VOLUME XV

{3043}

TUESDAY MORNING SESSION

April 5, 1977

Pursuant to adjournment as aforesaid, at 9:00 o'clock, a.m., on Tuesday, April 5, 1977, the Court met, present and presiding as before; and the trial proceeded as follows, the Defendant being present in person:

THE COURT: Have counsel resolved the matter of 34-B?

MR. LOWE: I believe we have, your Honor. I have just been given a written stipulation which appears to be in order. I would like to take it up with Mr. Taikeff. I don't think there would be any problem.

MR. CROOKS: Because it involves the witness on the stand, I would like to delay until this is taken care of.

(Counsel examine document and confer.)

MR. TAIKEFF: Do you have the original?

MR. CROOKS: That is the original, I think, and two copies.

MR. TAIKEFF: This is the original?

MR. CROOKS: Yes.

(Counsel confer.)

MR. TAIKEFF: I have signed the stipulation, your Honor, at this time. Mr. Peltier is looking it over, and he is about to sign it.

While that's occurring, perhaps I could take a moment of the Court's time with three minor housekeeping matters.

{3044}

THE COURT: Very well.

MR. TAIKEFF: I understand the Court has obtained the services of a Lakota English interpreter, and I am in need of the interpreter for interviewing a witness. I am wondering whether it is possible to have that interpreter available during the luncheon recess so that I can use the interpreter's services for about a half hour or 45 minutes.

THE COURT: Mr. Suby has made the arrangements for the interpreter. Mr. Suby, I do not believe the interpreter lives here, does he?

MR. SUBY: He does not. He lives in Wakpala, South Dakota. He would be available only on about 24 hours' notice.

MR. TAIKEFF: All right, thank you.

Last evening Mr. Lowe --

THE COURT: (Interrupting) Are you giving notice that you want him?

MR. TAIKEFF: No. I was sort of withdrawing the request because I don't know whether that witness will be available tomorrow and would not want to bring somebody up from South Dakota until I had a very definite arrangement in mind.

THE COURT: Very well.

MR. TAIKEFF: Then I will renew the request.

As I started saying, last night Mr. Lowe and I {3045} interviewed Jimmy Eagle at the Clay County Law Enforcement Center. I don't know what the intentions are with respect to keeping him here for the next several days. He may very well be called by the defense within the next two or three days.

Since we are having certain problems about residents of the Reservation getting here, we might have to take him out of turn in order to keep our case going uninterrupted so we would request that he not be sent to any other facility except one that is very close so that he would be available on one or two hours' notice.

And the last item is to indicate that we will in fact be calling Myrtle Poor Bear, and we wish to have the Marshal's Service notified by or through the Court to make her available to be called within the next couple of days.

We assume the Government is going to rest today, and our efforts are orientated around that assumption.

MR. ELLISON: Your Honor, I would like to bring something to the Court's attention for information purposes.

I spoke to Deputy Marshal Bruce Jacob yesterday afternoon in Rapid City -- then you have the information, your Honor.

MR. TAIKEFF: It was the thing that I advised the Court at the side bar concerning the transportation problems because of the snowbanks. {3046}

THE COURT: All right. There is one other matter before the Court here, and that is the motion of the United States for compliance with Rule 17(b), Federal Rules of Criminal Procedure relative to the calling of witnesses by the Defendant.

MR. TAIKEFF: Your Honor, I am sorry to interrupt, but I think we have resolved that informally.

I have divided the agents whom we might call into two categories, those that we are virtually certain of calling -- and Mr. Hultman has informed me that they will be brought here either tomorrow, or those that can't make it tomorrow will be here Thursday.

I have given him a second list of those that we might call but we could not say with any strong degree of certainty, so they are going to remain on call but will not be brought to Fargo; and he has agreed to comply with that request, so I think the matter is resolved.

THE COURT: Thank you. Then there is no need -- well, I have another matter.

Mr. Hultman, are you in agreement with that?

MR. HULTMAN: Yes, that is correct, your Honor.

The rest of my motion though I would hope would still be in the same posture, with reference one, to such witnesses as -- or possible witnesses as Mr. Skelly; and two, also I think there are some other matters in terms {3047} of whether or not specific witnesses at a given time -- I think we are probably going to have to meet those issues as any one of them is called with reference to the Rule, but I am in no posture right now because I don't know for certain which ones, other than the seven agents -- six agents and one other person that are definitely going to be called.
{3048}

THE COURT: The Court has authorized the issuance of subpoenas on the certification of defense counsel that a certain witness is necessary for an adequate defense. At this point the Court does not incline to go behind that certification. I think it would involve a lot of time and probably wasted time, and with respect to any individual witness or with respect to the testimony of any witness the Court will, the Court is confronted with motions to quash subpoenas, or if the Court is confronted with objections to testimony on the grounds of relevancy or some other matter the Court will act on it at that time.

MR. HULTMAN: Very good, sir.

THE COURT: Now, one other matter, I have before me a motion for the issuance of a subpoena duces tecum directed to the Oregon State Police

commanding that authorities representative arrive and bring with him or her a complete copy of the Oregon State Police Department report, three pages of which are attached to Appendix A. This matter was referred to in the discussion that was had yesterday morning prior to the jury having been brought in. And I want, I'm wondering if the defense doesn't have all the information required.

MR. TAIKEFF: The answer to Your Honor's inquiry is that we do not. That is a different report. I alluded to that yesterday but --

THE COURT: You alluded to it yesterday. It's typed {3049} this way, it's typed vertically on the sheet of paper instead of horizontally. It seems to contain substantially the same information.

MR. TAIKEFF: No, Your Honor, I believe that is not correct. As I read the report which Your Honor read from there by revealing that we had a copy of the same report, that was a retrospective report written sometime after the 19th of November because it makes reference to events occurring on the 19th of November and going back to the 15th of November.

That is sort of a summary report of all aspects of the Oregon State police activity. The pages which are attached to the subpoena, or the request for the subpoena, are pages which are attached to a 302. And because of the fact that the list seems to be essentially the same as the one in the report which Your Honor read from, and because of the numbering in the upper left-hand corner of those pages, or at least the first of those three pages, we believe that that comes from a report which details the finding of those objects which are contained within that list which is not the case with respect to the report that Your Honor read from.

We think that is a report of activities of the 15th, or at least a portion of it, and that's why we have requested in the subpoena the balance of the report, or the entire report of which those three pages are a part. We believe {3050} that the result will be the production of a document which reflects the detailed activities of the search on the 15th.

THE COURT: Does the United States have any information on this matter?

MR. CROOKS: None whatsoever, Your Honor. I have no idea if there is any other report than Mr. Hanson's. Frankly I did not have even his report prior to it being obtained. The only thing that we used was the version which was reduced in 302 form.

Whether he has an additional report or not I have absolutely no knowledge.

THE COURT: All right. I have one other inquiry to make of counsel. You've had investigators appointed. The evidence has indicated that at least one investigator has made a trip out to Oregon. Was that not, was that matter not checked into by your investigator?

MR. TAIKEFF: Our investigator has no access to police reports. I wish it were otherwise, and that all counsel, both Government and defense, had the same access to Government documents. But it's not the case.

And we have surmised from what we see attached to a certain 302 that indeed there is another report and that the schedules on that as yet unproduced report were probably used as a basis for providing a certain portion of the retrospective report. But we, we have no direct knowledge that there is such {3051} a report. We have very strong indication that there is such a report. Those schedules we believe are that indication.

MR. CROOKS: Your Honor --

MR. TAIKEFF: Our understanding by the way is that all of the weapons were taken out of the mobile home at the same time. The reason we're pursuing this, in case it is unclear to the Court or to Government counsel, is that by way of explaining the absence of the AR-15 from the photograph which showed all the weapons except the AR-15. The agent on the stand said that that weapon was discovered later, or the next day, I don't remember exactly what his testimony was. We believe --

THE COURT: He said it wasn't discovered yet?

MR. TAIKEFF: He said it wasn't discovered yet.

THE COURT: He said it hadn't been found yet.

MR. TAIKEFF: He said it hadn't been found yet. We believe, because of the information that we have, that all the weapons were in one place and they were taken out of the mobile home at the same time.

We further believe that the report which we've asked for will confirm that fact, that they were all discovered at the same time in the mobile home because the three pages which are attached to the request for the subpoena duces tecum list all of the things taken out of the mobile home, and that list includes the AR-15.

{3052}

MR. CROOKS: Well, I might just add, Your Honor, that I don't think that counsel heard the testimony the same way I did. My recollection of the testimony was that Mr. Zeller was very carefully going through the individual items, and there was no mass exit of anything from that mobile home until it had been completely dusted for fingerprints. And that is confirmed by Mr. Hanson's report of which the Court has seen, that at as matter of fact they could not even complete their search the first day because the time had run out and they sealed the matters up and went into it the next day.

The testimony of the witness was simply, was that the AR-15 was not in the picture because it had not yet been found. I don't believe that he seated or even knows exactly when that weapon had been found, and there was no testimony to that effect. But that is I think beside the point. As far as I'm concerned, through the Federal Bureau of Investigation, I will request of Mr. Hanson that he have any additional report. However, I do not want to assume, if the Court is inclined to grant the subpoena, responsibility for getting it there. If the Court wishes to grant the subpoena that's, I think, something within the discretion of the Court. But I will on my own attempt to contact Mr. Hanson and find out if there is any other report; and if there is, have it sent to us and relay it to counsel.

{3053}

But if the Court feels the subpoena is necessary I do not wish to have my representation taken in lieu of the subpoena because that, if they wish to have an actual subpoena and actually bring him in, fine. But I will voluntarily attempt to ascertain if there is another report, and if there is one I will furnish it.

THE COURT: Well, if counsel will go forward on the basis of your representation then I won't issue the subpoena. If they still ask for the subpoena I'll issue the subpoena.

MR. TAIKEFF: We're asking for the subpoena, Your Honor. We feel that we're entitled to have a subpoena issued.

The only reason we have to ask Your Honor is because we have an indigent client. Otherwise it wouldn't be necessary, we'd go to the Clerk's office, prepare the subpoena, deliver it to the marshal and we wouldn't have to

seek the Government's assistance in that regard. We'd much rather save the favor for some other time. When we can't do something via subpoena, we'll ask the Government to help us then.

MR. CROOKS: This is why I stated, Your Honor, I do not wish to have any representation taken by counsel of whatever list they have because I don't guarantee I can guarantee the production of anything else. This is not an agency under the control of the United States. But I will make that attempt, and if I locate such documents subject, I {3054} suppose, to any instructions that I might have from the Oregon State Police, I will make them available to defense counsel. But I do not wish to assume that responsibility in lieu of counsel whatever they wish of the Court.

THE COURT: Very well. Is there anything else to take up?

MR. TAIKEFF: No, Your Honor.

THE COURT: Jury may be brought in.

MR. HULTMAN: Your Honor, we do have just one brief matter.

MR. SIKMA: Your Honor, when the firearms examiner, Mr. Lodge, is on the witness stand he's going to be referring to the weapons over there. I wonder if it would be all right if they would be brought a little bit closer so we wouldn't have to go back and forth across the courtroom. They are numerous firearms there. If we could wheel that stand up a little closer here it would probably be easier for us.

MR. LOWE: In here? We have no objection.

MR. SIKMA: If there's no objection to that we'd appreciate that.

THE COURT: Very well. That will be done.

You may now bring in the jury.

{3055}

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

WINTHROP LODGE,

being previously sworn, testified further as follows:

DIRECT EXAMINATION CONTINUED

BY MR. CROOKS:

Q Mr. Lodge, when we finished yesterday I was asking you about various fingerprints which you had found and I'd like to go back, if I could, for a moment to one of the first fingerprints you testified about and that

being the fingerprint which you identified as having come off of the inside of the door handle of Special Agent Williams' car shown in Exhibit 9A. Now I would like to hand you Exhibit No. 2 and ask if you can identify that exhibit.

A Yes, sir, I can.

Q What is it?

A This is a rubber lift that I use to lift the latent print that I developed on the inside door release handle on this automobile shown in the photograph marked Exhibit 9A.

Q And is that the same fingerprint that you identified as being the latent fingerprint of Robert Robideau as shown by his ink print card, Exhibit No. 3?

A Yes, sir, it is.

MR. CROOKS: The United States will offer Exhibit No. 2.

MR. LOWE: No objection, Your Honor.

{3056}

THE COURT: Exhibit 2 is received.

Q (By Mr. Crooks) Just again with regard to Exhibit No. 2, which fingerprint or which finger, if any, does that print correspond with on Exhibit No. 3?

A It corresponds with the ink fingerprint in the No. 6 finger block for the left thumb.

Q What is your opinion as to the comparability, if any, between those two exhibits?

A There is no doubt in my mind whatsoever.

Q That they are?

A They were made by one and the same individuals.

Q Now I believe as we finished yesterday I was beginning to go into Mr. Peltier's print, prints, and I had shown you Exhibit No. 38A, and was it your testimony that that is an exhibit that you have seen before and are familiar with?

A Yes.

Q Insofar as that exhibit is concerned, did you make various comparisons between the prints contained on Exhibit 38A and various items that you found in or around the tent area?

A Yes, sir.

Q I'd first like to hand you Exhibit No. 12 and ask you if that's a vehicle you've seen before?

A Yes, sir.

Q And where did you first examine that vehicle?

A I examined it at the maintenance compound in Pine Ridge.

{3057}

Q And did you dust that vehicle to determine if any latent fingerprints of value could be found?

A Yes, sir, I did.

Q And in your examination did you examine the rear view mirror of that vehicle?

A Yes, sir, I did.

Q And what if anything did you find?

A I developed a latent print on the back of the rear view mirror that was attached to this vehicle.

Q Now I'd like to hand you Exhibit 38D and ask if you can identify that.

A Yes, sir, I can.

Q And what is it?

A This is a photograph of the list that was used to lift the print, the latent print that was developed on the rear view mirror.

Q And did you make a comparison between that exhibit that I have just shown you and the latent prints contained on 38A?

A Yes, sir, I did.

MR. CROOKS: United States would offer Exhibit 38D.

MR. LOWE: Are you saying E?

MR. CROOKS: D as in dog.

MR. LOWE: No objection, Your Honor.

THE COURT: 38D is received.

{3058}

Q (By Mr. Crooks) 38D now having been received, I hand it to you and ask again if you have made a comparison between 38D which you previously identified as a latent print developed on the rear view mirror of Exhibit No. 12, the red and white van, and ask if you've made a comparison between

that and any of the fingerprints contained on Exhibit 38A which has been previously identified as the fingerprint of Leonard Peltier?

A Yes, sir, I did.

Q And what comparison, if any, did you make?

A I found that the latent fingerprint appearing in this photograph marked Exhibit 38D and the ink fingerprint appearing in the little finger block or the No. 5 block on this fingerprint card bearing the name Leonard Peltier and marked Exhibit 38A were made by one and the same individual.

Q Did you during the course of your examination prepare any charts which would illustrate your findings?

A Yes, sir, I did.

Q I hand you Exhibit No. 42 and ask if you can identify that?

A Yes, sir. These are the charts that I prepared.

{3059}

Q And which exhibits are shown in the chart?

A The one marked --

Q (Interrupting) Well, that's not yet in evidence. I guess you really shouldn't be showing it to the jury, just relate orally if you would.

A Actually there are photographic enlargements of first, the latent print that was developed on the back of the rearview mirror.

Q And what was the number on the print that you just handled?

A That's Exhibit 38-D.

Q O.k.

A And the inked fingerprint appearing on this fingerprint card marked Exhibit 38-A and bearing the name, Leonard Peltier.

Q All right, and was this an exhibit prepared either by yourself or under your direction and control?

A It was prepared by me.

MR. CROOKS: All right. The United States will offer Exhibit 42.

MR. LOWE: No objection, your Honor.

THE COURT: Exhibit 42 is received.

(Plaintiff's Exhibit No. 42, having been previously duly marked for identification, so offered in evidence, was received.)

Q (By Mr. Crooks) Would you now display this to the jury and very briefly describe the manner in which this was prepared {3060} and what

it purports to show; and I would ask you at this time not to go into it specifically, but merely as a general explanation of the exhibit and what it is intended to illustrate?

A Yes, sir.

THE WITNESS: Would you like for me to, your Honor, approach the jury?

THE COURT: You may do it whichever way is most convenient for you.

A These are actually photographic enlargements, as I said, of the inked fingerprint appearing on the fingerprint card; and on your right, a photographic enlargement of a latent fingerprint lifted from the rearview mirror. These red lines and numbers are placed on the cards to indicate the points of identity in each print, the corresponding points.

I might add that there are other points of identity on both of these prints that correspond that I did not put on the card.

Q O.k., thank you.

Now, with regard to Exhibit 38-A, were there other prints that you found which were comparable in any way to any on the print card?

A Yes, sir, there were.

Q And I will first hand you Exhibit No. 46-B and ask if that's something you can identify?

A Yes, it is.

{3061}

Q And what is it?

A This is a photograph of a latent print that was developed on the gun owner's book.

Q All right. I hand you Exhibit No. 46-A which is already in evidence, and ask if this is in fact the gun owner's book that you are referring to?

A (Examining) Yes, sir, it is.

MR. CROOKS: The United States will offer Exhibit 46-B.

MR. LOWE: No objection, your Honor.

THE COURT: Is that "B" as in "Baker"?

MR. CROOKS: Yes, your Honor.

THE COURT: 46-B is received.

(Plaintiff's Exhibit No. 46-B, having been previously duly marked

for identification, so offered in evidence, was received.)

Q (By Mr. Crooks) All right. I now again hand you Exhibit 46-A and 46-B, and would ask you where in the book, if you can locate it, was the fingerprint found which is illustrated in the photograph by 46-B?

A (Examining) Yes, sir. It was developed on this introduction page.

Q Is there a number on it?

A Roman numeral IX.

Q Roman numeral IX, all right.

Insofar as 46-B, did you then make a comparison between {3062} that and 38-A which is the Leonard Peltier fingerprint card?

A Yes, sir, I did.

Q And what, if any, were the results of your examination and comparison?

A I found that the latent print developed on this introduction page and shown in this photograph marked Exhibit 46-B and the inked fingerprint appearing in the right thumb block of this fingerprint card marked Exhibit 38-A and bearing the name, Leonard Peltier, were made by one and the same individual.

Q All right. I would ask you in your utilization of Exhibit 38-A, if you examined Exhibit 47-A?

A (Examining) Yes, sir, I did.

Q And were any prints found on 47-A?

A Yes, sir, there were.

Q Which were in any way comparable to the fingerprints of Leonard Peltier as demonstrated by Exhibit 38-A?

A Yes, sir, there were.

Q I now hand you Exhibit 47-B, and ask if that's something you have seen before?

A (Examining) Yes, sir.

Q And what is it?

A This is a photograph of a latent print developed on Page 159 of the exhibit marked 47-A.

MR. CROOKS: All right. The United States will offer Exhibit 47-B. {3063}

MR. LOWE: No objection.

THE COURT: 47-B is received.

(Plaintiff's Exhibit No. 47-B, having been previously duly marked for identification, so offered in evidence, was received.)

Q (By Mr. Crooks) 47-B now having been received in evidence, did you make a comparison between 47-B which is the latent fingerprint developed on the Sierra Manual, and 38-A which are the known fingerprints of Leonard Peltier?

A Yes, sir, I did.

Q What were your findings, if any?

A I found that the latent fingerprint shown in this -- developed and shown in this photograph marked Exhibit 47-B, and the inked fingerprint appearing in the right thumb block of this fingerprint card marked Exhibit 38-A, and bearing the name, Leonard Peltier, were made by one and the same individual.

Q All right. I now hand you Exhibit No. 45-B, and ask if this is an exhibit which you examined as part of your fingerprint examination?

A Yes, sir, it is.

MR. CROOKS: And for identification, your Honor, I might state to the jury that this has been previously identified as the motor vehicle tax registration form, which by stipulation it has been agreed, has been found in the 1967 Ford Galaxy automobile at Tent City.

{3064}

Q (By Mr. Crooks) Now, insofar as that exhibit, did you make any comparison between it and 38-A, the known fingerprints of Leonard Peltier?

A Yes, I did.

Q And what findings, if any, did you make?

A Could I refer to several of my notes?

Q Surely.

A (Examining) Yes, sir.

Q All right. Would you state what your findings were with regard to Exhibit 45-B as compared with Exhibit 38-A?

A Three latent fingerprints were developed on the South Dakota Vehicle Registration Tax Form; and in comparison, two of the latent fingerprints appearing on this form, or developed on this form, and the inked fingerprint appearing on this fingerprint card in the right thumb

block, Exhibit 38-A, and bearing the name, Leonard Peltier, were made by one and the same individual; and also one latent fingerprint also developed on Exhibit 45-B and the inked fingerprint appearing in the No. 6 block or left thumb block of this fingerprint card marked Government's Exhibit 38-A and bearing the name, Leonard Peltier, were made by one and the same individual.

Q All right. I now hand you Exhibit No. 45-C, and ask if this is something you have likewise seen during the course of your investigation?

A (Examining) Yes, sir, I have.

{3065}

Q All right, and did you develop any latent fingerprints on that document?

A Yes, sir, there was one latent fingerprint developed on Government's Exhibit 45-C.

Q And what was that, what print -- well, did you make a comparison between that print and Exhibit 38-A?

A Yes, sir, I did.

Q And what were the results of your examination?

A I found that the latent fingerprint developed on Government's Exhibit 45-C and the inked fingerprint in the No. 6 finger block or left thumb block of this fingerprint card marked Government's Exhibit 38-A and bearing the name, Leonard Peltier, were made by one and the same individual.

Q All right. I now hand you Exhibit No. 45-D, and ask if that is something you examined for fingerprints during the course of your examination?

A (Examining) Yes, sir.

Q And excuse me, were any latent fingerprints developed on that?

A Yes, sir. Two latent fingerprints were developed on this item marked Government's Exhibit 45-D.

Q And did you make a comparison between those latent fingerprints and the known prints of Leonard Peltier contained in 38-A?

A Yes, sir, I did.

Q And what were the results of your comparison?

{3066}

A I found that the two latent fingerprints developed on Government's

Exhibit 45-D and the inked fingerprints appearing in the No. 9 fingerblock and No. fingerblock on this fingerprint card marked Exhibit 38-A and bearing the name, Leonard Peltier, were made by one and the same individual.

Q All right. I now hand you Exhibit No. 45-E, which prior testimony of Mr. Schumacher indicates were part of the Rice Motors' records as was 45-D, I might add -- I hand you Exhibit 45-E and ask if you examined that document?

A (Examining) Yes, sir, I did.

Q And were any latent fingerprints of value found on that exhibit?

A Yes, sir. There was one latent fingerprint of value developed on this item marked Government's Exhibit 45-E.

Q And did you make a comparison between that and the known fingerprints of Leonard Peltier as are shown on 38-A?

A Yes, sir, I did.

Q And what were the results of your comparison?

A The one latent fingerprint developed on this item marked Government's 45-E and the inked fingerprint appearing in the No. 10 finger block of this fingerprint card marked Government's Exhibit 38-A and bearing the name, Leonard Peltier, were made by one and the same individual.

MR. CROOKS: All right. Now, your Honor, at this time I would hand to the Clerk for filing a stipulation signed {3067} by Mr. Hultman, Mr. Taikeff, Mr. Lowe and Mr. Peltier.

THE COURT: Very well.

(Court examines document.)

MR. CROOKS: Your Honor, at this time I would ask leave of the Court to read that stipulation to the jury.

THE COURT: The stipulation may be read.

MR. CROOKS: The stipulation, omitting the formal parts, is as follows:

It is hereby stipulated and agreed by and between the parties as follows:

One. That Special Agent Jack Coler's Bureau car, a gold colored Chevrolet 400 Biscayne, bearing 1975 Colorado license plates, No. KE-1194, depicted in Government's Exhibit No. 57, was found on June 26, 1975, at the point indicated as Coler's car on Government Exhibit No. 71, by the

following Special Agents of the Federal Bureau of Investigation:

A. Dean Howard Hughes.

B. Ben R. Patty, Jr.

C. Robert K. Taubert.

D. Gerard P. Waring.

E. David F. Price.

F. Donald G. Wiley.

G. J. Gary Adams.

And that if called as witnesses, each of the {3068} aforementioned Agents would testify that to their knowledge nothing was placed in the vehicle by themselves or otherwise which was not in the vehicle at the time it was found.

Two. If called as a witness, Special Agent Donald G. Wiley would testify that he assumed control of Special Agent Coler's car at the scene, and that he remained inside the 1972 Chevrolet Biscayne automobile and that no person came near said automobile until such time as he had closed and locked the doors and trunk of said automobile; and he remained with Special Agent Coler's automobile until Deputy Sheriff Michael Lynn Jenniges, a peace officer employed by the Fall River County, or Fall River Sheriff's office of the State of South Dakota, arrived, accompanied by a tow truck; and that he then delivered custody of said automobile to Deputy Sheriff Jenniges.

Three. That if called as a witness, Deputy Sheriff Michael Lynn Jenniges would testify that he came to the Jumping Bull area with a tow truck and assumed custody of the aforementioned 1972 Chevrolet Biscayne automobile from Special Agent Donald G. Wiley; he was standing beside the same with the doors and trunk closed.

He would further testify that he supervised the hookup of said 1972 Chevrolet Biscayne automobile to the tow truck, and that the same was towed under his control and supervision to the Fall County Jail, Hot Springs, {3069} Springs, South Dakota, where the said 1972 Biscayne automobile was placed in a locked garage owned by Fall River County.

He would further testify that no person had any contact with the interior of said vehicle from the time it was taken into his custody from Special Agent Donald G. Wiley and until the same was delivered and locked

into the aforesaid Fall River County Garage.

He would further testify that after locking the doors of said garage, he applied seals to the exterior of the garage and that said vehicle remained locked in the garage until June 29th, 1975, when the seals were broken and the garage was opened for employees of the Federal Bureau of Investigation who he observed to conduct, or conduct a fingerprint examination of said vehicle.

Four. If called as a witness, William Fisher, 501 South Fifth Street, Hot Springs, South Dakota, would testify that he is a locksmith and that he was called upon to unlock the doors and trunk area of Special Agent Jack Coler's Bureau automobile on June 29th, 1975, to facilitate the fingerprint examination of the same by Winthrop Lodge, a fingerprint specialist of the Federal Bureau of Investigation.

{3070}

MR. CROOKS: Document having been signed by the various parties to this lawsuit.

Q (By Mr. Crooks) Now, Mr. Lodge, I would like to ask you a few additional questions concerning the exhibits which we have started talking about yesterday. First of all Exhibit 34-B which you had previously testified was found in the trunk of Coler's bureau automobile by yourself, insofar as your examination was concerned as you've heard from the stipulation do you recall a locksmith being called?

A Yes, sir.

Q And why was that?

A The vehicle was locked and we had no other way of conducting our examination on the interior of the car until we had the doors unlocked.

Q All right. And when the individual, the locksmith came and unlocked the doors was anybody else, did anybody else enter the vehicle prior to yourself?

A No, sir.

Q Now, when that exhibit was found do you recall whether it was in the first, middle or latter part of your examination? The time sequence in which that exhibit was found, 34-B?

A No, sir, I don't recall just whether it was in the beginning of our examination or at the end of the examination.

Q In any event when the exhibit was found what did you do with it? {3071}

A Well, first of all it was tagged for identification purposes and was later examined for latent prints.

Q All right. Insofar as the examination that you made of that exhibit for latent prints, what results if any did you find or were made?

A There were no latent prints developed on the present, or developed on the cartridge.

Q Now, insofar as the latent print is concerned there are basically different classifications, a print of value and a print not of value; is this correct?

A Yes, sir.

Q And you said, as I understood your testimony, there were no prints of value found. Were there any prints that you could identify of fingerprints which were not of value?

A No, sir. I don't recall any prints at all on the --

Q No prints of any kind?

A Right.

Q All right. Insofar as that exhibit is concerned could you examine the bottom of the exhibit, if you can see through the plastic, and indicate what manufacturer that shell casing came from.

A I'm afraid I would have to take this out of this plastic to, rather difficult to see.

Q Perhaps take it out of the first plastic bag and then maybe you will --

{3072}

A .223, Rem.

Q Those would be the only markings found on the base of the shell casing other than the primer mark?

A Yes, sir.

Q All right. And do you know whether or not Rem stands for Remington Arms Company?

A I just assumed that it did.

Q All right.

MR. CROOKS: United States will re-offer Government's Exhibit No.

34.

MR. LOWE: 34-B?

MR. CROOKS: 34-B, I'm sorry.

MR. LOWE: No objection, Your Honor.

THE COURT: 34-B is received.

MR. LOWE: Subject to cross-examination.

Q (By Mr. Crooks) I would now hand you Exhibit No. 35-G; ask if that is an exhibit you've seen before?

MR. LOWE: Did you say "G"?

MR. CROOKS: G.

A 35-G.

Q (By Mr. Crooks) Right.

A Yes, sir. I did retrieve this.

Q And where have you seen, where did you first see that?

A In the interior of the, of Special Agent Coler's automobile during my examination.

{3073}

Q And from your examination of the shell casing found in the paper bag, or the cellophane bag, what does it appear to be?

A It appears to be a .38 Special cartridge case.

Q And that would be again in the interior of Special Agent Coler's car?

A Yes, sir.

Q So the record's clear.

A Yes, sir.

Q All right.

MR. CROOKS: United States will offer 38 -- or excuse me, 35-G.

MR. LOWE: No objection, Your Honor.

THE COURT: 35-G is received.

Q (By Mr. Crooks) All right. During the course of your examination of the vehicle, Mr. Coler's vehicle in particular, did you prepare contemporaneous notes of any sort?

A Yes, sir, I did.

Q And do you have those with you?

A Yes, sir.

Q Could I see them, please.

I hand you what has now been marked as Government Exhibit No. 180 and ask if you can identify those without going into the details of the contents, just to give a description of what they are?

{3074}

A Yes, sir. These notes were written by me indicating the date, time, place that Special Agent Coler's car was turned over to me.

Q And what is the date that is indicated on the notes?

A 6/29/75. Hot Springs, South Dakota, Sheriff's Department.

Q All right. And would you describe how those notes were made.

MR. LOWE: Your Honor, may we approach the sidebar a moment?

THE COURT: I beg your pardon.

MR. LOWE: May we approach the sidebar?

THE COURT: You may.

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

MR. LOWE: Your Honor, I'm not sure what counsel is doing. I thought I ought to start out before we get to a critical stage. These were papers not disclosed to us, never given as part of 3500 material. I don't know what the purpose of the intent of showing them is, but we would object to their introduction, at least until we've had a chance to examine them before the testimony is given about it.

MR. CROOKS: I'm sorry, I thought you examined those this morning, John.

MR. LOWE: No. The only thing I looked at this morning was fingerprint notes that he had. He had about four {3075} sheets of white paper that he showed me and they weren't really notes, they were extracts from his reports and other things.

MR. CROOKS: Well, go ahead. I'm sorry, I didn't mean to interrupt.

MR. LOWE: I have never seen these before. They were never disclosed as 3500 material, and at this point I would have to enter a general objection as to any reference to them. And of course I've never seen them, so I don't know what they contain.

MR. CROOKS: Well, Your Honor, just for the Court's edification, what these are are basically his notes that he made contemporaneous with the search. They were then reduced to the formal 302, but these would be

the original notes as he went through the car item by item, then making notes of what he found and compared and so forth.

And very simply what I'm going to do is lay a foundation for these notes as being basically a recordation of the finding of the .223 cartridge which is, as counsel has many times indicated, the actual memory which is refreshed to introduce the exhibit showing it. But more importantly I think it goes for the obvious thing that counsel has on prior witnesses indicated a recent fabrication of the finding of the .223 cartridge. And it is simply to show that this contemporaneous with the event, the finding of this cartridge was noted.

{3076}

MR. LOWE: I'm sorry, I may have misunderstood what you said. You are intending to offer these as something to show --

MR. CROOKS: To corroborate.

MR. LOWE: -- his recollection at the time when it was fresh?

MR. CROOKS: Yes, absolutely.

MR. LOWE: And you feel that that is a basis that you feel you ought to be able to introduce those then?

MR. CROOKS: Not just that, but primarily to corroborate his testimony that this is not a fabrication. He found the cartridge because he noted it on his notes at the time they were found. And counsel has implied through various witnesses that this is all a fabrication.

I think he's even used the term to the Court that the cartridge was "salted", and I think we're entitled to show that this cartridge was not salted. It was found by Mr. Lodge. May be a contemporaneous note of it. And I'm not offering it yet, but that's --

MR. LOWE: You intend to offer it?

MR. CROOKS: Yes.

MR. LOWE: If you are intending to offer it, to save time from coming up to the sidebar, make an offer and let the Judge rule on it.

Obviously you are moving in that direction.

{3077}

MR. CROOKS: I think I'm entitled to lay the foundation.

MR. LOWE: I understand. I'll let you do that, but in terms of raising the question with the Court can we just take it up now. It's obvious that

you've got a question or two and you're going to offer it. Can you make a representation and an offer of proof and let the Judge rule? That's all, just state what he's going to say. I don't mind.

MR. CROOKS: Pardon?

MR. LOWE: State what he's going to say and we can get a ruling on it.

MR. CROOKS: He's simply going to say that there's a note of the .223 cartridge found in the, at the time or contemporaneous note. And that's all that I'm offering it for. If counsel wishes, I'll take out everything except the note pertaining to that. That's the purpose of it, and that's what he'll say.

THE COURT: What is the position of the defense.

MR. LOWE: Well, I think, you know, we oppose it. Well, I'm not even sure if I oppose it. If you are offering it in evidence, if Your Honor is going to accept it in evidence, I'd like to see it before I cross-examine.

THE COURT: Well, I'm not going to rule until I get your position on the record.

MR. CROOKS: Surely I'll show it to counsel.

MR. LOWE: We would -- may I talk to Mr. Taikeff for {3078} a moment, Your Honor?

THE COURT: You may.

MR. LOWE: As I say we're surprised a little bit on this. That's why I'm just not sure what -- and I wonder if it's possible that we could just take a look at them for a moment here just at the sidebar.

THE COURT: Sure, yes.

MR. CROOKS: Your Honor, or John, if I can point out the one paragraph which we're, if I can find it, I think I am correct. This is the page that it's on.

MR. LOWE: 30.

MR. CROOKS: Item 30, item 30 is on the last page, is the only item which the United States --

MR. LOWE: Let me just look at this a minute if we can because I've never seen it before.

We have no objection to the introduction of that, Your Honor, and what we'd like, though, is a chance, perhaps at the break if we could,

look that over. It's, I don't want to take the time right now at sidebar, but we would have no objection to introducing it as long as we can see it before cross-examination.

MR. CROOKS: Oh, sure. I'll be done with it in a few minutes.

MR. LOWE: All right. Fine. We have no objection.

THE COURT: Very well.

{3079}

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

THE CLERK: Are you offering it?

MR. CROOKS: No, I'm not.

Your Honor, if I could continue with my foundation.

THE COURT: You may.

Q (By Mr. Crooks) I now hand you Exhibit No. 180. You testified that you had made some contemporaneous notes and I've handed you Exhibit 180. Would you describe again what they are.

A Yes, sir. These are notes in my own handwriting. We didn't have a steno to dictate to, so I took these rough notes of the evidence that I recovered from the automobile.

Also indicates the place, the date and the time and the names of the individuals who turned the vehicle over to me in the Sheriff's Department in Hot Springs, South Dakota.

{3080}

Q Insofar as those notes, I hand you Exhibit No. 34B and ask whether or not there is any mention of that in any part of your notes? Do not read the mention but consult the notes, find out if there is anything in there concerning that.

A Yes, sir, it is.

Q All right.

And would you indicate just the page in which there is a notation concerning 34B.

A Yes, sir. It's listed as No. 50 on this very last page.

Q And that is a partial page and I believe there is a piece of white attachment to it, is that correct?

A Yes, sir.

Q. Now insofar as the notes that you took as you were taking items or removing items from the vehicle, were the notes prepared -- well, when in reference to the removal of items were the notes prepared?

A These notes were kept by me as the different items were collected from the automobile.

Q So as an item was found you made a note of it and put it on your papers?

A Yes.

Q Or your original notes?

A Yes, sir. And under area of the vehicle, the heading, that is, the area of the vehicle where the items were collected.

Q Okay.

{3081}

A In this particular case I had listed as "evidence collected from trunk of Chevy Biscayne 400," and the date.

Q Now insofar as your notes which are contained in Exhibit 180, were those notes reduced to another form at a later time?

A Yes, sir. They were dictated and put, I think they're referred to as the 302.

Q And would the 302 be substantially a dictation from the notes themselves?

A Yes, sir.

Q From reviewing Exhibit No. 180 and reviewing the items contained on Exhibit 180, do those in fact refresh your memory as to all or most or some of the items found in Coler's car?

A Yes, sir.

MR. CROOKS: We have no further questions of this witness, Your Honor.

MR. LOWE: Your Honor, I understood Counsel was introducing this and at the side bar the Court introduced it and am I to understand that's an exhibit or not an exhibit?

THE COURT: It has not been offered.

MR. CROOKS: Your Honor, Counsel was premature. He came to the bench before I offered it and I do not intend to offer it. It may be offered at some later time but not right now.

MR. LOWE: Mr. Crooks stated at the bench he was intending to offer

it.

{3082}

MR. HULTMAN: Let's approach the bench.

THE COURT: You may.

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

MR. LOWE: Mr. Crooks clearly said he was going to offer it and we acquiesced in that we studied it and said we would get copies of it. What's happening here? We're now changing what was said?

MR. CROOKS: Your Honor, Counsel was the one that brought this thing up prematurely. He asked me if I intended to offer it; I do not recall whether I did or not. Even if I did I don't know if I'm prevented from changing my mind. I have done what I wanted to do with the exhibit and what I started out to do with the exhibit, is to show this man has got his recollection refreshed from a contemporaneous document. If Counsel wishes to offer it, I don't see any problem. I just don't intend to offer it myself. I may later.

MR. LOWE: Did Your Honor remember Mr. Crooks saying he intended to offer it? That's my clear recollection. I'm sure it's on the record that --

MR. CROOKS: What's that got to do with it?

THE COURT: It is my impression, although I cannot repeat exactly what was said, it is my impression that Counsel indicated that he did intend to offer it. I remember asking you what your position on it was.

{3083}

MR. LOWE: I would have objected to some of the questions that were asked if I had not been basing my reliance on it.

MR. HULTMAN: John, you can offer it yourself. There's no problem. His recollection was refreshed and that was the last question, or our basis of offering it is gone.

MR. LOWE: The basis is gone. He said it did refresh his recollection.

MR. CROOKS: That's correct. That's right.

MR. LOWE: Why does that mean the basis is gone? That's an additional basis for --

MR. CROOKS: I don't know what the argument is. If Counsel wants it in he can offer it.

MR. LOWE: I think Your Honor understands. I acquiesced on a series of questions on good faith because Counsel said he was going to introduce it. The Court interpreted it was going to be introduced by Government Counsel.

MR. CROOKS: I don't follow this, Your Honor. I laid down foundation for that. That's what I was attempting to do all along. Counsel got up and objected before I offered it. I don't know how I can be forced to offer something that I've decided that I don't want to offer, particularly at this time. I didn't read any of the contents of this into the record. I simply asked him to refer to it and laid foundation {3084} for it. I may offer it at some later time.

MR. LOWE: Judge, I think we had valid objections to any reference in that document whatsoever on the ground I stated we had not been provided copies. There had not been any disclosure on --

THE COURT: Excuse me. I just reviewed 3500 and as I read 3500 you're entitled to it after the witnesses have testified.

MR. HULTMAN: That's correct.

MR. LOWE: Except I understood in this trial that there was an order that we be given this before a witness testified.

THE COURT: There's no order. There is something that's worked out between Counsel.

MR. LOWE: My mistake then. I thought there was an order on it.

THE COURT: I never entered an order to that effect.

MR. LOWE: I misunderstood. Last year.

THE COURT: It doesn't require it. That's why I checked the statute a moment ago.

MR. CROOKS: Counsel is correct. There is an understanding. However, these documents were documents which are not basically 3500 documents to start with. They're rough notes. He's got the same, exact same thing in the 302s. I had no intention of going into this until Counsel has raised {3085} the implication that we were concealing evidence and that's why we decided to make reference to these. If Counsel wants to look at them, if he wants to introduce them, it doesn't make any difference to me. From my standpoint I just, I haven't offered them. I'm not sure of the objection that the government hasn't offered something is one I haven't heard before.

MR. LOWE: I'll be more cautious in the future.

THE COURT: Very well.

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

MR. LOWE: Do you have a plan when you wanted to break? We have to have a copy of this to look at before cross-examination.

THE COURT: Have you finished with the witness?

MR. CROOKS: I have, Your Honor.

THE COURT: Are we requesting that we recess at this time?

MR. LOWE: It would be very convenient. Perhaps we can work out with government Counsel to --

MR. HULTMAN: Could we approach the bench for one more moment?

THE COURT: You may.

(Whereupon, the following proceedings at the bench:)

MR. HULTMAN: Your Honor, I was not a participant in {3086} the last conversation but I was a listener and I want to reflect on the record that last night Mr. Lowe came to me at the conclusion of proceedings and asked if he could see the notes. That was the word, "notes," of this particular witness. I indicated to him that I would try to locate the witness and make him available and whatever notes he had. I did do that. I indicated to him that he would be available this morning before trial; that I did too. The witness was available. I just wanted this to be made a part of the record. I don't know what he had reference to but he asked me specifically about notes.

MR. CROOKS: I might add to that, Mr. Hultman, I instructed the witness to make available any notes of any kind that Counsel wanted to see. I have no way of knowing what notes he looked at or what he didn't.

MR. LOWE: To make the record clear, Your Honor, I did meet with Mr. Lodge this morning and I said, "I'm supposed to look at your notes," and he pulled out, I would estimate it was four pages of white 8 x 11 paper which had ink pen or ballpoint pen notes on them and said, "here they are." We went over them. I never saw these yellow pages; he never pulled them out. He never mentioned he had them. I said, "I'm supposed to see your notes," and the white papers are the ones he showed me. This is the first I knew these existed is when he pulled them out on the witness stand.

{3087}

MR. HULTMAN: I didn't know. I just wanted to indicate on the record what our conversation was and the availability of the witness.

MR. CROOKS: Your Honor, I might just state as far as any knowledge of this matter, just so the record is completely clear, as I talked to Mr. Lodge this morning he asked me, "What notes," and I said, "All notes of any kind and any that he asks for show him." I have no way of knowing what Counsel asked for.

MR. LOWE: I think if we have a recess and if the government can work out with us we can use our machine or government can make a copy itself and give us a copy.

MR. CROOKS: We prefer the clerk does it. The exhibit is now in the clerk's hands.

MR. LOWE: Fine.

THE CLERK: It's not in my hands, Counsel. It's not offered.

MR. CROOKS: In any event, I would prefer the clerk does it.

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

THE COURT: The Court is in recess until 10:50.

(Recess taken.)

THE COURT: The jury may be brought in.

MR. SIKMA: Your Honor.

{3088}

THE COURT: Just a moment.

MR. SIKMA: I thought at this time we might take up the matter of Government Exhibit 34I for identification. Defense Counsel asked about it, that it be brought up before Mr. Hodge be brought in as a witness.

THE COURT: What is 34I?

MR. SIKMA: It is an ejection pattern for a Colt AR15 fired at hip position.

What was done was the firearms examiner took five different AR15s and fired them at hip position a number of times and set out a pattern, an ejection pattern for the trunk level height. This is being used as circumstantial evidence to show approximately where an individual could be standing in order to fire an AR15 and have the expended rounds ejected

into the trunk of a 1972 Chevy. We are intending to offer this into evidence.

THE COURT: On the testimony of --

MR. SIKMA: On the testimony of firearms examiner Hodge, Evan Hodge.

MR. LOWE: Your Honor, Mr. Ellison just went out to make a slide of this. I think I can show Your Honor and discuss it in some more aspects by projecting it.

As I understand it, Mr. Hodge will say that he obtained, I believe it was five AR15s. I don't recall where he said he obtained them from, from FBI weaponry or somewhere of that {3089} nature; and that he took these weapons out and ran tests.

Now he ran a shoulder firing test and he ran a hip firing test and then he plotted on graphed paper each of the rounds in a group of perhaps ten, I think it is, as to each weapon landed and based on that he came up with an overall pattern which included all 50 rounds as to where the cartridge cases ejected. That is where they landed after they ejected. In all instances they generally went to the right of the weapon which is a design characteristic of the weapon. However, in some instances they went forward, in some instances they went backwards. If Your Honor, please, I will put these on here to show Your Honor what the objection is, one of the objections anyway.

This is a diagram, a copy of the exhibit which is marked Government Exhibit 34I. Now the problem, Your Honor, is this: each of these circled areas -- perhaps Your Honor would want to look at the original of this for a moment to see the color. But I can talk about it easier.

{3090}

MR. LOWE: Each of the colored areas is a different weapon.

Now, if all of these fell in an approximately over-lapping situation, so that they showed some general conformity or pattern, then perhaps there would be some probative value, perhaps there would be some relevance, and perhaps there would be some basis that this witness could give testimony and assist the jury in making inferences or deciding what happened.

However, if your Honor will notice, one of the weapons fired all of its rounds in a generally forward or directly perpendicular pattern; and by that I have reference particularly -- I will get a pen that writes.

This one up here (indicating), for example, and yet there is another

weapon, another of the weapons that was fired that give an entirely different pattern and went all to the rear and to the right down here (indicating), the ones I have marked in blue.

THE COURT: All fired from the same position?

MR. LOWE: All fired from the same position.

In this case, I believe this was from the hip position (indicating), and I believe the other one was from the shoulder position.

THE COURT: This is shoulder?

MR. LOWE: This is shoulder, and the other one was {3091} from the hip; and as to the firing from the shoulder position -- excuse me -- the hip position, the results are substantially the same, that is to say, we have the one weapon -- and I am only guessing that it is the same weapon -- you have it up there (indicating), I believe in the color -- one of them went all forward and to the right, and another one or another several of them went all backwards and to the right, showing that these weapons are quite distinctive.

It frankly surprises me that a manufacturing tolerance would not produce at least some overlapping. There is virtually no overlapping, so this leaves the jury with a full range of speculation. They can take any one of these weapons and come up with any result the Government wants to base an argument upon, when in fact it is actually speculation.

I think it is clear that this witness can testify that all of the rounds ejected from the AR-15's -- and we will stipulate, in fact we will concede that AR-15 rounds ejected generally to the right, but that it may be forward or backwards or to the side; and nothing more could be proven by introducing this expert testing, purported expert testing because the results are just all over the ballpark, and you can conclude anything if you selectively take one weapon. There is not even what you could call a {3092} mean result or an average result in all of these rounds. It varies just from the ridiculous to the sublime, from five feet forward to 12 or 13 feet backwards, from very close in, one and a half feet in, on out to about 11 feet out. We feel this is so speculative, so unreliable in terms of showing an expected pattern that an AR-15 fired on June 26 might have produced, that it causes the jury to speculate in an improper manner.

There was no testing of any of the AR-15's that were fired on June

26. I believe that's clear, and that doesn't even purport to show such a firing.

The reason that the Government had this test conducted, I am sure they will concede, is because the AR-15, which was recovered from Wichita, was no longer capable of actually being tested itself as to ejection because it had been through the fire and substantially destroyed.

We believe that to introduce this evidence would be to lead the jury astray and ask them to speculate as to which of these weapons might have coincided with the pattern thrown by the weapon, AR-34-A -- Government Exhibit 34-A, or any other weapon on that day.

MR. SIKMA: Your Honor, I think that what is important about the charts is that it indicates not precise direction -- we don't know exactly where the person was standing, but we do know that he was standing close to the vehicles and {3093} we do know that it would be possible for a person in the vicinity of the vehicle to fire a round and have it go into the trunk from the area around where the agents were found dead; and we think that this is relevant to show that.

These arguments of the Defendant's counsel all go to weight and not to admissibility. It is important to show that there is some disparity, but Mr. Taikeff brought out the fact that the question about the ejection of rounds from the chamber talked about an area, 50 or 60 feet.

We want to give the jury some idea as to the difference between a variety of different firearms, but we also think that this shows that a firearm of this kind would be capable of throwing a round, an expended round, ejecting it into the truck of the vehicle; and the patterns which are shown on the Government Exhibit are all -- relate to rounds which landed approximately the same height from the ground as the outside of the trunk, in other words, so that it would have to clear the trunk area in order to get into the trunk. There were barriers set up so that they could be ejected at that ground level.

That was the pattern for one instance, the shoulder firing, and the other instance, firing from the hip level. In each case the landing pattern is several inches off of the ground, and it was measured to correspond to the ground {3094} level of the opening of the trunk, so I think that also bears some relevance to the issue which we are talking about here.

I would say finally that this clearly is a matter which goes to the weight, and defense counsel can argue about what it does or does not show; but I think that the jury is entitled to view the disparity of the AR-15, to see that it would be capable of putting a trunk -- or putting an expended round into the trunk of the '72 Chevy Biscayne.

MR. LOWE: Your Honor, an expert under the Federal Rules of Evidence and all the cases relating thereto, including cases before we even had Federal Rules of Evidence, make it clear that an expert is only appropriate where the items or the facts to be adduced are not susceptible of determination by a lay person or by a finder of fact, namely, the jury.

Here the witness can testify that the AR-15 ejects expended cartridges, that they go generally to the right. We will stipulate that or concede that, or let him just testify they generally go to the right; and I would have no objection in saying they are generally ejected somewhat right and to the right, and from that point any juror can make a determination that if a person, for example, standing in the right location with reference to the trunk, that if {3095} it goes up and to the right and it is fired from the shoulder, that it can get into the trunk; and similarly, if it is fired from the hip, which is obviously at least the height of the opening of that trunk as anybody can see looking at the pictures, that again if the rounds go up to the right, if he is standing in the right place, it is possible for a round to go into the trunk. You don't need an expert, but to have an expert to give or extract information from five different weapons that have a disparity in results such as these five have -- and it could have been done if they had taken even five more, and the results would have been more diverse.

We don't have an AR-15 which is Government's Exhibit 34-A or any other AR-15 that was in the Jumping Bull area that would have fired a pattern anything like that. I think that we could concede that any AR-15 that was there on June 26th would eject cartridges generally to the right, and they would go generally up out to the range -- or off to the right.

If that's the testimony of the expert -- I am assuming, that's the case -- I see what appears to be the ejection portal on the right side of the weapon, it looks like that would be out at least horizontal or upward. The expert can testify to that without introducing experimental tests on

particular AR-15's which are all over the board.

{3096}

THE COURT: What does the Government contend the evidence is that is now in the record with reference to the position of the person who fired the AR-15 you are talking about?

MR. SIKMA: Your Honor, we contend that the evidence at this point shows that the individual was at the time to the left of the vehicle in the general vicinity of the cars, within the number of feet, within the 10 feet of the vehicles, at the time a round was fired; and he was within the distance which the round could have gone into the trunk.

We are making a general proposition -- we can't precisely state exactly where the individual was standing; but I do think that the evidence of the experts at this time shows that someone who fired a round, no doubt an AR-15, or at least a .223 center fired weapon, fired a round that was within a few feet of Special Agent Coler; that the pattern of blood on the side of the vehicle shows that Special Agent Coler was laying very close to the vehicle, so if he was laying within a foot or two of the vehicle -- and the testimony of Dr. Noguchi showed that a round was fired into his head from within, inside of four feet, I think that this would be relevant to show that the rounds could have ejected practically straight forward or slightly to the right and forward; and I think that this is all relevant to the issue in question.

{3097}

Also, other Government witnesses -- one other Government witness testified that the Defendant himself was seen right in the area of the cars where the bodies of the deceased agents were lying, and that he had in his hand an AR-15; and I think that makes this evidence extremely relevant at this point.

Even the evidence of the forensic pathologist who testified that a weapon was placed against the hand of Special Agent Williams and was fired, where the bullet went through his hand and then through his face and into his head, taking away part of the back of his skull, I think that's evidence also that the person who fired a round of extremely high velocity -- which an AR-15 is -- was standing in the area of the vehicle.

And I think that these things are all relevant since they tend to

show and connect up to the evidence which corroborates the eyewitness testimony, and I think for this reason, shows the possibility and even the probability that this could have taken place.

MR. LOWE: May I just comment on two factual assertions which I think are not in the record.

First of all, without checking, I can't say certainly, but it is my recollection that Michael Anderson only testified that he saw Robert Robideau and Peltier down by the cars; and from a distance of 200 yards, as I recall, {3098} he did not testify as to what kind of weapons he saw.

I believe that Norman Brown was the person who testified that he had seen Peltier with an AR-15. I may be mistaken on that, but that's my recollection.

The second thing is that there is no testimony from anybody that a .223 round or rounds were fired into the agents as the three fatal shots or any of them, and in fact there were no cartridge casings around the agents. There is only one in the trunk and Dr. Noguchi clearly said that the high velocity -- he did not say very high, he said high velocity weapon was a .30 caliber and possibly less; and the testimony of at least one other witness -- I can't recall whether it was Dr. Noguchi or one of the other witnesses -- but one of the witnesses stated it was a high-powered weapon from one of the cartridges that was found. Mr. Butler had testified he had an M-1, and there were other weapons. I think a .303 was testified to. There is a .303 in evidence.

What the Government wants the jury to do is speculate that because of one particular pattern -- and there is no question they are going to pick one or two of these patterns, not the one that goes to the rear obviously, that wouldn't fit their theory -- they are going to argue that one of the patterns goes forward, the jury should infer that the round was fired by the agent killed.

{3099}

There are many other explanations which are entirely consistent with the innocence of Mr. Peltier or whoever fired the weapon that had that cartridge in it.

The jury is being asked to speculate. It is not proper to have them speculate with these five tests.

It is certainly proper for the Government to adduce that the weapon fires to the right and slightly upward. We have no objection to that. I understand that's the fact. The jury can draw whatever inferences they want, and the Government make argument.

THE COURT: Isn't that still speculation?

MR. LOWE: If the jury believes it is speculation, then the jury is not supposed to do that. I think the jury could infer from a shoulder fired shot, the expert says the round goes out to the right and either slightly upward or horizontal -- obviously if there is a place where a person could stand so the cartridge ejecting drops into the trunk, it is a matter of trial and error to find that place. That's not speculation, it is logic and a fair inference from the evidence. That's not to say that when a particular weapon is fired, the weapon went in a particular direction and distance. That's different than saying we have experimental data about particular distances.

(Counsel confer.)

MR. LOWE: The introduction of such tests which are {3100} really not relevant to the weapon at hand lend a suggestion of formality and dignity and a bolstering effect to what otherwise is a lay person's finding of fact which is within the province of the jury.

THE COURT: You spoke of an expert. Actually I do not view this as expert testimony.

MR. LOWE: Well, your Honor, he has been qualified as a firearms expert. I think the Court cannot ignore the effect that will have on the jury.

He will also give testimony, I believe, that these weapons are AR-15's, that they are the ordinary run-of-the-mill, not special in any way. I think that takes an expert to say that. I don't think they could introduce this evidence with just a lay person who happened to find AR-15's or buy them in a sporting goods store and takes them out and shoots them. I think they are going to have to rely, and want to rely on the fact that he is an expert in order to introduce this evidence.

I expect they would take the same position, that they are entitled to have an expert give testimony and give his opinion.

THE COURT: Mr. Sikma, what will the testimony be?

MR. SIKMA: The testimony will be that this firearm's examiner is an expert. I would say perhaps that he will testify that he examined the firearms and found them to be {3101} in working condition. I believe he will testify --

THE COURT: (Interrupting) You mean the firearms used in this test?

MR. SIKMA: Yes, your Honor. I think that that perhaps is necessary to show that they were a random selection. The Government does not intend, as counsel indicated, to show any pattern in particular. We are using this as illustrative for the purposes of the jury, to help them understand; and it is also a visual aid which the Government, I believe, is entitled to use in the presentation of its case.

We intend to show -- or we agree that we don't know precisely where people were standing with the exception of the person who fired the round into Special Agent Coler which took away a part of his forehead.

Now, we know we can tell just about where he was standing because of the blood on the car and also because of the fact that that round was fired from within inside of an area of four or five feet, so we can tell practically where he was standing. We want to be able to show the possibility.

We also want to show that this isn't idle speculation, that the realm of possibility exists that these rounds are scattered in a particular area with a particular type of firearm, and I think that that is relevant to illustrate {3102} that to the jury, and I think it has important probative value.

{3103}

MR. LOWE: May I just point out, I think Government counsel can verify this, no other ejections were run, for example, like the M-1's.

MR. SIKMA: No, they were not. We didn't find an M-1 round in the trunk. That's why we didn't run one.

MR. LOWE: I think that bears witness, Your Honor. Another reason why this shouldn't be presented is because it only presents the jury with one type of weapon when it's clear that other weapons would have been used at the same time, and they don't intend to do anything like that.

THE COURT: Mr. Lowe, in what way do you feel that this is prejudicial? In fact, it seems to me, in fact, that it would be helpful in some respects

to the, it would indicate that there is no fixed pattern of ejection from weapons of this type.

MR. LOWE: Well, first, Your Honor, we feel that it is simply not testimony which is relevant because it does not concern a weapon in this case, and there has been no relationship established that this weapon in this case would have thrown one of these patterns as opposed to some other pattern.

I don't think that Mr. Lodge can offer that testimony. I, secondly, I think it provides a basis upon which the jury could speculate that the rounds from this weapon fired forward and to the right when in fact it is equally, as a matter of fact, it is more probable that they fired backwards and to the {3104} right. If you take the predominance of the number of weapons in this particular test we don't feel there's any proper basis to give them the fact that it may look like there's more weapons that fired to the rear than forward. It does not eliminate the fact that the jury will be speculating. They will be asked to speculate whether this one would have been in the minority and fired forward as opposed to backwards, and in turn to speculate whether these are representative, or in fact any other representative would eject forward than these two particular weapons.

We might all say, well, you know the rule of the statistics would indicate that it probably would, and that's asking speculation here. Because we don't have enough of a statistical base to even offer such testimony as being representative, and we feel that it's asking the jury to speculate on a matter that they can understand as lay people without such examination if they simply have testimony of an expert to the general examination as to the way an AR-15 ejects.

THE COURT: If the witness is permitted to take the stand and testify as to having experimented with five different AR-15's and testify as to the manner in which those AR-15's ejected, how is that any different than simply illustrating that by this exhibit?

MR. LOWE: I would object and I thought I made clear {3105} that if the witness gives testimony that they eject generally to the right we're willing to concede and stipulate to that. And for one thing, I think if I'm correct that the portal was on the right, and it wouldn't take the

jury two seconds, looking at the weapon, to see that it couldn't possibly eject to the left. So that's just a simple fact. And that they eject either horizontally or upward, I'm willing to do that simply to enable the Government to have that much. And deprive them of a right in this point to say that we were depriving them of something they ought to be entitled to show. I have no objection to say that it ejects slightly upward or to the right. I simply don't know what the answer is, what the expert says is the general pattern. But all of the rounds fired from any AR-15 that we're aware of would follow that general pattern. That is, to the right generally and either slightly upward or horizontally generally. That is any AR-15 that I think anybody has ever fired. But then when you get into specific characterization of specific AR-15's, that is whether they fire forward or backwards, that is only getting to the objectionable part of the testimony which we would of course not want to have admitted.

THE COURT: On cross-examination Mr. Taikeff examined some witness at length as to the distance that a weapon could eject a spent cartridge. And you were specifically relating this to the area of the vehicle. I am unable to determine at {3106} this time what the relevance of that cross-examination is, and I'm wondering if it has anything to do with the evidence that the Government proposes to present on this exhibit, proposed Exhibit 34-I?

MR. TAIKEFF: Your Honor, I can tell Your Honor what was on my mind, and should I choose to argue the point, what I would argue to the jury is very simply this: A search was made in a circle with a diameter of approximately a hundred twenty feet. There were no cartridges found within there. I had to, except for three I had to eliminate the possibility with expert testimony that it was possible to fire any of those weapons and in the process of the shells being ejected having them go more than sixty feet in one direction or another from the car. That is to say, have them fly so far that if someone searching in the circle with a sixty foot radius. I started out with a sentence that I can't finish. I have to start it over again.

I had to show that they could not be ejected more than sixty feet so that a person looking in that circle would have to find every single cartridge that was found, that was shot. And that was the purpose of it.

It doesn't relate in any way to this. I would just like to add one thing on this particular argument which I have followed. I think the point that is most significant is the fact that if one wanted to establish for a jury that if {3107} you held an apple in your hand and reached outside an open window and released the apple it would fall to the ground. You wouldn't need much more than that testimony. It is not necessary to bring scientist into the courtroom or experts into the courtroom to run elaborate tests, first with an apple and then with an orange and then with a pineapple to show that gravity works the way we've always known it to work.

But the Government does, by offering this testimony of an elaborate test, multi-color diagram and an expert is improperly bolstering their case by showing the care and the concern with which they have pursued every possible aspect of the case. And it's nothing but window dressing and an attempt to guild the lily. It takes very little common sense to recognize that when a gun is designed with a portal, the ejection portal on the right hand side that the cartridges generally come out in that direction. Whether they go forward, whether they go backwards or whether they go directly to the right or somewhere in between, they tend to eject to the right. We all know they eject a certain distance, probably more than one inch and surely less than sixty feet.

Therefore, any person who stood in an infinite number of positions, such that the semicircle in which those shells could fall included the trunk of the car, the shell would fall into the trunk of the car. It is an obvious elementary fact of everyday life. It doesn't require an expert to come in and {3108} make it look like some very fancy scientific work had to be done in order to reach that conclusion, and it constitutes improper bolstering of the Government's evidence.

MR. SIKMA: Your Honor, I would say one thing, though. We're not dealing with something that necessarily is in probably within the common knowledge of all the jurors. I think this is a bit more than mere window dressing. Firearms tend to be something that many people know little or nothing about. And while it would perhaps not be necessary for an expert who's as qualified as the expert which we will call to testify to these things, nevertheless since he was working on the case he also ran these tests and I think that if any other witness could testify to them he

certainly could.

THE COURT: Ruling on this matter, I'm going back to the basic definition of relevant evidence which Rule 401 provides, "That means of evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

On the basis of that definition I find the evidence is relevant and it does not appear to me to come within the prescription of Rule 403, "Although relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues or misleading of the jury."

{3109}

I hold that it is relevant, it is simply a matter then of the weight for the jury to give the evidence in construing it along with the other evidence in the case, particularly the evidence of the expert pathologist as to the direction of the bullet, direction from which the bullet came that killed the agent. And the probable position from which the rifle could have been fired.

It certainly can be argued that the weapon that was used, well, can be argued that of course that there's, as to whether or not an AR-15 was in fact used, and if it was in fact used, if it might have, depending upon the position of the operator, have expelled the cartridges in such a way that it couldn't have possibly gotten into the trunk. This seems to me is circumstantial evidence which is relevant, and the objection to 34-I, assuming a proper foundation is laid, is overruled.

MR. LOWE: All right. Your Honor, since there is an experiment that was conducted I would like to have the opportunity to voir dire the witness briefly out of the presence of the jury before this testimony is given. And I don't mean right now, but prior to him being called. Maybe that it would be after lunch. We could do that in order to establish to the satisfaction of the Court and to counsel that the experiment relates realistically to the facts which the jury could properly find from the evidence in this case. {3110} And I think that's a proper request.

THE COURT: I would grant that request.

MR. LOWE: Thank you, Your Honor.

THE COURT: Did you want to be heard on that?

MR. SIKMA: Yes, I would like to be heard on it. I think that the questions that I will ask this witness will bear out the fact that it relates to the facts in this case. And I don't see why it is necessary for this witness to be voir dired outside of the presence of the jury. I really don't view the tests that technical, but I do understand that the facts were set out, or the test was set out in such a way that it would be relevant to this case, and that was the purpose of it. And I don't think that it is necessary to have a hearing outside the presence of the jury for this, these facts are set out.

If it comes up that they would not be relevant, why I understand that an objection could be sustained. But I think by way of offer of proof we will show that this particular witness will establish that the tests were conducted in such a manner that they would be relevant to this case. Otherwise the items themselves would not even be admissible.

THE COURT: Well, I'm going to permit it.

MR. LOWE: Thank you, Your Honor.

THE COURT: Permit the voir dire.

Are we now ready for the jury?

{3111}

Jury may be brought in.

When will this witness be called, Mr. Sikma?

MR. SIKMA: Next witness, Your Honor.

There's quite a bit of evidence to go through, and I probably won't be finished with him before noon. So perhaps we can do it after the jury goes out at noon hour.

THE COURT: Very well.

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

MR. LOWE: I believe we finished direct examination, have we not?

MR. CROOKS: Yes, I have, Your Honor.

THE COURT: You may cross-examine.

MR. LOWE: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. LOWE

Q Mr. Lodge, my name is John Lowe. We've met before, haven't we?

A Yes, sir, we have.

Q And we've talked briefly on at least one occasion, I think more than one occasion, haven't we?

A Yes, sir.

Q On the 27th of June of 1975 you indicated you went to the crime scene area and you made certain examinations of items. And that on the 29th of June, if I understand, you examined the car of Special Agent Coler at Hot Springs?

{3112}

A Yes, sir, that's correct.

Q Were there occasions, and if you mentioned this I simply didn't make a note of it, when you made similar examinations of Special Agent Williams' car, the red and white Chevrolet van and the 1967 Ford Galaxie, and if so, would you state what the sequence was, what dates?

A Yes, sir. I arrived in Pine Ridge the early morning of the 27th of June, 1975. And I had occasion to examine and process Special Agent Williams' automobile on that date.

Q On the 27th?

A On the 27th.

Q And was that at the site, or was it at another location?

A No, sir. Was at the site.

Q So that Special Agent Williams' car was still there on the 27th, which was a Friday, I believe the day after this incident took place?

A Yes, sir, It was there on the same day I arrived.

Q And when you say you examined it, did you make your complete examination, or did you only make a preliminary examination and then spend more time with it later?

{3113}

A That was the preliminary examination; right. The sight.

Q Did you later make a more detailed examination of it?

A We processed the automobile for latent prints. The ones that we could lift we lifted and they were later photographed, not at the sight but in another location in Pine Ridge.

Q I understood you to say you made a preliminary examination on

the 27th.

A The 27th.

Q That would suggest implication that you made a later more detailed examination. Am I misreading something into what you said?

A It wouldn't be. I wouldn't consider it more detailed in that particular instance.

Q Well, did you examine it again at a later time?

A The automobile?

Q Yes.

A No, sir.

Q So that was the only examination you made of Williams automobile was on the 27th?

A The 27th.

Q How about the 1967 Ford Galaxie?

A I'm not certain of that date. I think that was on June 30, 1975.

Q Well, let's do it a little different way then. On the {3114} 27th you examined Mr. Williams' automobile out in the tent city area, I guess is where you saw it?

A Yes, sir. It was in the clearing just above tent city.

Q Did you observe any other automobiles on that day or examine any other automobiles on that day?

A I observed other automobiles but I did not examine them on that particular day. The next day which was the 28th, did you examine any automobiles?

A No, sir.

Q Did you examine anything on the next day?

A Yes, sir. But it was confined mostly to other items of evidence that had been brought to me in Pine Ridge from different locations.

Q On the 29th you said you examined Special Agent Coler's car. Is that the only one you looked at on that day?

A Yes, sir.

Q And when did you look at the red and white van?

A That was also processed on the 30th. June 30th.

Q So you looked at the 1967 Ford and the red and white van on June 30th?

A Yes, sir.

Q And where were they when you saw them?

A They were brought to the compound. That was a maintenance garage and compound in Pine Ridge.

{3115}

Q All right.

I place before you Defendant's Exhibit 93 and Defendant's Exhibit 94 and ask you if you have ever seen that vehicle to your knowledge?

A Yes, sir. It appears to be a vehicle that was examined also in the compound. It was brought to the compound area of the maintenance garage.

Q This is a International Scout as is shown in Exhibit 94?

A Yes, sir.

Q And you say it was in the compound. Were you asked to examine it for latent fingerprints?

A Yes, Sir.

Q Did you make such an identification?

A I made an examination but there were no latent prints of value developed.

(Counsel confer.)

Q (By Mr. Lowe) Now on the 29th when you went to see Coler's car, was it in the BIA compound or somewhere else?

A Yes sir. That was somewhere else.

Q Do you remember where it was?

A Yes, sir. It was located in the sheriff's department garage in Hot Springs, South Dakota.

Q Okay.

When you arrived there were you accompanied by anybody or did you go there alone?

{3116}

A No, sir. I was accompanied by another by another examiner.

Q Who was that?

A His name was Tommy Morfield.

Q And were the two of you alone in your traveling to that particular place?

A Yes, sir.

Q And when you arrived did you present yourself to someone in particular to gain access to the car?

A Yes, sir. There was a dispatcher and a deputy.

Q All right.

And did they -- first of all, let me ask whether at that point what the condition of the automobile was. Was it locked up in a building, was it inside of a fence, where was it located?

A It was in a garage part of the building. The front entrance, the large doors were locked and sealed and there was an entrance from the interior of the building and that was also locked and sealed with tape.

Q And when you arrived did they break the seals and give you access to it through one or more doors?

A Yes, sir. We identified ourselves and showed them our credentials and they opened the garage for us.

Q And did you examine the car in the garage or did they bring it outside?

A We examined it inside and later on it was pushed out into {3117} the sunlight where it could, the lighting wasn't too good on the inside so it was moved barely out in the sunlight.

Q And about how long did it take you to examine that automobile?

A We started at approximately 8:15 in the morning and we completed our phase of the examination around 2:00 o'clock in the afternoon.

Q Did you personally make notes as you went along?

A Yes, sir, I did.

Q And did you, what type of paper did you use? Did you use a little notebook or legal pad or just generally what did you make the notes on?

A It was legal type, yellow legal type pad that I made my notes on.

Q Was this a pad that you had with you when you went there?

A Yes, sir.

Q And the notes you made were made by you and kept by you later and I believe you said used to dictate a 302?

A Yes, sir.

Q And so whatever notes were made by you were made by you for your use and kept in your possession until after you left the area and until

you dictated your 302?

A Yes, sir, they were.

Q Am I correct in assuming what you describe as your notes are exclusively your notes and not the notes of anybody else?

{3118}

A There may be one or two small notations made on the notes by the individual as I mentioned before, Tommy Morfield who was assisting me.

Q I show you Plaintiff's Exhibit 180 and ask you if this document is, or consists of the notes that you made?

A Yes, sir. These papers are the notes that I made right at the scene during my examination.

Q I'll just leave that there for the moment.

Did you make any such notes when you examined Special Agent Williams' vehicle?

A As far as --

Q Did you make any notes like this when you examined Special Agent Williams' vehicle?

A Only concerning the lifts and the area where it was found and so forth.

Q And as to those notes, did you associate them in some way either by attachment or by putting them in a plastic envelope with the particular lifts?

A Yes.

Q So those you didn't keep, you gave them then to some evidence person who was collecting such items or kept them in your possession?

A The lifts?

Q Yes.

A Were kept in my possession and later returned to, turned {3119} over to the personnel handling the evidence in Rapid City.

Q And when you did Special Agent's Coler's car, did you find any and take any lifts from that car?

A Yes, sir.

Q And did you treat those in the same way, that is, you make independent notes which you attach or associate in some way with the lifts and kept those together?

A Yes, sir. Normally they are, notations are made right on the lift or a tag; attached to the lift.

Q And is that the procedure you followed for both Special Agent Williams' car and Special Agent Coler's car?

A Yes, sir.

Q Those notes I trust then are in addition to the notes that are in Government Exhibit 180, I believe?

A Yes, sir. 180.

Q Those would be in addition to those notes?

A Yes, sir.

Q As to the red and white van that you examined, did you find, you found some latents, I believe you testified to, and did you treat them in the same way?

A Yes, sir.

Q Did you make a list of notes for the red and white van in any fashion similar to Government Exhibit 180?

A No, sir.

Q As to the 1967 Ford and any lifts you found there, did you {3120} handle them in the same way with notes attached or written on the lifts?

A Yes, sir.

Q And did you make any independent notes such as those as to what you found in the 1967 Ford?

A No, sir.

Q Now when you examined Special Agent's Williams' vehicle in the tent city area, do I understand your testimony that you found no boxes of ammunition in the vehicle, in the trunk or anywhere else in the vehicle?

A I don't recall. I think I was asked the condition of the material that was inside the car. As I recall, there may have been several shotgun shells or empty shells but I don't recall. I would have to go back through notes to, the 302s to give you exactly what was found.

I do recall that there are a number of items such as a suitcase containing clothing, but as far as definitely stating that ammunition was found in there, I would have to refer back to that 302.

Q Now you just started to say and you catch yourself, or change in the mid-sentence. You said you'd have to refer back to notes. What notes

did you have reference to when you said that?

A What I meant to say was the 302 which I did not dictate.

Q As to the findings you made of things you observed in {3121} Special Agent Williams' car on June 27, did you make a 302 as to what you observed, what you found?

A No, sir. An agent assigned to that particular vehicle inventoried the evidence that was in there and he dictated it.

Q But you didn't dictate a 302?

A No, sir.

Q And as to the red and white van, or the 1967 Ford, I gather you didn't dictate a 302 either?

A No, sir.

Q Since you did not -- okay.

MR. LOWE: Your Honor, for the purpose of the record we have disclosed to the government and in order to save calling a bunch of witnesses. Defendant's Exhibit 100 and Defendant's Exhibit 102 are pictures o£ the red and white Suburban Chevrolet van which has already been identified repeatedly in this case. These pictures were taken by members of the defense on April 10, 1976 on an occasion when they were given access to these vehicles under the supervision of Special Agent Hughes and others for the purpose of discovery in this case, and I represent to the Court that these are accurate depictions of the vehicle as it was observed and photographed on that date at that time.

MR. CROOKS: Counsel is offering them, we have no objection.

MR. LOWE: We would offer them into evidence and I {3122} gather there is no objection to that.

MR. CROOKS: We have no objection with the statement that Counsel represents as to the date and so forth of the taking of the pictures.

THE COURT: Exhibits 100 and 102 are received.

Q (By Mr. Lowe) I show you Defendant's Exhibit 100 and 102 and ask you if that appears to be the red and white van that you've referred to on some occasions in your testimony which is also shown in Government Exhibit 12?

A Yes, sir. That appears to be the same vehicle.

Q Thank you.

So in the Williams' vehicle you do not presently have any recollection as to whether you saw any ammunition boxes or not in the trunk? I don't understand if you answered that or not. Maybe you did in the process of answering.

A As I recall, there were several shotgun shells that I can recall offhand and possibly a shell box, empty shell box. But I don't, other than that I would have to go back; over the 302.

Q But presently you have no recollection of any box of live cartridges like 20 or 50 in a box, any of that type of ammunition in Williams' car?

A Offhand, no, sir.

Q Now I believe you testified that you examined Coler's {3123} automobile and you were done about 2:00 o'clock in the afternoon on the 29th, am I correct in that?

A Yes, sir.

Q Who was present with you at that time if you finished up other than Special Agent Morfield, if anybody?

A Turned the vehicle over to Special Agent Cortland Cunningham and Special Agent Kelso.

Q At that time?

A At that time.

Q Did you turn over any other things to them at that time?

A I don't recall.

Q Did you turn anything else over to either one of them later on that day or at any other subsequent time that you recall?

A Just about everything was turned over to them except for the material concerning the latent fingerprints.

Q I show you Defendant's Exhibit 178 for identification and ask you if you would look at that, study it for a moment and see if you can identify it for us, tell us what it is.

A Yes, sir.

This is a 302 concerning the evidence collected from Special Agent Jack Coler's automobile.

Q And did you prepare this -- first of all, strike that.

Did you dictate that 302?

A Yes, sir.

{3124}

Q Did you dictate it using your notes which are Government Exhibit 180?

A Yes, sir.

Q And if you need an opportunity to review this, you may. It's possible, I realize, that you've reviewed it prior to this time.

Is this an accurate recitation of the information which is contained therein reciting various observations you made and various items that were collected to the best that you were able to put it down on the day you dictated it, July 3, 1975?

A Yes. To the best of my knowledge this contains the evidence that is listed in my notes made after.

Q Although this was dictated on the 3rd of July which is approximately five days after you actually made the examination, you did have the benefit of notes that you took on the day of the examination when you prepared it, didn't you?

A Yes, sir.

Q So that as much as is humanly possible for you to have done, you have accurately recorded here the various things of significance which you observed on June 29 when you examined that automobile?

A Yes, sir.

{3125}

A Yes, sir.

Q Now, I would call your attention to the first page, up at top, on the first line is written "the passive voice" without identifying a particular person, says the following items were collected; and I ask you who collected the items that are shown in there -- it does not state -- was that you?

A At the bottom of the first page to the left it has the names -- my name and the individual who assisted me; and also following the typewritten names are the initials of both myself and Mr. Morefield.

Q So would I be correct in stating that these are items that you found, you, being plural, you and Mr. Morefield found on June 19 and as you found them -- or as you found them you made the notes in Government Exhibit 180 at that time as to each item, and then later used it to prepare

this 302?

A Yes, sir.

Q So that the following items were collected -- would indicate that they were collected by you and Mr. Morefield?

A Yes, sir.

Q All right. Now, it is not clear to me as to all of these items that were collected, did you actually remove them from Coler's automobile at the time you and Mr. Morefield were going through, dusting for prints and prior to the arrival of Special Agent Cunningham?

A Were they removed?

{3126}

Q Physically taken out of the places in the car that you have identified here, in the car.

A No, sir, not all the items.

Q All right. Prior to your departure on that date, were the items that are listed here removed in your presence or under your supervision and direction from the automobile?

A No, sir.

Q Well, when you say in here "evidence collected from a certain place", does that not indicate that the item was actually taken into possession by you or Mr. Morefield at that time and physically removed from the automobile?

A The items that appear here were inventoried by Mr. Morefield and myself; and some of these items were later processed, some in Pine Ridge, South Dakota.

Q I understand the difference between collection and processing. What I am trying to find out is what the difference is in your mind or at the time you made this, what it was between collecting an item and merely seeing it and making a notation that you observed it -- was there a distinction between those two activities?

A Yes, there would be a distinction.

Q As to all items that you say in here were collected by you, do you mean that at the time you actually saw it you physically took it into your possession?

A If you mean, did we carry it with us, no.

{3127}

Q No, I don't mean "did you carry it with you". Did you physically take it into your possession and in your hand and put it out of the car and perhaps on the sidewalk or whatever might have been in there or in a box or somewhere, place it other than where you picked it up out of the car?

A Yes, sir. Most of the items were actually taken out of the automobile.

Q I understand.

Do I understand that all of the items were actually taken out of the automobile where you have said they were collected or only most of them?

A The automobile was inventoried and processed, a certain area at a time, as I had them listed in Exhibit 180, that is, the glove compartment, the front seat, the rear of the vehicle, the trunk and so forth.

Q Well, let's look -- turn over to Page 2 for a moment -- let's take an example, maybe I can get by specific example -- Page 2 lists, about a third of the way down, evidence collected from driver's side, floor; and there are four items listed there, a tennis can, a paperbag, a cigarette butt and a calling card bearing the name, Jack Coler.

From your recollection being refreshed by looking at the document in front of you, can you tell me whether you actually removed those four items from the automobile and put them either in something or on a table or something at the time you {3128} made your notation that you were collecting those items?

A Yes, sir. As far as I recall, they were removed from the automobile.

Q Now, do you recall that, or are you merely inferring that from the fact that it says "collected" on this piece of paper?

A No, sir.

Q All right. You said before -- maybe I better be sure I understood what your answer was. Your answer was -- you said "No, sir," that you are actually recalling that, is that correct?

A As I recall, we normally collect the evidence and label it as to where it was taken from, and put it in some sort of container that would keep it separate from evidence from another location.

Q All right. The problem I am having, Mr. Lodge -- if I identify this for you, perhaps we can get to it quickly and we will move on -- is that each of the categories -- and you check me on this as you look through there -- each of the categories of items found in different places in Coler's automobile are all identified as being "evidence collected from", and then an identification of the place; and I understand by your definition of what it means to collect evidence, that you would have then taken those into your possession and either put them in a box or put them on a table or put them on the concrete walkway next to you?

{3129}

A Yes.

Q Is that correct?

A That's correct.

Q But when I asked you that question, you said that most of these items would have been treated in that way, and I don't understand why you say "most of them" instead of "all of them". I am trying to find out from you what items in here were not treated in that way.

A Well, there were, for one thing there was -- as I recall, there were five plastic bags containing what was indicated to me from the tags that appeared on it and so forth, that this was evidence that Special Agent Coler had collected, already collected in some other case that he had been working on, so I wouldn't have inventoried that any more than just state that it was five plastic bags containing evidence.

Q Can you tell me where you are looking at that on this 302?

A (Examining).

Q Is this Item 34 on Page 4?

A Page 4, Item 34.

Q All right, so this was five plastic bags containing tagged evidence (evidence from burglary of Pine Ridge P.D.) and this was found by you in the trunk of the automobile, is that correct?

A Yes, sir.

Q Now, up on Page 3, at the bottom, you have that list of 34 items, captioned "Evidence collected from trunk", and my {3130} question to you is: Was Item 34, that is, the five plastic bags, were they actually collected by you or were they just simply sighted and noted?

A They were collected and noted, and turned over to the individuals, the personnel in Pine Ridge.

Q But did you actually remove them from the trunk at that time?

A Yes, sir.

Q Well then, I still don't understand what items you did not actually take into your possession when you said "most of the items you took into your possession".

A Well, maybe you misunderstood me; but what I meant to say was that all evidence was inventoried and removed from the vehicle.

Q I didn't think you said that, and that was what I was trying to find out. That answers that question.

Now, I don't recall if I asked you about this document specifically, but would it be fair to say that as to the information as to what items you collected and where you collected the items from, where you found them and what the description of the items were that are listed in Defendant's Exhibit 178, would it be fair to say that in all of the cases you handled you don't have an independent recollection of all those items without referring either to your notes or to your 302?

{3131}

A Yes, sir.

Q And it would be fair to say, as I am sure is true in most of your cases, that you depend on the 302 or your notes in order to give testimony as to what items were found and what latent prints you identified, isn't that true?

A Yes, sir, especially in a case like this where there were numerous items of evidence.

Q Exactly, and as to every item that is listed in the 302, you personally either collected it or observed the collection in your presence and made the note at the time, I believe you said that?

A Yes, sir, that's correct.

MR. LOWE: Your Honor, we would offer Defendant's Exhibit 178 in evidence on the basis that it is a past recollection recorded. This witness has said he has no independent recollection of all these items, he would have to rely on this list to testify from which, of course, is completely to be expected, and we would offer it in evidence at this time.

MR. CROOKS: 178 being the 302?

MR. LOWE: Yes.

MR. CROOKS: Your Honor, the United States would object to this. We have been through this again and again and again. We object to the 302 as not proper evidence. If counsel wishes to offer -- in addition, this is not the {3132} best evidence. If counsel wishes to offer 180 which was the original notes, we, of course, would have no objection to that; but the 302 is not the proper evidence. It is simply a statement made later at a different time. This man has indicated he has reviewed his notes in preparation of testimony. If counsel wishes to offer them, we would not object to that. We would certainly object to the 302 Form.

MR. LOWE: The fact the notes would be admissible does not mean that 302 is not admissible. He has laid a proper basis. I am astounded to hear Mr. Crooks say that it is not a proper foundation. He gave me, the same information I gave, in the objection to the 302. This was made in circumstances that fit the Rules of Evidence. The witness testified he reviewed it, that what he relies on is the 302. That is not unusual -- I don't mean to be critical -- I would expect it. I think it is a proper document, It is a typewritten list of the items this witness testified he collected and found, and I think it is absolutely admissible under -- certainly under Rule 401 as your Honor cited before.

MR. CROOKS: Could we approach the bench to make our legal argument?

THE COURT: You may.

(Whereupon, the following proceedings were had at {3133} the bench.)

MR. CROOKS: Well, your Honor, just simply again, this issue has come up again and again and again in this trial; and the Court has consistently ruled that the 302's are not admissible. I don't figure there is any need for me to make any extended argument. If counsel wishes to put in the notes which we brought up and laid foundation for, I will have no objection to that.

This 302 is again the same type of offer that's been made again and again, and the Court has consistently ruled that these are not admissible evidence. If counsel can establish, for the purpose of impeachment, that there is something contrary to his testimony, then there is a proper way to put in the information and that's conceded; but to put the entire 302

in is not a proper way of eliciting evidence and we object to it.

MR. LOWE: Judge, that's simply a misstatement of the record. The Court has admitted 302's in this trial Exhibit 120 is an example of them, 121, 123 -- I guess those are the three 302's I can recall. It is perfectly proper.

What is so absurd about this is that the 302 is a typed version of these notes which I have no reason to say is not verbatim as to the information in the 302, although there is some information in these notes that was not extracted and put into the 302.

{3134}

It is absolutely absurd -- I don't know what the Government is trying to keep out. It is their own 302. It is their information.

Mr. Crooks came up before and offered this in evidence on the ground it was a past recollection recorded. It is absurd for him to argue we can't put evidence in on the same basis.

THE COURT: What is the purpose of the offer?

MR. LOWE: Because this is a list of all of the thing he found, and I want to make a record of many of the items that were actually found, identify them, particularly ammunition components found in Coler's car.

Now, I think that I am entitled to show this and also have it in a recorded form which it is in --

MR. CROOKS: (Interrupting) John, keep your voice down. You were criticizing me yesterday.

MR. LOWE: (Continuing) -- to have it in recorded form which it is in here, so that the jury can review it as an item of evidence to see what was actually there; and what is absurd is that the Government is not objecting to introducing this (indicating) which has the same information. It is not typed, it is not as legible, and I would represent to the Court that certainly would be one of the considerations in my offering it into evidence, is that it is in a legible form and a lot easier to use than this {3135} (indicating).

MR. CROOKS: Counsel, I am not sure what you are offering. You are talking about offering something, and you are referring to 180. I am objecting to the 302. We have made this argument again and again. I don't see what useful it does to re-argue. The 302's are not the best evidence.

If this man is asked specific questions, the best evidence is his testimony.

I have stated that we have no objection if counsel wishes to offer 180 for some particular reason; but as far as I am concerned, the best evidence is this man's oral testimony. If counsel is simply attempting, as they have in the past, to put the 302 in some kind of a transcript or whatever of testimony, counsel knows how to examine a witness and ask questions, ask him what he found, refreshing his memory or whatever, but we have been through this so many times I don't see it has to be argued.

MR. LOWE: Judge, this witness has said he has no recollection, that he has to rely on reading this (indicating), not that it refreshes his recollection. There is a difference between refreshing -- meaning you actually have a recollection -- and saying, "I have no recollection, I must rely on the written recordings I made at the time when I did have a recollection or had notes."

Now, we are entitled to have -- to say that it is the {3136} best evidence to ask this witness questions when all he is going to do is read the 302, that makes it secondary evidence. The best evidence is the 302 in this instance or the notes. I think we are entitled to pick which one we want to introduce.

THE COURT: In this particular case, Mr. Crooks, why do you feel this does not come within the Rule 612?

MR. CROOKS: Well, No. 1, it is not the best evidence. He testified that the document that he refers to is -- are his notes which are 180. I have already stipulated or agreed that I won't object to 180 if counsel wishes to introduce that; but counsel is attempting to introduce the 302 as a shorthand of this man's testimony and that is not proper. Counsel can ask him what he found, and he can go through it item by item if he wishes to take the time; but to put the exhibit in, the 302 in which is just a listing of all the items is improper. It is not the best evidence that should be offered.

If counsel wishes to cross examine or impeach him or something, then parts of it obviously are admissible. As I understand it, that isn't the purpose. Counsel wishes to again clutter the record up with documents for no specified purpose at all. If counsel wishes to impeach or counsel wishes to establish a specific item was there and wishes to show that this was

past recollection recorded {3137} specifically, that's fine; but he is simply offering the entire document, and it simply is not a proper way to impeach the testimony.

THE COURT: I will rule on it after lunch. I am going to think about it over the lunch hour.

MR. LOWE: I will try and ask some other questions.

THE COURT: You have been using it anyhow to question.

MR. LOWE: I understand. I will cover some other things. I am sure I will be on cross until after lunch.

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

Q (By Mr. Lowe) Agent Lodge, when you turned over items that you collected from the front seat or from other parts of the Coler automobile to somebody else, was that somebody else in all instances covered by Defendant's Exhibit 178 and the items that are contained in there, in all instances did you turn those items over to Special Agent Cunningham?

A Yes, sir. As I stated before, they were collected and tagged from different areas of the automobile, and then the evidence was turned over to Cunningham and Kelso along with the automobile.

Q I understand, but I just wanted to be sure that I had it clear that you turned all of the items that you list in here over to Special Agent Cunningham, and Kelso?

A Yes.

{3138}

Q As to any of the items that you note, evidence collected from various places in Defendant's Exhibit 178, I gather your answer was that Special Agent Cunningham did not find any of these, that he came in afterwards, these are exclusively items that you and Mr. Morfield found?

A Yes, sir.

Q Did you obtain any kind of receipt from Special Agent Cunningham as to the items you turned over to him? Is there any receipting that was done at the time you gave them to him?

A No, sir.

Q As to all of the items listed here are you able to say from your own recollection that you gave all of these items to Special Agent

Cunningham, or simply that to your recollection you gave a whole lot of things to him at that time and did not take any away with you?

A As far as I recall everything, the automobile and the contents, were turned over to Mr. Cunningham.

Q When you made your inventory of Coler's automobile did you attempt to be thorough and to inventory all items, or only items which you looked at with a view towards finding latent prints?

A No . We inventoried all items I would say.

I mean, it's, as you can see there's quite a list of items that were collected from the automobile.

Q Okay. And would I be correct in assuming that you took great pains and care to look thoroughly at all items, including {3139} places where things might have fallen down behind a seat or rolled under carpeting or whatever it might be, that you examined it quite thoroughly.

A Yes.

Q Now, you made some examinations of the tent city area I believe, including some books that you've identified and other items here, and I ask you if you would look at, first of all look at Defendant's Exhibit 179 for identification which I place before you and tell me if you can identify this document or the, or at least if you are familiar with the information contained therein?

A Yes, I recall this. This was more or less my departure memo from Pine Ridge, South Dakota.

Q All right. And then refreshing your recollection to the extent necessary, or looking at that document, can you tell the jury how many latent impressions of value total were derived from the following sources: the red and white van, the various documents, motor vehicle documents you've identified, the tents in the vicinity, in the tent area, the documents from Albert Eugene Kelly of Porcupine, South Dakota, the 1967 Ford Galaxie and its content, the two agents' automobiles, the green house near the crime scene, the white house near the crime scene, the log house near the crime scene, and a residence in South Dakota, in Rapid City, can you tell me how many latent impressions of value were found in all of those sources that you {3140} examined?

A Up to that date there were 533 latent impressions.

Q So there were 533 total of value; is that correct?

A Yes, sir.

Q All right. Now, can you tell me how many of those 533 were eliminated on the basis of belonging to the handlers of the items, and by that I trust you would mean Special Agents of the FBI or people of that nature?

A I couldn't tell you at that time. I didn't -- our comparisons weren't complete.

Q All right. On the second page of the document would you look at the first line there and see if that refreshes your recollection as to what you ultimately determined were at least some eliminated fingerprints.

A Yes, sir. It does indicate that.

Q All right. How many did you eliminate from the 533?

A 125.

Q Am I correct that when you say handlers you would mean such as yourself, Agents Morfield and Special Agent Cunningham, perhaps if you examined items later, or any of the agents that might have closed the trunk of the car or whatever it might be, am I correct on that?

A I wouldn't have identified my own because I wore gloves.

Q Fine.

A But there were, I'm sure, other people that would normally {3141} handle the item.

Q But these would not be people who might conceivably be suspects of being involved in the shoot-out other than the law enforcement officers, would then?

A Are you referring to the elimination parts?

Q Yes.

A Right.

Q So we had a hundred and twenty-five, and if my arithmetic is correct, that leaves 408 other than known handlers.

Now, of these can you tell me whether you made further identifications, looking at the next paragraph in that document, as to certain, seven certain specific people which you identified by name because they had recorded fingerprint cards or otherwise?

A Do you mean that additional latent identifications?

Q Yes. I refer you to the second full paragraph on page 2 of that

document.

A Yes, sir.

Q All right. And in fact there's a list of seven people there whose fingerprints were specifically identified among the remaining 408, am I not correct about that?

A Yes.

Q And those included Leonard Peltier, Theodore Lame, Harry David Hill, James Theodore Eagle, Joseph Bedell Stuntz, deceased, Darelle Dean Butler, Donald Mathew Loudhawk; is that correct?

{3142}

A Yes, sir.

Q How many of the 408 of total latents of value, other than handlers, did you identify to those seven individuals?

A Forty-two latent fingerprints.

Q So that left 366 latent fingerprints which were not matched up to those seven people, and they're not identified specifically in this document, am I correct about that?

A Yes, sir.

Q And in fact as to some of the 366 prints would I be correct in assuming that you never have been able to identify them to any particular person's fingerprints and they are just simply known people at this point to you?

A Yes, sir, that's correct.

MR. LOWE: Your Honor, I'm on a convenient breaking point. If I go into my next area I will not be in point at 12:30. Do you want to give us a five minute leeway or slippage?

THE COURT: I'll give you five minutes.

MR. LOWE: Thank you, Your Honor.

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

(Recess taken.)

{3143}

AFTERNOON SESSION

April 5, 1977

Whereupon, the following proceedings were had and entered of record on Tuesday afternoon, April 5, 1977, at 1:30 o'clock, P.M., without the

jury being present and the defendant being present in person:

THE COURT: I reserved ruling on the offer of Exhibit 178. Is Mr. Lowe here?

MR. TAIKEFF: He's not, Your Honor, but I'm here in his place.

THE COURT: Very well. But he was the one making the argument.

MR. TAIKEFF: I understand. I didn't want the Court to be inhibited, though.

THE COURT: Thank you. Which is the 302 and the reason I reserved ruling is because that Rule 612 on 302's does present a bothersome question. However, I find that Winstein discusses it this way: That section 612(05), and this is not with specific reference to 302's, but it's with reference to writings, "Clearly the writing should not be give substitive effect in every instance. To allow otherwise would undermine the usual modes of introducing evidence and would permit bypassing of best evidence authentication and hearsay rules in many instances. Rather this provision must be understood as allowing the jury to examine the writing, one, {3144} as a guide to assessing the credibility of the witness; and two, to the extent that it would have otherwise, that it would otherwise have been admissible for its normal evidential value.

On the basis of that discussion and on the basis of the Government's objection to the exhibit the objection is sustained.

The jury may be brought in.

MR. TAIKEFF: Your Honor, could we approach?

THE COURT: You may.

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

MR. TAIKEFF: Your Honor, I spoke with Mr. Hanson about a matter that I thought I would raise with the Court, and that is the fact that Friday is Good Friday and this weekend is Easter weekend. I know there may be special considerations for the jury. I have been informed by Mr. Hanson that according to the local rules Good Friday is a Court holiday.

THE COURT: I was intending to ignore it, but go ahead.

MR. TAIKEFF: I was intending, even before I knew it was a local holiday, for the Court purposes to ask Your Honor, unless Your Honor thought that the jury would be seriously inconvenienced, to recognize the holiday and take a three day weekend.

THE COURT: Well, the reason I was intending to ignore it was twofold one, because it's a Christian holiday and we're {3145} dealing with an Indian defendant here; and two, because of the fact that the jury would be idled for three days.

And I have recognized that it is normally a holiday in this district.

What's the Government's position on it?

MR. HULTMAN: Well, I think the first consideration is the jury, Your Honor. I indicated to counsel I wouldn't join in it because at the request I have made the Court has indicated on those one or two limited occasions that it felt, because of the jury being in the posture that they are, that that ought to be a primary consideration. And I feel it ought to continue to be.

THE COURT: I just am very reluctant to have that jury sit for three days.

MR. TAIKEFF: I can understand that. Actually I didn't mean to make it sound as if I was pressing I merely wanted to make inquiry.

THE COURT: Yes. Thank you.

MR. LOWE: Before we leave the sidebar, Your Honor, let me give this to you. I don't know if Mr. Crooks has this. In order to try and meet the Court's ruling anticipated and the Government's objection, Government Exhibit 180 is a handwritten list which is quite difficult to read. The witness has already identified the 302 which I believe is Government, or Defense Exhibit 178. I think that was the number.

{3146}

THE CLERK: 178.

MR. LOWE: Yes, 178. And has said that it accurately reflects the information that he had in his notes. Now, the only possible objection I can see the Government would have to introduce the 302 would be as to headings and dates and names that are associated with it, because clearly the contents have already been identified by the witness as being identical to the contents that he discloses on his handwritten notes.

I believe that we are entitled to have a legible copy to work from and to use with the jury, and this is an extract of the 302 which this witness has already identified as being an accurate list. I represent to the Court that I have no reason to believe that there's any difference

between this and 180.

I will, if the Court wants, go again and let the witness look at it exhaustively, or Government counsel, but we do not intend to try and show any difference between 180 and the 302. That's not the purpose. My main purpose is to have something legible that we can work with.

This I intended to offer as an exhibit, 180-A, and to represent it simply as a typed-up copy of the handwritten notes. That is, the list of items that are contained therein. It does not contain some of the extraneous items that are shown in the handwritten list, particularly like I think a couple of names of people that are not related to what he found.

{3147}

THE COURT: This is taken off the yellow --

MR. LOWE: The witness says this was taken off of the yellow notes when he dictated it, and he dictated it and he adopted this as being accurate. And I represent that as far as I know it is accurate.

The objectional part of the 302, if there is anything, must be in the extraneous information which I have eliminated by the zerographic method with this document, and I wanted to advise the Court before we get in the middle of a thrashing match out in open court that I will offer it as Exhibit 180-A.

If necessary I will have the witness read the list more carefully and readopt this. But I don't think there's any reason to believe the lists are not the same. They are some, if you look at the first page, there are some names and things which I did not try to extract. The information I want is simply the list of items that he found.

MR. CROOKS: Well, Your Honor, we certainly take issue that 180 is not completely legible. It's absolutely every entry --

THE COURT: All right. But what is your objection to this list?

MR. CROOKS: Your Honor, it goes to the same thing. Counsel is attempting apparently to condense this witness's testimony into some sort of document, and that is not a proper purpose of any document.

{3148}

If counsel has items he wants to bring out he can do it orally. But, Counsel, we've gone through this again and again on 302 forms, or lists or whatever counsel is attempting to substitute the 302 for the testimony.

And this goes back to the same thing that the Court had ruled on numerous times that if counsel can show some relevance to a particular part there's no problem.

Counsel is just trying to put in documents in summary or whatever he's got in his mind in lieu of offering oral testimony. If there are items on this list I have no objection if counsel will give the list to the witness and have him refresh his memory and indicate that certain items are in fact found. I just, I never seen a case where counsel has attempted again and again to put in documents in lieu of testimony.

MR. LOWE: Judge --

MR. CROOKS: Because you're, if counsel were putting it in for some usual, normal purpose such as impeachment, then that's one thing. But counsel is just trying to summarize testimony and put in things that really have no particular bearing or anything. And it's improper, it's an improper way to put the evidence in.

THE COURT: Well --

MR. CROOKS: I've offered, and I do again, that if counsel wants to put in 180 because it was referred to by the United States, I have no problem with that. I won't even {3149} object to that.

But to keep putting in the 302 forms I think is an improper way to establish way to establish facts. And counsel knows how to go through the items that are material and to bring them out.

THE COURT: The items listed here, are they taken --

MR. CROOKS: I don't really know, Your Honor. I understood the witness's testimony to be that they are substantially the same. Some of them are not. For instance, the last list found in the trunk, one item was scratched out here and apparently when it was reproduced in the 302 they have a different series of numbers because of the item which was scratched out. And I don't know why it was scratched out. But I don't know, I have not compared them.

MR. LOWE: Judge, this is ridiculous argument. That is not a 302, that is a typewritten list which the witness has identified as being the same as in there. Now, if the Government were objecting to 180 I think this is nothing but harassment. The Government says they don't object to 180, but they object to a typed copy which is to make it more legible.

This is 180-A. Now, this witness has said that he has no independent recollection. The best evidence is the documentary evidence, 180-A let's say for the moment, because he can give no oral testimony -- would you let me finish, I {3150} let you finish -- he has no oral testimony. To make him read the list is nothing more than to what the jury can do, and the jury is the finder of fact. He might misread the list.

Talking about best evidence, that is the best evidence, and he has testified to the effect that that's the best evidence. Now, all we ask is that we be allowed to utilize a typewritten copy which is more legible, and let the Government, if the Government finds some error in there, or mistake, I'll be happy to correct it.

I represent to the Court that I know of no such error. I don't suspect that there's any such error, and I'm introducing it to show some error between the two at all. But I think I'm entitled to have a legible copy that I can use to examine with the jury.

Now, I'd like to add one further point that Government counsel cleverly eliminates, and that is when you have a long list, I think there must be a hundred items in this list, there's no way on God's earth that that jury can remember all of the various ammunition components and calibers when they get back in that jury room. That was testified to. If the man just reads the list. One of the purposes of a document is to allow the jury to go back and review and to look at things and to check what the evidence was. This is no different than the Government introducing a photograph of the fingerprint. {3151} The best evidence there, you could argue, is the witness's testimony saying that the prints are the same and therefore you don't need to clutter the record with fingerprints. That's patently absurd as much as it is here.

Obviously the jury has an opportunity then to look at the fingerprints and make its own comparison, similarly to look at these exhibits and make their own comparisons on the basis of relying on these.

Now, there's absolutely no distinction between those two of any legal consequence, and all this is is a typewritten list of 180. And I would propose to make it 180-A and identify it to the jury as such and introduce 180 myself so that the jury can make a comparison. But for reference, and so that the jury has a clean copy to look at, I want to introduce a typed

copy of it. And I think that's entirely proper under the rules, and I will offer 180. In addition, I'll offer them together.

MR. CROOKS: All right. Well, Your Honor, this is, was my point. That this is the exhibit. If there's validity to what counsel says then 180 is the exhibit, and if counsel feels that this does not show it, and this is in fact an exact copy, and I don't know if it is or not, but if it is in fact, then I wouldn't have any problem.

If counsel wishes to represent that this is a typed copy of 180 then I don't have any problem. But if counsel is {3152} trying to establish the list, then 180 is the list.

MR. LOWE: I said I'll offer 180 and 180-A as a typed copy.

MR. CROOKS: You talked for about five minutes --

MR. LOWE: You just stopped and I was responding.

MR. CROOKS: Well, catching my breath, that doesn't mean I stopped.

My point is is that this was offered, or not offered by the Government, but referred to for a very specific purpose which I made clear when it was first brought up. Counsel has implicated a fabrication, and I have elicited testimony to show that there was a contemporaneous record made. And I have no problem with counsel offering 180 for whatever purpose he wishes to offer it. But the typed list in lieu of 180 is not correct.

If this is in fact a typed list and it corresponds with that, then I have no problem with it being offered as a typed copy of 180. But counsel, that isn't what he came up here for. Counsel came up here to introduce 180-A in lieu of 180. 180 is the exhibit. If there's any validity to what counsel --

MR. LOWE: Judge, I don't know why Mr. Crooks has stopped listening to me. What I came up here for, that was nothing more than to do that, and would be offered for nothing more than a typewritten list for 180, and that's all I offer {3153} them for.

MR. CROOKS: That came about the mid part of your argument.

MR. LOWE: That was the first thing I said. That this is a typed list, that's all I offer it for. And I would offer them together so that the jury can take both of them.

There's parts that have been tattered away, so in that case the 302 would be the best evidence. But I'm willing to let this typed list go in.

The witness has identified it as being the same. I assume that he's correct.

THE COURT: It isn't the same exactly.

MR. CROOKS: As I pointed out there is a renumbering of one item struck out. I believe item 14. Every item from there on has moved up one. So they aren't exactly the same. But I don't know. I have not compared them.

But if the witness is willing to say that this is a fairly accurate list in comparison and they're introduced for the limited purpose of showing the reproduced copy of that, then I would withdraw my objection.

THE COURT: Well, I thought --

MR. LOWE: That's all I offered it for. The Judge heard the same thing I said.

MR. CROOKS: You came up offering this.

MR. LOWE: As a typewritten copy of 180.

MR. CROOKS: You didn't say anything about that until {3154} I stated my position, then you said we'll offer 180.

MR. LOWE: But the Judge was listening to me and heard what I said.

THE COURT: Well, anyhow, 180, if it's offered, will be received.

MR. LOWE: I will offer that, Judge.

THE COURT: And this then --

MR. LOWE: 180-A.

THE COURT: -- will be 180-A.

MR. LOWE: Fine.

THE COURT: And received as a typewritten copy of the items listed on 180.

MR. CROOKS: The only thing I would ask is that the witness be given an opportunity to make at least a brief comparison, because I don't know -- if that's the state of the record then we withdraw the objection.

THE COURT: I assume that's the way it was going to be done.

MR. LOWE: Yes, sir

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

{3155}

MR. LOWE: May I proceed, Your Honor?

THE COURT: You may proceed.

Q Mr. Lodge, I place before you Government Exhibit 180 and also Defense Exhibit 180A and I will tell you that Defendant's Exhibit 180A purports to be a typewritten list of the items which you had in your Government Exhibit 180 and I think by looking at it you can see where it has been extracted from and at the request of Government I think I would like to have you have another opportunity, if you would, to check it and satisfy yourself that that is the same list essentially of the items found. There are some notations of names and things on the handwritten list which did not carry over to the typewritten list because the typewritten list only purports to be the items you found rather than some of the information.

Would you like to take a moment and look at that and see if it appears to be the same list and in order to do that let me give you another document which I will not identify specifically but which I think will be familiar to you which you may want to use to compare in order to see whether you can make an evaluation.

A Yes, sir. I would say that it's accurate.

Q For the record will you compare, if you have not already done so, Government, excuse me, Defense Exhibit 178 with 180A and see if those lists also appear to be the same items as to the substance of the list. Not some of the extraneous {3156} information that is shown on there.

I'm sorry. I was waiting for you.

Do they appear to be the same items on each of those two lists?

A Yes, sir, they do.

Q Now what I want to do is have you look at Defense Exhibit 180A and I want to go down as ask you some questions about certain items. First let's take the front page of it, if you'd look on there. I don't want to stand in your way but I --

MR. CROOKS: Your Honor, excuse me. Counsel has not yet offered it.

MR. LOWE: I'm sorry. I will offer both Government Exhibit 180 and Defense Exhibit 180A.

MR. CROOKS: Your Honor. We have no objection to 180 and we have no objection to 180A as a typed reproduction as stated at the bench.

THE COURT: Exhibit 180 is received and Exhibit 180A is received as a typewritten list of the items that are listed by handwriting on Exhibit 180.

MR. LOWE: Thank you, Your Honor.

Q (By Mr. Lowe) Looking at the first page of Defense Exhibit 180A, I call your attention to item 21 and ask you first of all as to whether this list containing item 21 was found in the front seat of the automobile known as Coler's car? Is that correct?

{3157}

A Yes, sir.

Q In other words, this is a list of items that you found in Coler's automobile, to go back to what we said before lunch?

A Yes, sir.

Q And that is one .38 special cartridge case, correct?

A Yes, sir.

Q And that's, I believe, the only cartridge case that you found in your search of the Coler automobile in the front seat of it, is that not correct, on your list?

A Yes, sir.

Q There are 24 items and only one of them is a cartridge case and that's the single cartridge case found in item 21?

A Yes, sir.

Q Going to the second page we have evidence collected from several other places and on that page, correct me if I'm wrong, the only cartridge case or cartridges which I see are shown as having been collected from the right front floor and that includes four boxes of .38 caliber Western Super Match Cartridges, item two, and one box of .38 caliber Winchester Super X Cartridges, item three. Am I correct so far the cartridges or cartridge cases shown on that page?

A Yes, sir.

Q Now do you recall how many cartridges were contained in each of these boxes?

{3158}

A No, sir, I don't.

Q They were full boxes unless you indicate to the contrary, would that be a fair assumption?

A Yes, sir.

Q You don't know whether they were, 20 or 50 or how many were in

the boxes from recollection?

A No, sir. From recollection, no, I don't.

Q So these were then found in the right front floor and I ask you, because sometimes the term right front seat means to some people the whole compartment, when you said right front seat on the first page, do you mean literally on the seating surface or the bench type seat in the front of that car?

A Yes, sir.

Q Was it a bench type seat?

A It was, as I recall, it was just a, it was no break in it. It was just a continuous seat.

Q And then this would have been found down where the passenger in the right front seat would have had his feet, I gather, when you said right floor or under the seat or somewhere?

A Yes, sir. On the passenger side.

Q Then I'll ask you to look at page 3 and again see whether I have circled in green three items, whether I've caught all of the cartridges or cartridge cases which are shown on that list. There is a revolver there. I'm talking only about {3159} ammunition components now.

A Yes, sir.

Q All right.

And again you have one box of Winchester Super X .38 caliber cartridge containing 12 cartridges and I gather that's an incomplete box and you counted the cartridges?

A Yes. Evidently it was an incomplete box.

Q As to the fourth, the same is true except there were seven cartridges, is that a fair assumption from your listing there?

A Yes, sir.

Q And down below you have one paper bag containing Winchester Super X box, empty. So there were no cartridges in that, although that item refers to ammunition?

A Yes, sir.

MR. LOWE: In order to clarify one point for the jury, will Government Counsel agree to sate what that weapon was, that that was a weapon that Special Agent Coler apparently had in conjunction with an unrelated matter

that does not relate to any of the evidence in this case, is that a correct statement?

MR. CROOKS: I have no personal knowledge but that is my understanding.

MR. LOWE: The gun in the glove compartment, that has nothing to do with this case and should not be confused.

{3160}

Q (By Mr. Lowe) On the fourth page of the list of things you found I have circled items five, six, seven, nine, ten at the top and 23, 29, 30, 31, 32. Would you check over and see if I caught all of the cartridges or cartridge cases shown on that page, or empty boxes. I think one of them is an empty box. Does it appear that that list circled all of them?

A Yes, sir.

Q All right now.

Item No. 5, first of all, is two empty boxes and I gather there were no cartridges or cartridge cases in those boxes?

A No, sir, there were not.

Q Then two full boxes, and again you don't recall how many cartridges there were in a full box at this time?

A No, sir. I do not.

Q And one box containing six cartridges. I assume that was a, partial boxes were on the other page?

A Yes, sir.

Q Two full boxes of high powered 12 gauge shot shells, five each, and would that indicate two times five or a total of ten shotgun shells, is that what that indicates to you?

A Yes, sir.

Q And one empty box which means there were no shells or cartridge shells in there?

A That's correct.

{3161}

Q Down to item 23, one box and it says, "48 Western Super X cartridges." Would the 48 indicate the number of cartridges in the box.

A That would indicate the number.

Q And then item 29, 1One .23 caliber Remington Cartridge Case R-P. I believe you previously identified that as Government Exhibit 34B. Would

that be the one.

A Yes, sir.

Q And item 30 is one .30 caliber cartridge. Just loose I gather.

A Yes, sir.

Q And then item 31 is 52 .38 caliber Western Super Match Cartridges. I gather they were loose in the trunk?

A Yes, sir.

Q And then item 32 is one .38 Special or R-P cartridge which again was loose in the trunk?

A Yes.

Q These four pages contain all of the items that you collected as a result of your search of and inventory of the automobile known as Coler's automobile?

A Yes, sir.

Q Now I want to ask you one or two additional questions about {3162} that. When you finished with the automobile and your collection that you did there, I believe you indicated earlier that you had identified the items, noted where you found them and had removed them, perhaps tagged them, marked them, put them in either boxes or envelopes or on tables or wherever it was you put them and that eventually you turned them over to Special Agent Cunningham. Am I reciting that correctly?

A Yes, sir. That was not everything. Not everything was turned over to Cunningham.

Q Maybe I'm just not thinking of what you said. You took --

A There were --

Q -- some latents or something?

A Yes. There were things pertaining to the latent examination weren't turned over to Cunningham.

Q Well, did you take some things other than those that you actually made yourself, that is, latent impressions which I understand you would take off and take with you, but that item would not have been in the car when you first approached it?

A No. That's correct.

Q As to any of the items that were in the automobile when you first gained access to it, did you turn all of those types of items over to Special

Agent Cunningham when you left?

A No. Some of the items were carried back to Pine Ridge and turned over to the agent personally in charge of the evidence.

{3163}

Q And was that because they were items that you wanted to process further for fingerprints?

A Some of the items; yes.

Q Do you have any way of determining now which of the items you took back to the evidence man at Pine Ridge and which ones you gave to Special Agent Cunningham?

A No, sir, I don't.

Q Would you be able to look at this list and tell us any items you know you gave to the evidence man at Pine Ridge, for example, or know you gave to Special Agent Cunningham or are you simply only aware that you gave everything to those two sources?

A I'm sure that I gave everything to those two sources, but to distinguish between the evidence I gave to Cunningham and the evidence I turned over to the agent personnel in Pine Ridge, I don't recall just what it was.

Q Do you remember, was there a specific person you gave these things to in Pine Ridge?

A I --

Q Was there an evidence man as such?

A Yes.

Q Do you know who that was?

A I believe the name was Brugger.

Do you remember -- strike that.

{3164}

MR. LOWE: May I have a moment, Your Honor?

THE COURT: You may.

Q (By Mr. Lowe) As to everything that you found in Coler's automobile, identified, marked down where it was found, perhaps checked it in some way and then removed and identified and put into whatever container or location you put it in and subsequently turned over to either Special Agent Cunningham or Special Agent Brugger, as to all of those items, was anything

else left in the car other than those items when you finished with your inventory to the best of your knowledge and belief?

A To the best of my knowledge nothing was left in the automobile.

Q Now I want to, calling your attention to -- let's take one of the areas of the car. Let's pick the trunk. That's a nice compartment type thing. When you finished with the compartment examination and you made a list here of all the various items that you found there, inventoried, removed, and put aside for the moment, eventually turned over either to Special Agent Brugger or Special Agent Cunningham, was there anything left in the trunk to the best of your knowledge or belief?

A To the best of my knowledge nothing was left in the trunk.

Q And as with all areas of the car you searched, were you fairly cautious and thorough in your examination of the trunk compartment as well as the other compartments?

{3165}

A Yes. I tried to be as thorough as I possibly could.

Q Is it even conceivable in your mind that there could have been, let's say, a box of some sort left in the trunk that you didn't see or identify or inventory?

A No, sir.

Q Is it conceivable there could have been, for example, a dozen or so cartridge cases left in there that you didn't see and identify?

A No, sir.

Q Did you personally take the items to Special Agent Brugger or did Mr. Morefield take them, Special Agent Morefield or did you take them together?

A We took them together.

Q And as to the items that were turned over to Special Agent Cunningham, was he also there and did he also assist in turning over all those items?

A At the same time?

Q Yes, sir.

A No. When we turned the automobile over to Special Agent Cunningham we left.

{3166}

Q Maybe I didn't make myself clear.

At the time you turned over the automobile and these other items, I gather since he was standing right there, that what you really did was said something like, "There it is, you have got control of it now," rather than actually hand items to him, would that be a fair assumption on my part?

A That's right.

Q And at the time that you said to him, "All right, there are the items I found," was Special Agent Morefield there participating in their turning over?

A Yes, he was.

Q Did you enumerate for him or point out to him any special items that you found particularly, or did you just say, you know, "These are the items we found, they are lined up here, they are piled up here in this box, they are piled up here in this pile, you have got control of them, I am going to take these other items over to Special Agent Brugger," is that what you said?

A Yes, sir. As I recall, we went over previously with Special Agent Cunningham the material that we removed.

Q You didn't say, "Here is one blackjack, three tennis balls one bag of candy," blah, blah, blah, down the list, did you?

A No, sir.

Q In fact, you didn't call any particular attention to any specific items on there except to point out that those were {3167} the items, isn't that fair?

A Yes, sir.

Q And isn't it true that you did the same thing with Special Agent Brugger when you got to him, that you had a number of items and you simply turned them over to him and assumed that he would properly log them in and write identifications based on the notes you had inserted with them and secure them properly?

A That's correct.

Q But you didn't say to him, "Here is one notebook and pen, one Mobile travel map, one pen and mechanical pencil," or anything like that?

A No, sir.

Q In fact, right now of your own recollection, as I understand your testimony, you cannot identify a specific item that you either gave to Special Agent Brugger or turned over to Special Agent Cunningham except to say that everything on this list was turned over to one of them or the other, isn't that fair for me to say?

A Yes, sir.

Q Now, I want to turn for a moment to the fingerprints, the latent fingerprints you identified; and I believe you have an exhibit here which is marked Government Exhibit 42, and I probably have a note on there -- you might tell me quicker -- let me just look at my note. I think I remember which one it {3168} was you did that on. I believe that that was a comparison of Government Exhibit 38-D which was a latent print on the rear view mirror of the red and white van and you compared that with a print off of Government Exhibit 38-A -- it is Print No. 5, I don't remember what finger you told me, it would be the pinky finger of one hand?

A That is the right little finger.

Q That's what I thought my notes indicated.

Now -- now, let me just talk a little bit generally about fingerprints. When you take a comparison of that nature you look for points which compare, either ridges or loops or whirls or dots or something in the known print, comparing that to the latent print which you have lifted or have been sent for comparison, in order to see how many points are comparable on each of the two, isn't that just generally what you do?

A Yes. One thing that you mentioned that I might clear up, the ridges are broken, that is, they are not continuous; and they form ridge characteristics known as points of identity. We don't particularly look for, as you said, a whirl or a loop, whatever the pattern type is. We try to take the points and compare them with the points in the other print and if they fall in the same relative area and position, without any unexplainable dissimilarity, then we have effected an identification.

Q All right, and is there a number of points of similarity {3169} which you like to have before you conclude that the latent was put there by the same finger that put the inked print on the known card, is there a certain number you like to have to be certain to a scientific level that you accept?

A Well, I try to take both prints in question; and to begin with, every print is different, most latent prints are fragmentary. That is opposed to the inked print taken under ideal conditions and transfer immediately, but as far as having a set number of points, that's entirely up to the individual examiner.

Q In any event, you certainly would want to have a number of points of similarity and not merely two or three or something of that nature, as a general rule wouldn't you?

A Yes, sir.

Q And in fact, a latent print usually has dissimilarities from the known print of the person who put the latent print there, for a variety of reasons, such as scars or something that may have been picked up on the finger since the known print was put on the card, isn't that one possible thing that might change it?

A Yes, sir.

Q And aren't there actually physiologically characteristics of the finger, sweat glands and things which change daily or more frequently, that will give you minor variations any time you make an impression of your finger?

{3170}

A Yes.

Q Just physical dirt can make a difference, can't it?

A Yes, sir.

Q The degree to which a person is all heated up or very dry might affect what ridges are prominent and what ones don't even show, isn't that true?

A That's correct.

Q In cold weather you might have an affect on the ridges that might make a variation from what they would be like if it were warm out, that also might affect it, wouldn't it?

A Yes.

Q Would it be proper to say that in any instance where you compare prints, you are never going to find every point to be identical, but rather you look for enough similarities to convince you that the person who made the one had to be the one who made the other one, isn't that true?

A Yes, sir; yes, sir.

Q Now, as to Government Exhibit 42, when you examine this, what you really determine from your examination is that there are enough points of similarity to convince you that the latent fingerprint was made by the finger which is shown by the inked fingerprint on the known card, isn't that the substance of your testimony?

A That's correct.

Q You are not testifying, I trust, that the latent fingerprint {3171} is identical to the inked fingerprint?

A No, sir, Technically it is not identical.

Q All right, and that's not necessary in order to make your identification, is it?

A No, sir.

Q In fact -- well, let me ask you a foundation question or two.

Within the technology that is available in the scientific world, it is actually possible today for someone with proper equipment, laboratory, whatever might be necessary, to forge or duplicate a fingerprint, isn't it?

A It is possible. There is a question there of the difference between forgery and duplicating.

Q Well, if you took a known fingerprint card and you took a picture of it and used some sort of a photo-chemical process to etch a piece of latex with that impression, so you would end up with a latex copy of the finger that made the known card, you would have what I would call in simple terms like a rubber stamp of that fingerprint, that is possible technologically to do today, is it not?

A Yes.

Q Isn't it true when we are talking about identity, if you ever found a fingerprint that was truly identical with a known print, one of the first things that would pop into your mind as an expert might possibly be a duplication because of the fact {3172} that it is identical instead of having some dissimilarities?

A Yes, that would be one reason.

Q It is not required for you to find identical comparisons between a known print and a latent print in order to make your identification and

make it in a valid scientific way?

A That's correct.

Q And would I be fair in saying that as to the prints you have described of Mr. Robideau, Mr. Butler and Mr. Peltier, that you did not find any of the latents that in fact were identical with the known inked prints of the cards that you looked at?

A No, sir.

Q That would be correct for me to say that you did not find them to be identical, but merely similar enough to resolve in your identification?

A Yes.

Q All right.

Did you execute an affidavit concerning certain of the examinations that you made in this case pursuant to a request from somebody in order that the affidavit would be used in the extradition proceedings for Mr. Peltier in Canada, do you remember that?

A Yes, sir, I do.

Q Would I be correct in recalling that you actually made two affidavits, I think one was made in March of '76 and one in April of '76? {3173}

A I don't recall exactly the dates. I do recall one was in the first week of March, I believe.

Q All right. Let's see if I can find it.

In any event, there was another one you made later at a later time?

A Yes, sir.

Q There was some differences in the two of some sort, and that was the reason for your executing a second one?

A Yes.

Q Do you remember how you received those, did you actually prepare them, did someone give them to you by hand or did you receive them in the mail?

A The original one was prepared by me, and then I received another one with amendments.

Q Do you know who sent that to you?

A I believe it came through the FBI office in Rapid City.

MR. LOWE: O.k. May I have a moment, your Honor? I think I am just about finished.

THE COURT: All right.

(Counsel confer.)

MR. LOWE: That's all the questions I have, Your Honor.

CROSS EXAMINATION (Redirect?)

By MR. CROOKS:

Q Mr. Lodge, just one point for clarification. Counsel {3174} asked you about things that may or may not have been left in Coler's trunk following your examination, and I don't recall particularly what your answer was, but you responded that you took most, if not all, of the things out that you observed?

A Yes. Everything that I determined that would be used for my examination.

MR. LOWE: Your Honor, I will object to the form of the question. The testimony was that he took all of the things out, not most of the things. He said to the best of his ability he took everything he could find by a careful and thorough search. I think that's the testimony

THE COURT: Was that your testimony?

THE WITNESS: Yes, sir.

Q (By Mr. Crooks) The question I was getting to, Mr. Cunningham performed his examination shortly after you did, is this correct?

A Yes, sir.

Q As I believe you stated earlier, that he was actually there when you left?

A Yes, sir,

Q All right. Do you have any way of knowing what, if anything, he may have found in the vehicle and logged in his evidence?

A No, sir, I don't.

(Counsel confer.)

{3175}

MR. CROOKS: We have nothing further.

MR. LOWE: No redirect -- recross, I should say, your Honor.

COURT: You may step down.

(Witness excused.)

MR. SIKMA: Plaintiff calls Evan Hodge.

EVAN HODGE,

being first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. SIKMA:

Q Please tell the jury your name.

A Evan Hodge.

Q And what is your occupation?

A I am a Special Agent with The Federal Bureau of Investigation, and I am assigned to the FBI laboratory in Washington, D.C.

Q And do you have any special training?

A I am assigned to the Firearms and Tool Marks Identification Unit of the FBI Laboratory.

Q And what do you do in that position?

A As a specialist assigned to the Firearms and Tool Mark Identification Unit, I examine principally bullets and cartridge cases recovered at scenes of shootings, and compare them with weapons which are sent to me by various law enforcement jurisdictions.

{3176}

Q Now, Mr. Hodge, have you had any special training to prepare you for this type of identification?

A Yes, sir.

Q And would you tell the Court and the jury what that is?

A In preparing for the assignment that I am now in, I studied for approximately one year under the then 12 firearms identification specialists in the laboratory. During this year I read all the available literature in the field of firearms identification, I examined literally hundreds of weapons, thousands of bullets and cartridge cases. I conducted other exams relating to firearms identification, and I toured several of the New England weapons manufacturing facilities.

Q Have you ever testified as an expert before?

A Yes, sir.

{3177}

Q Can you tell the jury what a firearms identification is?

A Most simply put firearms identification is the ability to determine

if a particular bullet or a cartridge case has been fired by a weapon to the exclusion of all other weapons in the world.

Q Can you tell the jury how that is possible?

A In the case of a bullet comparison, when the weapon is manufactured the inside of the barrel is cut with grooves which are given a twist so that when the bullet enters the barrel of a weapon it is forced, its outside surface is forced into these grooves. And this will give the bullet a spin as it's going down the barrel of the gun and provide it with stability like a top.

Now, as the bullet goes down the barrel of the weapon its outside surface is in direct physical contact with the inside surface of the barrel. So that if the bullet is recovered undamaged it will have markings on it from the inside of the barrel. In many firearms these markings will be consistent from shot to shot and it has been found over the years that they are unique in insufficient quantity to the weapon itself.

These markings will change from time to time throughout the firing of the weapon and through other actions that can cause changes inside the barrel of the gun, such as cleaning the weapon or if the weapon becomes rusted. In the case of {3178} cartridge cases, when the gun is fired, the cartridge case comes in violent contact with the mechanism of the gun. This mechanism, which is known as the breech, is the part that that keeps the cartridge cases from hitting the shooter. It's contained inside the weapon. The breech will have manufacturing marks from the machining and finishing process.

Many times these marks will be transferred to the soft metal of the cartridge case itself so that by comparison with a test fired cartridge case and a cartridge case recovered from some locality it can be determined if the matching marks, manufacturing marks are the same and if in fact they were fired from the same gun.

Q I will show you what is in evidence as Government Exhibit 29A and I would ask you to point out to the jury if you would where these various places are, the breech and so forth.

A Well, the breech of the weapon is on the face of this bolt which works back and forth inside the gun itself. That is the part of the weapon which comes in direct contact with the part of the cartridge case that

we call the head, and that part which contains the primer.

Also, another identifying aspect is the firing pin itself. And the surface of that may become pitted or have grinding marks on it, and these also can be compared by test firing the weapon.

Another portion of the firearm which is used in firearms {3179} identification work is called the extractor, and that is a little hook which is on the face of the bolt and it literally grabs the cartridge case to aid in removing it from the weapon. So if it grasps the cartridge case hard enough it will leave a little dig mark in the cartridge case and this can be used in a comparison.

Q I will show you what is marked as Government Exhibit 29-B. Can you perhaps take one of these objects out of Government Exhibit 29-B and show the jury in relation to the firearm how they fit and how you make your comparison.

A The portion of the cartridge case which is flat, the circular is the head. It contains the primer which is a metallic insert and contains a small charge of explosive, which when hit by the firing pin causes a flame to start the gun powder burning. When the gun powder burns it pushes the bullet out of the barrel, and in like manner the cartridge case wants to go backwards.

It is from this backward motion that the breech face marks on the bolt of the gun are transferred to the soft metal of the primer. Where the primer hit the, was struck by the firing pin, there is a small indentation. And around the grooved rim at the head is where the little hook will grab the cartridge case to leave its marks if it grabs it sufficiently hard, which we call an extractor mark, and can be associated with a particular weapon by just comparing the mark left on various cartridge cases.

{3180}

Q Does a cartridge casing, or a bullet always leave a mark that can be compared with a particular rifle?

A No, it does not.

Q So there are some instances where a rifle has fired a particular bullet or a cartridge casing has been extracted that you cannot compare with the particular rifle in question; is that correct?

A That's correct. Some guns will not have a rough enough surface in these areas to leave identifiable marks.

There are times when the identifiable marks may be removed, either in the case of a bullet because of mutilation or in the case of a cartridge case if it's been out in the elements for a long time, and it gets very badly oxidized, the marks may be obscured.

Q Okay. I would ask you to examine Government Exhibit 29-A, which is a rifle, and ask you whether or not you in fact had an opportunity to examine that particular rifle?

A Yes, sir. My initials are on the identifying tag. Also they are scratched inside the trigger guard.

Q Did you have an opportunity to examine the cartridge casings in Government Exhibit 29-B?

A Yes, sir. They all bear my initials.

Q Would you tell, in relation to your investigation in this case, would you tell the jury how the, in what ways the evidence came to you and what means you used to process the evidence which you received in this particular case.

{3181}

A Yes, sir Government's Exhibit 29 I received from our resident agency in Pierre, North Dakota; and Government's Exhibit 29-B were personally delivered to me by Special Agent Cortlandt Cunningham in July of 1975.

Q Now, would these cartridge casings for example have any marks on them when you received them?

A Yes, sir.

Q And what kind of marks would they have when you received them?

A Well, the cartridge cases in Exhibit 29-B had marks from the breech of the weapon in which they were fired.

Q I'm speaking about identifiable marks that you placed on there, or someone placed on there.

A The slips of paper as I recall were with these items, and I have marked them with my initials. They all, three slips of paper all bear my initials.

Q Okay. And what would you do with them when you received them from

Mr. Cunningham for example?

A I made a list of the items that I received among which Government Exhibit 29-B was, well, five items; and inventoried the items that I received and then made a comparison with any weapons that I received of like caliber.

Q Did you give them a number or something so you could keep them separated from other items?

A Yes, sir I marked the numbers on these items Q-91, 92, 208 {3182} 215 and 216 along with my initials. And these items are referred by those numbers in subsequent laboratory reports.

Q Now, on the items that you compared with Government Exhibit 29-A, the M-1 rifle, in that particular case did you make any charts that compare or relate to cartridge casings which you found were fired in Government Exhibit 29-A?

A Yes, sir. I had a chart prepared of the Government's Exhibit 29-A and other items which I compared against Government Exhibit 29-A.

Q What other items did you compare against 29-A which you included in that chart?

A I compared items listed in laboratory reports as Q-834, 835, 836, 837, 839 which were sent to me from Rapid City.

I compared items listed as 841, Q-842, Q-843 which were sent to me from Rapid City.

I compared items listed as Q-38, Q-35-B, Q-71, Q-75, Q-9, Q-11, Q-13, Q-14, Q-17, Q-21, Q-22, Q-23, Q-24, Q-27, Q-28, Q-29 and those are the items which are currently shown on the chart that I had prepared.

Q I will show you what is marked for identification as Government's Exhibit 29-1, Can you tell me whether or not you recognize Government Exhibit 29-1?

A Yes, sir.

Q And what is Government Exhibit 29-1?

A That is the chart of the comparisons with 29-A that I had {3183} prepared.

MR. SIKMA: Your Honor, I'd offer into evidence Government Exhibit 29-1.

MR. LOWE: No objection, subject to the record, Your Honor.

THE COURT: 29-1 is received.

Q (By Mr. Sikma) Okay. I will put up Government Exhibit 29-1. Would you explain, using this chart, explain to the jury what tests you ran on Government Exhibit 29-A and the various items which are marked 29-B, 29-E and also 29-E in another group. Would you explain that to the jury.

A Yes,sir. On receiving Government's Exhibit 29-A I examined it to make sure, first of all, that it was an operable weapon that was safe to fire.

I then selected ammunition from our storage room of 30-06 caliber and test fired Government's Exhibit 29-A into a large water tank so that I could recover both bullets and cartridge cases from the gun.

Upon completing that I then selected all of the 30-06 caliber cartridge cases and the 30 caliber bullets in the submission of items which I had received from Rapid City in connection with this case. I then made a microscopic comparison of the cartridge cases which I had fired in 29-A with the cartridge cases that I had received from Rapid City.

To do this I used a comparison microscope which is very {3184} simply two microscopes bridged together with a common eye piece so that you can view two objects simultaneously and make a side by side comparison of these objects. And the purpose of this comparison was to determine if the microscopic markings on the cartridge cases that I test fired in Government's Exhibit 29-A were the same as those on the cartridge cases, any of the cartridge cases which I had received from Rapid City.

Q I would direct your attention to Government Exhibit 29-E and ask you whether these are the cartridge casings which you compared with 29-A?

MR. LOWE: Your Honor, we'll stipulate that 29-E matches to the weapon, 29-A, if Mr. Sikma would just want to recite in summary fashion whatever it is about it is he wants to recite, rather than require a detailed explanation of the comparison. Because there's no contest that these were fired from weapon 29-A.

MR. SIKMA: Your Honor, in light of what defense counsel has indicated I would state for the record that Government Exhibit 29-B was found pursuant to earlier testimony on the east side of the green house as it's located on Government Exhibit 71. And Government Exhibit 29-E is in two parts, one found approximately seventy-five yards south of the green house and

the other part found with three items found near the green house.

I would also state that with regard to Government {3185} Exhibit 29-G which I am showing to the --

MR. LOWE: We have not entered any stipulation as to 29-G or 29-F, and I assume you understand that?

MR. SIKMA: I understand that.

MR. LOWE: We'll stipulate as to 29-B and also as to 29-E. I don't know if you've gone into 29-B or not yet, but we'll stipulate to that also.

MR. SIKMA: I have.

I would state for the record that in previous testimony Government Exhibits 29-G and 29, Government Exhibit 29-G was found by Special Agent Cunningham taken from SA Coler's vehicle; and 29-F was taken from SA Williams' vehicle.

Q (By Mr. Sikma) Now, I would direct your attention to Government Exhibit 29-G and ask you to tell the jury what type of examination you performed on Government Exhibit 29-G.

A Government's Exhibit 29-G consists of three .30 caliber bullets, or bullet fragments. In my examination of these items was to determine first of all their caliber. Next, the type of rifling in the barrel from which they were fired. After that to determine if these bullet, or bullet fragments had any marks on them that could be used to identify them with the weapon from which they were fired.

Q And what if anything, do you have an opinion as to the, these items that you have before, Government Exhibit 29-G?

A Yes, sir.

{3186}

Q And what is that opinion?

A That Government's Exhibit 29-G are 30 caliber bullets and bullet fragments, and that they were fired from a barrel which has four grooves with a twist to the right; and the dimensions of the grooves in the barrel and the number and the direction of the way they twist is the same as the barrel in 29-A.

However, there were not sufficient microscopic marks on any of the surfaces of 29-G to permit me to make any conclusion as to whether they had been fired from 29-A, or another rifle with the same rifling in this

barrel.

{3187}

Q I will show you Government Exhibit 29F and can you tell me whether or not you can make the same statement with regard to Government Exhibit 29F and Government's Exhibit 29F consists of approximately 12 .30 caliber bullet or bullet fragments, falls into the same category as 29C in that the rifling in these specimens is the same as that in the barrel of 29A and they are of 30 caliber so that I could not conclude because of a lack of marks in these items that they were fired in 29A. There was nothing to prove that they were or were not, but they could have been based on my observation.

Q Now with regard to Government Exhibit 29G and 29F, I take it there is a distinction between your findings with regard to Government Exhibit 29G and 29F as opposed to Government Exhibit 29B and 29E?

A Yes, sir

Q And would you explain what the distinction is to the jury.

A In preparing the chart for those items which in my opinion were definitely associated with 29A, in other words the microscopic markings were such that my opinion is they could have been fired in no other weapon, I had a line drawn between the box containing that exhibit and the weapon itself.

Where my findings were only that the bullet is consistent with having been fired but enough markings for positive conclusion the there are no lines drawn and the reason is out there, "similar rifling only".

{3188}

Q In other words, there were enough marks on Government Exhibit 29G and 29F to say that it could have been fired from Government Exhibit 29A, is that correct?

A Yes, sir.

Q But you could not say to the exclusion of all other weapons that they were fired from 29A, is that correct?

A Well, the exclusion of any other weapon with rifling of the same type.

Q Now did you examine any other firearm which we have here in evidence of Government's Exhibit 29A, 30A, 31A, 32A, 33A, 34A, 35A, 36A, 37A, 41A,

or 69A, could Government Exhibit 29G or 29F have been fired from any of those weapons?

A No, sir. They're either of the wrong caliber or of the wrong type of rifling in the barrel, the weapons that we have here.

Q So there are a number of .30 caliber rifles which could fire the same ammunition but which have different lands and g grooves in the inside of the barrel, is that a fair statement?

A Yes, sir. But it's also the, the converse of that is also true too.

Q What kind of firearm is Government Exhibit 29A.

A That is a .30 caliber United States rifle designated as the M1.

Q And what's the common designation for the type of ammunition which is fired from that weapon?

{3189}

A 30 aught six is the common caliber name for that type of ammo.

Q Was there any particular organization, to your knowledge, which used that weapon in the past?

A The United States Army did.

Q I would ask you to examine that weapon, Government Exhibit 29A, and tell me whether or not this firearm has a serial number on it.

A The serial number on the M1 rifle is right here at the base. It has been removed and restored.

Q Do you know what the muzzle velocity, in other words, the speed of a bullet coming out of the muzzle when fired from an M1 rifle is?

A That will vary with the bullet weight. For the most common load used in this type of rifle it's about 2700 feet per second.

Q Can you tell me whether or not that weapon is a semi-automatic or an automatic weapon?

A It is a semi-automatic weapon.

Q Can you tell the jury what the difference is between a semi-automatic and an automatic weapon?

A An automatic weapon will fire, assuming it's loaded, continuously as the trigger is held down. It's a machine gun. A semi-automatic weapon, the trigger must be pulled each time for the gun to fire and it will continue to fire as long as the {3190} ammunition holds out, each time the trigger

is pulled.

Q So all you have to do is pull the trigger and if there is ammunition in there it will fire, correct?

MR. LOWE: Your Honor, I object to the form of the question. First of all, I don't know which weapon he's talking about; secondly, it implies if you pull the trigger it will keep firing. I don't think that's what Mr. Sikma was trying to communicate, if he's talking about --

THE COURT: Objection to the form of the question is sustained.

Q (By Mr. Sikma) I will show you what has been marked as Government Exhibit 30A and ask you whether or not you can identify Government Exhibit 30A. I will set Government Exhibit 30AA alongside here. Do you recognize that?

A Yes, sir. I received that weapon from Special Agent Mike Gammage of the Bureau of Alcohol, Tobacco and Firearms.

Q And where did you receive that from Special Agent Gammage?

A In Washington, D.C.

Q Do you remember what date you received it?

A It was September the 12th, 1975.

Q Did you receive any other firearms or parts of firearms on that date?

A Yes, sir, I did.

Q And what kind of a firearm did you receive from him along with that, if you did in fact?

{3191}

A I received a Colt AR15 weapon in somewhat the same condition as Exhibit 30A is in.

MR. SIKMA: Your Honor, Defense Counsel have indicated that they would stipulate to the chart, Government Exhibit 30-I and the --

MR. LOWE: Your Honor, there are a number of these weapons and weapon components that are absolutely undisputed. We are aware of their connection. There is no need to go through detailed proof. I have given Mr. Sikma a list of those which we have no dispute on so he can simply make recitations for the record and I will acknowledge them, if Your Honor please, as he mentions each one. There's no need to go into detailed proof on these or even the nature of proof. We'll stipulate they were connected

up by proper procedures.

THE COURT: Very well.

What is the exhibit you just put up?

MR. SIKMA: Government Exhibit 30-1, Your Honor, and I would offer that at this time.

MR. LOWE: No objection, Your Honor.

THE COURT: 30-1 is offered, it's received, rather.

MR. SIKMA: Your Honor, I would state for the record that this is the firearm which was found in a burned condition in Wichita, near Wichita, Kansas, on the turnpike and brought by Mike Gammage to Washington, D.C. to this witness. I would also state for the record from the stipulation that Government {3192} Exhibit 30C would be offered by stipulation at this time and would read, paragraph 14 of the stipulation between the government and the defendant, and that is, "Government Exhibit 30-AA is a look alike gun for Government Exhibit 30-A. It is a Remington, .308 Remington Game Master model 760 carbine. It is stipulated and agreed that Government Exhibit 30-AA is a replica of Government Exhibit 30-A;

"that Government Exhibit 30-AA may be introduced into evidence to establish the appearance of Government Exhibit 30-A prior to its being damaged. Further foundation is waived."

Government Exhibit 30-C is a charge out record of nonexpendable property. This property was charged out to Special Agent Coler.

"This record also shows that the rifle. Government Exhibit 36-A and 30-A were issued to Jack R. Coler and also that the last digit of 30-A is a 2, and shows both exhibits issued to Jack R. Coler on 5/23/75 at Denver, Colorado.

"Government Exhibit 31B is a property card reflecting the ownership of Exhibit 31-A which is a Smith and Weston, model 19, .357 magnum revolver, with two and a half inch barrel, serial number 3K10439 is owned by Ronald A. Williams.

"It is still stipulated and agreed that the following firearms were in the possession of Special Agent Jack R. Coler {3193} on June 26, 1975 when he entered Jumping Bull area shortly before noon and prior to his death, that is a .308 Game Master model 760 Carbine, serial number 6967042," which is Government Exhibit 30-A.

I would at this time also offer into evidence pursuant to stipulation Government Exhibit 30-C and I will also offer into evidence at this time Government Exhibit 31-B.

MR. LOWE: I thought the purpose of the stipulation was to eliminate having to clutter the record with a lot of these documents. Unless something is contained on here which is probative of more than what we have in the stipulation, I would resist purely on the limit that we have already got 190 exhibits and I think having more in than are already covered by stipulation or are already necessary --

MR. SIKMA: Your Honor, they have been stipulated to by Counsel and in an earlier agreement. I don't know if Counsel is withdrawing the stipulation at this time.

MR. LOWE: I thought we stipulated the facts. This was Coler's weapon, it was assigned to him, he had it in his possession on June 26, I don't know what these documents add to that. If there is any other fact you want stipulated, just state it, we'll stipulate. There is no contest about the weapon, no intent to try to avoid any fact that the government wants to prove. Just state what it is and make an offer of {3194} proof and we'll stipulate to it.

MR. SIKMA: I would just refer to paragraph 15 of the stipulation and offer the exhibit at this time, Your Honor.

THE COURT: Would you read paragraph 15 again.

MR. SIKMA: "Government Exhibit 30-C, charge out record of nonexpendable items, the record shows rifle 36-A and 30-A issued to Jack R. Coler and the last digit of 30-A is 2, shows both exhibits issued to Jack R. Coler on 5/23/75 at Denver."

MR. LOWE: That's exactly what we offered to stipulate. That's why I don't know why we need the documents.

THE COURT: The stipulation refers to Government Exhibit 30-C and unless we have the exhibit it doesn't --

MR. LOWE: Your Honor wants to do it, I don't care. Either way.

THE COURT: 30-C is received.

What about 31-B?

MR. SIKMA: I will make that offer when we get to it. I have read the stipulation, Your Honor, but I will make the offer when we get to the

next exhibit.

THE COURT: Very well.

Q (By Mr. Sikma) With regard to 30-B, would you briefly summarize for the jury what examination you made with regard to 30-B and 30-A and what comparisons you made.

{3915}

A I received 30-B in the condition that it is now in, with the exception that there was a bolt inside the weapon itself. Appears to be missing. But that bolt was the item which I examined and I took a piece of lead and made an impression of the surface of these bolts -- there it is -- and the firing pin which is still intact and then compared the impressions which I took from this bolt with Government Exhibit 30-B. And the two photographs below are taken through the comparison microscope and show some of the marks which are present and upon which I based my conclusion that Government's Exhibit 30-B was indeed fired in Government's Exhibit 30-A.

Q Government Exhibit 30-1 refers to 30-B for the record as having been found on the ground at the rear of Coler's car and is Q 336, and it was opinion, as I understand it, that Government Exhibit 30-B was fired in Government Exhibit 30-A, to the exclusion of all other firearms, is that correct?

A Yes, sir.

Q What kind of -- I'll withdraw that question.

I'll show you Government Exhibit 30-AA. Are you familiar with that type of weapon?

A Generally speaking; yes, sir.

Q And do you know any particular group that uses that weapon. or any organization that uses that weapon?

A Well, the FBI issues this particular weapon to its field officers in limited quantities.

{3196}

Q And I take it, is it fair to state as stated earlier, that Government Exhibit 30-A was, prior to the time it was burned, a similar type of condition or looked similar to Government Exhibit 38-A?

A Yes, sir. It is the same Remington Model 760 carbine and the same

type.

Q I would show you what is identified as Government Exhibit 31-A. Have you seen that before?

A Yes, sir.

Q I will show you also Government Exhibit 31-D, 31-E. Are you familiar with Government Exhibit 31-D and 31-E?

A (Examining) Yes, sir.

Q Now, did you make a comparison between 31-D and 31-E and Government Exhibit 31-A?

A Yes, I did.

MR. SIKMA: Your Honor, I would offer into evidence Government Exhibit 31-1.

MR. LOWE: No objection, your Honor.

THE COURT: Exhibit 31-1 is received.

(Plaintiff's Exhibit No. 31-1, having been previously duly marked for identification, so offered in evidence, was received.)

Q (By Mr. Sikma) Would you tell the jury what the results {3197} of your comparison, Government Exhibit 31-A and 31-D and E, what the results of that comparison were?

A Yes, sir. The comparison I conducted between cartridge cases which I fired in 31-A and compared with the cartridge in 31-E and the six cartridge cases in 31-D, my conclusion was that 31-E and 31-D were fired in 31-A, based upon the configuration of the firing pin impression in the test cartridge cases that I fired and the items, 31-E and 31-D.

MR. LOWE: That's on our stipulation, your Honor, so there is no objection.

THE COURT: Very well.

MR. SIKMA: Your Honor, it is also stipulated that Government Exhibit 31-A is the firearm belonging to Special Agent Ronald A. Williams; and that Government Exhibit 31-A was in his possession on June 26th, 1975, when he entered Jumping Bull Hall shortly before noon prior to his death on that date.

I would at this time, pursuant to the stipulation read earlier, offer into evidence Government Exhibit 31-B.

THE COURT: 31-B is received.

(Plaintiff's Exhibit No. 31-B), having been previously duly marked for identification, so offered in evidence, was received.)

Q (By Mr. Sikma) I would like to point out or ask you to point up something on the chart. You have on the chart, that {3198} Government Exhibit 31-E was from Coler's car and area; and you have a Q number under that, 343; and on the other 31-D you have "From cabin at Al Running's property," Q2126 to Q2131.

Now, did you -- are you yourself knowledgeable of those facts, or is that information that you received by some other means?

A That is the information that I received as to the location of the recovery of these items. I have no personal knowledge of where they were recovered, that is the way the evidence was sent to me and set out in the communications covering its being sent to me.

Q Now, once again, the Q numbers, who assigned those Q numbers to the various items in Government Exhibit 31-1?

A I did.

Q Now, is it correct that you assigned one Q number for each item?

A Yes. We tried to do that, wherever possible.

Q I will show you what is marked as Government's Exhibit 32-A. Can you tell me what Government Exhibit 32-A is?

A Yes, sir. It is a 30-30 caliber Marlin rifle.

Q And did you make a comparison with items in Government Exhibits 32-A with other items of evidence?

A Yes, I did.

Q And would you state for the record what those items are?

A I compared Government's Exhibit 32-A with items I assigned {3199} Q No. 93, 94, 129, 2531, 2532.

Q Did you also make a chart of the comparison with Government Exhibit 32-A with those items?

A Yes, I did.

MR. SIKMA: Your Honor, I would offer into evidence at this time Government Exhibit 32-1.

MR. LOWE: No objection, your Honor.

THE COURT: 32-1 is received.

(Plaintiff's Exhibit No. 32-1, having been previously duly marked

for identification, so offered in evidence, was received.)

Q (By Mr. Sikma) Would you tell the jury what the results of the comparison between 32-B and 32-G and Government Exhibit 32-A were?

A That the cartridge cases in 32-B and the cartridge cases in 32-G were fired in 32-A.

Q Now --

MR. LOWE: (Interrupting) That's stipulated, your Honor, also.

THE COURT: Very well.

Q (By Mr. Sikma) Now, how many different comparisons did you make on the items found in or near the green house, Government Exhibit 32-B, what comparisons did you make on that particular -- on those particular Q numbers?

A On the items that are in 32-B?

{3200}

Q Yes.

A Well, I simply compared them with test cartridge cases that I fired in 32-A and formed my conclusion from a study of the microscopic marks on those cartridge cases with the items in 32-B.

Q Now, these items, Q93, Q94, Q129, and Q127 are all grouped together in one group, 32-B. Why are they grouped together in one group?

A Because they were found in the same general location.

Q There are some numbers missing in between. Why are the numbers missing in some of those instances?

A They were probably cartridge cases of a different caliber, or which were not identified with 32-A.

THE COURT: The Court will recess until 3:45.

(Recess taken.)

{3201}

(Whereupon, the following proceedings were had in the courtroom without the hearing and presence of the jury:)

THE COURT: May the jury be brought in?

MR. LOWE: Your Honor, we were going to take up Exhibit 34-I, the voir dire on that, and at some point without the jury, and Mr. Sikma and I thought this would be a convenient time because I don't exactly know when they'll get to Mr. Hodge on it, But it may be before we recess, Your

Honor.

MR. SIKMA: It would be fairly soon, Your Honor.

THE COURT: All right. You may.

MR. LOWE: May I voir dire?

THE COURT: You may.

MR. LOWE: Do you have Exhibit 34 -- you have it there

Mr. Lodge, is it Mr. Lodge or Special Agent Lodge?

THE WITNESS: Either one, sir.

MR. LOWE: Okay. You are a special agent?

THE WITNESS: Yes.

MR. LOWE: I show you a Government exhibit, 34-I, and ask you if you did not prepare that on the basis of some test you made on, I think it was, five different AR-15's?

THE WITNESS: Yes,

MR. LOWE: Am I correct, first of all, that they were AR-15's as opposed to M-16's?

THE WITNESS: They were both.

{3202}

MR. LOWE: They were both, I see. And do you know which ones are which on your color pattern?

THE WITNESS: I can relate to my notes and identify which is which.

MR. LOWE: Will you do that, please.

THE WITNESS: Weapon number 1, which is blue color coded, is an AR-15.

Weapon number 2, which is a black color coded, is an AR-15.

Weapon number 3, which is green color coded, is an AR-15 which has the M-16 adaptation.

MR. LOWE: Well, now when you say it has the "adaptation" is it an M-16 or an AR-15?

THE WITNESS: Well, the mechanism is the same, sir, except for the trigger device which is altered to fire fully automatic and has the selector switch for the full automatic for motive fire.

MR. LOWE: But my question is: Was it an M-16 or was it an AR-15?

THE WITNESS: Well, the M-16 is an AR-15 with full automatic capability.

MR. LOWE: I understand that. The physical hardware which is called

an AR-15 is different from the physical hardware which is called an M-16 in that there is a full automatic capability and a selector switch on the M-16.

{3203}

THE WITNESS: Which does not affect the ejection pattern of the gun.

MR. LOWE: My question is: Is the piece of hardware that has full automatic capability at any time properly called an AR-15, or is it only properly called an M-16?

THE WITNESS: It is called a military M-16,

MR. LOWE: Has this ever been called by anybody an AR-15 when it has full automatic capability?

THE WITNESS: It could be.

MR. LOWE: Not could be, I know that you could call an elephant this, but it wouldn't make an elephant out of it. My question is --

MR. SIKMA: Your Honor --

MR. LOWE: I think it's quite obvious this witness is an expert and he knows what I'm asking and he's evading.

MR. SIKMA: Your Honor, I'd object because if it is called that on certain occasions that answers the question. He asked if it ever could be and he answered --

THE COURT: Proceed.

MR. LOWE: My question is not whether you could call it an AR-15. To your knowledge has any respectable firearms person ever called an M-16 an AR-15 properly?

THE WITNESS: I don't really know, sir, if they have or not.

For the purposes of this, if you prefer we'll call it {3204} an M-16 if it's fully automatic and has the Government stamp on it.

MR. LOWE: I only want it called that if that's the proper designation. That was number 4; is that right?

THE WITNESS: Number 4 is, yes, U.S. rifle.

THE COURT: What was number 3?

MR. LOWE: What was number 3, is that also an M-16?

THE WITNESS: Number 3 is, too, yes. M-16.

MR. LOWE: How about number 5?

THE COURT: Number 4 was, excuse me?

THE WITNESS: Number 5?

THE COURT: Just a moment. You had gone through number 3 which was color coded green. You had not given any testimony on number 4.

THE WITNESS: I'm sorry, Your Honor. Number 4 is color coded yellow and that is an M-16. And number 5 is color coded red and that is an M-16.

MR. LOWE: All right. Now, when you conducted these tests you conducted them firing at shoulder position and also at hip position; is that correct?

THE WITNESS: Yes, sir.

MR. LOWE: And utilizing Government Exhibit 34-AA, which I represent to you, I presume you probably know has been identified as an AR-15, when you say at shoulder level I presume that you lodged the butt up against your shoulder, held the {3205} gun parallel to the ground approximately and fired off, I guess it's ten shots; is that correct?

THE WITNESS: I forget how many we had loaded in the clip. I think we fired each weapon twenty times from each position if I am correct. But that is the position that it was fired from, from the shoulder, yes, sir. Regular --

MR. LOWE: All right. With the weapon parallel to the ground?

THE WITNESS: Yes, sir.

MR. LOWE: It was not pointing down, it was not pointed up as near as you could do it, to the limits of your eyeballing it in it was parallel to the ground when you fired?

THE WITNESS: Yes. We were shooting into a sandbox at some distance away at approximately eye level target.

MR. LOWE: I presume also that you did not turn the weapon on its axis in any way, but rather tried to keep the vertical axis of the magazine and the handle on the weapon with the actual vertical as you were firing so that the weapon was not turned in any direction either?

THE WITNESS: That's correct.

MR. LOWE: All right. And in firing from the hip position I trust you did essentially the same in terms of the vertical and horizontal axis of the gun, that is that it was fired at the level and it was fired with the gun substantially in the vertical plane except that you were holding it at hip {3206} level when you fired it; is that correct?

THE WITNESS: Yes.

MR. LOWE: Now, because I do not have colors on my -- would you again just designate which colors these are. You say the yellow, the green, yellow and red are the M-16; is that correct?

THE WITNESS: The last three, yes. Green, yellow and red. 3, 4, and 5.

MR. LOWE: All right. Now, can you tell me first of all, I think this may be self-obvious but we're not experts and you are, on this AR-15 I'm holding Government Exhibit 34-AA, there appears to be a little portal on the side here, on the right side of the weapon directly above the slot in which the magazine fits, and I ask you whether that is the ejection portal out of which expended cartridge cases come when you fire the weapon?

THE WITNESS: Yes, it is.

MR. LOWE: All right. And that is on a spring of some sort so that it is thrown open I presume by the cartridge as it is ejecting and encloses behind the cartridge?

THE WITNESS: It is thrown open by the bolt as it comes forward. And then stays open until it's manually closed.

MR. LOWE: So that when you are firing the weapon, once you start firing would this stay open until you manually close it, is that what you are saying?

{3207}

THE WITNESS: Yes.

MR. LOWE: All right. When you are firing does the expended cartridge case strike this door as it ejects, or can you say?

THE WITNESS: The door is folded down out of the way. It's flapped down.

MR. LOWE: All right. Does it fold down all the way flat?

THE WITNESS: As I recall it folds down pretty close to all the way. Although I'm, it may vary with some models, but it certainly has to be down out of the way.

MR. LOWE: Now, I gather from the data that you have provided through Government Exhibit 34-I and information which we have received informally from the Government that you determined that on, let's take one of the weapons, the cartridge ejected in a generally -- some of the cartridges ejected generally towards the front as well as the right, and then in a

pattern that was in the right front quadrant, if I can call it that, from the ejection portal; is that a fair statement?

THE WITNESS: Yes. Some of them did go forward.

MR. LOWE: And as to some of them, they ended up all in the rear quadrant, in fact very much to about the 45 degree angle to the rear on one or two of the weapons; isn't that also true?

{3208}

THE WITNESS: Yes. Well, weapon number 5 for instance, which is color coded red, I'm sorry I'm mixing up my ammunition, the five weapons did cover an area of almost 60 degrees to the front and almost 60 degrees to the back. There was quite a range.

MR. LOWE: Did you make any tests to see what effect on the ejection pattern, or either in distance or in direction would be affected if you aimed the gun below the parallel at an angle of, let's say, between 10 and 45 degrees below horizontal? Did you run those tests?

THE WITNESS: All the shooting that I did was from the horizontal.

MR. LOWE: And would it be fair for me to say as an expert that you would not be prepared to offer an opinion on the pattern, either in direction or distance that would result from firing at anywhere from 10 to 40 degrees below the horizontal without actually running tests to determine that?

THE WITNESS: Well, not if you want to get extremely specific. In general I would be of the opinion that it would not add any increase in distance than that what I've already seen.

It could possibly change the location or shorten the distance, but I don't think it would have any appreciable, add {3209} any appreciable distance to the distance that the cartridge case would be ejected. Like I don't think it would double it or anything like that.

MR. LOWE: It might three or four feet for example?

THE WITNESS: It could. Another gun might add three or four feet.

MR. LOWE: All right.

THE WITNESS: I only tested five. But in general I don't think there would be any gross significant change.

MR. LOWE: All right. Based on your examination of those five weapons would you be in a position to offer an expert opinion as to what the ejection pattern would be on a weapon which is called Exhibit 34-AA without testing

it?

THE WITNESS: I would be of the opinion from the tests that I conducted --

MR. LOWE: My question is: Would you be able to offer an expert opinion as to what the ejection pattern would be like on this weapon based on the tests that you ran on the other five weapons?

THE WITNESS: Based on those tests it would fall someplace in that general area or close to it.

MR. LOWE: Isn't it true that what you can really tell from the tests that you ran the following: One, on an AR-15 or an M-16, which is fired at the horizontal when the vertical plane is maintained, that the shells ejected generally to the {3210} right of the weapon? That's the first thing you could determine that, couldn't you?

THE WITNESS: Yes, sir.

MR. LOWE: Number two, that different guns tend to favor different ejection patterns inasmuch as the five that you tested fairly disparent test patterns so that they is a variation of some significance in the location as to different guns you tested; isn't that true?

THE WITNESS: Yes, And to add to that, there also was a difference in the ammunition as versus U.S. military to the commercial.

MR. LOWE: All right. What kind of ammunition did you use to test with?

THE WITNESS: I used both military and commercial ammunition to see if there was any difference.

MR. LOWE: I 'm sorry, you used what? I didn't hear what you said.

THE WITNESS: I used both United States military ammunition and the Remington commercial ammunition.

MR. LOWE: Did you note on here, or do you, can you determine from your notes as to which rounds are which?

THE WITNESS: The ones which are color coded red are the military ammunition. The dots which are color coded blue is the commercial ammunition.

MR. LOWE: All right. Now, let me ask you this: {3211} If there were hand loaded, reloaded rounds, then that might give an entirely different pattern of ejection, might it not, if it were a high charge for

example or a low charge?

THE WITNESS: I would expect that the lower the charge the further that the cartridge case would be ejected because it would not give as much energy to the recoil mechanism of the gun. And in like manner a higher velocity round may kick it a little further.

{3212}

MR. LOWE: Let me ask you this: When you fire the gun at the horizontal and with the vertical plane maintained vertical, does the round come out in an upward arc, does it come out exactly on the horizontal or does it come out in a downward direction when it ejects?

THE WITNESS: In the rounds that I observed, it comes out fairly flat. Possibly with a slight arc but generally speaking fairly flat out of the weapon.

MR. LOWE: When you say flat, you mean out horizontally approximately out of the port?

THE WITNESS: Yes, sir.

MR. LOWE: So that as to any distance that is obtained, it is based on the velocity of the round as it comes out, the cartridge and where it lands?

THE WITNESS: Yes, sir.

MR. LOWE: Do the results of your tests do any more than confirm what you would have just speculated from a right hand ejection port on a weapon when it ejects cartridges that have been expended?

THE WITNESS: Not significantly. I had not thought that it would throw the cartridges quite as far forward of the shooter as I found on my test. Other than that one aspect; no.

MR. LOWE: May I just confirm for a moment, Your Honor?

{3213}

THE COURT: You may.

MR. LOWE: I have no further questions, Your Honor. I don't know if there is any cross-examination voir dire.

MR. SIKMA: I'll ask my questions when the jury is present, Your Honor.

MR. LOWE: May I be heard on my objection, Your Honor?

THE COURT: You may.

MR. LOWE: This witness has testified that these tests were made with the gun at the horizontal. Now by any fair reading or by any even remote reading of what Dr. Noguchi testified to, nobody shot these two agents with the gun at the shoulder and at the parallel, and in fact as to Agent Coler who was on the ground, nobody shot them with the gun at the hip level. As to Agent Williams, we just simply don't know whether it could possibly have been fired at the hip or possibly even the shoulder level. There is simply no evidence whatsoever.

There is no evidence upon which this jury could conclude that the weapon, if indeed it was an AR15 to begin with that was fired, which ejected the cartridge into the trunk of Coler's car, if that is how the weapon, the cartridge got there, there is no way for the jury to conclude from the evidence in this case or even to infer properly that that weapon was fired on the level. In fact, the inference is to the opposite and that would be if the .223 was fired in an AR15 {3214} aimed at these agents that was fired in a downward manner and this witness admitted he can't, did not test the weapon under those circumstances. He cannot say, it might have thrown it further, it might have thrown it shorter. By just logic Your Honor can see by changing the elevation the way that round comes out could change the direction and where the drop and the other factors.

In addition there is at least some testimony about reloading capability. This witness admits he tested only government and commercially available ammunition and that factor could change where the pattern resulted here.

And on top of that we have three M16's which are not AR15's themselves but have some differences in the mechanism. I suggest that while this witness may think that that makes no difference, that this witness has not tested enough rounds in enough weapons by his testimony to be able to say on the basis of two AR15's and three M16's that the mechanisms change between automatic and full automatic in the M16 would not somehow affect the ejection pattern.

For all of these reasons we believe that the government has failed to provide any foundation upon which the evidence would be relevant in this case or something which the jury could probably consider as evidence.

It also says nothing that the jury does not already know and that

is a right hand ejection weapon is going to throw {3215} rounds out to the right and we're willing to offer, to stipulate or have the witness testify that the rounds come out generally to the right and that they come out generally on the horizontal and then go some distance, depending on various factors.

MR. SIKMA: I have made my argument, Your Honor. I don't think that's said has changed my opinion.

THE COURT: Do you have an opinion as to whether there is any difference in the operation of the AR15 and the M16 except for the selector trigger device on it?

THE WITNESS: Well, the selector trigger allows the AR, M16 to be fired fully automatic.

THE COURT: I understand that.

THE WITNESS: I tested the weapon the semi-automatic mode of fire and the mechanism in that respect is essentially the same, the same weapon, only the selective switch has been added to allow the bolt, the weapon to fire full automatic. So I do not see how it would affect the way the fired cartridge case is ejected from the gun.

THE COURT: Is that your opinion? You do not have an opinion?

THE WITNESS: Yes, sir. That would not affect it appreciably.

THE COURT: Would it affect it at all?

{3216}

THE WITNESS: Not that I can see. No, Your Honor.

THE COURT: Well, if I were a defense lawyer I could have a lot of fun with arguing this case. But it seems to me it's a question of, it's a question of weight and that the evidence of the test is relevant for whatever weight that it may have. But certainly there are some holes in it as far as its weight is concerned.

Defendant has made his record and the Court will stand on the ruling that it's made.

MR. LOWE: That's all we have, Your Honor, without the jury.

THE COURT: The jury may be brought it.

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

THE COURT: As the jury probably surmised, the delay again was due

to a legal question that arose in this case. It arose with respect to testimony expected to be elicited from this witness and it was necessary the Court go into it before the jury returned.

You may proceed.

MR. SIKMA: Your Honor, the government and defense counsel have agreed that for a number of these items to which there is no objection we are rather going to refer to items which are already in evidence, we are going to present this witness' testimony simply with regard to the charts rather than {3217} going into all of the items of evidence.

Q (By Mr. Sikma) I will show you what has been marked as Government's Exhibit 33-1 and ask you whether or not you recognize Government's Exhibit 33-1?

A Yes, sir.

Q And is that a chart that you made in relationship to the examination of items with Government Exhibit 33A?

A Yes, it is.

MR. SIKMA: Your Honor, I would offer Government's 33-1 into evidence at this time.

THE COURT: Any objection?

MR. LOWE: Just hold up the chart. I'm trying to remember.

Subject to the record, we have no objection, Your Honor.

THE COURT: Very well.

33-1 is received.

Q (By Mr. Sikma) I direct your attention to Government Exhibit 33-1 and I will draw your attention to the notation there which is 330. What does that particular box in Government Exhibit 33-1 relate to, what does that represent?

A 33C is a .44 magnum bullet which was recovered, which I received as having been recovered from the notation and from my examination of 33C in comparison with test bullets that I fired in 33A, it is my opinion that 33C was fired from 33A.

{3218}

Q The notation there reads that item was Q1 taken from the body of Special Agent Williams.

Now you were able to make a positive identification on Q1, 33C, is

that correct?

A Yes, sir.

Q I would also now refer you to the square marked 33F. Would you tell the jury what that is?

A Those are two other .44 magnum caliber bullets which my opinion is that they were fired from Government's Exhibit 33A.

Q And the notation there is that it was taken from Special Agent Williams' car. Now they are Q12 and Q26, is that correct?

A Yes, sir.

Q Now the remainder of the items were shell casings taken from the scene, Government Exhibit 34, or 33B, from the 1967 Ford Galaxie, 33D; from the 1966 Chevrolet Suburban, 33E, and near the white house adjacent to the crime scene, Government Exhibit 33G and you also conducted a comparison with those items. What type of comparison did you make between those objects and Government Exhibit 33A?

A I made a comparison of those cartridge cases in 33B, D and E and G with the cartridge cases which I fired in Government's Exhibit 33A, and based upon the microscopic marks appearing in the test cartridge cases which I fired and the markings appearing on the cartridge cases in those exhibits, My opinion is that they were all fired in 33A.

{3219}

Q Now is the same true of Government Exhibit 33B which was found 75 yards past the culvert on the road to Oglala Lake leading into hills, is the same true of 33B as was true of 33, the other cartridge casings found relating to 33A?

A Yes. 33H in my opinion was also fired in 33A.

Q Now I would direct your attention to 33K and 33J. Would you relate to the jury what your findings were with regard to 33K and 33J?

A 33K and 33J are .44 caliber bullets which contain rifling like that produced by the barrel of the rifle, Exhibit 33A consists of 12 grooves twisting to the right. The connection is only that 33K and 33J could have been fired from 33A or from another similarly rifled barrel.

Q Now 33A is of what rifling did you say?

A 12 grooves cut inside the barrel twisting to the right.

Q Did you measure the grooves?

A Yes, I did.

Q Did the measurements match with Government's Exhibits 33K and 33J?

A Yes, sir.

Q I would direct your attention to what is marked as Government Exhibit 36-1 and ask you whether or not you recognize Government Exhibit 36-1?

A Yes, sir, I do.

{3220}

Q Did you prepare this chart, or was it prepared under your direction?

A It was prepared at my direction.

Q And does it relate to Government Exhibit 33-A -- or excuse me, 36-A?

A Government Exhibit 36-A, yes, sir.

MR. SIKMA: I would offer into evidence Government Exhibit 36-1, your Honor.

MR. LOWE: No objection.

THE COURT: 36-1 is received.

(Plaintiff's Exhibit No. 36-1, having been previously duly marked for identification, so offered in evidence, was received.)

Q (By Mr. Sikma) Would you relate to the jury what examinations you made with regard to Government Exhibit 36-B and 36-A?

A I again testified that Government's Exhibit 36-A is a Remington Model 870 shotgun, and I compared the test fired shot shell from 36-A with 36-B which was the fired shot shell; and the marks on the primer area of the shot shell which I received on 36-A are identical to the marks on the firing area of the shot shell, 36-B; and it is my conclusion that 36-B was fired in 36-A.

MR. SIKMA: Your Honor, we have a stipulation with regard to Government Exhibit 36-A, that it is stipulated and agreed that Government Exhibit 36-A, a Remington Model {3221} 870 shotgun, 12 gauge, Serial No. SO -- excuse me -- S043910V, was in the possession of Special Agent Jack R. Coler on June 26th, 1975, when he entered the Jumping Bull Hall area shortly before noon and prior to his death. It is stipulated and agreed that if the custodian or other qualified witnesses of the Denver FBI Property Documents

were called he would testify that said firearm was checked out to Special Agent Jack R. Coler.

It is further stipulated that said firearm was in the possession of FBI Agent Jack R. Coler shortly before noon, June 26, 1975, when he entered the Jumping Hall area.

Q (By Mr. Sikma) I will show you what is marked as Government Exhibit 37-1 for identification, and ask you whether or not you recognize it?

A Yes, I do.

Q Is this a chart also which you prepared with relation to Government Exhibit 37-A in your examination at the FBI Laboratory in Washington?

A It is a chart that I had prepared, yes, sir.

MR. SIKMA: Your Honor, I would offer into evidence Government Exhibit 37-1.

MR. LOWE: No objection Your Honor.

THE COURT: 37-1 is received.

(Plaintiff's Exhibit No. 37-1, having been previously duly marked for identification, so offered in evidence, {3222} was received.)

Q (By Mr. Sikma) I would direct your attention to Government Exhibit 37-1 and ask you with regard to the box denoted as 37-B from Williams' car, Q20, what comparisons you made between Government Exhibit 37-A and 37-B?

A I test fired .45 caliber ammunition in 37-A into a water recovery tank and recovered the bullets, cartridge cases. I then compared those bullets that I fired with the .45 caliber bullet which is Government's Exhibit 37-B; and based upon my observations under the comparison microscope, I concluded that Government's Exhibit 37-B was fired from Exhibit 37-A.

Q Now, is that a comparison which is made to the exclusion of all other firearms?

A Yes, sir.

Q I notice on Government 37-C which depicts two items found on the east side of the green house, one of those appears to be an unfired round. Can you explain what that is?

A Yes. This is what we would call commonly a misfire. In other words, the firing pin struck the primer of the cartridge, but it either did not

strike it with sufficient force to make the cartridge go off or the priming compound in the cartridge was not of sufficient quantity to make it go off, so it did not fire the cartridge. It did --

Q (Interrupting) Go ahead.

A It did, however, leave an impression of the firing pin in {3223} the primer itself so that impression could be compared with the weapon or cartridges that were test fired in the weapon.

Q The photographs, you have what appear to be photographs under designated Q123 and Q7. What are those photographs, would you take the -- and if it is necessary, would you take that pointer there and point out the comparisons which you made so the jury can see what comparisons you made with regard to those items?

A The photograph on the left, marked Q236, Q123, contains the circle which is the whole head of the primer itself. That's the portion of the cartridge that the firing pin strikes. The indentation in that primer is caused by the firing pin.

Now, what Q -- this photograph, Q123 and Q7 represents is essentially some of the microscopic marks that I saw underneath the comparison microscope; and these markings, the parallel markings that you can see are caused when the cartridge case recoils against the breech. It is what is called breech case firing.

The line down the middle separates the two objects optically so that the one, the cartridge case on the right is the one I test fired, and the cartridge case on the left is the one which I received as having been recovered from the east side of the green house in 122.

Q I would now direct your attention to the photograph, or really two photographs in the right lower, lower right corner {3224} of that Exhibit 37-1, and ask you, what do those photographs depicted by Q214 and K7, what are they photographs of?

A Q214 is the misfired cartridge, and this is the partial firing pin impression which was in the primer of that cartridge.

You will notice the light is bouncing off the area around that indentation, indicating that it was not a full impression as is on the photograph on the right of K7; but you can see the grinding marks on the shape of the firing pin -- in the shape of the firing pin are the same.

Q And what is the photograph on the lower left-hand side?

A Those are the microscopic markings which are left on the surface of the bullet by the barrel of the gun, and the matching up of those microscopic markings is what we base our opinion on in firearms identification, that they coincide essentially.

Q I will show you what is marked as Government Exhibit 41-B for identification, and ask you whether or not you recognize that?

A Yes, sir, I do.

Q And is Government Exhibit 41 -- excuse me 41-1 another chart which you prepared with relationship to Government Exhibit 41-A and 41-B?

A Yes, it is.

MR. SIKMA: Your Honor, I would offer into evidence Government Exhibit 41-1.

MR. LOWE: No objection, Your Honor.

{3225}

THE COURT: 41-1 is received.

(Plaintiff's Exhibit No. 41-1, having been previously duly marked for identification, so offered in evidence, was received.)

Q (By Mr. Sikma) Again would you tell the jury what comparisons were made in the .22 caliber rifle designated as Government Exhibit 41-A and the mark on 41-B?

A My comparison in -- with Exhibit 41-A was to determine if the cartridge case was fired in that particular weapon. Cartridge case designated as 41-B. Again I test fired ammunition in 41-A and made a microscopic comparison of the firing pin impression, in other words, where the firing pin struck the cartridge case; and in this type of weapon there is another area that can be compared in that it is a .22 caliber rim fire gun; and as the firing pin strikes the rim, it also causes the rim of the cartridge to be crushed against the barrel of the gun so that sometimes microscopic marks directly over the barrel of the gun, the breech of the barrel can be transferred to the rim on the cartridge case.

In this particular instance both the markings in the firing pin impression and from the outside of the chamber, the breech of the barrel were consistent with -- between Exhibit 41-A and Exhibit 41-B, and my microscopic examination led me to conclude that they were fired by the

same gun.

Q That is a .22 caliber, is it not?

{3226}

A Yes.

Q Now, what is the actual measurement of that in terms of inches?

A The bullet diameter?

Q Yes.

A It varies from .221 to about 224 thousandths of an inch.

Q Did you examine any other -- any other bullets or fragments with approximately the same diameter, any other type of rounds?

A Yes.

Q And what kind were those?

A They were jacketed bullets of .22 caliber.

Q And what was their caliber or their normal designation?

A Well, the normal designation is .22 or 5.56 mm., military -- it would be in the metric system -- that would be called that.

Q Have you heard of the designation .223?

A Yes, sir, that's a .22 caliber.

Q And what is .223?

A Well, .223 is the name of a cartridge type, in other words, it is .22 caliber; and the whole cartridge itself is called a .223, .223 Remington is the full complete name.

Q What is the difference between the .223 and the .22 as you have designated there on Government Exhibit 41-B?

A Well, the difference is that this is a very small cartridge. It is rim fire versus the .22, .223 being the center fire, in other words, the pin sits in the center of the cartridge case, {3227} whereas the primer strikes the edge of the cartridge case in Exhibit 41-A. The bullets are entirely different. 41-A will fire a lead bullet which is not copper coated. A .223 caliber bullet is copper coated, a much harder bullet.

Q You have in front of you Government Exhibit 41-B. Would you show the jury what kind of a cartridge casing it leaves?

{3228}

A (Indicating)

Q Now I'll show you Government Exhibit 34-D. Is this this .223 round

which you were talking about?

A Yes, sir, it is.

Q Okay. Now would you hold them up so the jury can see by comparison the difference between the two.

MR. SIKMA: If it's all right, Your Honor, perhaps the witness could step down so the jury could see the difference.

THE COURT: Witness may step down.

THE WITNESS: (Indicating.)

Q (By Mr. Sikma) What is the muzzle velocity of Government Exhibit 41-B, if you know, approximate muzzle velocity?

A Well, 41-B is a Winchester. The maximum velocity would be in the area of 3200 feet per second.

Q 41-B, are you sure?

A I'm sorry, that's the wrong one.

41-B is the .22.

.22 long rifle, it would be in the area, fired in a rifle, about 1700 feet per second, 1800 feet per second.

Q Okay. Now, 34-D I believe is that the other?

A 34-D?

Q Yes.

A That is in the area of 3200 feet per second.

Q I will show you what is marked as Government Exhibit 69-1 and {3229} ask you whether or not you recognize 69-1?

A Yes, I do.

Q And is that a chart which you had prepared as the other charts to compare Government Exhibit 69-A with various exhibits, cartridge casings?

A Yes. That's -- I had that prepared.

MR. SIKMA: I would offer into evidence Government Exhibit 69-1.

MR. LOWE: No objection, Your Honor.

THE COURT: 69-1 is received.

Q (By Mr. Sikma) There is a notation on Government Exhibit 69-1. Depicts an examination of what kind of firearm?

A Government's Exhibit 69-A is essentially a World War II British army rifle and caliber .303 British.

Q And what kind of comparisons did you make about Government Exhibit 69-A and 69-B, C and D and E?

A I compared the chart cartridge casings in 69-B, C, D and E to the cartridge casings which I test fired in Government's Exhibit 69-A.

Q And what did you find, or what did you determine as a result of those comparisons?

A That the microscopic markings left on 69-A test cartridge cases that I found were identical to the microscopic from both the breech face area in the firing pin impression and 69-B, C, D and E, so it was my opinion that the cartridge casings in {3230} 69-B, C, D, and E were fired in Government Exhibit 69-A.

Q I will show you what is marked as Government Exhibit 35-1 for identification and ask you whether or not you recognize Government Exhibit 35-1?

A Yes, I do.

Q And what is that?

A That is an exhibit that I had made up for the K 87 revolver.

MR. SIKMA: I would offer into evidence Government Exhibit 35-1.

MR. LOWE: No objection, Your Honor.

THE COURT: 35-1 is received.

Q (By Mr. Sikma) What kind of weapon does 35-1 relate to?

A The weapon, Exhibit 35-A is a .357 magnum Smith and Wesson, Model 19 revolver.

Q I will show you what has been marked as Government Exhibit 30 -- excuse me, 35-A and ask you whether or not you had an opportunity to examine Government Exhibit 35-A?

A Yes, sir, I did.

Q Now, does that firearm, would you look at the butt plate of that firearm. Is there, can you tell me whether there is normally a serial number there?

A Yes. The serial number is normally, on the Smith and Wesson revolver, stamped into the butt.

Q And is there one there on that particular firearm?

A No, there is not.

{3231}

Q Can you tell whether or not there was a serial number there?

A Smith and Wessons do put their serial number in that area. This area up here appears to have been ground off and it appears that the serial number has been removed from that area.

Q I would direct your attention to Government Exhibit 35-1 to the box which is designated 35-b and 35-G designated from the seat of Coler's car. Would you tell the jury what kind of comparisons you made with the cartridge casings which are designated on box 35-B and 35-G?

A Yes, sir. As with the other cartridge cases that I examined I test fired Government's Exhibit 35-A and took the cartridge cases, 35-B and 36 -- I'm sorry, 35-G and placed them on the comparison microscope and compared the imperfections in the firing pin impression of those cartridge cases with the imperfections in the firing pin impressions in the cartridge cases that I test fired in Government's Exhibit 35-A.

MR. LOWE: We'll stipulate to these. I thought they were on the list that I gave you. If they weren't, they should have been. There's no contest on these. Am I correct?

MR. SIKMA: Yes, that's correct.

Q (By Mr. Sikma) Now, is the same true of 35-E, which is designated from the cabin near residences of Al Running?

A Yes, sir.

Q And how many cartridge casings were in that group?

{3232}

A I believe there were six in that group.

Q And I would direct your attention to the Government exhibit designation 35-F on that chart from a brown metal tool chest in one of the vehicles involved in the shoot-out with Ontario State Police at or near Ontario, Oregon on November 14, 1975. How many cartridge casings were compared in that group?

A Six.

Q And what did you find with regard to Government Exhibit 35-F and 35-A?

A With regard to Government's Exhibit 35-F and 35-A, that 35-F was fired in 35-A.

Q And is that to the exclusion of all other firearms?

A Yes, sir.

MR. SIKMA: Your Honor, pursuant to stipulation at this time I would offer into evidence Government Exhibit 35-C which is the property assignment card for Jack R. Coler pertaining to Smith and Wesson Model 19, .357 magnum, four inch barrel revolver, serial number K622056, O. N. I. on left side, to Jack Coler. "The parties hereby stipulate and agree that if the custodian or other qualified witness of said document were called he would testify that said records are kept in the ordinary course of a regularly conducted business activity, and it was the regular practice of the business activity to make said records. Further foundation is waived."

{3233}

With that I would offer into evidence Government Exhibit 35-C.

MR. LOWE: No objection, Your Honor.

THE COURT: 35-C is received.

MR. SIKMA: I would also state, Your Honor, that pursuant to stipulation it is stipulated and agreed that Government Exhibit 35-A was in the possession of Special Agent Jack R. Coler on June 26, 1975, when he entered the Jumping Bull area shortly before noon prior to his death.

Q (By Mr. Sikma) You indicated earlier in your testimony that you had received from Mike Gammage a piece of burned weapon. I will show you what is marked Government Exhibit 34-A and ask you whether or not you recognize it?

A Yes, sir.

Q And when did you receive that and from whom?

A I received this from Special Agent Mike Gammage, the Bureau of Alcohol, Tobacco and Firearms in Washington, D.C. on the 12th of September, 1975.

Q I will show you what has been marked for identification s Government Exhibit 34-B and ask you whether or not you recognize that?

A Yes, sir.

Q And when did you receive Government Exhibit 34-B?

A I received Government's Exhibit 34-B on the 24th of July of {3234} 1975.

Q And how did you receive it?

A It came in with a large box of other items from Rapid City FBI office in Rapid City, South Dakota.

Q And how, how did you receive it, by what means?

A Came in by railway express.

Q Did you compare Government Exhibit 34-B with Government Exhibit 34-A in any manner?

A Yes, I did.

Q Would you explain to the jury how you made a comparison?

A Government's Exhibit 34-A, because of its condition, could not be fired. However, I could remove the bolt out of Government's Exhibit 34-A and place it in another firearm, AR-15 rifle, and test fire it in that manner.

This I did and compared the markings, microscopic markings placed on the cartridge cases that I fired using the bolt of Government's Exhibit 34-A with Government's Exhibit 26 -- I'm sorry, 34-B.

{3235}

Q When did you make the comparison on Government's Exhibit 34B?

A I don't really know the day that I did it. It would have been sometime late in the year of 1975 or early 1976.

Q And do you have an opinion as to the comparison which you made between the known items fired from the firing pin of Government Exhibit 35A and the firing pin impression of 35B?

A No, sir. I could not form a conclusion. But based on either the firing pin or the breech face as to whether or not the Government's Exhibit 34B had been fired in Government Exhibit 34A --

THE COURT: Now there seems to be some confusion in the record. You referred to 35 and the witness referred to 34.

MR. SIKMA: Excuse me, 34. There is a confusion.

Q (By Mr. Sikma) What comparison did you make? You indicated earlier, I believe, that you compared an ejection mark with 35, or 34B and 34.

A Yes, sir. The ejector marking in the rim of Government's Exhibit 34B, I'm sorry, the extractor marking, that hook I referred to earlier, I compared that with the extractor marking placed on test which I fired in one of our weapons using the bolt from Government's Exhibit 34A.

Q And do you have an opinion as to 34B and 34A?

{3236}

A Yes, I do.

Q And what is that opinion?

A That 34B was loaded into and extracted from Government's Exhibit 34A based upon the microscopic characteristics of the extractor mark on the rim of the cartridge cases.

MR. SIKMA: At this time, Your Honor, I'd offer into evidence Government's Exhibit 34A.

MR. LOWE: I believe we've made some remarks on the record, Your Honor, on that. I have no additional matters to bring before Your Honor.

THE COURT: Very well. Exhibit 34B is received.

MR. SIKMA: 34A.

THE COURT: Was it A that you offered?

MR. HULTMAN: Yes. A is offered.

MR. SIKMA: Yes, Your Honor.

THE COURT: 34A is received.

Q (By Mr. Sikma) Now did you have occasion to prepare a chart as you did with the other firearms with regard to Government Exhibit 34A and the items which you compared?

A Yes, I did.

MR. SIKMA: Your Honor, I'd offer into evidence Government's --

Q (By Mr. Sikma) I show you, first of all, Government Exhibit 34-1. Can you tell me whether or not this is a chart which you referred to?

{3237}

A Yes. That's the chart.

MR. SIKMA: I would offer into evidence Government Exhibit 34-1.

MR. LOWE: Again, I think we have a record on that, Your Honor.

THE COURT: Very well. 34-1 is received.

Q (By Mr. Sikma) With regard to Government Exhibit 34B, what is the Q number that you assigned to that item?

A It's Q2628.

Q I will show you what is marked as Government's Exhibit 34C. 34C is designated on the chart as from the 1967 Ford Galaxie. How many items do you have on Government Exhibit 34C?

A 35 I believe.

Q Now did you compare all of the items in Government Exhibit 34C as you did with Government Exhibit 34B?

A Yes, I did.

Q And do you have an opinion as to whether or not Government Exhibit 34C as they're designated with extractor, with the extracting bolt which is found in Government Exhibit 34A?

A Yes, I do.

Q What is that opinion?

A That all the cartridge cases in Government's Exhibit 34C were loaded into and extracted from the rifle of Government's Exhibit 34A. {3238}

Q Now 34D is designated as from a 1966 Chevrolet Suburban Q number 547. Did you conduct a comparison between the bolt of 34A and Government Exhibit 34D?

A Yes, I did.

Q And what were your findings?

A That an extractor mark was present in Government's Exhibit 34D and that in my opinion based on the microscopic characteristics that was produced by the bolt of Government's Exhibit 34A.

A 34E as designated as the log house near the crime scene is Q number 2536. Did you make an examination with regard to 34E and 34A?

A Yes, I did.

Q And what was your conclusion?

A That 34E had been loaded into and extracted from Exhibit 34A.

Q Now with regard to Government Exhibit 34F, did you make an examination with regard to 34F and 34A?

A Yes, I did.

Q 34F is designated as from the hood and top of 1967 Ford at tent city. What is your conclusion with regard to 34F and 34A?

A 34F had been loaded into and extracted from 34A.

Q I will show you what is marked as Government Exhibit 34C which is designated on the chart as from Williams' car, Q10, {3239} 15A, 15C, Q18. Will you examine these items.

What did you find with regard to Government Exhibit 34G?

A Government's Exhibit 34G consists of .22 caliber copper jacket

bullet fragments and those fragments designated as Q10, 15A, 15C and Q18 contain rifle impressions consisting of six grooves twisting to the right which is consistent with the barrel of Specimen Q34A.

Q Now Q34A is what kind of firearm?

A It's a .22 caliber center fire semi-automatic rifle.

Q Now the .22 rifle that you referred to earlier, could those items in Government Exhibit 34G have been fired from that weapon?

A No, sir. That fires an entirely different type of bullet.

Q Now does that fire a rim fire or a center fire?

A It is a rim fire cartridge. It is fired in the other rifle.

Q Now by comparison purpose, 34A is an AR15. What is the muzzle velocity of an AR15?

A In commercial loaded ammunition it is approximately 3200 feet per second, in that general area.

Q Have you done any research to determine the firing muzzle velocity capabilities from any loading manuals?

A I looked through the various loading manuals by Spear and Hornaday and Sierra and also checked some of the commercial ammunition pamphlets for the various velocity ranges that are {3240} available.

Q I'd ask you whether or not you, show you Government Exhibit 47A and ask you whether or not you looked in Government Exhibit 47A in that regard?

A Not in this particular manual; no, sir. I looked in a Sierra, another copy of it.

Q The same manual, I mean, the same --

A I don't remember if it was the same edition or not.

Q And what did you find with regard to that, the muzzle velocity variation of an AR15?

A Well, the highest, it can vary up to as high as, I believe, 3,690 feet per second is the highest any hand loader has listed in his manual.

Q Now with any of the firearms which you examined in connection with this case, did any have as high a velocity capability as the AR15 by comparison?

A No, sir. Not quite that high a velocity that was available from any of the other by hand loading.

Q Of those that you examined in connection with this case, what was the next highest velocity?

A The 30 aught six with 110 grain bullet.

Q I would show you what is marked as Government Exhibit 34H which is designated on the chart as being found from the ground beneath bodies of Williams and Coler, Q84. Did you have occasion to examine --

{3241}

A Yes, I did.

Q -- Government Exhibit 34H?

A Yes, sir, I did.

Q And what did you find with regard to Government Exhibit 34H?

A That it is a .22 caliber copper bullet jacket. It has rifling impressions consisting of six grooves with a right hand twist and that the rifling in 34H is consistent with the rifling in the barrel of Exhibit 34A.

Q Now you could not tell whether that was fired from Government Exhibit 34A, is that a correct statement?

A That's correct.

Q Why could you not make that comparison?

A With any of the fragments in 34C and item 34H, none of them have any of the type of microscopic marks needed for identification purposes remaining on the outside surface so it would not be possible for me to identify them with any firearm.

THE COURT: The Court is in recess until 9:00 o'clock tomorrow morning.

(Whereupon, at 5:00 o'clock, P.M. on April 5, 1977, recess was taken until 9:00 o'clock, A.M. on April 5, 1977.)