion.

That's the reason for my motion. and because I did receive the letter on Thursday night that indicated these {2860} people were to be available for Monday, morning and I wanted the Court on record as to my resistance and the basis for my resistance as well as the procedure that I believe ought to be followed in each and every instance. I wanted the Court to be on notice of this as early as possible.

MR. TAIKEFF: Your Honor, with respect to the possible appearance of Mr. Kelly. I approached Mr. Hultman and told him that at this time based on our evaluation over the weekend where we spent a lot of time working on our order of proof, I indicated that there was about a 50 percent chance

Mr. Kelly's presence would be required. Realizing he was both an important public figure and a busy person, I thought that it would be appropriate if Mr. Hultman found out whether there were any particular problem dates within the next week and have him report back to us so that he could work around those particular problems, whether they be personal or professional. I also told him that we would be going to Your Honor in an ex parte fashion, making an offer of proof and otherwise substantiating our need for a Subpoena and if Your Honor, granted the subpoena we would see to it voluntarily that Mr. Hultman was notified that the subpoena be issued so that he would then have an opportunity to come before Your Honor and move to quash the subpoena. I trust that that would involve a sufficient number of safeguards and considerations for Mr. Kelly's schedule so there {2861} would not be any undue or unnecessary inconvenience.

I trust that Mr. Hultman finds that proposed arrangement agreeable.

As to the letter that is in exhibit attached to the government's motion, or, rather, is designated the appendage, I would like to say these things: I think Mr. Hultman is quite correct in taking it upon himself to see to it that the proposed witnesses not be here today knowing that his case is going to continue through the day and possibly into tomorrow and we certainly have no quarrel with him for making that decision. It seems to be a sensible one

{2862}

When this letter was prepared and given to him on Thursday, we were two days beyond the day, or perhaps only one day beyond the day when the Government had originally predicted about a week earlier that its case would end, and we know that the Government could not control in any way exactly how long its case would take.

So when the letter was given on Thursday, it was with the expectation that the end of the case was going to occur very shortly, possibly even Friday, and, that's why Monday was selected.

Our concern, your Honor, is that once we assume the burden of presenting evidence, we, like the Government in the three weeks before us, has the burden of keeping the case going continuously from 9:00 in the morning until 5:00 in the evening except for the usual recesses. We don't want to be in the position where we have to say to your Honor, "We

have run out of witnesses," and so we must do what in a business sense might be considered an inefficiency, but given the obligation of going forward and keeping the proceedings going, a necessity -- and that is to keep a backlog of witnesses in the witness room.

Now, I am sure the Government will concede that it subpoenaed virtually all of its witnesses to appear on March 14th, the day the trial began; and many of them are either still here today, they have not testified or at {2863} least into last week were still waiting to testify, and in many instances were never called to testify. Now, each of those witnesses, if a non-Governmental employee, gets $20.00 a day witness fee and $16.00 a day for expenses -- and I don't think anybody would criticize the Government for doing what they did because you have to make decisions as the trial unfolds. Sometimes you add witnesses, sometimes you delete witnesses. You have to be sure that the Judge doesn't say, "You have just rested your case by running out of witnesses at 2:30 in the afternoon." We are intending to do, but on a smaller scale, what the Government has done and what every lawyer has to do who has the burden of going forward. That was the purpose of the request of March 31st. I had it on my list of matters to call to your Honor's attention the fact that I think it would be appropriate if the Government rests today, that the FBI Agents and other Government employees -- I notice just one such person on the list, Marvin A. Stoldt -- be available as of 9:00 o'clock Wednesday morning. If the Government rests in the middle of the day tomorrow, then I think the middle of the day on Wednesday would be sufficient; but quite frankly, we feel we should have between five and ten witnesses backlogged so that we never run out of witnesses.

If the Government is concerned that the FBI Agents {2864} will be wasting their time sitting around on the second floor, we would be perfectly happy for them not to be here and appear to be wasting time; but we would then like the privilege of running out of witnesses and not being punished for it in any way and being able to call the witnesses in the sequence we think will be most understandable and most appropriate in the eyes of the fact finders.

Now, I think our need and right to do that is incompatible with the Agents sitting around and twiddling their thumbs for a day or two. We are

willing to agree to any arrangement as long as we are not punished for running out of witnesses and as long as we have the right to call our witnesses in the sequence in which we contend they should be called.

THE COURT: Are we ready for the jury?

MR. TAIKEFF: Yes, your Honor.

MR. HULTMAN: Plaintiff is ready, your Honor.

(Whereupon, at 10:09 o'clock, a.m., the jury returned to the courtroom, and the following further proceedings were had in the presence and hearing of the jury:)

THE COURT: It was reported to me this morning that the jurors had been sitting in a cold draft last week. I suppose the only consolation you can get from the delay {2865} that was incurred this morning -- and a necessary delay, by the way -- is that you were not sitting in the cold draft while you were waiting.

I do also, however, want to assure you that I have taken it up with the GSA; and we will make arrangements to see that somehow or other this cold draft is eliminated. The results of that may not show up until tomorrow, but it is going to be done. Counsel may proceed.

MR. HULTMAN: The Government calls Dean Hughes.

DEAN HOWARD HUGHES

being first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. HULTMAN:

Q Would you state to the Court and to the jury your name, please?

A Dean Howard Hughes.

Q And what is the nature of your occupation, Mr. Hughes?

A I am a Special Agent for the Federal Bureau of Investigation.

Q And approximately how long have you been in this capacity?

A Approximately 11 years.

Q And have you been a Special Agent for the FBI carrying out duties during this period of time on the Pine Ridge Indian Reservation?

A For approximately the last four years, yes.

{2866}

Q And would you just in a sentence or two or three indicate to the jury what generally your responsibilities have been there?

A Well, there is a certain number of violations on the Pine Ridge Indian Reservation which the FBI has jurisdiction over, and those are the matters I have investigated over the last four years.

Q Now, I want to take you to the month of June of 1975, and ask you how many Agents of the Federal Bureau of Investigation were available or who had responsibilities with reference to duties concerning the Pine Ridge Indian Reservation?

A Well, there were approximately 12 of us assigned to Rapid City. We didn't all work necessarily on the Reservation.

Q In other words, is it a fact that of the 12 Agents that worked out of the Rapid City office, that you have general jurisdiction concerning crimes and criminal matters above and beyond those that pertain to the Reservation itself?

A That's correct.

Q All right. Now, I wish to take you to -- is included in those responsibilities and duties the serving of arrest warrants?

A That's correct.

Q And is that a normal function of the Federal Bureau of Investigation?

A Yes.

Q And I want to take you to the 25th of June now and ask {2867} you whether or not on that particular day you had any responsibilities on the Reservation or in and about the Reservation?

A You said the 25th of June?

Q Yes, sir, the 25th of June.

A The 25th of June, yes, I was working on the Reservation.

Q All right, and I now want to take you to the 26th of June and ask you what, if anything, that you were doing on the 26th of June, 1975?

A Well, I made preparations that morning to take a prisoner I had arrested the previous day to Rapid City to arraign him before the U. S. Magistrate.

Q All right, and what were the circumstances, just briefly, surrounding that arrest?

A The arrest of this particular prisoner?

Q Yes.

A I had arrested him with some other Agents on the 25th of June in the vicinity of Porcupine, South Dakota. That's a village on the Pine Ridge Indian Reservation.

Q Who was that individual?

A Theodore Paul Poyer.

Q For what crime had he been arrested?

A Violation of Title 18, Section 1153, assault with a dangerous weapon.

Q All right. Now, what, if anything, then in approximately {2868} what time on the 26th were you doing anything concerning this individual?

A Well, at 10:58 in the morning I had placed him in my FBI automobile and briefly talked to him, after advising him of his rights; and he didn't really give me any information other than some background information, and at that time I had a brief conversation with Special Agent Ronald Williams.

Q And would you tell us where that took place?

A That took place right in front of the Pine Ridge jail on the Pine Ridge Indian Reservation.

Q All right, what, if anything, were you preparing to do at that time?

A I had placed prisoner Poyer in my automobile, and I was planning to take him to Rapid City, South Dakota, to arraign him before the U. S. Magistrate.

Q All right. What, if anything, was the nature of the conversation with Mr. Williams at that time?

A Well, Agent Williams and I discussed briefly his -- he indicated that he attempted to locate and arrest James Eagle in the vicinity of Oglala, South Dakota, the previous day, and he indicated this was negative.

Q That was a similar responsibility to the one you had the day before when you did in fact arrest the person that you had now in your custody, is that right?

A That's correct.

{2869}

Q All right. About what time was this?

A Well, I had the conversation at 10:58. I happened to glance at

my watch. To the best of my recollection that's when the conversation took place.

Q All right. What, if anything, happened next?

A Well, I placed the prisoner in my car; and then I started for Rapid City. I had another Agent follow me, and we started driving towards Rapid City, South Dakota.

Q All right, and what route did you take from the time you left with reference to the place that you were going?

A I left Pine Ridge on Highway 18 which goes to Oelrichs, South Dakota. Then you turn right and proceed on to Rapid City. It is Highway -- I think it is 385 for a way, and then as you go past Hot Springs it becomes Highway 79. It is a standard route to get to Rapid City.

Q Did you in fact then, in looking at Government Exhibit 71 which is behind you, traverse the route on part of Highway 18 that is shown there.

A Yes. That's the part of Highway 18 that goes by the village of Oglala, South Dakota, the area of Oglala.

Q All right. So you left Pine Ridge then, and you went down Highway 18 as on 71, moved from the right to the left as we are looking at it, and proceeded on, is that correct?

A That's correct.

Q Approximately how long had you been an Agent and working {2870} in the general area?

A I was assigned to Rapid City on March 30th, 1973, so I had been there, oh, just roughly three years.

Q Were you generally familiar with the area that's represented on Governments Exhibit 71?

A Yes. I had been in there several times in that general area.

Q All right. Now, what, if anything, happened next that came to your attention that morning?

A Well, I was traveling between Oelrichs and Hot Springs, heading towards Rapid City, when about half-way between these two points I heard what I thought was the voice of Agent Ronald Williams calling for help over the FBI radio.

Q Now, had you heard Agent Williams' voice on the radio before?

A Yes, numerous times.

Q What, if anything, was it that you heard over the radio at that time? Let's start at the beginning.

A Well, I am not positive about the exact words or the arrangement, but to the best of my recollection he said some thing to the effect that "We are being fired on, we are in a little valley in Oglala, South Dakota, pinned down in a cross fire between two houses," something to that effect, he said.

Q And what, if anything, happened next?

A Well, again I don't recall his exact words, but he was {2871} directing Agent Gary Adams to his rescue; and I assumed that Adams was in that immediate area somewhere.

Q All right, and what was the nature of the words to the best of your recollection that you heard at that time?

A Well, he said something to the effect, "Get to the high ground," talking to Agent Adams; and he subsequently said something to the effect, "Hurry up and get here, or we are going to be dead men."

Q And what, if anything, did you hear next?

A Well, the last thing I heard, what I thought he said was very vaguely, "I am hit," and that's the last thing I heard Agent Williams say.

Q Now, what, if anything, happened next?

A Well, the Agent behind me who was following me in a separate FBI vehicle indicated to me that he had also heard these transmissions, and that he was going to turn around and proceed back towards Oglala.

Q And what, if anything, happened next?

A I told him that I would drive on to Hot Springs to drop off my prisoner there and would return to Oglala, which I did.

Q And what, if anything, did you do then?

A Well, I drove at a high rate of speed to Oglala -- I am sorry, to Hot Springs, put my prisoner in the jail there, and then returned towards Oglala at a high rate of speed.

Q Did you then traverse the same route back that you had {2872} taken in going?

A That's correct.

Q All right. Now, what, if anything, happened next?

A Well, at a position between Oelrichs and Oglala, while I was

proceeding towards Oglala, I observed the FBI automobile of this Agent who had been following me parked along the road with the blinkers on. I stopped and jumped out to look it over and see if he had been hurt. The car was locked, appeared to be o.k., so I proceeded on towards Oglala.

Q All right, and what, if anything, happened next?

A As I approached Oglala, I asked Agent Adams, Gary Adams over the air where I should go because I was unfamiliar with what was happening, and he indicated I should stop at a position north of him, and as I drove up to that area I observed numerous police vehicles parked off to the side of the road, and I stopped and parked my car off the side of the road there.

Q All right. I am going to ask you to look at Government's Exhibit 71 and indicate, if you can, the approximate area that you had just testified to?

A You want me to go up to the map?

Q Would you approach the exhibit?

A To the best of my knowledge I approached from this area (indicating), and there is an area off here (indicating) where you can park, and I swung my vehicle and parked it in here somewhere (indicating). There were numerous other police type {2873} vehicles parked in there.

Q All right you can return back.

{2874}

Q Do you have any idea as to approximate time that this may or may not have been the time that you did return under the point you're now discussing?

A I would estimate I arrived in Oglala at that time at approximately 1:00 P.M.

Q All right. Now, what if anything did you see then or do at the point where you pulled off of Highway 18 in the general location that you've indicated?

A Well, I observed some BIA police officers and a couple FBI agents leading a search team down toward the creek. So I --

Q Excuse me.

A So I joined this group.

Q All right. Was one of those in that group the agent who had gone, who had left with you to go with your prisoner and whose car you then later

testified to a moment ago that you saw?

A Yes, it was.

Q Did you find out at that time or at some later time, I mean why his car was there?

A Yes. He told me later what had happened to his car.

Q What if anything did you do next?

A Well, the agents briefly briefed me on what their plan was. They were going to search for the agent. We only knew Agent Williams might be missing at that time.

So I joined this group and took charge of this group {2875} and we ran down to White Clay Creek and proceeded to follow this creek.

Q All right. I'm going to ask you now, with the Court's permission, for you to go to Government's Exhibit 71 and indicate what it is, the route that you took and the things that happened, that did appear, those things which you can project on Government's Exhibit 71.

A Okay.

Q Beginning with the fact that you are in the area you had previously pointed out along Highway 18, would you indicate to us then the route that you took.

A We parked here (indicating), at least I did, and we ran down to the creek area. Past through some open areas, and this creek is very densely wooded. It varies. It's, at that time of year, it was very densely wooded.

And we got in the water and heavy brush surrounding that creek. We initially traveled in a northwest position and then circled around, and actually we ended up going over here to a southeast position south of this. These houses over here down in there.

Q All right. Now, was there a route in fact on the ground that you followed primarily?

A We just followed the creek here. It was a northwest and then south and then southeast.

Q All right. Whichever way the creek went is the way that you {2876} went; is that right?

A We stuck to the creek because that's where the cover was.

Q All right. Now, what if anything, what if anything happened at the time when you emerged from the route that you've indicated?

A Well, as we traveled through the creek area we heard sporadic firing and the firing seemed to be coming from a green house that was located right here (indicating).

So our only thought at that time was to try and get to a position where we could approach that green house.

Q All right. How did you conclude that the firing was coming from the green house, or generally speaking?

A We could hear the sounds from the reports and just seemed to be coming from that house.

Q All right. Now, where was it then that you came out of the woods that you're now, the route that you've just now traversed generally?

A Our final destination, traversing through the woods, we went right approximately in here, a position what appeared to me at that time southeast of the green house.

Q All right. Could you see the green house when you came out of the woods at that general location?

A If you left the woods and got up to the edge you could see the green house, yeah.

Q All right. Now, did you in fact proceed out of the woods, you {2877} yourself personally?

A Yes. At that time we had no idea where Agent Williams was or what his condition was, or if any other agents were with him. So a brief plan was to form a line and approach out here to an area where I could holler at the house to try and get a response to find something out about Williams.

And we did that. Officer, one of the BIA officers was with me and we approached out front more or less on the right side into an open area. And prior to my being able to announce anything an individual ran from this green house, from the area there, towards me and snapped a shot at me with a rifle. It was just a quick thing and a shot come quite close. I got the distinct impression that it must missed me.

Q What if anything did you do?

A Well, we saw that this wasn't going to work obviously as all exposed through there. So we got back in the creek and the regrouped to a position somewhere in there. More or less a little bit to the left of where our original position was. And at that time I hollered an announcement at the

individuals in the green house.

Q And what if anything did you say at that time?

A Well, there again I'm not positive on my exact words, but I said something to the effect that "Hello, the green house," to get their attention, "This is the FBI and the BIA, you are surrounded, come out with your hands up and without your guns {2878} and there will be no shooting".

Q And what if anything happened at the end of your announcement?

A Well, immediately after that announcement we received a great deal of firing at us from this area of the green house. And we received some firing at us from other positions that I don't know where it came from.

Q Now, and up to this time that you're now testifying had you or anyone in your group done any firing of any kind?

A No.

Q All right. What if anything happened next?

A I directed members of the search team to return fire at individuals at the green house were firing at us. And it was a matter of concern that they didn't fire indiscriminately because I didn't know where the agents were, agent or agents, so I asked them to fire only at specific targets. And fire was returned by the search team.

Q All right, And what if anything happened next?

A Not an FBI agent, a BIA police officer somewhere behind me said something to the effect, I think one was hit outside the green house." And after he said that firing was over. It had ceased.

Q All right. And what if anything happened next?

A At that time Agent Gerard Waring who was with me got in a tree and he had a rifle with a scope and he advised that he {2879} observed the car of FBI Agent Jack Coler in a field, in a valley.

He said it was about two hundred yards west of our position, what I thought he said. And he noted that he was familiar with this automobile. It was a 1972 Chevy, and it had been shot up. And he noted it had Colorado license plates on it, and Agent Coler was from the Denver division of the FBI.

Q All right. Now, up until that moment when Agent Waring indicates something that he has seen or perceived through his scope, had you any

knowledge of any kind, one, as to the whereabouts first of Agent Williams?

A No.

Q Or Agent Coler?

A No. I hadn't heard Coler at all.

Q Or the location of either of their automobiles?

A No.

Q All right. The only thing you knew in effect were what you had heard in terms of radio transmissions; is that right, generally speaking?

A Prior to that we didn't have a radio. Our radio went out. So I didn't know what was happening after I entered the creek area.

Q All right. Now, what if anything happened next?

A Well, I advised the search team to stay put here and officer, one of the BIA officers and one of the FBI agents and I {2880} traveled down here to check out the automobile of Agent Coler.

Q All right. And where approximately did you then come back from the creek and the wooded area? Do you remember any objects or anything in that general area?

A Well, we traveled right down through here (indicating) and come out behind these corrals in this area right here somewhere (indicating), which appeared to be the closest spot we could get to the agents' car without being in an exposed area.

This was all low grass and you would be exposed if you ventured out there.

Q All right.

MR. HULTMAN: Let the record show that the general area that the agent has just testified to is a corral, as represented on Government's Exhibit 71. And there is a marking of Z-3 in the general area of that corral.

Q (By Mr. Hultman) All right. What if anything did you see or observe or do next?

A Well, as the three of us traveled down through here we were shot at four or five times. Bullets hit right above us. So we had to be careful.

I hollered at the FBI automobile and could get no response. I couldn't see any bodies or any activity around it. I could see it had been thoroughly shot up, front tires were flat. But I still had no idea where any agents were.

Q All right. And what if anything did you do next?

{2881}

A I left the BIA officer, an agent, an FBI agent here (indicating) and I traveled back to here (indicating), got the search team, brought them back here (indicating) and regrouped there near the car of Coler, Agent Coler.

Q Now, did you have any sense of time during the period that you have discussed here as to any sense of time as to when any of these events approximately may have taken place?

A To the best of my knowledge the shoot-out here occurred at approximately 2:25, 2:30 P.M. when the BIA officer announced that I think one was hit outside the green house.

Q All right.

A This town here, when we regrouped here, would be roughly 3:00 o'clock, 3:00 P.M. approximately.

Q All right. Now, what if anything happened next?

A I sent an agent out to the highway where I thought Agent Adams was, and instructed him to return with additional men, equipment, gas, radio equipment to prepare for an assault upon this group of houses here as that seemed to be the area where the people that were responsible for this matter, as they were the ones who did the shooting.

Q Now, throughout the testimony you have indicated that you were the one that was giving the instructions and so forth. Am I to assume that you were the one that took charge of the particular group after you left the Highway 18 area? Is that a fair conclusion on my part?

{2882}

A That is correct.

Q All right. Now, what if anything at this time again did you still have any knowledge of any kind as to where Agent Williams might be or his condition?

A No, I did not.

Q Or did you have any knowledge now other than the fact that Agent Coler's car was in the area with numerous bullet holes as to where his personal location or condition might be?

A Well, I knew this was Coler's car also and I figured he was in

this. But I had no idea where he was or what his involvement was.

Q Was this the first occasion when you yourself had seen the car?

A That is correct.

Q I mean on this, at this particular moment or this period of time from the time that it was in this general area?

A It's the first time I had seen the car that day.

Q All right. Now, what if anything did you do next?

A Well, we maintained our position. And at approximately 4:20 P.M. an individual came from the vicinity of this residence (indicating) which at that time I thought was the residence of a girl by the name of Joanne LeDou, as I've seen here there several times.

Q All right. Had you been in that particular, at that residence in that general location before?

{2883}

A I hadn't been to it before. I had been outside the residence.

Q All right.

MR. HULTMAN: Let the record show that this is on Government Exhibit 71 shown there as with a marker that says "First residence" and then tan and red house.

Q (By Mr. Hultman) All right. What if anything happened next?

A Well, this individual was wearing a white T shirt. He had his hands up and I directed him to come down. I hollered at him to come down to our area, which he did, and as he approached I recognized him as Edgar Bear Runner. And he identified himself as Edgar Bear Runner.

He walked this way by the agent's car, up to our position.

Q All right. You say that you recognized Edgar Bear Runner: is that right?

A That's correct.

Q You had seen him on a previous occasion; is that right?

A Yes.

Q All right. Now, what if anything happened next?

A I asked Edgar Bear runner about the condition of the agent, or agents, and he first indicated that he had been sent in there by BIA Superintendent Kendall Cummings to negotiate a peace, and he had twenty minutes to do so and get back.

{2884}

And he indicated that there were two individuals lying alongside the car. He didn't know if they were alive or dead.

Q All right. And what if anything happened next?

A I asked him to check on the condition of the agents. And he walked up here with his hands up, stood there briefly and then walked up here toward the vicinity of the green house without giving any indication. He gave no indication to us whether they were alive or dead.

Q All right. And what if anything did you observe then once he reached the general vicinity of the green house?

A Well, earlier down here (indicating) he had told me that this was his party up here, but he didn't know who was up there.

Now, at this time he stood right in this area (indicating) between the green and the white house just briefly with his hands up and then he disappeared from view.

Q All right. Did you see any other individual during that period of time other than Mr. Bear Runner?

A No, not right then.

Q All right. Now, what if anything did you next observe?

A A few minutes later Edgar Bear Runner reappeared from this area here (indicating) with a white male, who I didn't know at that time, and they walked down here with their hands up and stood in that area approximately alongside Agent Coler's car, {2885} standing there with their hands up looking down.

Q All right. And what if anything did you do?

A At that time I got up from my position of cover and a BIA officer got up with me and we walked out here with our guns lowered. And at that time I observed Agent Ronald Williams and Agent Jack Coler lying obviously dead on this side of the agent's car. (Indicating.)

Q All right. Would you come back to the seat, and I want to show you what has been previously introduced in this trial as Government's Exhibit No. 54 and ask you whether or not you recognize the general scene that is portrayed on the first page, page 1 of Government's Exhibit 54?

A Yes. That's a good representation of what I observed when I observed the two agents lying there dead.

Q Now, this photo is actually taken at a later time, is it not?

A A little bit later in the afternoon.

Q All right. But the, what is it that you are referring to when you say what things it is that represents that you saw at that time we are now talking about?

A Well, I observed that the agents had been dead obviously for a period of hours because there was a great deal of dried blood underneath their heads with flies buzzing around.

Q Well, now did you see the bodies in the relative position as indicated in the photograph number 1?

{2886}

A That's correct.

Q All right. And that was the time and place now when you walked out with someone else and Mr. Bear Runner and Mr. Cummings were standing at the car?

A The four of us were standing there, yes.

Q All right. Looking at the automobile itself that is represented here, and whose car was that?

A That was Agent Jack Coler's.

Q Was it in relatively the same condition with a door open and with a trunk lid up as you remember at that time?

A Yes. The driver's door was open and the trunk lid was up when I saw it at 4:30 that day.

Q All right. And is the same true as far as the photograph number 4 on that exhibit, is that likewise the general scene that you saw portrayed at that time that you're now testifying to?

A Yes, it is.

Q All right. Is the same true as far as the bodies of the agents and the automobile as far as the other scenes that are portrayed in this exhibit?

A Yes.

Q All right. Now, what if anything did you do next?

A I and the BIA officer returned to our position that we had left and Edgar Bear Runner and the white male who identified himself to me as Kendall Cummings, acting BIA Superintendent {2887} for the Pine Ridge

Indian Reservation, returned to the houses on top of the hill, that area.

Q All right. And what if anything did you observe or do next?

A When I returned to my position the agent I had sent out previously to get gas and equipment and men had just returned with approximately twenty additional local law enforcement officers and some FBI agents. A lot of them, I didn't know the local officers.

Q All right. At the time that you were at the car just a moment before to which you've been testifying and saw the two agents, was there anything generally as to their clothing or the position of any clothing that you observed at that time that you recall?

A On the two dead agents?

Q Yes.

A What I observed was that Agent Williams was naked from the waist up. He had his gun missing from his holster.

I observed that Agent Coler had his shirt partially pulled up towards his shoulder and he appeared to have a bandage of some kind wrapped around his upper right arm.

Q All right. And you indicated they were laying face down?

A They were laying face down, both the same way apparently, obviously.

Q All right. Now, what if anything did you do next then upon {2888} return from the cars back to the corral area and the edge of the woods?

A Well, as I indicated at that time the agent I sent out earlier had returned with the additional men and equipment.

At this time I had a radio and I immediately put word out over the FBI radio that Agent Williams and Agent Coler were dead. And I then organized this group of law enforcement people into three groups. And the agent that I had sent out took two of the groups with him and some of these individuals had M-16's, and then they went to a place where we were originally south of the green house.

{2889}

Q Now were any of those agents to which you are now referring, were any of those agents members of S.W.A.T. teams to your knowledge?

A I recall a couple agents from Minneapolis division that were members of S.W.A.T.

Q And do you recall any teams as such being present at that time?

A I don't know if there were any. By team that generally means five individuals. I don't know if there were any full five man teams there or not. I don't know what the local law enforcement people, I don't know the individuals so I don't know what their particular area was.

Q Now what if anything then was the plan that you developed at that time beyond what you've stated to the jury at this moment?

A Well, the plan was to take an assault and clear the houses on top of the hill where the shooting seemed to be coming from. This was to be done. We originally, the final plan was to do it at 5:50 P.M.

Q What if anything then happened?

A Well, at 5:50 P.M. I ordered agent, one of the FBI agents to fire gas at the green house, which he did.

Q When you refer to gas, what kind of gas is it that you're --

A Laymen's term, I guess, it would be tear gas.

Q What was the purpose of firing the tear gas?

{2890}

A We anticipated being shot at a great deal when we assaulted these houses since shooting had been coming from this house before and the tear gas would be running through an open area for maybe 300 yards would perhaps disenable them to shoot us straight.

Q Would you thus likewise be able to find out who if anyone was in the building at that particular moment?

A Well, hopefully when you gas a place the people will come out and throw down their weapons and give up, but that didn't happen.

Q What if anything happened next?

A Well, after the agent fired the gas, the teams that were directly south of the house began their assault and my group began our assault.

Q Had you given any particular instructions to anybody in your group?

A No. Just assault and clear the houses of any individuals there.

Q Did all of the people in your group assault together?

A No.

Q Who didn't and for what reason, if you know?

A Well, I ordered one agent to remain in a concealed position behind Agent Gerald Waring and he had a rifle with a scope which is the only one I took notice of there. I directed him to fire at anyone who shot at us

and to protect our rear as we {2891} assaulted the place.

MR. TAIKEFF: Your Honor, could we have a clarification on that last piece of testimony. He spoke of Waring and a person he describes as "he." "He" was referring to the same person?

Q (By Mr. Hultman) Were you referring to the same person?

A Yes. Waring is the one I directed to stay behind.

Q Now would you again return to Government's Exhibit 71 and indicate on it for the jury the general route that you took and any others that you knew or observed or had given instructions to. A. I left my position here and ran from this area up this way (indicating) and the other group, of course was to assault the place from this area (indicating) somewhere in here.

Q What if anything then happened as you left your position?

A Well, I got about halfway there and I had a great deal of rapid fire directed at me. I was packing my shotgun, an FBI shotgun and a portable radio and I dropped the radio and ran a zigzag position on towards the house. And at that time I heard a great deal of rapid fire from up in here which I presumed was our group assaulting the place (indicating). And I was able to get up here, crawl, hit the ground, crawl part of the way and eventually the houses were deemed clear and we were just standing around.

There was a lot of gas around. At that time one shot {2892} went through the area of the houses. I have no idea where it came from.

Q Was anybody in your group that came from the corral and across the open ground with you personally or behind you, did anybody in that group have any M16s of any kind?

A I don't know.

Q Do you know whether or not anybody in the other group that was up in the corner that you just referred to, do you know whether or not anybody in that group, were there any M16's in that group?

A Yeah. That group took some M16s with them.

Q You indicated you heard some rapid fire in that general area as they were assaulting the house, is that right?

A Well, I presumed it was the M16s. I've done a lot of shooting with M16s in practice and I've heard a lot of them. I don't know for sure but I presume.

Q You don't know from your own knowledge then specifically, is that right?

A No.

Q And am I correct you didn't see specific shooting, you're only referring to what you heard?

A That's correct.

Q As you indicated, there was some fire that came in at the time you were somewhere in the general area of the middle of the open field. Did you have any idea specifically where that {2893} fire came from?

A No. I really don't other than the sounds came from out here somewhere (indicating). But I don't know where it came from.

Q Now after you were at the position of the green house and the white house, you indicated that one single round did come in, is that right?

A That's correct.

Q Did you again know where that round came from?

A No.

Q When you arrived at the top of the hill in the general vicinity of the houses, with relationship to any given house or houses, where did you arrive on top of the hill?

A I went up over this rise to the green house right in here (indicating).

Q And do I take it from your showing now that it was somewhere on what would be the north side of the green house between the green house and the white house?

A That's correct.

Q Now what if anything happened once you arrived at the green house?

A Well, as I walked up here (indicating), I observed a dead Indian male laying on the northeast corner and an FBI agent walked up to me and handed me a rifle, a 30-30 Marlin with the letters AIM on the side and he said he had taken that off {2894} the dead Indian male that was lying there.

Q And would you describe specifically where the Indian male was that you have just referred to, where he was lying?

A Well, he was lying on the northeast corner of the green house within a few feet of the green house.

Q And was there, would you describe what his position was and anything about him?

A He was lying on his back and he was wearing one of the FBI S.W.A.T. jackets which had the letter "FBI" on the left breast pocket.

Q Are you generally familiar with FBI S.W.A.T. jackets?

A That's correct.

Q Are you a member of a S.W.A.T. team yourself?

A Yes, I am.

Q And were you at that particular time?

A Yes, I was.

Q Did you have a S.W.A.T. in your group of agents that was stationed at Rapid City?

A Yes, we did.

Q And were any members of that team, as you recall, with you during that particular day?

A Not with me specifically; no.

Q So is it fair for me to conclude, you weren't there at any time operating as a S.W.A.T. team in any way?

A No. Just some of us assigned to Rapid City belonged to a {2895} S.W.A.T. team.

Q Do you know whether or not Agent Coler or Agent William's belonged to S.W.A.T. teams?

A Agent Coler belonged to a S.W.A.T. team in the Denver division, Agent Williams did not belong to S.W.A.T.

Q Since you arrived had you had any type of operation at any time in which you operated as a S.W.A.T. team?

Q Would it be customary for S.W.A.T. team members to have items of their equipment such as their jacket in their automobile?

A That's customary to carry your equipment in your automobile; yes.

Q Now I'm going to show you, you might return again, what has previously been introduced into evidence here as Government Exhibit 54 and I would like you to look at a series of photographs on page 16 of that exhibit and ask you whether or not you recognize the scene that is portrayed in any of the photographs that are on that page.

A Well, there are three photographs here I took of the dead Indian

male who was lying on the northeast corner of the green house that day, the 26th of June.

Q So then at a later time you in fact photographed the individual that you have been discussing, is that right?

A Yes, I did. Later that day.

Q And those photographs, three of them, are portrayed on {2896} very page of this exhibit, is that right?

A Yes.

Q And are those a fair and accurate representation of what you saw and observed at the time when you arrived at the green house as well as at the time when you took the photographs?

A Yes.

Q And would you point out to the jury where it is on any one of those photographs, maybe photograph C, the specific object or jacket that you are referring to that you just testified to.

A This is an FBI S.W.A.T. jacket. It's Army type color. It has the letters "FBI" very plainly on the jacket pocket there, left jacket pocket.

Q Now what if anything did you do next or observe next?

A Well, I then began a crime scene investigation of that immediate area around the green house.

Q And what if anything did you find during the course of that search?

A Well, the agent that handed me the Marlin 30-30 rifle for examination also handed me a .22 magnum pistol which he said a highway patrolman had taken out of the holster of the dead Indian male and the dead Indian male was wearing a holster.

Q Is this same person which you have been referring to and of which you took a picture?

A Yes, it is.

{2897}

Q I'm going to show you what has previously been introduced in this case as Government Exhibit 32A and ask you whether or not you recognize that particular object. I'm going to show you what's been previously entered into evidence as Government Exhibit 32A and ask you to look at it and examine and tell us whether or not you recognize that particular object.

A This is the Marlin 30-30 with the letters "AIM" underneath here

which the agent handed to me and said he had taken off the dead Indian male.

Q You recognize it for the various objects then that appear on it?

A Yes.

Q What if anything else was exhibited to you at that time?

A Well, as I mentioned, the .22 Magnum revolver and then I began the crime scene investigation, picking up numerous shell casings which were lying on each side of the green house.

Q Did you notice anything concerning whether or not the individual who was there at the green house had a holster or not?

A Yes. He was wearing a black holster which an agent, FBI agent indicated to me that a Highway Patrolman had taken the pistol out of the holster.

Q There was no pistol in the holster when you observed it?

A It was empty.

Q What if anything did you do next? You indicated that you {2898} began then a search of that particular area.

A I began picking up numerous shell casings that were laying alongside the green house. That would be the east side of the green house. They were lying on top of the grass in a clean and shiny condition, appeared to me to be relevant to the crime so I started collecting them.

Q I'm going to show you what has been marked as Government Exhibit 29B and ask you to open it, to examine it and any documents that are there and then ask you whether or not you recognize them in any way?

A As I picked up the shells on the east side of the green house, I put them in plastic bags and attached a note. Each note I initialed and where I found the articles and what they were and dated it.

Q Is that what you are now looking at?

A Yes.

Q Do you recognize it as such?

A 30-06 caliber shells found on east side of the green house that day.

Q What was the general condition of the shells themselves? A. Well, as I indicated, they were laying on top of the grass and dirt there. They weren't ground in so appeared to me obviously they had just been placed

there. That's why I thought they were relevant and should be obtained.

Q You then pursued after the proper marking and so forth that {2899} you used the manner that has been discussed previously in terms of turning the evidence in?

A Well, I didn't want to mark the shells so I put the paper in the bag and I then turned them into the evidence room in Pine Ridge, South Dakota.

MR. HULTMAN: Government offers Exhibit No. 29B.

MR. TAIKEFF: No objection.

THE COURT: 29B is received.

MR. LOWE: Is that five cartridge casings, is that what Exhibit 29B is?

MR. HULTMAN: Right. Right.

Q (By Mr. Hultman) Now I'm going to show you what has been marked as Government Exhibit 32B and ask you again to open it, examine any documents that are with it and then indicate whether or not you recognize the objects that are in that exhibit?

A There again I have a note here with my initials on it dated 6/26/75 noting shells that are in this particular package. A 30-30, .44, 30-30 and a 30-06.

Q And did you go through the same procedures that you just discussed with reference to the previous exhibit?

A Yes. I bagged it, put my piece of paper in there noting what it was and turned it into the evidence room at Pine Ridge.

{2900}

Q And you didn't put any markings on the rounds themselves again, is that correct?

A No.

Q All right. For the reasons that you have indicated, is that correct?

A That's correct.

Q All right, again would you describe the condition as you found the rounds that are represented in Government's Exhibit 32-B?

A Well, they were clean. They hadn't been ground into the dirt. They didn't have any dirt on them, and obviously had just fallen there recently.

(Counsel confer.)

MR. TAIKEFF: Your Honor, we have no objection to the shells. There apparently is some question about whether the Government is also offering the piece of paper which is contained in it.

MR. HULTMAN: I have -- as long as there is no objection to what that indicates in terms of the chain and so forth, your Honor, I have no objection at all if we remove -- only those particular objects within -- only for reference purposes.

MR. TAIKEFF: Then there is no objection. I don't think we will raise any question about continuity or possession or anything of that sort.

{2901}

MR. HULTMAN: All right, so the Government offers 32-B with that indication, your Honor.

THE COURT: I am not sure I understand the indication -- that the paper is going to be removed?

MR. TAIKEFF: We don't object if it stays in there for convenience. Unless and until the jury requests that exhibit, it can stay in there.

THE COURT: Very well.

MR. HULTMAN: Your Honor, I think at an appropriate time we can remove them, and they can be marked so that it is known which exhibit they were a part of, for record purposes. That's all that we are concerned about.

THE COURT: All right. 32-B is received.

(Plaintiff's Exhibit No. 32-B, having been previously duly marked for identification, so offered in evidence, was received.)

Q (By Mr. Hultman) I will show you what has been marked as Government's Exhibit 33-B, and ask you to look at it and indicate whether or not you recognize what is contained therein?

A (Examining) Here again these are shells I picked up on the east side of the green house on the day in question. I know that from the note here indicating what they are, and I dated it and signed it -- and initialed it. I didn't sign it.

Q All right. Did you go through the same procedure with those particular rounds that you previously indicated?

{2902}

A Yes. I then turned these into the evidence room in Pine Ridge,

South Dakota.

Q All right, and would you describe the general condition that you found the casings that are found in Exhibit 33-B?

A Well, there again these shells are laying there in clear view, shiny, metallic objects laying there, obviously they haven't been rained on, and have been put there recently.

(Counsel confer.)

(Counsel examine document.)

MR. TAIKEFF: We are offering no objection.

MR. HULTMAN: Government offers Exhibit 33-B.

MR. TAIKEFF: No objection.

THE COURT: 33-B is received.

(Plaintiff's Exhibit No. 33-B, having been previously duly marked for identification, so offered in evidence, was received).

Q (By Mr. Hultman) I now show you what has been marked as Government's Exhibit 37-C, and ask you to take a look at that particular exhibit and once you have examined it, ask you the same question.

A (Examining) These are .45 caliber automatic shells I picked up on the east side of the green house.

Q And would you describe --

A (Interrupting) That day, June 26th.

Q And did you do the same things as far as preservation that {2903} you previously testified with reference to the other rounds?

A Yes. There again these shells had obviously just been there a short time, and I packaged them up, put a note in it, dated it and turned it into the evidence room in Pine Ridge.

MR. HULTMAN: All right. Government offers Exhibit 37-C, your Honor.

(Counsel examine document.)

MR. TAIKEFF: No objection to that offer.

THE COURT: 37-C is received.

(Plaintiff's Exhibit No. 37-C, having been previously duly marked for identification, so offered in evidence, was received.)

(Counsel examine document.)

Q (By Mr. Hultman) I am now going to show you what has been marked as Government's Exhibit 69-B, and ask you to analyze -- and then I am going

to ask you some questions concerning that exhibit.

A (Examining) Here again I have a note in here dated 6-26-75, initialed, indicating shells that I picked up on the east side of the green house that day.

Q And did you do with these similarly as you had done with the others?

A Yes, I did.

Q All right. Now, I want to ask you just a couple of questions in case I may have not asked specifically of all of {2904} these various rounds that you found and which have been introduced here in testimony today, would you describe the relative condition of them as you observed, you have I know as to some?

MR. HULTMAN: I would offer Government's Exhibit 69-B your Honor.

MR. TAIKEFF: We would like to take a look at it.

MR. HULTMAN: I am sorry.

MR. TAIKEFF: Thank you.

(Counsel examine document.)

MR. TAIKEFF: No objection, your Honor.

THE COURT: 69-B is received.

(Plaintiff's Exhibit No. 69-B, having been previously duly marked for identification, so offered in evidence, was received.)

THE COURT: The Court is in recess until 11:35.

(Recess taken.)

{2905}

(Whereupon, at 11:35 o'clock, a.m., the following proceedings were had in the courtroom, the Defendant being present in person:)

THE COURT: The jury may be brought in.

(Whereupon, at 11:37 o'clock, a.m., the jury returned to the courtroom, and the following further proceedings were had in the presence and hearing of the jury:)

MR. HULTMAN: May it please the Court?

THE COURT: You may proceed.

Q (By Mr. Hultman) Mr. Hughes, we were discussing -- just placed into evidence a number of rounds, expended rounds, casings; and I wanted to ask you just a couple of more questions generally about the casings.

Once the items are found and placed into bags in the procedure you

used, do those items ultimately go to the FBI laboratory?

A That's correct.

Q And do you know from your own knowledge then, generally speaking, those items are examined and then the items that may have some significance of some kind or some tie-up are then returned, is that right, just as a general --

A (Interrupting) That's the general way it works, yes.

Q And that the Agent in the lab who then does the examination would be the one who knows what happens to the items once they reach him, and that you have no knowledge or any kind what {2906} happens there?

A Yes. He puts his identifying mark on it which I don't know what he does and sends it back.

Q All right. Now, did you proceed then from the search of the green house area to do or to be present with other Agents when a search was made of the general area surrounding Agent Coler's car?

A Yes. I took my camera and observed them, the Agents doing the work on the car. I observed this, and I took the photo- graphs of the car and bodies.

Q Was this on the outside of the car in the general area surrounding the car?

A Immediate proximity of the Coler car.

Q When was that done?

A After I had done the work on the green house, that would be subsequently later in the afternoon.

Q All right, and were you in the presence of those Agents and taking photographs when those events took place, that search surrounding the Coler's car?

A Yes, I was.

Q All right. I am going to show you now what has been marked as Government's Exhibit No. 11, and I want you to look at it and look at the items inside and so forth; and then I have some questions to ask you about Item 11.

A (Examining) These are the FBI credentials of Agent Ronald {2907} Williams. I observed one of our Agents pick these up in front of Coler's car, a few feet in front of his car.

Q Did you at that time take a look at Government's Exhibit 11?

A After the Agent picked them up, yes.

Q And did you notice the picture that is in Government's Exhibit 11 at that time?

A Yes.

Q And did you recognize it?

A That's how I knew it was Agent Williams' credentials immediately.

Q All right, and is this a standard type of credentials that the agents of the FBI do carry?

A Yes, it is.

Q And do you have credentials of this general type on you also?

A Putting the badge on the outside is optional. Many Agents do that, but it is optional.

Q But there is on all of them a picture inside of the kind and nature of that kind?

A That's right.

MR. HULTMAN: The Government offers into evidence Government's Exhibit 11.

MR. TAIKEFF: No objection.

THE COURT: Exhibit 11 is received.

{2908}

(Plaintiff's Exhibit No. 11, having been previously duly marked for identification, so offered in evidence, was received.)

MR. HULTMAN: I have no further questions, thank you.

MR. TAIKEFF: May I have Just one moment, your Honor, before I inquire?

THE COURT: You may.

MR. TAIKEFF: I would like to proceed now if I may, your Honor.

THE COURT: Proceed.

CROSS EXAMINATION

By MR. TAIKEFF:

Q Agent Hughes, am I correct that you were designated the case Agent in connection with the investigation of the deaths on June 26, 1975?

A That's correct.

Q Could you briefly tell the Court and jury what it means an Agent is designated the case Agent?

A Well, on the normal case it means that you are in charge of the investigation which it didn't mean that necessarily in this particular case.

Q All right. Tell us first about the normal situation. The n we can explore the special circumstances here.

A Well, the normal case, you are assigned on a matter to investigate and you investigate it, but something of this magnitude obviously it takes more people.

{2909}

Q If, though, a case is such that additional efforts are necessary either in the city where the investigation is going on or some other city, a case agent can call upon other members of the FBI to assist, can he not?

A That's correct.

Q Now, this of course was a case of very special magnitude, was it not?

A That's correct.

Q And there were people of high-ranking positions in the FBI participating in this investigation?

A That's right.

Q And so your designation as case agent didn't have all of the meanings that it had in the usual situation, which means to say that you were not one hundred per cent in charge of what was going on that case?

A That's correct.

Q Did you, though, nevertheless take some supervisory or oversight position with respect to the investigation at least in its initial stages?

A No. I wouldn't say that's true in this particular case.

Q Did you read the 302's of any other agents? I'm particularly interested in the first five days, and would ask you to focus your attention on that period unless I designate otherwise.

A No. Not in the first five days. Somewhat later I did to work out leads for who to investigate.

{2910}

But to the best of my knowledge I didn't review any 302's for some time, some period of time.

Q Could you give us the date or an estimate of the date when you

first began the process of reviewing the accumulated 302's?

A Well, it would be quite a bit later because we didn't have a need to. We had conferences to go after these leads for quite a while.

Q Tell us briefly about these conferences again. I'm focusing on the first five days.

A Well, to the best of my recollection there was an all agent conference generally every morning, and you attended if you weren't tied up doing something else.

Q When you say "an all agent conference" I assume you mean all agents working on any aspect of this case?

A Yes. If you could be available you attended this conference every morning.

Q Were there afternoon or evening conferences of a similar nature?

A I don't recall any conferences except in the mornings. That was a lead-type conference to work out leads.

Q That was a time when everything that had come to the attention of those who were supervising was disseminated to the other people so that everyone would have as comprehensive a picture of what had been developed up to that point as possible?

A That was one of the basic ideas, yes.

{2911}

Q Now, were there meetings between smaller groups than, let us say, all the agents? A half dozen agents or key agents in the investigation?

A No. I think these were all handled through the basic conference in the morning, or not that I'm aware of anyway.

Q Were there any agents that you would designate as being particularly involved in this investigation as compared with other agents?

A Well, possibly the agents that worked that reservation were because we were more familiar than outside agents that were sent in there.

At least for a while to help them find their way around, that sort of thing.

Q Will you name those people for us, please.

A Well, they would be the agents assigned to Rapid City at that time. That would Agent Price, Agent Adams, Agent Coward, Skelly, McCarty. We had twelve guys, I think it was, assigned to Rapid City. Those twelve

agents.

Q You haven't named twelve, but I want to ask you about two more in particular. Does that including Waring?

A Well, Waring wasn't assigned to Rapid City at that time. He was in a, he was one of some agents that had been sent in to help us out in work schedule.

Q On a full-time basis, though? not just for this case?

A No, not for this case He had been sent in prior to that.

{2912}

Q Was he one of those people who might be called a key agent?

A No. As I recall he was just happen to be down there that day.

Q How about in the week or so that followed, did he play a major role?

A I'm not familiar with what role he played.

Q How about yourself, would you include yourself amongst the list of those who were especially involved?

A Well, yeah. Because again I was familiar with the area and agents coming in, or are at quite a disadvantage that are not.

Q Now, there were other law enforcement agencies involved at one stage or another of the investigation. Again I'm confining myself to the first week, let's say, just to narrow down the scope of my inquiry.

Would you say that's a fair statement that there were other law enforcement agencies involved.

A In the investigation?

Q Well, beginning at, let's say, 12:00 noon, June 26, 1975 and continuing for one week?

A Yeah. There were probably other agencies involved.

Q That would be the BIA police?

A They would be in a helping status of some kind, yeah.

Q The state police in South Dakota, or highway patrol, whichever name it's known by?

{2913}

A Yeah. They were there that day.

Q What mechanism was set up for someone in the FBI to collect and/or review their police report if they wrote any concerning this case, or the

events of June 26?

A Well, to the best of my recollection the only way we knew what involvement a particular agency had is to interview one of their officers if he happened to be there that day. That's the only thing I'm aware of.

Q And if that person had written a report would that report be turned over to you so that it could be either copied or quoted verbatim in a 302?

A Not necessarily. He would be interviewed, an individual, an officer who was there that day. If we knew he was there we would interview him to get our information from that interview.

Q Now, as far as you know and except and for kinds of notes that were made in connection with finding things, such as you refer to in your direct testimony, was there any note taking by the agents who were involved in the activities on the afternoon of June 26, 1975?

A There possibly was. I didn't observe agents taking notes or what they were doing.

Q Do you have any personal knowledge of the existence of notes other than the kind that are referred to before with respect to objects found on the ground?

{2914}

A Not that I recall.

Q Now, as a general proposition a 302 is a document which is official in nature, is it not?

A It's, yes, I would say that's an official document.

Q And it's a place where an agent who participated in some official activity or conducted an interview or made an investigation or made a surveillance records the details of his activities?

A That's correct.

Q And if he had spoken with someone records to the extent that he thinks appropriate what that person said?

A That's correct.

Q I assume, and tell me if my assumption is correct, that very agent makes an effort to be as complete and as accurate as possible?

A You try and put down what is significant to you at that time. And maybe something might turn up later that is significant that you don't have down there when you find out additional details.

But at that time to the best of your knowledge you put down what you deem to be significant when you are writing the 302.

Q All right. And as to the writing down process an effort is made to see to it that it's accurate because of the official nature and function of the 302; isn't that correct?

{2915}

A That's correct.

Q As a general rule is it not the practice to write or indicate as the case may be a 302 as quickly as is reasonably possible so as to have the best possible memory of all the details?

A You try and get it dictated within a reasonable time after the activity.

Q Now, would you say that an agent who had participated in a lengthy complicated field activity and who did not make notes should attempt, if it were possible, to dictate whatever he remember of his events as quickly as possible, particularly because of the duration of the activity and the fact that he had not made notes?

A If the circumstances are such that an agent can, or steno available, you can try and dictate, yeah. I would want to.

Q And is it fair to say that you would do that because of the complexity of a long activity that may have lasted hours, and the fact that you didn't have notes, assuming both of those factors were present in a particular situation?

A Yeah. You would dictate as soon as circumstances permitted you to dictate.

Q Now, sir, in connection with whatever official activities you performed during the first week, beginning with 12:00 noon, June 26, 1975, did you discover the presence or possible presence of a woman by the name of Myrtle Poor Bear? And when {2916} I say "presence" I mean presence of the Jumping Bull Compound.

A No. I don't recall seeing her that day.

Q Now, besides not seeing her personally I'm referring to what you learned in your official role, in your official capacity as an agent of the Federal Bureau of Investigation during the first week.

A If you are referring to Myrtle Poor Bear.

Q Yes. I'm only talking about the first week now.

A The first week?

Q Starting at 12:00 noon June 26, 1975 and going for seven full days after that.

A Whether I had any knowledge of Myrtle Poor Bear within the first week of this investigation?

Q The answer to your question is yes, providing you understand that --

A Well, why don't you repeat the question, please. I'm not sure of your question. Would you repeat it, please.

Q Okay. I'll lay a foundation and then I'll put a question to you.

You participated on a full-time basis in the investigation beginning sometime on the 26th. There were conferences, you referred to them as all agent conferences. And as far as you can recall that was every morning, at least for the first few days. That was a time when agents were brought up to date and leads, things that had been found, et cetera. Am I correct so far?

{2917}

A Yes.

Q As a general description, but not necessarily an exclusive description of what you did?

Q Yes.

Q Okay. Now, within the framework of what I've just described to you and based upon your official participation in this official investigation did you, during the seven day period, starting 12:00 noon, June 26, 1975 learn or hear of the possible presence at the Jumping Bull Compound of one Myrtle Poor Bear?

A I don't recall when her name come up. I'm familiar with the person you're talking about. I don't recall what date her name came up.

Q Now, at some point in time she became an FBI informant; is that not correct?

A To the best of my knowledge she gave information, yes.

Q Were you the agent who had direct personal contact with her in connection with that informant status, and it's my word, I'm not attributing the word informant to you.

A No. I'm not the agent that was contacting her.

I had seen her, been with her, but I wasn't the agent contacting her.

Q Was that Agent Skelly?

A Not to my knowledge. He might have interviewed her, but {2918} not to my knowledge.

Q I show you Defendant's Exhibit 158 for identification which is a photograph of a person, and I ask you whether you recognize the person depicted in that copy of that photograph?

A Well, it's not a photograph you could make a positive identification, but it's similar to the person I know as Myrtle Poor Bear.

Q All right.

A I couldn't say that that's her.

Q But you would not declare that it is not she, would you?

A No, I couldn't say that either.

Q I believe in your direct testimony you informed us that as of now you have four years of experience on the reservation.

A Well, counting from March 30, 1973, I think that's a little short. Well, it is actually, approximately four years.

Q Okay. I want to ask you certain questions about your observations and experiences and in particular I'm talking about the period beginning March of 1973 and ending in June of 1975, a period of a little more than two years. Do you understand that?

A Yes.

Q Could you briefly describe, based on your own observations, the quality of life on the reservation with respect to the incidence of violence?

A Well, there's been a great deal of violent crimes on the {2919} reservation while I've been there.

Q And would you say that it's fair to summarize in this way: That it involves at times beatings, shootings, knifings and assaults generally?

A That would be a fair statement.

Q Now, just tell us whether or not you've heard the word "goons" as pertains to the subject of the reservation generally?

A There's a group called goons on the reservation, or there were anyway.

Q And when you use the past tense I assume that does not include the period I mentioned to you? That they no longer existed?

A Well, I haven't been down there for some time, but the word goon come into prevalence during and immediately after the occupation of Wounded Knee in 1973 when there were two groups, two divergent groups, the American Indian group and the goon group. So they referred to each other as an AIMer or a gooner, or something to that effect.

Q And they were not terribly happy with each other?

A No.

Q And in fact within some families there was strong dissention and many families had rather substantial arguments over whether they supported the goons or the American Indian Movement?

A That happened, yes.

Q Is it accurate to say that in connection with this investi-{2920}gation and any arrests that have ever been made or any prosecutions that have ever been brought that a person by the name of LeRoy Kosatos was never charged or prosecuted for the murders which are alleged in this indictment?

A To the best of my knowledge Kosatos has never been charged with murder of the agents, no.

Q Now, in connection with your work as an agent you at least at the very beginning received some firearms training, is that correct?

A That's correct.

Q And without going into the specific details, it's accurate to say I assume that you learned how to use a variety of weapons?

A That's correct.

Q And is it also accurate to say that from time to time since your initial training you received in-service training, further training or refresher training in connection with the use of weapons?

A That's correct.

Q And although you may or may not be a firearms expert this is generally the kind and quality of training that all agents of the Federal Bureau of Investigation get, how to use weapons, how to recognize them and have at least some familiarity with them?

A That's correct.

{2921}

Q Would you say then that based on your training, which I understand from your testimony to be rather standardized, you know when it is advisable and best to employ a shot gun as opposed to a pistol or rifle?

A I have, I would have situations where I would rather have a shotgun and other situations where I would rather have a pistol or a rifle as I understand your statement, yes.

Q So what you are really saying is that there is some basis for differentiating when to use a particular weapon and when to use another kind of weapon, and that's part of your training and understanding as a law enforcement officer?

A That's correct.

Q All right. Now, specifically with respect to a shotgun, is there an outer limit beyond which it doesn't make very good sense to use a shotgun?

A Yes, there is.

Q Could you tell us what that range is.

A Well, a shotgun is a particular type weapon, it uses many different type loads, so it would have to depend on what you're shooting in a shotgun.

Q As a general rule law enforcement agents don't use the full range of shot that may be available in commercially loaded shot gun shells; isn't that correct?

A Well, as a general rule --

Q You don't use bird shot, do you?

{2922}

A You don't use shot, no.

Q You use, well, why don't you tell us what are the several categories of loads that might be employed by a law enforcement officer, FBI agents if you will.

A Double odd buck, or a rifle slug, or a rifle slug would be a single piece of lead that has the rifling on it, such as would be inside the barrel of a rifle, and that can be fired as an ordinary bullet would basically.

Q Subject to its range and its accuracy?

A It's a heavier slug which is not comparable to a rifle for range or accuracy. But it will go farther than, say, the shot from a shotgun.

Q Okay. What would you say the range would be for that? Not how

far it could travel into the air, but the effective range using the weapon as a weapon rather than as a contest of how far you can project something?

A Accurately, well --

Q Within reasonable accuracy, not precise accuracy. So that you would choose to use the shotgun under such circumstances.

A Well, I would personally not use a shotgun if I had a choice. Except for using double odd buck which is only good for about forty yards.

Q Forty yards. How about that single rifled slug?

A That's good for a longer range, but I personally wouldn't choose that type of slug.

{2923}

Q Because of inaccuracy?

A Well, you don't, if you are going to shoot that far you're better off to have a rifle than a shotgun.

Q Okay. But let's suppose that you had a rifle slug in a shotgun and you were going to use it under circumstances where you were defending yourself as a law enforcement officer. What would you say would be the maximum outer range for which such a shot would be worthwhile or reasonably accurate?

A Well, I could only estimate. I would say shooting where you might have any change of hitting something, seventy-five to a hundred yards. That would be just an estimate on my part.

{2924}

Q I understand, sir.

If you'd be kind enough to turn your attention to the chart, I want to make sure that we understand your testimony. This scale is in feet and the chart shows the location of Coler's car at a point which is designated with those words on the chart. You said not more than 100 yards for a rifle slug, is that correct?

A Yes.

Q That would be 300 feet, would it not?

A For where your finger is?

Q Well, Coler's car. I put the zero on Coler's car, right?

A Yes.

Q That's 300, right?

A Yes.

Q So if you had a rifle slug, the effective distance would be not more than up to the first curved line within the oval which is the Jumping Bull compound? I say it that way so the record will reflect what you and I supposedly can see. Is that a fair description?

A If that's 100 yards, that's what I'm estimating.

Q I understand.

Do you quarrel with me that that point shows 300 at that curved line?

A Yes. It shows 300.

Q Okay. And that the distance up to the houses is at least {2925} twice that distance, that number being 600?

A Yes.

Q And you say that if the gun were loaded, if the shotgun shell were loaded with buckshot which means ball bearing, maybe four or five of them in a load?

A No. That's not correct.

Q How many?

A I believe there is nine pellets in a buckshot load.

Q Nine of those ball bearings. You didn't think that would go or be effective beyond forty yards which would be 120 feet, is that correct?

A That would be an estimate on my part.

Q Would you say that not more than half the distance between Coler's car and the first curved line in the oval would be the effective range, not more than half the distance? I call your attention to the fact that half the distance is 150 feet or 50 yards. Is that a fair estimate?

A I'll go along with that.

Q Can you tell us again what your location was when you heard the first transmission on the radio on June 26th that told you something was going on and your presence was required?

A I estimated I was somewhere between about halfway between Oelrichs and Hot Springs, somewhere in that vicinity.

Q Now if I may have a moment, Your Honor, to look at the larger map.

{2926}

THE COURT: You may.

Q (By Mr. Taikeff) Oelrichs is north or south of Hot Springs?

A I can pinpoint it on the map. I'm not positive about the direction.

Q The reason I ask, it's not designated. By looking at the map could you locate it?

I call your attention to the fact that that circle is designated Hot Springs.

A Oelrichs is at this junction right there (indicating).

Q So then it's closer to the reservation than Hot Springs and it is southeast of Hot Springs?

A That's right.

Q How long did it take you to get to the Jumping Bull compound?

A From where?

Q From where you were when you first heard the transmission?

A I arrived at the Jumping Bull compound at about 1:00 P.M. and I heard the transmission at approximately, I believe, I'm not too sure at this time, 11:40 when I was heading towards Hot Springs.

Q Could have been later?

A Could have been. I'm not positive about the time.

Q If I suggested to you that may have been 11:50 or 11:55, would you quarrel with that statement?

{2927}

A I couldn't say one way or another. I estimated it 11:40.

Q But I did ask you a specific question and that is whether you would quarrel, whether you would take exception to an assertion that it was 11:50 or possibly even 11:55?

A Well, that's a possibility.

Q Now you had to make a stop enroute, did you not?

A I had to get rid of my prisoner.

Q How much time would you say that took up of the hour or more it took you to get where you were going?

A From when I heard the statement to Hot Springs?

Q Well, let me go back a step to eliminate any confusion, including in my own mind if there is any. You estimated that it may have been as early as 11:40?

A That's correct.

Q When you heard the first transmission, and that's when you got going to get finally to the Jumping Bull compound. So far am I correct?

A Yes.

Q And you had a prisoner whom you had to lodge some place so you stopped to take care of that piece of business?

A Yes.

Q And you got there at about 1:00 o'clock?

A That's correct.

Q So if you heard the first transmission at 11:40, you got {2928} there about an hour and 20 minutes later, correct?

A That's correct.

Q If you heard it later, then it took a little less to get there, correct?

A Uh-huh.

Q How long did the lodging of the prisoner take out of what may have been an hour and 20 minutes or may have been an hour and 15 minutes or something less than that?

A I don't know how long it took. I had to do it myself because there was no one there so there was a slight delay there. I don't know how long it took.

Q Other than when you were coming to a halt to dislodge your prisoner and took the prisoner to some facility, is it fair to say you were driving at a high rate of speed?

A As fast as I could.

Q Under the road conditions?

A Under the circumstances.

Q Now if you were traveling to the reservation, the area of the Jumping Bull compound from Rapid City, would you come in over the same roads that you used in getting to Jumping Bull's?

A Not necessarily.

Q Based on your own knowledge of the area and your own experiences what's the least time you think you could make it from Rapid City to Jumping Bull's compound, no traffic, no ice, snow or water on the ground, just you and the car driving as {2929} fast as you can?

A I wouldn't have an idea. Whatever the road conditions would permit

and how fast you would drive and stay on the road and depending on how many measured miles it is.

Q Do you know how many miles it is?

A I think from Hot Springs to Rapid it's 50 miles, roughly 50 and from, however far it is from there to Oglala, I'm not positive about that, the mileage from Hot Springs to Oglala. It might be 40 miles, somewhere in that area.

Q Would you say that from Rapid City to Jumping Bull is somewhere between 100 and 120 miles distance by the shortest route?

A That way I'd say it's about what you said. There's another way to go. I don't know if that's shorter or not. We often use that way to go to Pine Ridge. I'm not sure of the mileage.

Q By the way, the location of the FBI office in Rapid City is on the north side of the city of Rapid City, is it not?

A That general part of town; yes. The federal building you're speaking of?

Q That's where your office is located?

A That's correct.

Q And the reservation is south of Rapid City, is it not?

A That's generally correct.

Q Is there any highway, peripheral highway that goes around {2930} the city or if you're up north and wanting to go South, do you have to go through the city?

A I believe you have to go through the city.

Q Now I believe that when you testified on direct examination you told us about certain activity in this area and when I say "this," I refer to the general area which is marked "Z1." You see tile "Z1"?

A That's correct.

Q Let me make sure that I understood what you testified to in connection with that particular location. There came a time when a certain number of law enforcement official's went to "Z1," or the vicinity of "Z1" in some effort to see what they could do in connection with the green house, is that a fair summary?

A That's correct.

Q And for one reason or another they came back to where you and

other law enforcement officials were because there was shooting or something of that sort. Did I follow you correctly in that regard?

A Well, no. Not really. Could you summarize that. Summarize that. I think I may have not heard you accurately.

A We regrouped in the area, "Z1". Well that's where we ended up. When we circled in the creek we went to "Z1," heard shooting from the area of the green house and that's when myself and {2931} another officer and some other officers with us formed a line. We were going to advance toward the green house with the idea in mind of announcing at the green house our presence and trying to get an idea where the agents were. That's when an individual ran from the green house and snapped a shot at me which curtailed our advance.

Q Now did you then go back into the woods some distance?

A Yes, we did. For cover.

Q And was there a time shortly or immediately thereafter that one or more people were sent out again to "Z1"?

A I wouldn't know. I don't recall. I don't recall that. Well, now, wait a minute. Later on I sent people back to the general area. It was a little to the left of "Z1" to the best of my knowledge. I wasn't there with them.

Q Could you tell us the names of those people?

A Now what I'm referring to as the final assault on the house?

Q Yes. Apparently there was what I might call an advanced party that was sent up to the area of "Z1" to differentiate them from the entire group. Can you tell us the names of those people?

A You have to tell me what time you're referring to and in what regard this advanced part, if you will, please.

Q Were there several occasions?

A Well, what I'm referring to so I don't get you or I {2932} confused, is upon the assault on the green house a group of law enforcement people that come into help us and some agents went to the area "Z1" a little bit to the left of "Z1" to my knowledge. I wasn't there with them. We assaulted the houses in a combined effort. I was somewhere else. They were there and we assaulted the houses.

Q And those people, can you identify them that went to the vicinity

of "Z1"?

A A lot of them were law enforcement people I don't know. There were two agents that I knew with the group, Agent Price and Agent Talbert.

Q Now I think on your direct testimony in describing the shooting from a green house you said it seemed to be coming from the green house.

A That's what it appeared to me; yeah.

Q Is it fair to conclude from that that your observations were based primarily on what you heard as opposed to what you saw?

A Well, you could see puffs of smoke from around the green house and the noise came from that immediate area so that was my assumption. I didn't see people there shooting. I didn't see them actually shooting.

Q Then I think you said in connection with that episode that you made some sort of an announcement to the people at the green house and this resulted in firing coming from the green {2933} house and from some other location.

A After I was shot at, we regrouped a little bit to the left, or more south of the green house and that is when I made that announcement. Firing was directed at mostly from the green house and then some other bullets come in from elsewhere. I don't know where they came from.

Q Could you say how many?

A Oh, I wouldn't have any idea. It wasn't a long period but there was quite a bit of firing for a short period.

Q Could you give us any idea of the direction from which it came?

A Most of them come from the area of the green house. The others I have no idea.

Q I'm focusing my attention on the other shooting. Could you tell us with some degree of accuracy what quadrant it came from?

A I wouldn't have any idea. Our trouble was coming from the green house so that's what I was focusing my attention on, that's what I was concerned --

Q Could you tell how many people were firing those shots that came from an undetermined location?

A I would have no idea.

Q Could you say whether it was more than three people?

A I would have no idea.

Q Now amongst the cartridge cases which you found were five {2934} 30-06 caliber expended casings, am I correct?

A I found 30-06 caliber expending cases; that's correct.

Q I think there are five of them in the envelope. Are those the only ones that you found?

A No.

Q You found more?

A Yes. I'd have to refresh my memory to find out exactly how many 30-06 cartridge casings, but to the best of my knowledge I found more than five.

Q I see.

This is Exhibit No. 29D that was offered in evidence while you testified and it does contain five 30-06 casings, am I right?

A Yes. It appears to.

Q Now inside that envelope are some notes you made or photocopies of notes you made.

A Uh-huh.

Q Would you look at those notes and see whether in any way that helps you on the subject of whether there were more 30-06 casings.

A No. This doesn't refresh my memory any. But I know found others and put them in bags. To the best of my recollection I found some more 30-06.

Q Do you remember the location?

A I found some right there in the green house and I found some {2935} more in the residence that's been identified as Wanda Sears' residence per search warrant the following day.

Q Any others besides those you mentioned thus far today that you can recall?

A I would have to refresh my memory by looking at my report. But I found several shells. The number I wouldn't know of any variety.

Q Now I'm holding in my hand Government Exhibit 29A. Would you tell me whether you recognize that as a military style M1 Gerand rifle?

A Well, I'm not, I have never -- well, maybe I have. I'm not that familiar with that rifle. It looks to me like what used to be a military rifle in World War I or II. I don't know the era.

Q Do you know the caliber of this cartridge that this rifle shoots?

A No, I don't. I think they shoot a 30-36, but I'm not positive.

Q In connection with your work on the 26th, did you have contact with a BIA policeman by the name of Ecoffey?

A There was a BIA police officer by the name of Ecoffey with me part of that day.

Q Do you have any information concerning any shots being fired inside any of the residences?

A I didn't observe any of that.

{2936}

Q Does the way you phrase that answer imply you have some official knowledge of such a event?

A I can't recall if I interviewed anyone that might have said that. That's why I phrased it that way.

Q I see.

Now in connection with your duties as an FBI agent, is it fair to say that you, I'm speaking of you as an individual now, that you did not do anything improper or illegal in connection with your investigation, is that a fair estimation, that you did not?

A I didn't even fire a shot that day.

Q Now did you in the course of your investigation interview any person who had significant, and I emphasize the word significant, or purport to have significant information that you were prepared to reject out of hand because of the unreliability of that person?

A Would you repeat that, please.

Q Yes.

Let me give you a foundation question. I believe you interviewed somebody and after the interview noted that the person was intoxicated at the time of the interview. Do you recall one such episode?

A Oh, that's happened numerous times over the years. But I don't recall what you're referring to.

Q What I'm pointing to is the fact that when you interview {2937} a witness, a perspective witness or someone who has information, you make some effort, do you not, to evaluate the likelihood that this person is giving you valid information?

A Well, sometimes if a person is obviously drunk, you might note that because through experience when people are drunk they sometimes say things that are not necessarily true.

Q And you would be prompted as a rule to make some notation of the fact that person you interviewed was intoxicated?

A You might. That's up to the discretion of the agent. You might, you might not, depending on how you feel it is, whether he's telling the truth or what.

Q For instance, does looking at this document in any way refresh your recollection as to whether in connection with this investigation you had at least one such experience?

A Yes. That indicates I interviewed an individual who gave us information. I noted he was drunk at the time. I didn't note whether I thought it was true or untrue, just made a note he was intoxicated.

THE COURT: The Court is in recess until 1:30.

(Recess taken.)

{2938}

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, the Defendant being present in person:)

THE COURT: The jury may be brought in.

MR. TAIKEFF: May we come to the side bar while this is being done so that counsel can inform the Court of something?

THE COURT: Very well.

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

MR. TAIKEFF: Your Honor, on Friday we received word from the Reservation by telephone that substantial snow had fallen and drifted on the Reservation; and it was thought that there might be some problems with people getting off the Reservation to come here.

As of early this morning we didn't have an update so the matter was not called to your Honor's attention because we thought that perhaps the condition would clear substantially over the weekend. We didn't want to say anything until we had up-to-the-minute information.

Apparently during the luncheon recess a telephone call was received from a person by the name of Jacob -- Mr. {2939} Jacob, who identified himself as a United States Marshal, Deputy Marshal in Rapid City; and he left this phone number, 605-342-6331. He wanted to inform us that the situation on the Reservation was rather severe with respect to drifted snow. Apparently they are flying food in with helicopters. The roads are impassable, and he wanted to inform us that he could not serve those subpoenas which had to be personally served. He had made arrangements for most people to come in and voluntarily pick up their subpoenas.

At this moment we don't know exactly what that means in terms of which witnesses might be here. We don't actually expect that will cause any serious problem or delay except I wanted to make it known to the Court and put it on the record at the earliest possible time so there would be no question of any failure on our part to take whatever steps were necessary to take under the circumstances.

MR. LOWE: We have tried several times, Curly -- this is a slide which was made, your Honor may recall, while Mr. Anderson was testifying; and there are two things about it that are noteworthy, that I have talked to Mr. Hultman about.

First of all, I went to Mr Hanson, the Clerk, to see if they had a copy of it. He informed me he did not.

I found we actually had not numbered it or introduced {2940} it yet.

The second thing was that this coloring was put on through inadvertence in a water soluble pen. I am concerned with all these exhibits that they might be in any blotted by water spills. I got together with Mr. Hultman and we agreed the best thing was to take the permanent type pen and trace it. On the back I traced it in the same colors over the same lines, so that if anything happens to the front side, the back is still that way.

This is the exhibit -- it is 165, and at some appropriate point we would just want to introduce that as the same which we did with Angie Long Visitor's. I don't care whether we do it now in front of the jury or just have it on the record is sufficient, by reference.

MR. HULTMAN: I don't have any objection.

THE COURT: No objection. That Defendant's Exhibit 165 is received.

MR. LOWE: Fine.

MR. HULTMAN: Pursuant to the evidence that accompanied it at the time.

MR. LOWE: Thank you.

(Defendant's Exhibit No. 165, having been previously duly marked for identification, so offered in evidence, was received.)

(Whereupon, at 1:35 o'clock, p.m., the jury returned {2941} to the courtroom; and the following further proceedings were had in the presence and hearing of the jury:)

MR. TAIKEFF: Before I resume my questioning, may I have a word with Mr. Lowe?

THE COURT: You may.

MR. TAIKEFF: Thank you.

(Counsel confer.)

THE COURT: I will mention to the jury that the GSA tells me they have had that vent turned off. If it is not, I wish you would let me know.

MR. TAIKEFF: May I proceed, your Honor.

THE COURT: You may proceed.

DEAN HOWARD HUGHES

having been previously duly sworn, resumed the stand and testified further as follows:

CROSS EXAMINATION (Cont'd.)

By MR. TAIKEFF:

Q I think at the point where the luncheon recess was taken, I was asking you generally about the care with which you conduct your investigations, and you recall there was some questioning about encountering a prospective witness or informant who might be intoxicated, that you would record that fact so that in the future you would have some notation as to potential reliability of that information. Do you recall that we were at that point?

A That's correct.

{2942}

Q O.k. Now, in connection with this investigation you indicated two people who claimed that Jimmy Eagle admitted being involved in the death or deaths of the agents, did you not?

A I interviewed that I recall a couple of people that indicated Eagle related to them he had some responsibility in the deaths. In other words, he told them the story that he had some responsibility for the deaths.

Q Now, when you interviewed those people, did either of them appear to be intoxicated?

A No.

Q Did either of them appear to be to you unreliable in such a way that you should not take any action based on what they told you?

A Well, could you tell me what people you are referring to so I would be more correct?

Q Yes. I would be happy to do that. Someone by the name of Melvin White Wing and someone by the name of Marion Highbow.

A Yes, I remember interviewing those two individuals.

Q Was there anything about your interview with those individuals that then and there would indicate to you serious questions about their reliability?

A Well, I would have to refresh my memory by looking at those particular interviews. It has been some time ago.

Q I would be more than happy to show them to you. For the {2943} record they are 302's dated July 27, 1975 (handing).

A And what is the question before me?

Q The question before you is whether at the time you interviewed either or both of those individuals you had any impression that they were obviously unreliable?

A Well, in these two particular 302's Eagle was relating to them a story, now they are relating the story back to me, so in my estimation they related back to me what Eagle related to them.

Q O.k. In fact, as a result of these interviews and possibly other factors, the following day you arrested Jimmy Eagle, did you not?

A He was incarcerated already. I went to the Pennington County jail and advised him that he was also under arrest for the deaths of the two FBI Agents.

Q Well, just to clarify one point, he was in custody but not on the charge of murdering either or both of the agents?

A It is my understanding he was in custody on another charge relating

from an incident on the Pine Ridge Reservation.

Q But not the murder of the two agents?

A But not the murder of the two agents.

Q So you arrested him which is a technical event because he was already in custody, but you arrested him and he was charged with the murder of the two agents, was he not?

A That's correct.

Q Was he ever brought to trial?

{2944}

A No.

Q Is it a fact that sometime in July of 1975 you interviewed a person by the name of Rooks -- (spelling) R-o-ok-s -- and obtained from him approximately 31 empty casings, caliber .303?

A I recall interviewing Michael Rooks, I don't recall specifically what date or exactly the number of cartridges without refreshing my memory by looking at my dictated report there.

Q All right. Putting aside the question of precision, is it fair to say that you interviewed someone by the name of Rooks from the Pine Ridge Reservation, from whom you obtained a certain number of .303 casings?

A I don't recall if it was .303 casings right now. I believe it was, but I am not positive without refreshing my memory.

Q All right. I will see if in a moment I can get you that document; and in the meantime I will go on to something else.

Now, I believe you testified on direct examination that you may have been present and possibly even observing when other agents searched the area around Coler's car?

A That's correct.

Q And how long did that examination or search take, as you recall it?

A I don't really know. It took almost until dark. I was taking pictures and run out of light to take pictures with.

Q Can you tell us anything about the number of empty casings {2945} found in the area around the car?

A The agents doing the search did find some casings around the car. I would have to again, to be positive about it, look at the report which

my name is on, detailing that search.

Q I am not trying to corner you about any matter of precision. I want you to relax in that regard. I am only trying to find out the approximate size of the find, three, five, seven and nine are in the same category. I want to know whether there was a relatively small number of casings found or whether it was a substantial number, or how you would describe it?

MR. HULTMAN: Well, your Honor, I would object. By the foundation that has been laid thus far, the witness has indicated that he cannot, but that he could refresh his recollection specifically from the report that was filed and evidently is in the possession of counsel; and I would have no objection to him refreshing his recollection and stating specifically what was found, but I do object to any further questions just in generalities because I believe he has already indicated in response that he has no such independent recollection.

THE COURT: Sustained.

Q (By Mr. Taikeff) I show you Defendant's Exhibit 173 for identification, and ask whether that is the 302 which covers the activity that I just questioned you about?

A Yes. This is the report on that particular examination.

{2946}

Q All right. Would you look at that report, and then after you have a chance to look at it, tell us whether it refreshes your memory, not whether you believe the accuracy of what it says but whether it independently refreshes your recollection so that you can tell us something on the subject from your own memory, not from looking at the piece of paper and repeating what you saw on the piece of paper?

A And your question is the total number of expended rounds in the immediate area of the car?

Q That's correct, but before you tell us that I would like for you to tell us whether you now are functioning on refreshed recollection or whether you are merely accepting what the piece of paper says?

A Well, I recall the examination that the agents made. I was watching it and taking photographs.

Q Yes.

A But I don't recall specifically how many cartridges they picked

up, how many cartridge cases.

Q All right. Look at that report and see if that refreshes your recollection as a first step.

A (Examining).

{2947}

Q I'm sorry, sir, have you finished looking at the report?

A Yes.

Q All right. Now, my first question is: Does looking at the report refresh your recollection of what you observed that day?

A It refreshes it to some extent, It's a very detailed examination on the car.

Q The inside and the outside of the car?

A No. Just the outside.

Q Doesn't refer in any way to the interior of the car?

A I didn't observe anyone doing anything with the interior of the car.

Q How about the report, does the report refer to the interior of the car?

A Not to my knowledge, no.

I didn't see anything done with the interior of the car.

Q The trunk was open on that car, was it not?

A Yes.

Q Was an examination made of the opened trunk?

A I don't believe so, not to my knowledge,

Q All right. What is the state of your somewhat refreshed recollection concerning the finding of expended cartridges in the area of Coler's vehicle?

A Well, there were, from what I can remember and from refreshing {2948} my memory here, there were a total of six cartridges found in the area around the car. Not all of them were expended.

Q How many of them were not expended?

A I believe two. Although I'd have to go through the report again. I'm not positive about it.

Q But speaking in terms of approximations, it's about six cartridges and you believe that two of them were not expended, so that there would

be probably not more than four actually expended, right?

A That's correct. Unless I've read the report wrong here. I don't remember exactly.

Q And one of those was a shotgun shell, wasn't it?

A Expended or not expended?

Q Expended.

A Yes. There was a shotgun shell found near Coler's car.

Q Which was expended?

A Yes.

Q Now, before we move on from there I want to go back a step because I think I have found the 302 which may help you. It's a 302 of July 12th. I'll show it to the Government in a moment.

Does that help you refresh your recollection about Mr. Rooks and the .303 casings?

A Yes, it does.

Q Now, I think I suggested to your originally that it was {2949} Mr. Rooks from the Pine Ridge Reservation, and that you received from him thirty-one .303 caliber casings. Is that a fair statement in summary form?

A That's correct.

Q Thank you.

Now, returning our attention to the search of the cartridges. The next thing I'd like to ask you about concerns the subject matter of certain vehicles, non-Government vehicles. You had something to do with the seizure of some vehicles, did you not?

A The seizure of vehicles?

Q Yes, I mean taking them into custody or removing them from the premises. Maybe I didn't use the right word when I said seizure.

A Not to my recollection, no. Not the actual physical taking them in custody.

Q Well, there was a red and white van that was taken to the BIA police building, wasn't there?

A Yes.

Q How would you describe the taking of that van? Is seizure a wrong word?

A I'm not aware of, or positive how that van got there. I know it

was impounded there because I observed it there.

Q Maybe impounded was the better word.

Besides the red and white van how many vehicles were {2950} impounded in the four days after the incident?

A I couldn't accurately tell you. I don't know.

Q Isn't it a fact that there were three?

A I know there were three because I observed three in a compound. Whether any more or not I don't recall.

Q And let me ask you whether the three were A, the red and white van; B, a red International pickup and C a '67 green Galaxie sedan?

A The International was a Scout which is quite a bit different from a pickup.

Q We'll get to that in a moment.

How about the question that I put to you about the identity of the three vehicles?

A Would you repeat that, please, what the question is.

Q Yes. Whether or not at least three vehicles were impounded in connection with the investigation: red and white van, the International Scout and the '67 Galaxie sedan?

A I'm not positive about the year, but there was a Ford vehicle there. I think '67 might be correct I'm not positive about it.

Q All right. And the International Scout?

A Yeah. There was an old International Scout which someone towed in there.

Q That vehicle wasn't in operating condition, was it?

A I believe I was told by someone that it wasn't. I never {2951} personally checked the motor or anything to my recollection. I don't think it was.

Q Now, I would like to show you a photograph, in fact I will show you a photograph, Defendant's Exhibit 95 in evidence, and first ask you what it the scene, the location depicted in that photograph?

A To the best of my knowledge this is the impound lot near the Pine Ridge jail where the three vehicles were impounded.

Q Okay. And it does depict the, or an International Scout, does not?

A Yes.

Q Now, I show you Defendant's 93 in evidence and ask you whether or not as far as you can tell that's the same vehicle depicted at the Jumping Bull Compound in the general vicinity of that "Y" intersection, general vicinity? I'm not asking you to pinpoint it exactly.

A It looks like it could be. As far as I know it could be.

Q Well, the colors seem to be slightly different in the two photographs; isn't that correct?

A There's a different shade of color, yeah.

Q But take a look at the bullet holes in the windshields, or the windshield depicted in each photograph. Aren't those --

MR. HULTMAN: Your Honor, I'm going to object at this time because assertion by counsel to some things that are not in the record; and secondly it's been established by foundation {2952} that this witness, one, is not that familiar with the exhibit that he's now being asked to testify to, and any response would be purely speculative on his part.

MR. TAIKEFF: Your Honor, I would like to know if I in fact referred to anything which is not in the record. Perhaps Mr. Hultman is referring to the bullet holes.

MR. HULTMAN: That is correct.

MR. TAIKEFF: But, Your Honor, the photographs are in evidence and as such --

MR. HULTMAN: There's no evidence in the record, Your Honor, that there's bullet holes in anything, and I go back and renew my objection at this time.

MR. TAIKEFF: I stand corrected. I appreciate Mr. Hultman's observation.

Q (By Mr. Taikeff) Do you see any bullet holes --

MR. HULTMAN: Well, now again, Your Honor, I object for all of the reasons. It's obvious that no one can look at a photo that they're not familiar with of the scene and tell whether that it is a bullet hole or not. It might be a rock that's gone through the windshield.

Now, if counsel wishes to present evidence that he's now putting in the record by a competent witness who can competently testify, I will have no objection. But again I renew my objection, one, on the grounds

that it's matters not part of the record, and two, for the grounds that the foundation {2953} has been laid. This witness is not competent to respond to anything different than what he already has.

MR. TAIKEFF: I withdraw my question and I ask Your Honor's permission to pass the photograph amongst the jurors before I proceed.

THE COURT: Denied.

Q (By Mr. Taikeff) Are you able to tell us, based on your experience as a law enforcement officer, whether or not in your opinion those are bullet holes in the windshields?

A Well, the possibility definitely exists that those are bullet holes.

Q Well, whether they're bullet holes or not in the two photographs, are they not in the exact same position?

MR. HULTMAN: Your Honor, again I renew my objection, and if counsel has evidence that they are bullet holes then I probably won't have any objection to it at this time.

MR. TAIKEFF: I'm not characterizing them as bullet holes. I said whatever kind of holes they may be.

Q (By Mr. Taikeff) Are they not in the exact same position in both photographs taken at two different locations?

MR. HULTMAN: Well, Your Honor, again I have no objection at all if counsel is indicating, and he has evidence that the two vehicles are one and the same. The Government has no objection to that.

All I'm objecting to is asking this witness to testify {2954} to something of which the foundation he doesn't have the capability of.

THE COURT: Questions to this witness based on his lack of knowledge have no probative value. The question which counsel is attempting to bring out is a matter for argument to the jury when the case is finally argued.

MR. TAIKEFF: Your Honor, then I will withdraw that question and ask another to lay a foundation concerning this witness's personal knowledge.

THE COURT: Very well.

Q (By Mr. Taikeff) Did you not have some contact in your official capacity with the three vehicles which you referred to before as being three vehicles which you thought were impounded?

A I didn't personally work with these vehicles. I stood by while the defense team, whatever, photographed and examined these vehicles.

Q And did you have occasion to see the vehicles which were being photographed by one of the defense lawyers?

A That's correct.

Q And I ask you whether the vehicle or the object depicted in Defendant's Exhibit 95 is not the very object which was being photographed by the defense attorney in the BIA lot?

A It looks similar to me.

Q And did you see that it had bullet holes or holes in the {2955} windshield when you saw the vehicle in the lot?

A Yeah. I recall some holes in a windshield.

Q And now based on your observations made at the BIA lot I ask you to look at the photograph which is 93 in evidence, not the one taken at the BIA lot, examine it, examine 95 if you need to, rely upon your memory and tell us whether the vehicle depicted in 93 in evidence is the same vehicle as far as you can tell?

A To the best of my knowledge the possibility exists that it's the same vehicle. Whether it is the same vehicle, I don't know.

Q Okay. Now, do you know who arranged or ordered that these three vehicles be taken to the BIA lot?

A No, I have no idea.

Q Do you know why these three vehicles were taken to the BIA lot?

A Subsequent investigation showed that at least two of these vehicles were possibly instrumental in this particular matter.

Q Might I venture a guess and say that the two vehicles you were just thinking of were the the '67 Galaxie and the red and white van, but not the International?

A That's correct.

Q Well, then how come the International got taken to the BIA lockup?

A I didn't have anything to do with why it was taken in. I {2956} have no knowledge of why it was taken in.

Q Now, sir, would you say that a pickup or a pickup truck is a vehicle that has a cargo carrying capacity that is open in the back, that the top of it is open so that things can be put in and taken out without opening

any doors, windows or other such portals?

A That's the standard way they're made, excluding additions of campers, whatever.

Q Showing you again Defendant's Exhibit 95, does the International Scout shown in that photograph not have that kind of carrying capacity that I just described for a pickup? Yes or no.

A It could have.

Q Well, look at the photograph and tell us whether it does or it doesn't.

A It looks like it's open in back.

Q Did you have anything to do with examining the red and white van?

A No.

Q Now, going back for a moment to the number of expended cartridges.

I think your answer was that four may have been the maximum number of expended cartridges found in the vicinity of Coler's car, one of which was a shotgun casing; is that correct?

{2957}

MR. HULTMAN: Well, I don't think that is a fair statement of the record, counsel, and I would object to that basis. I think he said there was a total of about six. I think that's the exact words he used. He left it indefinite.

MR. TAIKEFF: I agree, two of which were not expended. My statement was that there were four expended, one of which was a shotgun shell.

MR. HULTMAN: Well, if you want to use the words then with the total of about, well, then I think it would reflect what the testimony was and not specifically.

THE COURT: He may answer.

A What is your question, sir?

Q (By Mr. Taikeff) The question is whether or not in the search around Coler's vehicle there were approximately four expended rounds, one of which was a shotgun casing?

A To the best of my recollection that would be generally true.

I'm not positive about the number without completely going over that report again. It's a very detailed report.

Q Now, sir, I show you Government Exhibit 55 which contains numerous

photographs taken in and around Tent City and possibly some of them taken at another location at another time; and I'm looking at page 35 and I ask whether photograph B on that page shows the rear end of the red and white van?

A That's possibly the red and white van. I didn't do the {2958} examination, so I'm not that familiar with that vehicle.

I observed it sitting in a lot in Pine Ridge and that's possibly it.

MR. TAIKEFF: I'm wondering whether the Government would be willing to concede as a foundation that that photograph is of the red and white van?

MR. HULTMAN: I don't think there's any dispute, Your Honor, and I think it's already been in effect indicated.

Q (By Mr. Taikeff) Now, sir, I ask you whether you see any bullet holes in the back of that van?

A Well, unless I'm missing something I don't see any holes.

Q There are some dents?

A Yeah.

Q Okay Did any of the Rapid City agents, and I assume you know that I'm talking about the ten or twelve agents who were mentioned earlier, did any of those agents go to Oregon in connection with this case?

A Go to where?

Q Oregon, the state of Oregon.

A Yes.

Q Could you tell us the names?

A Myself, and I was the only one from Rapid City that went to Oregon assigned to Rapid City.

Q Did you play any role in connection with the extradition of Mr. Peltier from Canada?

{2959}

A No particularly significant role that I'm aware of. I wasn't involved in working that aspect of it.

Q So I gather then that you did not prepare any of the affidavits or other papers which were filed in Canada in connection with that case?

A No.

Q I think you told us on your direct examination at least once that Agent Waring had a rifle with a scope on it?

A That's correct.

Q Do you know what kind of rifle that was?

A I believe it was a .308.

Q The .308 is a fairly standard issue for FBI agents, is it not?

A Yes, that's correct.

Q And the scope which is mounted on it, was that also a standard item as far as you know?

A I'm not familiar with the scope, what power it was. They can vary. I don't know what he had.

Q Have you ever used the FBI issued 2 to 7 power, or variable power scope?

A No. I don't believe so.

Q Have you ever looked through a 7 power scope, telescopic sight?

A No, I don't think I have.

{2960}

Q Now do you know what was the total number of expended shells? Again I am not asking you for a precise number, don't expect you to be able to give us a precise number but can you give us some idea of the total number of expended shells recovered in the area of the compound, and I'm including the entire area, starting up here at the Y intersection, going around counterclockwise past the residences, down along this roadway, pass this building here which I think it is also indicated as a residence, but I think maybe Jumping Bull Hall.

MR. HULTMAN: That's just a small house there. Jumping Bull Hall is to the north.

Q (By Mr. Taikeff) Jumping Bull Hall. There's a small house here between the residences and the tan and red house and coming around to include the tan and red house and all the way down to Coler's car and all the way back up to the Y intersection. Within that circle, within which is the Jumping Bull compound could you tell us how many expended casings were recovered?

A I wouldn't have any idea.

Q Have you in the course of giving your direct testimony identified

all of the casings which you found?

A No I don't believe so. I found most of nine on the east side of the green house and those that weren't relevant I don't believe were brought into evidence to the best of my knowledge.

Q So you're saying that there were other casings but some {2961} decision was made, not necessarily by you, that certain casings were not to be offered into evidence so you didn't testify about them, is that a fair summary of the situation?

A All I know is that the shells I pick up I send to the laboratory and the men there take it from there and identify those that are relevant and send them back and those are the ones introduced into evidence to the best of my knowledge.

Q Could you tell us the relationship, if not with precision then with some qualitative word or phrase, how many did you find compared to how many were put into evidence during your direct testimony? Was it two to one, one and half to one, five to one? Again I'm not asking you for a precise answer, just so we can get some sense of the relative size.

Q I couldn't even give an accurate answer, sir, unless I set down and counted the ones I found which are all detailed on my report and got a percentage of those that were introduced into evidence. That would be the only way I could answer that correctly.

Q You're familiar with the weapon known as an AR15?

A Generally familiar, yes.

Q And did you personally discover any casings that could have been fired or were fired as the case may be from an AR15?

A To the best of my recollection I found some casings on the east side of the green house which could be fired from an M16 or AR15. They shoot the same shell.

{2962}

Q And how many were there?

A Well, there again I would have to go into my report, my details of how many I found.

Q Would that be in your crime scene examination report?

A That would be in the crime scene examination outside the green house where I have a long list of shells.

Q Is it within Defendant's Exhibit 173 for identification?

A Well, I'm talking about the green house. I'm not too clear on what you're talking about here.

Q What I'm trying to discover from you is some information about casings which you found which were not introduced into evidence during your direct testimony. That's the general topic I'm inquiring about.

MR. TAIKEFF: May I have this document marked for identification. Perhaps I can assist the witness in some way.

THE COURT: It may be marked.

MR. TAIKEFF: Thank you.

I'm going to show Counsel for the government so they know what I'm referring to.

Q (By Mr. Taikeff) I just want to make sure that there is no confusion about the subject. Do you understand that for the last few minutes I have been making inquiry on the subject of shell casings which you found in connection with your official activities? That's the general topic.
{2963}

A Okay.

Q Now clearly you recall that during your direct testimony the government offered into evidence without objection by the defense a series of plastic bags which contained numerous shell casings that you found?

A That's correct.

Q And I believe that virtually all of them were found up on the high ground in the vicinity of one or another of the residences, am I right about that?

A I found all my shells on the east side of the green house with the exception of some -- excuse me -- the Wanda Sears' residence.

Q Which is where? Over on the left? The red and tan house? A Yeah. That, about right beside it there.

Q That's on the left of the compound as we look at Exhibit 71?

A Per search warrant I found some casings in that house, plus the shells I didn't pick up myself but which were found around Coler's vehicle.

Q For the moment let's exclude what was found around Coler's vehicle from consideration and take into account those objects, those shell casings which were introduced into evidence on your direct testimony.

Now I think we established not quantitatively but qualitatively that you found other shell casings, right?

{2964}

A That's correct.

Q You collected those in a similar manner as to the methods or method used for those things which were introduced into evidence, right?

A Would you repeat that, please, what you just said.

Q You collected them in a manner and they were handled in a manner similar to the exhibits which are in evidence, right?

A That's correct.

Q And as far as you know it followed the routine of going to the lab, the lab did certain tests and then other people made a decision as to what was offered in evidence. That's not your job, is it?

A No.

Q So yes to my assumption and no you don't make those decisions?

A I don't make the decisions as to what is offered in evidence.

Q Okay.

But you are aware, are you not, from your official activities in this case that an AR15 is a subject matter of the evidence?

A To the best of my knowledge; yes. An AR15 is relative to this case.

Q And as far as you know there is some indication that the defendant, Mr. Peltier, was seen by one or more witnesses carrying {2965} and/or shooting an AR15, isn't that correct?

A That's my understanding; yes.

Q Now I understand you're not responsible for what questions are put to you because you're only the witness, you're not the lawyer. But you weren't asked any questions about any AR15 ammunition, were you?

A When?

Q On your direct examination.

A I believe the question referred to M16. There is really no way to tell the difference that I know of.

Q How would you make a choice if you decided something was M16 as to AR15?

A I don't know how you would tell AR15 ammunition from M16 ammunition.

Q But you did in fact find a number of .223 caliber cartridge casings, didn't you?

A I found some M16 or M15 cartridge casings on the east side of the green house; yes.

Q That's up on the ridge, is it not?

A It would be on the east side of the green house.

Q Do you recall whether you ever wrote a 302 in which you detailed the finding of any .223 caliber casings?

A To the best of my knowledge I wrote one 302 detailing what cartridges I picked up on the east side of the green house and listed all those I picked up. Best of my recollection that's {2966} the way it was done.

Q Do you know what .223 is expressed in millimeters?

A I'm not positive. The .223 shell is also called 556 I believe, although I'm not positive about it.

Q 556 millimeters or .223 inches, right?

A I think that's the way it is; yes.

Q Now I want to show you a document which you did not prepare. It's an FBI Washington, D.C. lab report. It's marked Defendant's Exhibit 175. It's a rather lengthy lab report from the Washington laboratory. I ask you to look at it, particularly with reference to the section that mentions your name.

A I see the section you're referring to.

Q Now I ask you whether or not you found seven .223 casings?

MR. HULTMAN: Could I note what page on what report, Counsel, you are referring to?

MR. TAIKEFF: I'd be happy to let you know, sir. It's the third page in the sequence, Your Honor, of a report dated August 5, 1975. Appears to be an official FBI document.

MR. HULTMAN: Could I just look at it one second.

MR. TAIKEFF: Sure.

A Yes. This lists -- I called them here 5. or 556 caliber but that's interchangeable.

Q We understand I think that .223 means .223 inches approximately and the other way of saying the same thing is 5.56 {2967} millimeters.

A That's correct.

Q Now having looked at that official FBI document, could you tell us whether or not you discovered seven .223 caliber casings?

A Well, according to this the lab received from me or recovered by me at the scene seven .223 caliber casings. So --

Q All right.

A I presume that is what I recovered.

Q You have no independent recollection of that?

A I don't have a recollection of physically how many. I didn't count them and put a number on how many of which type I recovered.

Q I show you, sir, a document which has been marked Defendant's Exhibits 176 for identification and ask you whether that's a 302 which you and you alone wrote?

A Yeah. This is the 302 I wrote detailing to the best I could there at the scene under the conditions there how many cartridges I picked up. I mean what type of cartridges and lifting them. That's where I bagged the cartridges.

Q The activities which are reflected in that report occurred on June 26th 1975, right or wrong?

A That's correct.

Q And you dictated that report on June 30, 1975, is that correct? {2968}

A That's correct.

Q And you said that when you looked at the copy of what appeared to be an FBI Washington, D.C. lab report you were willing to conclude up to that point, because of what you had seen, that perhaps you had found seven .223 casings, is that a fair summary of your response?

A That's what the lab report said; yeah.

Q Okay.

Now, sir, can you explain why the document in front of you shows that you only found two .223 casings, or they may be listed as 5.56 millimeters?

A Well, as far as I can see this just lists on the document two .223 cartridges or five .556.

Q Five .56 millimeter, right?

Can you offer us some insight on that subject?

A No. The only thing I could say is at the scene either I or the lab people miscounted under the prevailing conditions, that possibly I did it. Whether the lab did it, I have no way of knowing.

Q Have you ever in the course of your experience as a law enforcement officer known expended cartridge casings while on way to Washington to reproduce?

A Not to my knowledge.

Q By the way, getting back to Defendant's Exhibit 176, except for any question that may have been raised concerning the .223 {2969} cartridges, would you say that that report, that 302, 176 for identification, is otherwise accurate?

A Well, you do them as accurately as you can under the conditions. I had just seen a couple of my friends murdered and it was a difficult time. But to the best of my knowledge I tried to do it as accurately as I could.

{2970}

Q I am not asking you for a guarantee that it is precise.

A As far as I know it is accurate.

Q And is it or has it been your testimony that without the benefit of looking at that report you could not tell us how many cartridges you found that day, and/or the calibers of the cartridges you found?

A No, I couldn't be sure, I didn't count them per caliber.

Q And would you say that that report, within human limits of the ability of a person to be accurate, is an accurate reflection of what you knew at the time of the events, based on notes which you had made and your own recollection?

MR. HULTMAN: Well, I object again to the characterization. These records show earlier he indicated he made no notes.

MR. TAIKEFF: I think he said he made no notes except notes of things he found.

A On that day I did the crime scene as quickly as I could because it was getting dark. Before it got dark we wanted to get the crime scene done, so what I was doing, I was picking up the shells; noting what they were, putting them in plastic bags and trying to count them at the same time, and that is how I got my record of what I picked up and the number

involved.

Q (By Mr. Taikeff) All right. What I am trying to do is establish that at this moment your independent memory is insufficient and that the only recordization, the only record {2971} of what you saw with respect to finding shell casings is now memorialized on that piece of paper which is Defendant's Exhibit 176 for identification, is that a fair statement?

A Well, no, that's not exactly correct.

Q O.k. How is it wrong?

A The notes I put in each bag also detailed what was in that bag.

Q All right.

A Now, whether they correspond to this, perhaps that's where the error was made, I don't know, as far as the number of cartridges found.

Q But as far as you can tell when you wrote that it was an effort to accurately record what you had seen and what you had recorded on your notes?

A Well, you try and put it down as accurately as you can. Sometimes things happen in dictation, the number is wrong; and when it comes back for approval, if you miss it, you don't review it perhaps as thoroughly as you should, this happens once in awhile.

Q Mr. Hughes, perhaps you misunderstand the nature of my inquiry. I am not challenging the accuracy of what you have done. I am not trying to pin you down to saying it was precise so that I can show you made a mistake in counting. I am trying to establish whether or not that document contains what used to be your memory which has now failed you, and that's the only {2972} purpose I ask you that question. Is that a fair statement, that that piece of paper is all that remains of your memory as to what cartridges you found and what the calibers were, is that a fair statement?

A That plus the notes I put in each bag.

Q All right, and that is as far as you could do it, an accurate compilation of your notes, right?

A That is correct.

Q And the notes were made on the scene as you were doing them, is that correct?

A Yes, they were.

MR. TAIKEFF: I offer that document as a past recollection recorded.

And I am showing it to Government counsel.

(Counsel examine document.)

MR. TAIKEFF: Can counsel have a moment, your Honor, please?

THE COURT: You may.

(Counsel confer.)

MR. TAIKEFF: May we approach the side bar?

THE COURT: You may.

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

MR. TAIKEFF: Your Honor, the Government made a mark on Defendant's Exhibit 176, Mr. Hultman made a mark.

{2973}

MR. HULTMAN: Inadvertently.

MR. TAIKEFF: Inadvertently, Instead of trying to get another document, we will just state to your Honor in the presence of the jury that there is a mark there, and that was just put on by counsel.

MR. HULTMAN: I was going to ask a question about it, and I accidentally marked it. We have been trying to find another copy, and we can make another copy if you want to. I brought counsel's attention to it.

THE COURT: If it is acceptable to counsel, it is acceptable to the Court.

MR. TAIKEFF: It is acceptable.

MR. HULTMAN: I would like to ask on voir dire a couple of questions.

MR. TAIKEFF: I am almost finished with my cross examination.

MR. HULTMAN: On this little item.

MR. TAIKEFF: O.k.

MR. HULTMAN: Probably after asking those couple of questions, we may not have any objection at all to this document going in, to the extent of the part you are talking about. I would object to anything up here (indicating), in the rest of it, but you haven't discussed it in any way, so that I might be willing to accept, without objection, the cartridge listing which is the part you have been {2974} asking the questions about.

MR. TAIKEFF: It makes good sense to me.

MR. HULTMAN: That's what you are trying to get, is that fair enough?

MR. TAIKEFF: Perfectly all right. Suppose then what we do, you indicate your position on that, and then I will make the offer.

MR. HULTMAN: Reproduce it.

MR. TAIKEFF: You don't have to mention that mark. The record is now complete.

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

MR. TAIKEFF: Mr. Hultman, are you going to examine the witness?

MR. HULTMAN: Could I just voir dire for two questions? I think then we might be able to stipulate, counsel, as to the part of the exhibit you are questioning about.

Mr. Hughes, Agent Hughes, is it my understanding that at the time counsel is asking you about now, that you made the listing which is part of the proposed exhibit, Defendant's Exhibit 176, that lists the number of cartridges by various calibers and various numbers, is that correct?

THE WITNESS: That's correct.

MR. HULTMAN: All right. Is it also true that you at that time were doing the best you could in terms of {2975} recording what it was that you were picking up?

THE WITNESS: I was trying to get it done before dark, yeah.

MR. HULTMAN: Is it possible that you could have made a mistake during that time in terms of either the number of specific cartridges that you may or may not have picked up or to a specific designation of a given cartridge or cartridges?

THE WITNESS: Under those conditions, yes, very possible.

MR. HULTMAN: And that whatever -- is it also true that whatever was received then by the lab from you and were analyzed carefully there by number, by caliber and so forth by experts -- and I might add, counsel, who will be testifying probably within the next witness or two -- that they were in a more -- better position to accurately analyze how many, what the caliber were and so forth than were you at the time you were picking them up?

THE WITNESS: That's correct,

MR. HULTMAN: All right. With this, your Honor, the Government would have no objection to the entry of that part of the Exhibit 176 which begins with one sentence and then lists all of the cartridge casings to which counsel has been referring; and I would note for the record that it does

refer to some specific 5.56 cartridges.

{2976}

MR. TAIKEFF: Two of them.

MR. HULTMAN: We would stipulate that part beginning with the sentence: The area surrounding this green house was searched, and on the east side of the green house the following shells were located.

MR. TAIKEFF: With your Honor's permission, we will prepare a duplication of that part of the exhibit and then offer that as 176-A if we may do that.

THE COURT: If you can get by the Clerk, I will do that.

MR. TAIKEFF: I was watching the Clerk as I was addressing the Court.

THE COURT: What is your position on 176?

MR. TAIKEFF: Withdrawing 176 and substitute 176-A in its place at the appropriate time.

THE COURT: Exhibit 176-A is received.

(Defendant's Exhibit 176-A, having been previously duly marked for identification, so offered in evidence, was received.)

MR. TAIKEFF: Your Honor, in view of the fact that for all practical purposes it is in evidence and in view of the fact that Mr. Hultman made reference to some 5.5 cartridges being mentioned, I think it appropriate that I indicate at this particular time that the list contains two 5.56 millimeter cartridges.

{2977}

THE COURT: Very well.

Q (By Mr. Taikeff) I have just a few more questions for you, sir.

You said that the agents who were killed that day were friends of yours. I assume you were referring to both of them?

A That's correct.

Q Is it a fact sir, that Special Agent Williams was a bachelor without children?

A To the best of my knowledge he was.

Q If he had any, he was keeping it a secret?

A He wasn't telling me.

Q O.k. Specifically with reference to my question about Oregon, could you tell us whether Special Agent Adams was one of those who went

to Oregon?

A No, not Oregon to my knowledge.

Q And could you tell us if you know the name of the person who on behalf of the FBI, possibly in the Rapid City office, handled the Canadian extradition aspect of the case?

A I am not familiar with who was handling that. It was not part of my work.

Q O.k. Now, you interviewed a person by the name of Noah Wounded, an Indian person, sometime in November of 1973?

A I believe I did. I would have to refresh my memory again.

Q All right. If I could have just a moment. I am showing you a 302 with your name on it, dated {2978} November 6, 1975, making reference to an interview on November 5, 1975; and I call your attention to the last paragraph on the first page and the only paragraph on the last page, and when you have looked it over, I will put a question or two to you.

A (Examining).

Q Is it a fact, sir, that Noah Wounded told you that, whatever he knew?

A This doesn't refer to an interview by Noah Wounded, by any FBI's.

Q (Examining) I see. I stand corrected on that. That was an interview of Noah Wounded by the Bureau of Indian Affairs?

A By an officer named Fred Two Bulls.

Q And you in turn interviewed that person?

A The individual listed on the report with me, Tom Greene interviewed him, I was present during the interview.

Q You have no knowledge, no personal knowledge of what was said between Fred Two Bulls and Noah Wounded?

A I listened to Tom Greene interview Fred Two Bulls. I know that's what the interview is concerned with.

Q I see, but then you have no personal knowledge of the conversation between Fred Two Bulls and Noah Wounded?

A None other than what he reported.

Q O.k. The last topic I want to question you about relates to the assault on the green house, something which occupied {2979} some if not most, of your time in the latter part of the afternoon of June 26th, 1975.

Now, on at least one occasion in connection with your efforts to assault that building, you came under heavy fire, is that correct?

A That's correct.

Q Now, taking into consideration your arrival -- and I use the pleural, I don't mean your personal arrival but some or all of the members of your group -- taking into consideration the arrival of members of your group in the immediate vicinity of the green house, I want you to tell us how much before that did you come under heavy fire which, based on your observations, was coming from the green house?

A Now, this is the assault at 5:50 p.m.?

Q Yes, the latter part of the day, almost 6:00 o'clock, that's right.

A Well, to the best of my knowledge, as I am about half way there I had a great deal of fire directed at me from that area. I don't know if it came from individuals in the green house or where it came from.

Q But it was close to --

A (Interrupting) Well, the sound come up, from up there, that's all I can testify to.

Q O.k., and once this area was secured, initially how many law enforcement officers would you say were up there?

{2980}

A Well, I estimated that approximately 20 additional officer joined us.

Q After how long?

A This was at approximately 4:30 p.m., prior to making the assault, and they were in on the assault of those houses.

Q So the total number of law enforcement people up here in the vicinity of the green house (indicating), after the assault was greater than 20?

A It was greater than 20, yes.

Q O.k. From that vantage point in or near the vicinity of the green house, can you see this area here (indicating), which is marked "Crest of plateau", and let's say for 50 feet on either side of the line marked "Crest of plateau"?

A I am not positive, but I believe, as it indicates there, there is a plateau which perhaps obstructs part of the view, I am not positive. I am not positive on that. That doesn't --

Q (Interrupting) Can't you see from up here all the way over to these trees (indicating)?

A I don't know offhand if you can or not.

Q Let me ask you this question: If you stood here on the line (indicating) and you could see the green house, you would be satisfied that you could see the opposite way, could you not?

A Could you repeat that, please?

Q I said, if from the center of the area marked "Crest of plateau", you could see the green house, there is no reason to {2981} believe you couldn't see the other way to the same distance, isn't that correct?

A I don't recall that well enough to know what you can see or cannot see.

Q When you and your fellow officers were up there around the green house after you secured it, were you on the lookout for anybody other than other law enforcement officers, seeking to apprehend somebody?

A After the houses were deemed clear, I had assumed -- I was told, I don't recall which -- that the individuals that had be there had escaped, so my immediate concern was to get the crime scene done prior to the approaching darkness, so I don't recall what you can see.

From then on my attention was devoted to doing the two crime scenes around the green house and around Agent Coler's car. Were there any people running from the green house leading in the direction of Tent City?

A I don't know. You mean, during the assault or when?

Q Any time after the shooting stopped while you were running up to the green house, there was shooting, wasn't there?

A Yes, there was.

Q Had to be somebody there?

A I don't know where the shots come from, whether it come from there or elsewhere.

Q Well, you said the shots came from the green house?

{2982}

A Well, the sound come from that area somewhere.

MR. TAIKEFF: Excuse me one moment.

(Counsel confer.)

{2983}

Q Weren't there law enforcement officers somewhere along this right-hand curved part of the road that forms the right-hand part of that "Y" intersection?

A At what time?

Q At the time of the assault.

A Well, we sent the group down there somewhere. Where they went, I don't know. I didn't see them.

You can't, the map doesn't show, but the topography of the area there, there is a lot of places that you cannot see. And I sent them there. That's where they were sent, but whether they went there, where they were exactly, I don't know.

Q Did any law enforcement officers report to you that either at the time of the assault on the green house or immediately afterwards anybody ran from the vicinity of the residences in a southeasterly direction, or in a direction which would take them to tent city?

A I don't recall specifically. I'm aware that through subsequent investigation that I think some of the people did escape that way.

They escaped down to the aware known as tent city, but I'm aware of that through subsequent investigation. Perhaps an officer told me that, I don't recall.

Q But the question is: What time of day did they do that?

A Well, they weren't there at 4:30. We found no one up around {2984} the green house except for the dead Indian male, Joe Stuntz. So I can only presume that they escaped sometime between 2:30 when they were shooting at me physically. I actually saw one then, and the rest of the time I don't know where the shots came from when I assaulted the house. So I wouldn't know this, that area when they escaped that area of time from 2:30 to, when we assaulted the house at 10 till 5:00.

Q Let me ask you then whether it's fair to summarize what you've told us in this way: That either there were people at the green house shooting at you who then managed to escape, or people were shooting at you from another location that you have not determined the site of; is that a fair summary of your testimony?

A The first part of that, there were definitely people shooting at us where the shoot-out occurred at 2:30.

Q I'm talking about the latter part of the afternoon.

A At the final assault?

Q Yes.

A There I don't know where the shots came from.

Q Could be the green house or some other location?

A I don't have any idea where the shots came from other than the sound came from that area up there.

MR. TAIKEFF: I need one minute to confer with Mr. Lowe, Your Honor.

{2985}

(Defense counsel conferred.)

MR. TAIKEFF: Your Honor, I have no further questions on cross-examination at this time.

I assume that at some time in the near future the Government will produce the five, if there are five, cartridges, .223, at which time it may be necessary to recall this particular witness. But at this time there are no further questions.

MR. HULTMAN: Your Honor, I think I have just a brief redirect and I may solve the problem now which counsel is referring to.

REDIRECT EXAMINATION

BY MR. HULTMAN

Q Is there what is known, one's evidence of the kind and nature that you found as taken to the spot where it is kept, you do then subsequently prepare a, what is known as a green sheet which then accompanies the specific objects, such as in this case the round that you have found, to the laboratory itself?

A The green sheet serves as a double check that allows you to, once you're back from your field position, to sit down and count out specifically what cartridges you have seized under a better situation.

And I filled out a green sheet detailing from these bags what cartridges I have picked up.

Q Did you in fact on that occasion make out a green sheet, or summary of those items?

{2986}

A I set down and filled out a green sheet and counted the cartridges I was sending to the laboratory.

Q All right. I'm going to show you here an item, and I suppose I should at least mark it for identification purposes.

(Clerk marked document.)

Q (By Mr. Hultman) What has been marked as Plaintiff's Exhibit 177, and it is a reproduced copy of a document, and ask you to look at it.

A This sheet --

Q Well, wait a minute, I want you to look at it for just a moment, Agent Hughes, and ask you whether or not you recognize what it represents?

A Yes. It's listing the cartridges I picked up on June 26, 1975.

Q All right. Now, subsequent to the picking them up you then made out a green sheet which is what you're now indicating; is that right?

A That's correct.

Q And when did you do that?

MR. TAIKEFF: I must object, Your Honor. I think the phrase that indicates that the witness was indicating that, or suggests that he was indicating that that's the green sheet, was misleading. I don't think that's been his testimony.

MR. HULTMAN: All right. I'll withdraw.

Q (By Mr. Hultman) Did you or did you not make out a green {2987} sheet?

A I did.

Q And is that something that is commonly referred to in terms of being a green sheet?

A Yes. It's a Form F-2192. It's green in color. We call it the green sheet.

Q Now, is what I have in front of you now a photostatic copy or some type of a copy of such a document?

A It's a copy of the document I prepared detailing the cartridges picked up on 6/26/75.

Q All right. Do you know from your own memory that you prepared such a document without looking at the document itself?

A Yes. I know I prepared a document.

Q All right. And if I ask you to look then at the copy that is in front of you at this present time do you recognize anything on it that would indicate that you have any relationship to it?

A Well, my name is on it.

Q All right. And does customarily the individual put his name on that document?

A Yes.

Q Okay. Now, do you recall from your own memory without refreshing your memory as to the document itself, what the compilation was in terms of calibers, in terms of numbers of rounds and so forth that you in fact sat down and counted at the {2988} time you made out the green sheet?

A I don't have an independent recollection. There were so many.

Q All right. Would you, by looking at the document which is now in front of you, be able to at least recall that there were some rounds of certain particular caliber? I'm not asking you specifically what ones, I'm just asking you, can you by looking at the document refresh your memory at least as to certain caliber of rounds which you did in fact count at that time?

A Yes.

Q Or make some notations as far as that green sheet?

A Yes.

Q All right. Now, am I correct that the green sheet then, the document goes with the items, in this case rounds, to the lab?

A That's correct.

Q And then am I correct that at the lab, whoever receives them there, sits down with the green sheet that you have sent and with the items that are accompanying the green sheet and determine in fact what it is that is there?

MR. TAIKEFF: Your Honor, I think that is clearly a leading question and I object to it.

MR. HULTMAN: Well, I'm just trying to get preliminary to get -- {2989}

MR. TAIKEFF: I understand, but I think we're on a sensitive point and although generally neither side gets too upset about leading questions in this trial, I think when we get to the sensitive stuff there should be no leading.

THE COURT: Sustained.

A You send a green sheet accompanying your evidence so that the

laboratory has a record of what it is, what you are submitting for examination.

Q (By Mr. Hultman) All right. Now, just in looking at this document and refreshing your recollection, if it can be refreshed by the document, might I look at it just one moment, did you in fact note on the green sheet that there were included 5.56 cartridge cases of some kind and nature?

A That's correct.

MR. HULTMAN: All right. I have no further questions on this at this time, Your Honor.

MR. TAIKEFF: May I see the document before --

MR. HULTMAN: I'm not going to offer it until I have the expert that received it.

Counsel, I'm not going to offer it at this time and I'm going to go to other matters unless you want me to wait.

MR. TAIKEFF: On redirect?

MR. HULTMAN: Yes.

MR. TAIKEFF: I'll wait

MR. HULTMAN: I have a few very brief questions.

{2990}

MR. TAIKEFF: I'll wait.

Q (By Mr. Hultman) I just have a few other questions, Agent Hughes.

On cross-examination counsel asked you a number of questions concerning shotguns and what kinds of rounds can be fired in them and so forth. And also some questions about other weapons. And I just wanted to ask you with reference to the distance questions and so forth that he asked you one question, if, if you were an agent, one of either two agents who were at a car, and if the two agents, you and the other agent, had between you a revolver, and in the trunk of an automobile, one of your automobiles was a shotgun and was a rifle and you proceeded to secure them, which of the weapons generally speaking between a revolver and a shotgun and a rifle, which of them would be normally used for the shortest range?

A The shortest range?

Q Yes. The closest range.

A Well, probably be the shotgun.

Q All right. What would, what would be the next weapon that would

be the next longest range generally speaking?

A Generally speaking a pistol. It would depend on the barrel length of the pistol.

Q All right. And the rifle would be a weapon that would be used at a longer range; is that correct?

A That's correct.

{2991}

Q I believe on your testimony on cross you indicated that you had carried a shotgun all that particular day; is that correct?

A I indicated that I was packing a shotgun, yes.

Q So that was the weapon that you yourself that day made a judgment call about and that's the one you selected that particular day; is that correct?

MR. TAIKEFF: Objection. Leading. That's also not any evidence upon which that question could be asked.

THE COURT: Sustained.

Q (By Mr. Hultman) Well, what weapon did you carry that day?

A I carried --

MR. TAIKEFF: That's been asked and answered, Your Honor.

THE COURT: I think it's clear that he was carrying a shotgun.

Q (By Mr. Hultman) All right. Then I'll ask the question: For what reason if any did you carry a shotgun that day?

A Well, for -- that was a weapon that I felt comfortable with or for most general situations which you might run across.

Q All right. With reference to the same weapon or types of weapons that we've just been discussing, can you fire a pistol with just one hand, one arm?

A Yes.

{2992}

Q What about if you are going to use a shotgun, comparatively speaking?

A Well, the type shotguns that we carry, they're pump action shotguns. So you could not put the shell in the chamber with one hand unless you did a lot of maneuvering. It would be very difficult.

Q And would the same be true as far as a rifle, any other type of

rifle?

A Our rifles are also pump rifles, so that would also be very difficult.

MR. HULTMAN: I have no further questions.

RECROSS EXAMINATION

BY MR. TAIKEFF:

Q Mr. Hughes, I'm going to place before you again the two page document which has been previously identified as Plaintiff's Exhibit 177 so that I can ask you some questions about it. I'll have to stand by because there's only one copy, so we'll look at it together.

Now, do I understand that the original of this was on a green colored paper and hence it's called a green sheet, or green document?

A Normally, yes

Q This is a photostat of that document?

A Yes.

Q Now, ignoring the Clerk's yellow label showing the exhibit Number, is it fair to say that the document consists of the {2993} following components: There are certain lines and boxes that are printed on it with words indicating what kind of information is supposed to go inside those boxes?

A That's correct.

Q And in addition to that the bulk of the writing on the document is typed writing?

A That's correct.

Q Typewriting?

A That's correct. Except that to the left.

Q And then there's a certain amount of handwritten material that might have been made in pen or pencil, but we can't tell from this photostat; is that a fair statement?

A That's correct.

Q And then there is what appears to be the reproduction of a rubber stamp of some kind?

A Yes.

Q And in addition to that, in a handwriting that appears to be different than the handwriting which is in the upper two-thirds, a few

notations in the vicinity of the rubberstamp, one of them completely within, one of them completely outside and one of them partly in and partly outside with some notations, handwritten notations?

A Yes.

Q And then there is some kind of a signature in the lower right-hand corner of what appears to be the rubber stamp or {2994} initials by somebody?

A Yes.

Q Now, have I accounted for all the separate components which can be seen on the face of the document?

A Basically speaking, yes.

Q Okay. Now, when you first prepared this document did you type it or did you dictate it or how did you prepare it?

A To the best of my recollection I dictated it.

Q And when you got it back is it fair to say that it had only the typing on it other than the printed stuff that's already on the blank form? {2995}

A Yeah. That's the best of my recollection, that's all it had.

Q Now you notice along and in the left-hand margin there are a lot of numbers, most of which begin with the letter "Q."

A That's right.

Q And in virtually every case or possibly in every case, from the "Q" number over to the typed number of your list there is a horizontal line which ends in a little arrowhead.

A Yes.

Q Did you wrote those "Q" numbers?

A No.

Q Did you wrote those arrows?

A No.

Q Do you know when those marks were put there?

A No, I don't.

Q Do you know by whom they were put?

A No, I don't.

Q On the piece of paper.

A No.

Q Is there any date on this form which indicates when it was typed?

A I don't believe these have a date indicating when they're typed.

A And that one certainly doesn't?

{2996}

A No.

Q Is there any stamp or other notation which indicates when that form may have been processed or received at any office or premises of the Federal Bureau of Investigation?

A Sometimes these stamps have dates. I don't know if this one does or not.

Q At least on the photostat it doesn't appear to have a date, would you say that's a fair statement?

A I can't see one now.

Q It may be on the original but it's not on the copy?

A I don't know. I don't know.

Q Now a "Q" number is a number which is assigned to a piece of real evidence, right?

A This is done in the laboratory. To the best of my knowledge that's what they do, but that would be purely speculative on my part. I'm not sure what they do down there.

MR. TAIKEFF: I'm wondering, Your Honor, if the government would stipulate that

Q numbers are assigned by the laboratory and they sequentially number exhibits which are processed in a particular case.

MR. HULTMAN: I was trying to redirect to get to that information and I think the expert will be called, one of the next two or three witnesses will indicate the manner in which the

Q numbers are given, but beyond that I would be incapable to stipulate whether or not they do them in any {2997} particular sequence or how that person would do that.

MR. TAIKEFF: May I at least ask for a concession at this time that they represent some method of designating evidence, items of evidence by the laboratory?

MR. HULTMAN: An item is given what they call a

Q and then a number.

MR. TAIKEFF: All right.

Q (By Mr. Taikeff) Now item No. 13 and item No. 17 on your list of 36 separate entries refers to five .56 millimeter cartridge, doesn't it, or casing?

A That's right.

A Now somebody, I know you don't know who, somebody apparently put a long oval or loop around those two lines, isn't that correct?

A They've been underlined and over lined; that's correct.

Q And in fact the two lines have been joined at the end so it's an enclosed loop, isn't that true?

A Item 17 is that way. Item 13 is not that way.

MR. HULTMAN: I think the government will stipulate that Counsel did that very thing in sitting here just a moment ago.

MR. TAIKEFF: No, Your Honor. That's on the photostat. It's not on the surface of the paper.

Your Honor, I see the original now. Apparently that was on the original from which the photostat was made.

{2998}

MR. HULTMAN: Just about five minutes before.

Q (By Mr. Taikeff) Now in your 302 which has been previously identified as Defendant's Exhibit 176 you list separately a single 5.56 millimeter Lake City cartridge case, is that right?

A I believe I do. I'd have to look at it to make sure.

Q (Indicating.)

A Yes.

Q And then in addition to that several lines below you list another 5.56 millimeter Lake City cartridge case, is that correct?

A That's correct.

Q Now is Plaintiff's Exhibit No. 177 for identification essentially the list of cartridges which you found in the same order in which that list appears in 176 for identification?

A I'd have to go through and examine them.

Q Just take a look. There seems to be some difference on the endings here.

I'm interested, of course, in the first 17 entries.

A They're basically similar as far as I can see. It's hard not having

numbers here which number is which.

Q The 302 doesn't have numbers, correct?

A That's correct.

Q But the 13th item on the list of the 302 is a single 5.56 millimeter cartridge, right?

{2999}

A That's correct.

Q And the 17th item on the 302 is another 5.56 millimeter cartridge case, is that right?

A That's correct; yes.

Q Now looking at the typewritten portion of Plaintiff's Exhibit 177 for identification, does that refer to 5.56 millimeter, the typewritten portion?

A Item 17?

Q 13 first.

A Item 13.

Q On the green sheet. The copy of the green sheet.

A Yes, it does.

Q Does the word case or cases appear on the 13th line typewritten portion?

A It says "case."

Q Singular?

A Yes.

Q Now look at the 17th line of the photostat of the green sheet. Does that make reference to a 5.56 millimeter object?

A Yes, it does.

Q And does it say case or cases?

A It says "case."

Q So when you made up the list, the green sheet of transmitting whatever it was you were transmitting to Washington at that time you dictated once again for each of those two {3000} entries in the singular, isn't that correct?

A Yes.

Q Yes or no?

A Yes.

MR. TAIKEFF: I have no further questions.

MR. HULTMAN: I have no further questions.

THE COURT: The court is in recess until 3:45.

(Recess taken.)

(Whereupon, the following proceedings were had in the courtroom without the hearing and presence of the jury:)

MR. HULTMAN: Your Honor, there is one item, in response to the Court's inquiry of Counsel this morning, I now have a list of FBI fingerprint cards and I will give counsel those cards. These are the 11 that are in possession of the FBI in addition to the one that's in evidence in trial here.

MR. LOWE: That is not in here?

MR. HULTMAN: No. That is not in here. That's the 11 in addition to that in evidence.

MR. LOWE: Thank you very much.

MR. HULTMAN: I would like to note these are all of the ones in the possession of the FBI and I would not make any representation as to any prints that may have been taken by somebody somewhere else that are not within the FBI files. Could well be some other one.

{3001}

MR. LOWE: We understand that, Your Honor.

THE COURT: Very well.

The jury may be brought in.

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

MR. CROOKS: If it please the Court, the United States would next call Mr. Gerald Douglas.

GERALD L. DOUGLAS

being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CROOKS:

Q Mr. Douglas, would you again give your full name for the record, please.

A Gerald L. Douglas.

Q Where do you live, sir?

A Sioux Falls, South Dakota.

Q What is your employment?

A Deputy United States Marshal.

Q And is that for the district of South Dakota?

A Yes, it is.

Q Calling your attention back to the year, or the month in November, 1975, did you have occasion to take a fingerprint of an individual by the name of Robert Robideau?

A Yes, I did.

Q I hand you Exhibit No. 3 and ask if this is something you've seen before?

{3002}

A Yes, it is. Those are the fingerprints I took from Mr. Robideau on November 11, 1976.

Q The marking here is 11/9/76 and sometimes depending on which order, but it is, the meaning of that is November 11, or, excuse me November the 9th?

A I think that we did, he was arrested by our office on November 9th. I fingerprinted on November 11.

Q Okay.

Insofar as Exhibit No. 3 is concerned, would you state just in very general terms how this document was prepared?

A It was prepared at the Minnehaha County Jail at Sioux Falls on November 11. I went down about 10:00 o'clock that morning. I asked Mr. Robideau if I could take his fingerprints; he responded it would be all right and I rolled fingerprints at the county jail.

Q There are indications on each little block within the fingerprint card designating a finger and to the best of your recollection do the little blocks truly and correctly correspond to the finger of whichever hand is indicated?

A Yes, they do.

Q And insofar as Mr. Robideau is concerned, is he an individual who you knew before that time and after that time as being Robert Robideau?

A Yes.

MR. CROOKS: The United States would offer Exhibit No. {3003} 3 and I would state for the record there is a piece of masking tape on the reverse

side of this to cover some extraneous material that was placed upon the exhibit by myself.

MR. TAIKEFF: No objection.

THE COURT: Exhibit 3 is received.

MR. LOWE: May we approach the bench, Your Honor?

THE COURT: You may.

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

MR. LOWE: Mr. Taikeff was not aware of one issue raised. I think that that ought to be blocked out in some way. I think it is not relevant to this trial. I think there may be some inferences drawn from the jury in the fact --

MR. CROOKS: You can save the long speech. I'll stipulate to that.

MR. LOWE: Make that --

THE COURT: How do you want to block it out?

MR. CROOKS: I would think just a piece of masking tape.

MR. LOWE: I don't think there is anything. I haven't looked on the back.

MR. CROOKS: This was one of the reasons we blocked out. There was some extraneous material there, too.

{3004}

MR. LOWE: We can do it the same way.

MR. CROOKS: I have no objection.

MR. LOWE: No objection.

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

MR. CROOKS: I would, Your Honor, for the record indicate that the clerk pursuant to agreement of Counsel has blocked out further extraneous material and I now reoffer it at this time.

MR. LOWE: No objection, Your Honor.

THE COURT: Very well.

The record may show that Exhibit 3 is received.

MR. CROOKS: We have no further questions.

MR. LOWE: We have no questions of this witness, Your Honor.

THE COURT: You may step down.

MR. CROOKS: The United States would next call Mr. Winthrop Lodge.

WINTHROP DALE LODGE

being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CROOKS:

Q Mr. Lodge, would you again give your full name for the record, please.

A Yes. Winthrop Dale Lodge.

Q And where do you live, sir?

{3005}

A I live at 1530 Brian Court in Waldorf, Maryland.

Q And what is your employment?

A I'm employed by the Federal Bureau of Investigation as a fingerprint specialist.

Q And how long have you been employed by the FBI in that capacity?

A Over 26 years.

Q And would you detail, first of all, what type of training and practical experience you have had to prepare you for fingerprint examination?

MR. LOWE: We'll stipulate to qualifications. If you want to state his experience is substantially the same as Mr. Mulholland incorporate that, we have no objection.

MR. CROOKS: I, Your Honor, would like, I think the jury is entitled to a brief outline of his qualifications and background. However, in view of Counsel's offer I will consolidate it considerably.

THE COURT: Very well.

Q (By Mr. Crooks) And merely have him summarize, if you would, Mr. Lodge, basically what your background has been insofar as the fingerprint field is concerned.

A Initially, extensive training in fingerprint work and I have conducted schools for police officers, agents of the Federal Bureau of Investigation.

Q And what position, if any, do you hold within the Bureau {3006} itself concerning the fingerprints or fingerprint examination?

A I'm presently employed as a fingerprint specialist.

Q Now insofar as your work as a fingerprint specialist, were you

called upon to do certain evaluations concerning the case that we're hearing in this courtroom today?

A Yes, sir, I did.

Q Well, first of all, where was your examination of your principle examination done insofar as this case was concerned? Was it back in your office or was it out on the scene?

A Initially it was at the scene and also in my office in Washington.

Q When did you come to the scene for the part of your work that was done there?

A The early morning of June 27, 1975.

Q And when you arrived, what places did you go and what did you examine?

A I examined numerous items of evidence: automobiles, evidence that was collected from different areas at the scene.

Q In the course of your examination, did you have occasion to examine vehicles which were identified to you as being the Bureau vehicles of Special Agents Jack Coler and Special Agent Jack Williams, or Ronald Williams?

A Yes, sir, I did.

Q Now, first of all, going to the vehicle of Mr. Coler, do you recall where that was located when you first examined it?

{3007}

A Where the automobile was located?

Q Yes.

A Yes, sir. It was located at the sheriff's department in Hot Springs.

Q And where was Special Agent's vehicle when you examined that?

A It was located near an area known as tent city at the scene.

{3008}

Q And did you examine it at any other location other than the Tent City area, if you recall?

A No, sir, I did not.

Q All right. Insofar as your examination of both vehicles, particularly Special Agent Coler's vehicle first, what condition did you find the vehicle in when you first came to make the examination?

A Which vehicle?

Q Coler's vehicle.

Q Aside from the obvious condition of the glass and certain areas of the automobile, there was quite a bit of material in the automobile.

Q Well, let me ask you, first of all, before you get into what you actually saw, are you familiar or do you know Mr. Cunningham, Cortlandt Cunningham?

A Yes, sir.

Q And was he or was he not in the area at the same approximate time that you were?

A Yes, sir. In fact, after I had completed my examination, why, I had turned the vehicle over to Mr. Cunningham.

Q All right. Now, Cunningham works in another part of the FBI laboratory, does he not?

A Yes, sir.

Q And in a different field, particularly ballistics and things of that nature, as opposed to fingerprints?

{3009}

Q Yes, sir.

Q Now, who made the examination first -- and I think you have already partially answered that -- you or Mr. Cunningham?

A I did.

Q And is there any reason for you having done it in that progression?

A We normally do it in that progression because -- to preserve any latent prints that may be on the items or the vehicle itself.

Q All right. So in other words, when the people would be coming in to remove hard items, there would be more of a chance that a fingerprint would be spoiled, would this be substantially the reason?

A Yes, sir.

Q So ordinarily the fingerprint people would go in first, and then followed by the people that would be removing hard evidence?

A Yes, sir.

Q All right. Now during the course of the examination of Special Agent Coler's vehicle, you described it as having various obvious bullet holes or defects to the exterior. Would you describe the interior as you first saw it?

A As I recall, there was quite an amount of items in the vehicle itself, inside the vehicle.

Q And from your examination of the vehicle, did it appear to {3010} have been ransacked by anyone prior to your having gone into it?

A No, sir. It didn't give that appearance, that I noticed.

Q In other words, things were in a relatively orderly fashion, at least as orderly as they could be, having been subjected to a barrage of bullets?

A Yes, sir.

Q All right. Insofar as the examination of Special Agent Williams' vehicle, what was your observations when you first examined that vehicle?

A I would say that it -- are you speaking of the interior of the vehicle?

Q The interior, yes.

A I would say that it would -- I guess accurately say it was in disarray.

Q Now, so we can be a little more specific, and I think you have already indicated that you looked at the vehicle up at Tent City; and I would call your attention to a map which has been numbered Exhibit 71, and indicating the designation on the map, "Special Agent Williams' vehicle," would that be the approximate location as best you can recall where you examined that vehicle?

A Yes, sir. As I recall, it was in a clearing just above the area known as Tent City.

Q All right. Insofar as your examination of Special Agent Williams' vehicle at that time, when your examination was made, {3011} did you observe things of a personal nature which would normally be associated with the owner of the vehicle?

A I observed a suitcase containing clothing.

Q All right. What about -- for instance, were there any boxes of ammunition found that you would ordinarily expect an FBI Agent to be carrying, if you recall?

A As I recall, offhand I don't recall seeing any.

Q All right. Were there other items which -- that I would generally classify as items of value, which you saw in the vehicle at the time you

searched it?

A No, sir. I don't think that you would consider the things that I observed of value.

Q All right. Insofar as Special Agent Coler's vehicle, would you make the same observation or a different observation?

A I would say a different observation.

Q And will you explain that from the standpoint of what types of things you found in Special Agent Coler's vehicle that you would consider being things of value?

A Well, for one that strikes my recollection was a wallet containing money.

Q All right. Were there any firearms -- excuse me, I didn't mean to cut you off -- were any firearms found in Special Agent Coler's vehicle?

A Yes, sir.

Q And do you recall generally what type this was and where {3012} it was located?

A I don't recall just where it was located, but I do recall that it was a handgun.

Q O.k. and were there any boxes of live ammunition found which would normally be expected to be found in a law enforcement officer's vehicle?

A Yes, sir. There was quite a number of pieces of ammunition in the automobile.

Q Getting down more specifically to your examination of Special Agent Coler's vehicle, were any shell casings found by you and removed from the vehicle as evidence?

A Yes, sir, there were.

Q And I would hand you, first of all, Exhibit No. 34-B, and ask if that's an item that you had seen before and can identify?

A (Examining) Yes, sir. This was one of the casings that recovered from the automobile.

Q And where was that recovered from?

A This was recovered from the trunk of the automobile.

Q And so the record is clear, what date was that found?

A 6-29-75.

Q And there is a tag contained within the exhibit, is there not?

A Yes, sir.

Q And in whose handwriting is that tag made out?

A This is in my handwriting and also my initials appear on {3013} the tag.

Q And what did you do with that exhibit after you found it?

A We processed it for -- examined it for latent prints which there were none.

Q You found no latent prints on it?

A No, sir, I did not.

Q O.k. Then what did you do with it?

A The items were turned over to Cortlandt Cunningham of our laboratory.

Q Now, Cortlandt Cunningham is the gentleman that you have testified about earlier, he was at the scene and started his examination immediately after yours, is that correct?

A Yes, sir, that's correct.

MR. CROOKS: I offer Exhibit 34-B.

(Counsel examine document.)

MR. LOWE: May I have a moment, your Honor?

THE COURT: You may.

(Counsel examine document.)

MR. LOWE: May we approach the side bar?

THE COURT: You may.

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

MR. LOWE: There were some discussions that have been had.

(Counsel confer.)

{3014}

MR. LOWE: My concern and Mr. Taikeff, I think, talked with Mr. Hultman and maybe there is some light he can shed on the subject. I will describe my concern.

My concern is that this is being testified to by this I witness as having been found on June 29th, three days after the incident, and there have been some discussions back and forth, and I would like on this 34-B which was allegedly found in Coler's trunk -- they have just offered it, and I am raising the issue that Mr. Lodge has just testified that he

personally found it on June 29, 1975, three days after the shooting incident, when the vehicle was impounded, wherever it was, Hot Springs, I think it was?

MR. CROOKS: Right.

MR. LOWE: Now, this brings us back to a point that we had discussed preliminarily with opposing counsel on one other occasion, perhaps before the Court, I am not clear; and that is that there has been no nexus shown in evidence at this point between June 29 and its being found in the trunk of Coler's car, and the condition -- where, the location it might have been found on June 26 when the incident occurred and the officers came through the area and secured the crime scene; unless there is a stipulation of some sort, that a proper foundation has not been laid -- I am unaware of any such stipulation but there was some {3015} discussions about this earlier; and I think at this point we have to deal with that question because my objection would be on the grounds that no foundation has been laid to show that this cartridge was in Coler's trunk at the time of the shoot-out or immediately thereafter; and until and unless such evidence is adduced, then an improper foundation exists.

Now, does that key you to the other discussions we had with Mr. Hultman, perhaps with Mr. Sikma, with Mr. Crooks earlier?

MR. CROOKS: Your Honor, I might respond to this. It has been our clear understanding from the very start that we need not account for these vehicles that counsel has stipulated that the vehicles -- if we went to the trouble to prove them -- were impounded from the scene and locked up in a secure area and so forth. I have never understood that to be the question.

Counsel has stated to us on numerous occasions that that was not an issue, and that it would not be raised. Counsel has now apparently -- Mr. Lowe apparently is now raising a point which they have already stipulated with us in person on numerous occasions.

If Mr. Lowe wishes to nickel and dime this issue, we can go back and produce all the people that cared for that car and introduce it, but that was clearly stipulated as {3016} being not an issue in this lawsuit, that those vehicles were in a secured position.

MR. LOWE: Judge, this is a piece of the daily record of this trial,

Page 2211, which I have extracted when I specifically -- and I made a big point of saying that we were not stipulating in any way the chain of 34-B -- and I anticipated it back then, and here we are now -- on the fact that we do not stipulate any part of the chain in view of this problem on the affidavit; and I think that was certainly true back then, and I think it supports the lack of foundation at the present time.

MR. CROOKS: Well, just if I could have one second to get our written stipulation.

Your Honor, during the course of the discovery we went through all of the exhibits; and Mr. Taikeff or Mr. Lowe in his own hand made out a list of those on which they were not stipulating the chain of custody, and clearly designated six items. This was not a listed item, and counsel, there has been no question from the very start that insofar as Mr. Taikeff, at least, is concerned, that we are not going to have to bring in the Sheriff, the ambulance drivers, the garage towers, and everyone else to account for these vehicles being in the same condition; and if counsel is going back on their stipulation, then I suppose we are going to have to produce new witnesses. I {3017} suppose it is as simple as that.

MR. TAIKEFF: I just want to respond only to the extent that what Mr. Crooks said concerned my pre-trial activities, and that is to say, that Mr. Crooks may not have been at the side bar the other day when Mr. Hultman and I were addressing the Court in this connection. But to simply summarize it and to perhaps refresh the Court's recollection, the understanding was that the Government had an adequate and proper chain of custody, body of evidence, and on their representation we agreed. In the course of the trial, as might be expect, a number of revelations were made which required us, in our role as advocates for the Defendant, if you will, to withdraw as to a limited number of items where there was a solid indication that we should. That doesn't mean to say that the Government, in telling us that there were no problems, acted in bad faith; and it doesn't mean that we, in recognizing one or two or three exceptions, are acting in bad faith.

I was under the impression that Mr. Hultman and the Court and I were in essential agreement about this. This appears to be one of those things.

MR. CROOKS: Well, your Honor, as far as we are concerned, this shell

casing was found as testified by this witness in this vehicle. It seems to me that in and {3018} of itself is enough to put it into evidence.

Counsel has now stated apparently that he has some reason to believe -- they apparently have some reason to believe that we planted the shell casing and I put them to their proof. If counsel is suggesting that the United States planted the shell casing that that is a just reason for backing out of that stipulation, then I submit that they should offer some evidence of that rather than just stating to the Court that because they now feel it is damaging evidence, that the stipulation which was clearly understood by all counsel would not -- would be binding.

Now, if counsel has some reason to believe that there is some evidence that that shell casing was planted and was not there on the 26th, then we suggest that they should come forward with their proof rather than merely saying that, "We feel that now, because the shell casing is extremely damaging, we should go back on our stipulation."

MR. LOWE: Judge, that is not a correct statement of the situation, and the other day I took great pains to anticipate the possibility that the Government would need to call additional witnesses. The record, Pages in the record, 2210 and 2211, show the fact that the 3500 material which I had not seen when we entered into the stipulation was the affidavit of Mr. Cunningham which raised a serious question as to the origin of this round, where it was {3019} found, when it got there and I put it in the record. That's the document, Xerox copy of the transcript you have in front of you, as to Exhibit 34-A, and B. We simply cannot stipulate as to the chain in view of this affidavit

Now, that doesn't mean that the Government is not allowed or can't prove that there is a chain; but this round is irrelevant unless it is shown that it was present in the car on June 26th; and until and unless they show a chain from June 26th, where the car was down there where the agents were killed, and connect it up with the round that is found on June 29th, they have not laid a proper foundation.

We put them on very clear notice. I think your Honor knew that we did that. I don't think they can be heard now to claim any surprise. That was on the 30th of March which was almost a week ago, and we made it quite clear that we weren't going to stipulate as to any chain in 34-B. Here

we are.

MR. CROOKS: The further discussion which counsel is talking about here was a question at the bench. However counsel well recalls a very irate conversation between myself, Mr. Sikma and Mr. Lowe immediately following that. Shortly thereafter we talked to Mr. Taikeff, and Mr. Taikeff assured us that there was in fact no problem. That's the state of the record. {3020}

MR. HULTMAN: In light of the fact two counsel have commented, I want to make one comment; and that is, your Honor, we stand on the proposition that the evidence right now is sufficient, that a foundation has been laid for the entrance of this regardless of what stipulations or anything may have been.

(Counsel confer.)

THE COURT: Well, I want to examine the record more fully. Are Mr. Taikeff's comments on the record?

MR. CROOKS: No, your Honor. Mr. Taikeff's comments were after the irate conversation with Mr. Lowe. Mr. Taikeff came over to our table and said, "Your understanding as to the agreement is in accord with mine, and there is no problem," and we assumed that concluded the issue. That was right at our counsel table, and it was right after this conversation at the bench.

MR. SIKMA: There are two chains of custody we are concerned with. One is the chain on this piece of evidence from the time it goes to the trunk into Washington, D.C., into the lab. The other chain is really the chain of custody of the vehicle itself, when the vehicle is found down at the scene, they close the trunk lid and they haul -- the wrecker comes in and hauls it away somewhere else. We had a wrecker driver, agents, the people who handled the impound and so forth, and my understanding has always {3021} been that we didn't have to call those witnesses, and that's what I understand.

MR. TAIKEFF: Could I confer with Mr. Lowe about that?

MR. SIKMA: That's what I understood him to say to me even after this.

(Counsel confer.)

MR. LOWE: The state of the record is clear in the defense camp,

and I can state what our understanding is. I believe this is what I stated the other day to Mr. Sikma, perhaps Mr. Crooks and Mr. Hultman. It is what Mr. Taikeff understood, he acknowledged: That we are willing to stipulate if there be an offer of proof of some kind, we will stipulate to the offer of proof, I presume, as to the wrecker operators that towed the car and put it in the compound, BIA officers who locked it up or sealed it up or whatever they did with it in the compound, BIA officers who will testify that it was not unlocked until Special Agent Lodge or Cunningham. They broke the seals, and will stipulate the testimony about what was done with the seals, that they were broken by the officer and kept or something, or they are in existence somewhere; and stipulate that at that point the BIA officer gave access to Special Agent Lodge or Special Agent Cunningham, whichever -- I guess it was Lodge first - we have no dispute with stipulating that on an offer of {3022} proof.

What we are certainly not willing to stipulate to is what happened from the time of 11:50 a.m., on June 26th, 1975, through the time that the wrecker operator hooked up the car and pulled it away; and that's the only part of the thing that we have been indicating and even as to that if they will make an offer of proof, it is possible we can stipulate to that. We don't know what the offer of proof will be, and we are not prepared to stipulate blindly, just generally, as to custody or generally as to foundation; and I think that's clear in the record, that we said could not do that generally; but I told Mr. Sikma if he would tell us what the chain was and what the people would testify, I was sure we could stipulate as to what their expected testimony will be so we wouldn't have to call probably a procession of witnesses which would take a lot of time.

That's what Mr. Taikeff understood also. There was no problem, we would stipulate to these people along the line we stated, if they would make an offer of proof to us on which we could base a stipulation.

MR. CROOKS: No. 1, everything Mr. Lowe just said is completely irrelevant. We have more than an adequate foundation right now to put the exhibit in. The testimony has been the thing was locked up in the garage. He {3023} testified he came and examined the vehicle and found the shell casing. That's all the foundation we need.

If counsel wishes to cross examine, to imply something different,

that's their business; but there is more than adequate foundation right now to produce that exhibit, and I fail to see what counsel is talking about.

I certainly wish that we could resurrect Jack Coler and Ron Williams who are dead to say how the shell casing got into the trunk. We don't have anybody other than their client who knows exactly how that shell casing got into the trunk. That's exactly what I am saying, counsel is attempting to nickel and dime an issue which he hasn't got a good objection to to start with.

This man testified he found the casing. That ends the inquiry. If that shell casing was found a month later, that goes to the weight, not to the admissibility of this evidence.

MR. LOWE: He didn't find it at the crime scene, it was found 12 miles away. That's not relevant unless you can show it was at the crime scene at some point.

THE COURT: I cannot from my recollection recall what evidence you have in the record at this time as to the chain of custody of that Coler automobile from the time that it was first examined.

MR. CROOKS: All we have, your Honor, is general {3024} testimony that the vehicles were towed to Hot Springs and locked up, and I don't think we need anything more than that.

We had understood, as I said before, that that was not going to be an issue. Counsel clearly led us to understand that that was not an issue, even after this conversation. Mr. Taikeff informed us, "That's not an issue, we aren't raising that," and now Mr. Lowe --

MR. TAIKEFF: (Interrupting) We are not raising that now, are we?

Mr. CROOKS: Mr. Lowe is now raising a technical objection to something that counsel has backed off on before this trial started, and even with that, the objection goes to the weight, not to the admissibility of this exhibit

THE COURT: What witnesses is it going to be necessary for you to call to show the chain of possession?

MR. CROOKS: I don't know exactly, your Honor, probably five, six.

Mr. LOWE: We will probably stipulate five of them. I have indicated we will stipulate as to what most of those people will say if they will

tell us who they are and what their expected testimony will be. We are not saying we won't. It may be we can stipulate the entire chain. All I asked Mr. Sikma was what the chain was.

THE COURT: There is the statement in the record, {3025} Page 2211. Any conversation you may have had with Mr. Taikeff after that apparently did not get into the record.

MR. TAIKEFF: Your Honor, I don't think the record should indicate that we might be taking advantage of an off-the-record conversation because, quite frankly, I am prepared and do live up to my off-the-record conversations to the same extent that I live up to my on-the-record conversations.

I don't think Mr. Lowe say that what I indicated to the Government was not a problem, it is in fact the problem. I told counsel -- I don't remember how many of them, but it was at least Mr. Hultman and probably all three Government counsel -- that from the time the vehicle was picked up until such time as the FBI Agent who found the shell was there, we would be prepared to stipulate that if certain people were called, they would say thus and such, and we would not challenge them in that regard.

I hope your Honor realizes that Mr. Lowe has said here and the position he has taken is not inconsistent with my assurance to the Government of those facts.

THE COURT: Well, it seems to me then it is up to the Government to disclose just exactly what the chain of possession was.

MR. CROOKS: We have already done that, your Honor. Counsel knows full well what the chain is.

{3026}

THE COURT: They have indicated that --

MR. CROOKS: (Interrupting) Your Honor, Mr. Beinner spent several weeks going over chain problems, any questions that arose; and I assume that this was one of the issues covered.

MR. TAIKEFF: It was not specifically.

MR. CROOKS: They didn't ask.

MR. LOWE: Judge, this has just come up. All we ask is they sit down and make a notation, just a one sentence as to each witness and what he would say. We are not talking about an elaborate process.

MR. CROOKS: If that's what counsel wishes, we will do that.

MR. LOWE: That's all we need.

THE COURT: For the record it is necessary it be done because apparently this is considered -- just a moment -- apparently this is considered a critical piece of evidence; and I think you are leaving a big hole in the record the way it is.

MR. CROOKS: Well, your Honor, I don't think that this evidence can go into -- this piece of evidence is entitled to go into evidence even without that. If we have to do that to shore it up as far as weight, that's another thing; but this piece of evidence was found by this man. He just testified to that under oath. The {3027} assumption is that the evidence was where he found it at the tine the vehicle was gone in there.

THE COURT: The inference might arise, but then again it might not, because there is no evidence in the record as to who closed down the trunk when it was closed down, specifically how the vehicle was transported, whether or not the trunk was sealed.

MR. CROOKS: Well, your Honor, I can finish with the rest of the examination and prepare something on this over the evening because I can't do it off the top of my head.

Mr. LOWE: That's fine.

MR. CROOKS: We have the thing ready, and we can do it.

MR. LOWE: We can get together with you the first thing in the morning, 8:30 or something. I am sure we will have no trouble in working out a stipulation.

THE COURT: I think the counsel should get together this evening in view of this understanding and see.

MR. CROOKS: We are prepared to do it. We would have been prepared to do it at the very start, if this kind of a nickel and dime objection hadn't been raised. We will be prepared to do it this evening.

MR. LOWE: We made it clear on the record. We can't do any more than that.

THE COURT: I think the word of the parties is clear on the record.

MR. LOWE: Thank you, your Honor.

{3028}

(Whereupon, the following proceedings were had in the courtroom and

presence of the jury:)

Q (By Mr. Crooks) Mr. Lodge, insofar as your examination of the various vehicles which were involved in this case did you in fact raise or determine the presence of any fingerprints?

A Yes, sir, I did.

Q And on which vehicles did you raise fingerprints of useful value?

A On four vehicles.

Q And which were those?

A The two automobiles assigned to Special Agent Williams and Coler, and a 1966 Chevrolet Suburban van and a 1967 Ford Galaxie.

Q All right. First of all I'd like to go to the vehicle of Special Agent Williams. I hand you a picture of a vehicle which is marked as 9-A and ask if that is a photograph of the vehicle you're discussing?

A Yes, sir.

Q All right. Did you examine that vehicle, or you've already indicated you examined that vehicle for fingerprints. Did you find a fingerprint on the vehicle which was of useful value?

A Yes, sir, there were several.

Q And where did you locate the fingerprints that you did locate?

A One fingerprint was, I developed on the inside door release handle on the driver's side.

{3029}

Q All right.

A Of the vehicle.

Q I would hand you a card marked Exhibit --

MR. LOWE: May we approach the bench, Your Honor, for a moment?

THE COURT: You may.

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

MR. LOWE: When Mr. Douglas testified about Government Exhibit 3, which is the fingerprint card of Mr. Robideau, am I right about the number?

MR. CROOKS: Yes.

MR. LOWE: He testified he took that on November 11, 1976. Mr. Ellison raised the question he did not believe we have ever received from the Government any copies of laboratory reports of fingerprint analysis or anything of that nature after November 11, 1976. I had him go and look

specifically, and to our knowledge we have never received any such disclosure of scientific reports.

It's conceivable that the Government would have a copy with our initials on it, or would produce a copy that they'd disclosed to us, but at this point as best as we can determine we have no indication that the Government ever compared Government Exhibit 3 with anything and made an analysis. And we object to any reference to Government Exhibit 3 for analysis {3030} purposes if they have not disclosed to us any such written reports.

And I presume that there is a report if this witness is going to testify to it. Now, I stand to be corrected, but that's the way we understand it at this point.

MR. CROOKS: Your Honor, with regard to this print, with regard to this fingerprint, Your Honor, the reason that this particular card is used was because Mr. Jacobs, who originally was going to introduce that, he had previously used that of Mr. Robideau. Inadvertently through no fault of anybody's shows up on jury duty and was sitting there and we obviously could not use Mr. Jacob's. So we used Mr. Douglas's card instead.

Counsel has been furnished with the examination of Mr. Robideau's prints and comparisons with the print beforehand. If counsel wishes, well, of this witness to compare Exhibit 3 with the card of the report that he had furnished them and make an examination right on the stand, we're prepared to do that if counsel wishes that done. But this is Mr. Robideau's print. Counsel's been furnished with that report a long time ago.

The only reason we're changing cards is because the inadvertent error in getting Mr. Jacobs, who originally was going to be the witness, is servicing the jury, or with the jury.

{3031}

THE COURT: Is that the marshal, deputy marshal?

MR. CROOKS: Yes. Deputy marshall Jacobs who appeared for jury duty. And we obviously could not use him as a witness, so we got Mr. Douglas up with a different card. And it's the same prints of Mr. Robideau, and we're prepared to have this witness make an examination of the two different cards, tie them together as being Robideau's prints, and then we'll ask him for his opinion.

MR. LOWE: Well, do I understand that this witness has compared Government Exhibit 3 with latent prints taken in place of Mr. Robideau's?

MR. CROOKS: Yes. That's exactly what he's going to say.

MR. LOWE: Am I correct in assuming that he has written reports of those comparisons?

MR. CROOKS: John, what are you talking about?

MR. LOWE: Does he have a --

MR. CROOKS: He's comparing Robideau's records. He found Robideau's prints with the prints found on the door handle.

MR. LOWE: Does he have a report?

MR. CROOKS: They're the exact same prints that he previously used in a report. If you want him to make an examination on the stand and say that, I'll be more than happy to do it.

{3032}

MR. LOWE: Do you understand my question? Do you understand the question I asked?

MR. CROOKS: Yes, I understood your question.

MR. LOWE: Did he make a comparison of Government Exhibit 3 with the other latents and prepare a report on it?

MR. CROOKS: He didn't prepare a report.

MR. LOWE: He has never prepared a report on it?

MR. CROOKS: He could take a look at it in two seconds and tell you it's the same prints.

MR. LOWE: Your Honor, I ask that counsel stop speaking so loudly and in front of the jury.

THE COURT: Hold it down.

MR. LOWE: As I understand it he is going to now compare 3 with latents, or is he going to report that in the past at some time he compared Exhibit 3 with latents and made an analysis?

MR. CROOKS: He's going to testify that the print found on the door handle of the car was one of the prints contained on this card.

MR. LOWE: On the basis of an analysis now or on the basis of an analysis that he has made in the past before coming here to Fargo?

MR. CROOKS: Well, we can do it either way.

MR. LOWE: Well, has he made it in the past?

{3033}

MR. CROOKS: Well, of course he has.

MR. LOWE: Then there must be a report, isn't there?

MR. CROOKS: He did this with comparison in testimony when we had to switch the cards.

MR. LOWE: Well, is there a written report?

MR. CROOKS: No, there's no written report.

MR. LOWE: That was my question. If you had just answered my question we would have been away from here eight minutes ago.

If there are no written reports I don't think there's any objection to them raising it. If there is a written report we'll find out about it. That's all I ask.

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

Q (By Mr. Crooks) Handing you again Exhibit No. 3. You testified earlier that you raised a print off of the door handle of Special Agent Williams' car. I hand you Exhibit No. 3 and ask if that is a fingerprint card which, with which you have made comparison?

A Yes, sir.

Q All right. And insofar as the examination of Special Agent Williams' car and the finding of the print did you find any comparabilities between that print and of the prints contained upon Exhibit No. 3?

A Yes, sir. I found that the latent that I developed on the {3034} door handle inside of the automobile and the inked fingerprint appearing on this fingerprint card marked Exhibit 3 and bearing the name Robert Eugene Robideau were made by one and the same individual.

Q Now, I would ask you did you make a similar comparison with another card also purportedly made by Mr. Robideau previous to the card that you have before you No. 3?

A Yes, sir.

MR. LOWE: Objection, Your Honor, improper foundation. Unless that card has been identified and proper foundation is laid it would be improper to ask any questions about it.

THE COURT: Sustained.

Q (By Mr. Crooks) Well, have you prepared a written report as to

your conclusions pertaining to this specific card, Exhibit No. 3?

A No, sir, I haven't.

Q And why, what was the reason for that if you know?

A Well, the comparison was made previously. I compared this against another card and, but as far as why there wasn't any formal report after the comparison with this print, why I don't know.

Q Well, was the comparison done relatively recently at the request of our office?

A Yes, sir.

Q And the card that you had originally used, did you make a {3035} comparison between that and Exhibit No. 3?

A Yes, sir, I did.

Q All right. Now, insofar as your comparison of the print found on the door handle and the card you have before you what is your opinion as to the comparability?

A Well, do you mean as far as the identification?

Q Yes.

A There's no doubt in my mind whatsoever.

Q And what is the comparison, what print on Exhibit No. 3 or block was, or did you find comparable?

A The left thumb, or the number 6 finger block.

Q All right. Insofar as your examination, using Exhibit No. 3 again, did you also make an examination of the contents of Exhibit 47-A?

A Yes, sir, I did.

Q and did you find, or did you compare the prints found by yourself in Exhibit 67-A -- or 47-A, excuse me, with Exhibit 3?

A Yes, sir, I did.

Q And did you find any of them comparable?

A Yes, sir, I did.

Q And did you form an opinion as to whose fingerprints were contained and found on some of the prints found at least on Exhibit 47-A?

A Yes, sir.

Q And whose would those be?

{3036}

A The latent prints developed on Exhibit 47-A and the inked

fingerprints appearing on this fingerprint card, Exhibit No. 3 bearing the name Robert Eugene Robideau were made by one and the same individual.

Q Do you recall how many prints you found in the Exhibit 47-A which were comparably with Mr. Robideau's prints?

{3037}

A Offhand not exactly. I have that in my notes if you care for me to refer to them.

Q If you would, please.

A There were a total of 63 fingerprints and 28 palm prints identified with the prints of Robert Eugene Robideau.

MR. CROOKS: Your Honor, at this time the United States will also offer into evidence pursuant to stipulation Exhibit No. 48.

MR. LOWE: I believe we have entered into stipulation on that, Your Honor.

MR. CROOKS: Your Honor, at this time I'd like to read the part of the file stipulation that pertains to this exhibit. "It is hereby stipulated and agreed by and between the parties that if Special Agent Earl J. Webb were called he would testify that on June 27, 1975 this exhibit was found in a white wall type tent near the scene where the bodies of FBI Agents Coler and Williams were discovered on June 26, 1975;

that said exhibit has been subjected to chemical analysis for purposes of raising latent fingerprints. Further foundation is waived.

Q (By Mr. Crooks) I now hand you Exhibit No. 48 --

THE COURT: 48 is received in evidence.

Q (By Mr. Crooks) -- and ask you if that is an exhibit with which you've made comparisons of the fingerprints contained on {3038} Exhibit 3?

A Yes, sir.

Q Insofar as the prints that you have found, or some of the prints, do you find any of them in any way comparable to the fingerprints contained on Exhibit 3?

A Yes, sir.

Q And what conclusions do you draw from that?

A I found that 50 fingerprints and one palm print developed on Exhibit 48 and the ink fingerprints appearing on this fingerprint card marked

Exhibit 3 and bearing the name Robert Eugene Robideau were made by one and the same individual.

MR. CROOKS: Your Honor, if it please the Court, the United States will now offer into evidence Exhibit 43 pursuant to stipulation, being the latent, inked fingerprints of Darrell Butler.

MR. LOWE: Are you going to read the stipulation, Mr. Crooks? I don't know whether you were planning to.

MR. CROOKS: The stipulation being on the paragraph 18 of the written stipulation. "Government's Exhibit 43, fingerprint care of Darrell Dean Butler taken, Rapid City, South Dakota, by Deputy United States Marshall Ben B. Mahoney on December 1, 1975."

MR. LOWE: Subject to the same deletion of material which doesn't relate to this trial as was done with Exhibit 3, there is no objection, Your Honor. I trust, Mr. Crooks, just {3039} take out this information which doesn't pertain.

MR. CROOKS: I would hand the exhibit to the clerk. The government is willing to delete a certain descriptive data which is contained on the exhibit.

THE COURT: Exhibit 43 is received.

MR. CROOKS: Let the record show that the clerk has deleted the material indicated.

Q (By Mr. Crooks) I now hand you Exhibit No. 43 and ask if that is a, or an exhibit that you have seen before?

A Yes, sir, it is.

Q And what is it?

A Pardon?

Q What is it?

A It's a, Exhibit 43 is an ink fingerprint card bearing the name Darrell Dean Butler.

Q I hand you Exhibit No. 13B and ask if that is one of the car that you examined during your fingerprint examination?

A Yes, sir, it is.

Q And did you develop any fingerprints on that vehicle?

A Yes, sir, I did.

Q And did you develop any fingerprints which correspond in any way

to Exhibit No. 43?

A Yes, sir, I did.

MR. LOWE: Mr. Crooks, could you state for the benefit of the jury what the car is. I don't think we {3040} remember what the car is on that exhibit.

MR. CROOKS: That's the 1967 Galaxie Ford.

MR. LOWE: Thank you.

Q (By Mr. Crooks) Did you make a comparison between the prints found and the prints contained on Exhibit No. 43, the Butler print card?

A Yes, sir.

Q And what opinion, if any, did you draw following your examination?

A I found that one latent fingerprint, developed on the rear view mirror of this 1967 Ford Galaxie and the ink fingerprint appearing in the No. 7 block or the left index finger of this fingerprint card marked Exhibit 43 bearing the name Darrel Dean Butler was made by one and the same individual.

MR. CROOKS: Your Honor, the United States would now offer by stipulation Exhibit No. 6, GUN OWNERS BOOK OF CARE, REPAIR AND IMPROVEMENTS. 46A, I'm sorry.

The stipulation being as follows: "It is hereby stipulated and agreed by parties that on June 27, 1975 Special Agent, Special FBI Agent Earl J. Webb found this exhibit in the tent near the scene where the bodies of FBI agents Coler and Williams were discovered on June 26, 1975;

that said exhibit in in substantially the same condition as found but has been subjected to clinical treatment {3041} for the purpose of raising latent fingerprints. Further foundation is waived."

MR. LOWE: No objection, Your Honor.

THE COURT: 46A is received.

Q (By Mr. Crooks) I would ask you whether or not during the course of your fingerprint examination you examined No. 46A for the purpose of raising fingerprints?

A Yes, sir, I did.

Q And were you successful?

A Yes, sir.

Q And what fingerprints if any did you raise, or how many, excuse

me?

A There were a total of 19 fingerprints developed on Exhibit 46A.

Q And did you make a comparison of any of those fingerprints with the fingerprint card that you previously referred to, Exhibit 43 being the fingerprint card of Darrell Dino Butler?

A Yes, sir.

Q And what were the results, if any, of you comparison?

A I found that two of the fingerprints developed on 46A and the inked fingerprint appearing in the No. 6 block or the left thumb of this fingerprint card marked Exhibit 43 and bearing the name Darrell Dean Butler were made by one and the same individuals.

Q During the course of your examination for fingerprints did you utilize either the original or a copy of Exhibit 38A?

{3042}

A Yes, sir, I did.

Q And did you make certain fingerprint comparisons utilizing at card?

A Yes, sir.

Q I'd first --

THE COURT: We've reached the hour of 5:00 o'clock, Mr. Crooks.

MR. CROOKS: I would think this would probably be as good a place to break as any, Your Honor. I can't finish up within a few minutes.

THE COURT: Very well. Court is in recess until 9:00 o'clock tomorrow morning.

(Whereupon, at 5:00 o'clock, P.M. a recess was taken until 9:00 o'clock, A.M. on April 5, 1955.)