VOLUME XXIII

{4948}

FRIDAY MORNING SESSION

April 15, 1977

Pursuant to adjournment as aforesaid, at 9:00 o'clock, a.m., on Friday, April 15, 1977, the Court met, present and presiding as before; and the trial proceeded as follows out of the presence and hearing of the jury, the Defendant being present in person:

MR. LOWE: Your Honor, may I address the Court for a moment on one of the exhibits that we checked with the Clerk?

THE COURT: You may.

MR. LOWE: Your Honor recalls that laboratory reports were received in their entirety; and your Honor instructed me to go ahead through and make the red brackets throughout, noting particular attention called to a portion of the reports.

While doing that, I noted that two -- it just was not in my mind -- there are four pages in Defendant's Exhibit 187 which refer to the homemade grenade, Molotov cocktails. I had forgotten they were in there. I had bracketed that to be removed. I had not -- since the testimony has not been in evidence, it would be highly inflammatory and prejudicial. Those very small portions of that one report should be deleted. It could be done. It is identifiable, being on Page 8, Page 19, {4949} Page 20 and Page 21 of that report; and I would ask that the Clerk be instructed to do that or to allow us to do that before that exhibit is given to the jury.

I don't think it is necessary to do it right this moment, because the jury will not get those exhibits certainly until tomorrow; but I would like it to be raised before we get into argument.

MR. SIKMA: Your Honor, there are about 2,000 items I in those exhibits that are not in evidence; and that is why I objected to them. They were not even gone into on cross examination.

If we are going to remove those things which are not in evidence, I think we should pull the whole exhibit or all of the exhibit.

Secondly, this was our objection to the items in the first place.

Thirdly, the Molotov cocktails were found right in the area of the crime scene; and I think that it is very relevant, or it can be reasonably

argued that they are very relevant to the state of mind of the Defendant who, we believe, the evidence shows had control and was a leader in this area in dealing with these items, the same as all the other items that were found in that particular area.

THE COURT: The reports were not received for a {4950} limited purpose, so the reports themselves will become evidence.

MR. LOWE: Well, your Honor, the problem is, the Government withdrew its offer under objection -- faced with objection and the Court's apparent preparedness to rule at the time the Molotov cocktail information was offered, we withdrew it and agreed to enter -- and did not enter it.

My point is that that specifically has been excluded from the trial. It is not a matter that it wasn't in evidence. It was a matter an objection was raised and specifically withdrawn from consideration. That's a lot different than saying it wasn't mentioned.

THE COURT: That Molotov Cocktail had a different location?

MR. LOWE: No, sir. They are -- the Molotov cocktails we are speaking of were in the Tent City area. Those are the ones we are talking about.

THE COURT: I thought you were talking about the Oregon event.

MR. LOWE: This is Tent City, the same ones depicted in those pictures.

MR. SIKMA: Your Honor, I still say, I contend they were found --

THE COURT: (Interrupting) Is the green sheet there?

{4951}

MR. LOWE: No, sir. This is the laboratory report.

Your Honor remembers there were some pictures of soda pop bottles, RC six pack, orange drinks and things.

We had a big argument at the bench, and your Honor, I thought, was leaning towards ruling them out, at least at that point. The Government counsel withdrew the offer. They would not offer it, withdrew the offer. It is not part of this trial.

Page 8 at the top, homemade grenades, analysis, comments on Pages 19 through 21.

In view of your Honor's consideration of the Government withdrawing them, I think it would be improper to put those in.

MR. SIKMA: Your Honor, the defense counsel offered the documents in their entirety in the first place; and then when we attempted to make

some reasonable stipulation, they just marked out items that showed some relevance to this offense, so we went along with putting the whole document in; and if anything is going to go out, they are going to use it for the parts that are totally irrelevant to this case.

We want to use it for those parts that are relevant to the state of mind of the Defendant.

THE COURT: The motion is denied.

MR. LOWE: All right. I would move to have the {4952} Government instructed that they may not argue those items, much in the same way we may not argue the dates on those laboratory tests. Certainly at least there is as much prejudice in arguing those items that were never in evidence because they were withdrawn over objection as in the use of the dates of those reports.

MR. SIKMA: We would resist that.

Your Honor, the defendant's reason for putting them in was so they can take little items out of context and argue them. That's why we objected.

We should be able to argue and use them in the same way the defense counsel is using them.

THE COURT: The request is denied.

MR. LOWE: Well, in the face of that, your Honor, I would move to relieve us of the burden of not being able to use the dates on the laboratory reports.

MR. SIKMA: I would resist that, your Honor.

The reason stated by the Court is very specific in that counsel is trying to use the dates as they are, essentially in violation of Rule 614(b).

THE COURT: Denied.

With reference to Plaintiff's tendered Exhibit 38-H on which the Court reserved the ruling last evening, there is considerable evidence in the record that the Defendant in this case is a leader of the American {4953} Indian Movement, and there is further considerable evidence of the peaceful programs and objectives of that Movement; and I think 38-H would be admissible as a rebuttal of that evidence.

However, I find that the possible prejudice that might arise from 38-H would outweigh the relevance of the exhibit, and therefore, the offer of 38-H is denied.

With reference to the other motions for the receipt of the balance of Defendant's Exhibit 75, and then the Exhibits 83, 87, 88, 91, 105, 106, 142, 144, 156, 166, and 178, which counsel for the defense has offered for the limited purpose of proof of utterance for recordation, the Court finds that for that purpose the exhibits are irrelevant and the offer is denied.

On the matter of the motion to strike the portion of the testimony of Wilford Draper, the Court finds that this is not a situation where Mr. Draper was asked a question and stated that he was just guessing, it is a situation of where he had made a sworn statement and then under cross examination stated that he was just guessing.

That, therefore, would make it a matter for the jury to determine the credibility and the weight to be given either of those statements, and the motion to strike that portion of Wilford Draper's testimony is denied.

Counsel may make an offer of proof.

{4954}

But I would suggest that we do it at a later time on Mr. Rossmoore and Mr. Steele.

I would now ask the United States have you received a copy of the Court's proposed instructions?

MR. HULTMAN: The plaintiff has, Your Honor.

THE COURT: Do you have any exceptions to state for the record?

MR. SIKMA: Your Honor, we have no exceptions to state for the record.

THE COURT: I would ask the defendant, have you received, defense counsel, have you received a copy of the Court's instructions?

MR. ENGELSTEIN: We have, Your Honor.

THE COURT: Do you have some exceptions to state for the record?

MR. ENGELSTEIN: Yes, Your Honor. Only to the extent that some of our applications were not granted.

THE COURT: Very well. The record may show that all specific requests for instructions except as attained in the general charge are denied. The record will further show that counsel are deemed to have accepted to the failure of the Court to give an instruction which was requested.

MR. ENGELSTEIN: I just have a few comments, Your Honor, But first

I would like to introduce it by saying that the time spent last evening I felt was very profitable, despite {4955} my prejudgment on this question, and perhaps Your Honor's response to the argument as such as to encourage me to go much further this morning that is appropriate in the hope that I might even prevail on arguments that were not prevailed upon last night. But in light of the situation of course I won't.

I would like to say that we're pleased about striking manslaughter and what I don't want to reargue murder two since I have nothing more substantive to say. We are also pleased in the improved format with respect to murder two since it spells out as a separate item all of the necessary elements for murder two.

I would like to refer Your Honor to the aiding and abetting, instruction number 19 states the statute which of course if unobjectionable. I recommend that Your Honor join number 20 and 21 to make that one instruction for the following reasons: If the jury should want to see the instructions in the course of their deliberations and this --

THE COURT: By the way, I should mention that I make it a practice of sending my instructions to the jury along with the exhibits.

MR. ENGELSTEIN: In that case when the jury examines the instructions in the course of their deliberations I think it would be important for them to see the entire concept of aiding and abetting, one page, for the following {4956} reason: Let's assume they're considering the evidence from the point of view of the respect in which it matches the legal standard of aiding and abetting. It's not impossible and perhaps not even unlikely that they may refer to one page with respect to it, not consider the counterbalancing consideration on the matter. Number 21 deals with the fact that mere presence does not constitute aiding and abetting.

Now, let us assume they're weighing the consideration of whether presence does constitute aiding and abetting and they happen to turn to number 20 and happen to turn to the statute and it's not explicitly spelled out in the way that we would like. So we think to avoid the possibility of that simple mechanical failure to turn to all of the pages appropriate to that legal charge we urge that Your Honor just put them on one page.

Further as a substantive change we recommend that you turn to 21, paragraph number two of our supplementary instruction Number 2 which deals

with the justification of self-defense.

THE COURT: Excuse me, that was paragraph what?

MR. ENGELSTEIN: Paragraph number 2.

THE COURT: Of your supplementary 2?

MR. ENGELSTEIN: Of our supplementary 2. Which deals with the justification of self-defense in aiding and abetting and this again speaks to the easy way in which one forgets that aiding and abetting is a complete crime in and of itself {4957} which has its own justifications, one of which is self-defense.

It would be unfortunate if the jury starts thinking in the direction of aiding and abetting, checks off in its minds that the elements exist and fails to consider whether there was an element of self-defense in the act of aiding and abetting.

Furthermore as a matter of logic to the degree that aiding and abetting is relevant to the case it would have to deal, I think, or most likely with the activities that we're engaged in in a way from the actual situation of the premeditated act of murder to the degree that it would deal with actions from the ridge or from a distance to that degree. Is the element of self-defense more appropriate than it would be at the close range execution. And since Your Honor has included a general self-defense instruction with respect to the entire situation and to the act of premeditation we think it should be included in the aiding and abetting to the degree that it is -- it does no harm, but to the degree that it aids the jury in considering aiding and abetting per se. They must not be left with the impression that with respect to the crime of aiding and abetting there is no justification of self-defense.

Finally, or not finally, we didn't have the occasion last night for various reasons, time and so on, to talk about something that is rather important and relates to aiding and {4958} abetting as well and that's our supplementary proposal number one. That's a cautionary instruction with respect to how the jury should react to the supposed admission of Leonard Peltier to Corporal Tweedy in Canada when he said, "No," in response to a question about whether he killed the agents. "No, but I know who did." We think it imperative and again the text of our supplementary proposal number one states the point, and I won't read it. We deem it imperative

that the jury recognize A that that is not an admission; B that it does not constitute aiding and abetting, and C that the failure of Leonard Peltier affirmatively in any way or responsively to even inform the Government who killed the agents. Because he said that he knew them does not constitute any kind of evidence of his guilt or any kind of evidence of aiding and abetting.

The importance of such a cautionary instruction is simply that it talks to the normal psychological reaction of an average person who would say by knowledge these, that man knows who did these horrible crimes and he's not helping the Government do its proper job. Now, there is a lot of law with respect to the fact that there's no obligation for a person to do that under the circumstances and no presumptions should be drawn from the failure to do that. And we urge Your Honor to consider the dangerous implications of the absence of such a cautionary instruction.
{4959}

Your Honor's charge number 28 on the testimony of accomplices. I did mention that briefly yesterday and I just want to restate it again very briefly. After all it is the purpose of an instruction not only to charge the jury on how to determine whether a man is guilty, but also to determine when a man is innocent. The charge as it stands now tells the jury that uncorroborated testimony of an accomplice may be considered with caution and can prove the guilt of the defendant if it's believed beyond a reasonable doubt.

Now, that is correct law, and that is as far as Devitt and Blackman goes, And I believe Your Honor has accepted that language. But we have cited case law including a Supreme Court decision Cool v. U.S. which suggests that another sentence be included in that which speaks to the possible innocence of the defendant. That is if the uncorroborated testimony of an accomplice speaks to the innocence of a defendant then the jury need not believe that beyond a reasonable doubt.

It is the difference in the standards between the requirement of innocence and guilt that implies the necessity of the instruction with respect to the testimony of an accomplice that goes to innocence. Because absence of such an instruction, isn't it logical that a juror would conclude or might conclude that any testimony by an accomplice has to {4960} satisfy

the standard of beyond a reasonable doubt; whereas the law is clear that if the testimony of the accomplice goes to the innocence of the defendant it is the much lower standard that is necessary.

And since in our case we have had people who at least could be considered accomplices because there were so many people on the scene shooting and since so many of those people have testified in this case it would seem that any testimony they gave which might go to the innocence should be accompanied with that kind of an instruction. And your instruction number, and Your Honor's instruction number 30, there is one sentence which states that the prior inconsistent statement may be considered as substantive evidence in the case. {4961} We question whether that is the proper law. We're not sure of that. In the absence of time to research it, we ask Your Honor for the privilege of submitting a very short memorandum sometime in the course of the day on that question.

THE COURT: You may.

I think that has developed, that rule of law has developed just since the adoption of the new Rules of Evidence.

MR. ENGELSTEIN: That may be why we're uncertain about it.

One final point, Your Honor, and that is --

THE COURT: I think prior to the adoption of the new Rules of Evidence, I was not giving that kind of an instruction.

MR. ENGELSTEIN: We have submitted an instruction or supplementary instruction number three which is anticipatory, to be sure, and, of course, we're not expecting that to be given at this time. That is an instruction with respect to what Your Honor should say in the event of a hung jury and I guess it is premature because we're not asking for a ruling, but that is the kind of instruction we think that could open the door to the kind of difficulty that nobody in this case would like to encounter.

Finally, I would like to say that the way in which {4962} Your Honor has gone about the charges has been rather special, the fact we have had two or three hours of oral argument yesterday, we have had an opportunity to present further argument today, it certainly confirms the remarks I made yesterday that in many respects this has been an extraordinary trial and has been concluded in a similar fashion. Thank you.

MR. SIKMA: Your Honor, may I just have one or two sentences.

THE COURT: You may.

MR. SIKMA: By way of comment to say about this, the Court will give an instruction that the jury instruction should be considered as a whole and therefore the necessity of adding the additional instruction with regard to self-defense would be surplus. I do not believe it should be given in place requesting, relating to aiding and abetting and because it would place undue emphasis on it. We question in light of the fact that the instruction on manslaughter has not been given that because of the infinitismal amount of evidence with regard to self-defense in this case that perhaps the self-defense instruction should not be given because I don't believe that a reasonable person could conclude by the state of the evidence there was any self-defense involved in this case, and if there was, it might reduce the facts involved to a situation where a manslaughter question would come into play.

THE COURT: I think the evidence on self-defense was {4963} slight but it was my opinion that there was sufficient there to justify it.

MR. SIKMA: Your Honor, with regard to the question, the statement or admission made to the Royal Canadian Mounted Police officer Tweedy, this can be considered as an admission inasmuch as it was, at least showed a misprision of felony. But in light of and in context with the statement involved where Tweedy asked if the defendant was involved in the conspiracy of the offense and his noncommittal shrug, I think there is some evidence from which the jury could believe that was in fact a definite admission on his part.

Thank you, Your Honor.

THE COURT: The Court will take under consideration the suggestions made by defense counsel relative to the instructions.

Are Counsel now ready to proceed?

MR. CROOKS: The United States is ready, Your Honor.

MR. TAIKEFF: Defense is ready, Your Honor.

THE COURT: Very well.

The jury may be brought in.

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

THE COURT: Members of the jury, we have now reached a point in the

trial where the lawyers have the opportunity to make their summation. We sometimes refer to it as an argument.

{4964}

I remind you of the instructions I gave you at the beginning of the trial and that is that a lawyer's summation or arguments serve a definite purpose. It gives the lawyer an opportunity to assist the jury in drawing together and pointing what they consider to be the strength of their case and the weaknesses of the adverse case.

{4965}

But you must bear in mind that what the lawyers say is not evidence, and it is your recollection which controls as to what the testimony in the case has been; and if the lawyers in their arguments should misstate an item of evidence, you must depend on your recollection.

I think I can assure you that if they do misstate it, it would undoubtedly be unintentional.

In any criminal case, and in any civil case for that matter, the side that has the burden of proof under the Rules of Procedure of the Court has an opportunity to make an opening argument or summation, and then a rebuttal argument or summation; and as I say, that is only because that side has the burden of proof.

In this case, as you have already been advised, the Government has the burden of proof. Therefore, the United States will make, or the attorneys representing the Government will make the opening summation; and then the defense will make the Defendant's summation, and then the attorney representing the Government will make the rebuttal summation; and after that I will instruct you on the law, and when that has been done one of you will be dismissed because one of you, as you know, is an alternate; and the remaining 12 will then take the case under deliberation and will be asked to reach a verdict.

Mr. Crooks.

{4966}

MR. CROOKS: May I proceed, your Honor?

THE COURT: You may proceed.

MR. CROOKS: If it please the Court and counsel, ladies and gentlemen of the jury, I would like to just at the very outset reiterate what the

Court has said, that I am an advocate for the United States as are the other attorneys that you have seen and heard here in this courtroom.

What I say is not evidence, it is merely my argument as an advocate, and that's important to keep in mind because, as you have seen throughout this trial, there have been flare-ups between counsel, there have been statements made by counsel on both sides. These are not evidence, they are merely our way of expressing our anger or frustration, or whatever; and we all -- and I think the defense counsel will agree -- we all ask you to forgive us for our weaknesses because we all feel very strongly about our clients and our cases; but this is not a game where we are trying to determine which side has the best lawyers. That is not the purpose of this trial, and I think you all understand that.

It is a very important, serious case, and it is something that should not be decided on whether our side or their side are the most eloquent in their presentation. As I said earlier, or a moment ago, the lawyers are not {4967} the parties.

The parties are Leonard Peltier, the Defendant, and the United States, the people of the United States who have brought the charges against him.

In this case, as you have seen, there are basically three actors. I have just discussed the lawyers.

The second actor obviously is the Court. The Court's function, as you have seen throughout this case, is very important because he is to preside and keep order to the proceedings, to make sure that only legal, competent, relevant evidence comes in before you. The Court at the close of the case will instruct you on the law.

Now, in my argument, I will, for instance, mention points of law which I think the Court will instruct you on; but you are not to take that as the law. You will hear the law from one place, from the bench; and I ask you and caution you, as the Court has previously, not to make up your mind as to what the law is in this case until you hear it from the Court altogether in one series at one time.

That brings us to the third actor who are very passive actors in many ways, and that is the jury, you 12 people, or the 12 that will ultimately sit in this case.

The jury system is one of the best and most important {4968} parts

of our criminal justice system. These cases are not judged simply on what lawyers think, what lawyers reason. They are judged on what 12 average, ordinary citizens think and feel after hearing the facts; and that is important, it is very important to the fair justice system that we have established in this country.

The purpose of having 12 jurors is obvious. No one juror can remember everything that has gone on in this six week trial. Your job obviously will be to apply your collective knowledge, your collective judgment, your collective recollection of these facts, because none of you will remember everything.

I don't. I have worked on this case longer than any of you have, and I don't remember everything and none of the other attorneys do; and that's why we have 12, so that we have a broad, collective knowledge upon which to draw a collective judgment as to the facts.

In reaching this judgment obviously you must use common sense, and that's why we have ordinary -- and I don't mean that in a demeaning sense -- we have ordinary people sitting as jurors. We have people that have no special interests one way or another, people that are fair and unbiased, and people that are willing to use their common sense that they have gotten from their jobs, their prior lives, and are willing to adapt it to {4969} the facts in this case; and that is very important especially in a case such as this where there is no one picture but a vast series of evidence which fit together forcing a picture. You have to apply common sense. If you do not, then our system has failed.

Ladies and gentlemen, the Court will read you again the instructions, I anticipate, or the charge which has been made against this individual.

Basically he is charged with two counts of first degree murder, the premeditated murder of two individuals, two human beings.

Now, I emphasize at the start that we are talking here about the first degree murder of two human beings, we are not talking about two Government agents as such. That's important only to the jurisdiction. We are talking about human beings, living, breathing human beings that had feelings, loves, hatreds, just like all of you and myself and everyone else in this courtroom. These two individuals were young men who chose as their calling (indicating) the Federal Bureau of Investigation, Ron

Williams and Jack Coler, two young, relatively handsome young men who chose as their life's work, I would assume, or at least part of their life's work, law enforcement, and two young men who were killed in the performance of their duties; but more importantly, they were killed as {4970} human beings, not as FBI Agents, not as Government employees, not as anything other than human beings.

It is easy for us to sit here in this trial, who have never known Jack Coler and Ron Williams, to forget what I have just said, that we are talking about people that a year and a half ago could have been standing in my place or standing in your place. It is easiest for us to forget that we're talking about death, not talking about theft, we are not talking about forgery of Government checks. We are talking about deaths, the irrevocable act which will never be undone. What we perhaps forget, who have not known these two individuals -- I haven't any more than any of you have -- is that we are talking about the destruction of human lives, not replaceable Government property. We are talking about the destruction of human lives which are unique in God's creation and are never going to be replaced and never going to be duplicated.

In this case I think the Court will instruct you that, as set out in the indictment, the charge is first degree murder. I believe the Court will define first degree murder, and I am not quoting exactly; but I think in substance that first degree murder is the premeditated, unlawful killing of another human being with malice aforethought, that if, the cold, calculated, intentional {4971} killing of another without legal excuse or justification.

I believe the Court will instruct you substantially that premeditation or malice aforethought or -- and malice aforethought simply means that it is not a spur of the moment killing but a planned killing of some sort, not necessarily planned for a week, a month, a day or even a few minutes; but at some time before the killing, these murderers or this murderer decided to commit murder and planned it at least long enough to form the positive, real, articuable attempt to take a human life. I believe that in essence is what the Court will instruct you.

Really, when I talk about the definition of first degree murder, I suspect that this is a crime that need not be even defined to jurors.

All of us know what murder is. We don't need legal definitions to tell murder from an accidental killing, murder from self defense, murder from a number of different types of killings, murder stands alone as the most horrible crime of the human race. It is a crime in every society that has ever lived on this earth, and it is a horrible crime. No matter how it happens, it is a horrible, horrible crime; and I don't think you really have to have a legal definition to know what the difference between that and an innocent killing is.

To establish the Defendant's guilt, now we are getting {4972} to a specific individual. We have charged Leonard Peltier with these murders. To establish his guilt we must show beyond a reasonable doubt, first of all, obviously that Ron Williams and Jack Coler were murdered; and secondly and most importantly, that Leonard Peltier was responsible for those murders, that is, that he acted as the principal, he was the moving force behind those murders, and must assume the responsibility for them.

Now, you will note that I didn't say that we have to prove Leonard Peltier pulled the trigger on either of the deaths because the law does not require that. All we have to show is that he was responsible, whether it was by pulling the triggers or by some other method or means.

I believe the Court will further instruct you that to establish the proof of guilt, we need not show that the Defendant did every act that arose into this, on June 26, and happened that day, and obviously he didn't.

You have heard testimony for several weeks about numerous people that were doing acts which resulted in those killings, those two cold-blooded cowardly murders. It is obvious that he didn't do everything involved in those deaths.

I believe the Court will say something to the effect {4973} that anyone who commits an offense against the United States, who aids, abets, counsels, commands, induces or procures its commission, is punishable. In other words, anyone who willfully participates in the commission of a crime, as Leonard Peltier has here is guilty and responsible.

I emphasize this point at the outset and with some, length because I think it's obvious to all of you that we have not been able to produce an eyewitness to the actual final killing. We have gotten down to everything except an eyewitness to the actual shooting.

We have got all sorts of circumstances, however, which fill in that hole; but I think it is also obvious that our two best witnesses, Jack Williams -- or Jack Coler and Ron Williams are dead. They are not available to come into this courtroom. We have to rely instead upon some of the participants themselves to fill in the holes in the final length to Leonard Peltier.

{4974}

I submit that we have, as I said earlier, or a few moments ago, we have submitted strong circumstantial evidence which indicates that Leonard Peltier did in fact fire the fatal shots; but you need not believe that he did. I think that he did, and I think the evidence shows he did. But we did not prove that.

You need not believe beyond a reasonable doubt as I've just indicated to find him guilty beyond a reasonable doubt. We have proven beyond any doubt, not just a reasonable doubt, beyond any doubt that this man is responsible for two dead human beings. There's nothing new or unusual about what I've said about responsibility, about aiding and abetting. I think all of you can reason for yourselves that if I hire someone to kill one of your jurors I pay a man to do a killing for me. There's no problem with anybody deciding that I'm guilty of murder. That's pretty basic.

If I hold one of you jurors while someone else stabbed them to death would any of you have the slightest hesitation to say that I'm guilty of murder? I don't think you would.

If I and five companions, for instance the men sitting behind me, if we all attacked you or one of you jurors with firearms, rifles, guns blazing in unison, would you have any hesitation to convict me of first degree murder even though it wasn't my bullet that killed you? That's what we have here.

{4975}

Along this same line, and as I've mentioned just a moment ago, it is obvious that both of our two most important witnesses, Norman Brown and Mike Anderson, would have been defendants in this case along with Leonard Peltier and perhaps should have been. I think it's also obvious why they were not. As I said our best two eyewitnesses are dead, Jack Coler and Ron Williams. They can never testify. Everyone else, as you've hoard

from this witness stand, everyone else that was on June 26th at the Jumping Bull Compound was involved in these killings in one way or another, with one possible exception, and that obviously is Angie Long Visitor.

But as you've heard her testimony she states that she left before the killings and that was corroborated by at least two people that saw her leave. So we are left then with the only witnesses available being involved in the killings As strong as the evidence is, the physical evidence which we've got in the record now, as strong as that evidence is I think it's obvious that witnesses are still needed to expand and fit that evidence into place so that it says, so that it means what it says.

In short, we needed witnesses. There's no question about it. The evidence for instance does not indicate that Mike Anderson or Norman Brown initiated these killings, or that they fired the fatal shots. The evidence on the other hand indicates that Leonard Peltier was not only the leader of {4976} this group, he started the fight, he started the shootings and that he executed these two human beings at point blank range.

Our alternative of course, as distasteful as it is, is to let these two young men off so that we can get the one individual who is most responsible for these deaths. Out of all the individuals who were involved there was one individual who was most responsible, and I think the evidence without any question proves and establishes beyond any doubt that that was the man seated over there (indicating) in the blue shirt and the vest, Leonard Peltier.

The defendants, or the defendant and the other people who were here were strangers to this area. Every witness testified that they came in for some purpose, whether it was a hired guns or whether it was helpers, they came in sometime in the early part of the month. I don't think, or as I recall the evidence, none of them were even natives of the reservation. They came from other reservations and I believe the evidence further indicated that most of them weren't even Sioux Indians. Most of them were Chippewa or Navajo or from Washington, some reservation or some other tribe of Indians. They had been in tent city for several weeks doing many things. The defense testimony was that they were helping with various things, but apparently while they were there they were also doing a little burglary. Mr. Rooks house was burglarized in the early ?art of the month. His {4977}

.303 rifle was stolen along with numerous other rifles and numerous other personal property.

Where does this .303 rifle wind up? At tent city, and at the crime scene in the hands of Norman Charles one of the residents. There's no question, and I think counsel, defense counsel has really conceded this, there's no question that Leonard Peltier was there. Even his own witnesses place him there, his fingerprints are all over tent city, car's there, fingerprints on the vehicles. No question he was there.

What makes you wonder why they spent as much time as they did cross-examining Mr. Coward? Because they in effect concede he was there. That's never really been a substantial dispute in this trial.

I don't think there's any question, either, that he was the leader of this group. He was the oldest member, he ran the camp. Testimony was that he even chewed out the younger men when they didn't do something right. He led the escape out of the area and again even his own witnesses indicated this leadership.

Do you recall the defense witnesses having testified? Jean Ann Day, for instance, that yeah, he was the leader, he was the boss. These were the defense own witnesses. No question he was the leader.

Jack Coler and Ron Williams were likewise new to the area. They had been assigned to Rapid City. I believe {4978} Mr. Williams had been assigned in 1975, was assigned to the reservation a short time later, I believe in the early, or excuse me, around in '73 to the Pine Ridge -- or to the Rapid City. But he was assigned to Pine Ridge in early '75, or perhaps late '74 if my memory serves.

Special Agent Coler is perhaps an even more tragic case. He was on a sixty-day temporary assignment which was just about completed. Do you recall his conversation with his friend Special Agent Bunch? They were talking about going fishing as soon as he finished his assignment. Ron Williams, the young man on this photograph (indicating) was twenty-seven years old. He had three years in the Federal Bureau of Investigation. Jack Coler, twenty-eight years old, he had four years in the bureau. They're not necessarily old hands, but certainly experienced FBI agents.

On June 25th and 26th they were on the Pine Ridge Reservation doing their jobs. Their job was to enforce the federal laws which was their life

work as law enforcement officers. Part of their job was to apprehend federal fugitives. Federal law not only authorized them to arrest Jimmy Eagle, it was their duty to do so. It wasn't a matter of them deciding, let's go down and find Jimmy Eagle. They had an arrest warrant for him and it was their duty to go find him.

One of Jimmy Eagle's co-defendants had been found, and I believe Mr. Hughes had taken him in that morning. But they {4979} had not yet succeeded in finding Jimmy Eagle.

I don't think that there's even a shadow of doubt as to what Ron Williams and Jack Coler were doing on the Jumping Bull Compound on the 26th. They went there to apprehend Jimmy Eagle. They had a warrant, or at least were aware of it, and knew it was outstanding and it was their assignment to catch him.

The night before they had been to the Jumping Bull Hall, I believe to the Sears' house, the tan and red house. They had been looking for him and they were in the company of two BIA officers, Ecoffey and Little Bird. That evening they stopped three young men who were from the camp, Norman Charles, Mike Anderson and Wish Draper thinking that one of them might be Eagle. Also the question of the .303 clip which was taken from Norman Charles, they were taken in for, I'm not sure exactly the purpose, whether it was identification or concerning the clip. There was no question these three individuals were taken in that night as part of looking for Jimmy Eagle.

The next morning, on the 26th, the day of their deaths. Special Agent Gerard Waring visited with Ron Williams and he offered to accompany him to look for Jimmy Eagle. Jack Coler however indicated that he would just as soon go because he had been with him the night before. This leads to the terrible irony that the handsome young man by the name of {4980} Gerard Waring who testified here could have been in these photographs in place of Jack Coler. That's how senseless this murder was.

Special Agent Bunch, as I mentioned earlier, had talked to Jack Coler. He was a friend of his, a companion, his car mate or whatever. That morning they talked for about forty-five minutes about fishing, about family, friends whatever cases they were working on and he described to him the cases he was working on. He was looking for Jimmy Eagle.

That morning, an hour before their deaths, the agents were still looking for Jimmy Eagle. They went and talked to Mr. White Eyes. Mr. White Eyes identified the photographs, these were the two agents looking for Jimmy Eagle which was their job.

I believe Special Agent Hughes also testified that he had seen Williams in the morning and they had discussed what they were each going to do that day. Mr. Hughes said he was taking his defendants in and he was going to come back and then help find Jimmy Eagle. We come now down to the facts of this incident, the direct facts. I think it is clear, as you've seen from the testimony that we really have two incidents here, not one, but two. The first incident is the killing of the two agents. That stands all by itself.

The second incident is the attempt to rescue these agents by their co-workers and fellow law enforcement officers {4981} and that stands by itself. They should not be intermixed because the evidence does not intermix them. What we have is two young men coming into an area to make an arrest being attacked and murdered. The closest fellow law enforcement officer is fifteen miles away. The next closest FBI agent, if I recall, was Mr. Waring thirty miles away. BIA officers are of course in Pine Ridge which is again twelve miles away. Nobody even gets there until they're either st the very point of being shot or they're already dead. From then on the officers don't even know if their agents are dead until 4:00 o'clock in the afternoon.

They're trying to figure out if they're hostages or what the situation is. We have people even coming into the area and letting them go in to try to find out where the agents are. That's ultimately how they found out. But there's two separate distinct incidents. There's shooting after the deaths but has nothing to do with the deaths. The shooting after these deaths is completely separate. As a time of the death we have two against seven. That's the evidence, two against seven.

The law enforcement force builds up after that but unfortunately the agents are already dead. Shortly before noon Special Agent Williams spoke by radio to Mr. Coler. He spoke concerning a red and white vehicle that he was going to chase or was moving next to. He had been told the night before {4982} that Jimmy Eagle had been seen in a red vehicle leaving

the Wallace Little house which is just down the road and he gave chase.

This conversation was overheard by several agents. It was also a transmission a few minutes later where they indicated that the red and white vehicle had stopped and it looked like they were going to fire at them. This again was overheard by several agents: Waring, Hughes, Adams, some of the others. And this is what brought them into the area. This is why they stopped their cars and raced back a hundred miles an hour. These two transmissions corroborate Mike Anderson's testimony that Leonard Peltier's red and white van entered the area first. It was followed immediately by the agents. The agents gave a short chase, the van stopped up at the fork in the road where the P is written. The agents stopped at the bottom of the hill. Mike Anderson testified Peltier and his two companions, Charles and Stuntz, got out and appeared to fire at the agents. The agents apparently fired back. And I don't recall if he went into whether there were shots by the agents at that time or not, but at least he set the stage. Peltier was at the fork, he stopped the van. The three individuals got out and they appeared to be firing, or getting ready to fire at the agents.

Now, the defense has implied through their cross-examination that the shooters, and including all the shooters, may not have {4983} known that these guys were FBI agents. Well, that of course is rather absurd in view of Angie Long Visitor's testimony that she recognized FBI agents immediately. Anybody could see that, and she even went in and told her husband that that was her testimony.

I think it's all corroborated, her testimony is corroborated by Jean Ann Day, Della Starr. They had no problems in spotting FBI cars. Everybody knew what they looked like. But that really is immaterial in this case because Leonard Peltier knew they were FBI agents.

Norman Charles who was in the van with him, he knew they were FBI agents because he had been in that car that night before, Special Agent Williams' green rambler. He had been taken into Pine Ridge in that same car and he was in the van with Leonard Peltier and he knew what those colors were, he knew which agents were in there chasing.

Mike Anderson had no problem recognizing them for the same reason. He was in the car the night before, too. Now, Leonard Peltier at that time

had an outstanding attempted murder warrant against him. Undoubtedly believed as he told the Mounties in Canada, undoubtedly believed that these agents were after them. That's what he told the Mounties, that was his explanation. The agents came to arrest him for an attempted murder warrant that was outstanding.

The tragic and ironic part is that there's no evidence {4984} that the agents even knew he was there. Even if they had, they would have been entitled to arrest him. It was a federal warrant. There's no indication they even knew who their killers were.

Earlier I've said that the dead agents are no longer available to tell what happened. This is only partly true. It is true that Ron Williams and Jack Coler are no longer living, they can't come into this courtroom, they can't tell you their stories, they can't point their fingers at that man seated over there with the blue shirt. {4985} But they are not completely silent. They do have a story to tell. Eyewitnesses in any case may not be available to tell what happened. When you refuse to speak and forget, you may exaggerate. But the things that Ron Williams and Jack Coler do have to tell you are stated with undisputable clarity. They speak directly to the intent of their murder without any question whatsoever. They speak through Dr. Noguchi and through the photographs we introduced concerning the autopsy.

You recall defense counsel, Mr. Lowe, in cross-examining Dr. Noguchi saying again and again, "We agree with you, Dr. Noguchi. You're in accord with our judgment. This is right. This is the way it happened. We agree with that," because it is undisputable.

These are the photographs, as horrible as they are, of Jack Coler's testimony. He testifies that as he was standing behind the car with his arm outstretched, probably holding his .303 rifle, a bullet came through the trunk of the car, was deformed by hitting the trunk and almost ripped his arm off, obviously, from the photograph. He collapsed against the back of the car and he bled on the back of the car, crawled over to the side and became unconscious, motionless l on the ground bleeding severely, so severely a tourniquet had to be applied to his arm. As he lay on the ground unconscious and helpless, someone walked up to him at close range, three to four feet, pointed a high powered rifle at his forehead, {4986} pulled

the trigger. Apparently not believing they had killed him, he aimed again, fired, literally blew his face apart. That's the story that Jack Coler tells.

In another series of photographs we see the results of one of the shots. This is blood and brain that are splattered against the side of the car, apparently before the second shot which silences him forever.

What story does Ron Williams tell? He tells that he was standing somewhere with his arm extended, apparently working the microphone, firing a weapon, whatever. A bullet went through his arm, came out and went into his side and came out down by his waistline which indicated, as Dr. Noguchi said, that he was in a crouched over position like that (indicating).

They further testify that as he was kneeling, I believe Dr.Noguchi indicated, he was shot in the foot. Severe pain. Bleeding. Agony. Bones shattered. But more tragically they tell, as he sat helpless, essentially helpless, not as helpless as Jack Coler, but helpless nevertheless, an individual approached him, recalling Mr. Noguchi's illustration, approached him apparently on his knees because his foot had been shot, he can't stand very well, there is mud on his knees, this arm is disabled, he can't use this arm. He puts his right hand in front of his face to ward off a shell. He turns his face and he dies. That's the story that's told by {4987} these photographs with undisputable clarity.

The story told by these photographs contained in these exhibits can be summarized in three words: first degree murder. Without any question, without any other evidence, without any other testimony, they speak of three words: first degree murder. They also speak with equal clarity to the depravity, the outright depravity of the individual who did this.

We have other witnesses to testify who was responsible for this dastardly, cowardly, brutal act. Mike Anderson testified for the government that immediately after Mr. Peltier was up by the "P," by the fork, the agent was down at the bottom, he then ran back to the tent area.

Norman Brown testified that Bob Robideau and Dino Butler and, I believe, a couple others were in the tent area. When the shooting started they grabbed their rifles, they went to see what was going on. I believe that Norman's testimony was that he went to the hill first, came back for a rifle, then went to see what was going on with rifles.

Angie Long Visitor then looked out of her house. She heard a firecracker noise first. I would assume what she's talking about is the repeated firecracker sound. She looked out of her house immediately and what did she see? She saw Norman Charles and Joe Stuntz both at the hill lying down in front of her house beside the wood pile, lying {4988} just where Mike Anderson said they would have been, first on the scene. She heard, she went into her house, I believe her testimony was, told her husband the agents were out there, came out a second time to flee. She heard one shot by the agents and I believe she indicated without any question that she was fleeing because she did not want to be a part of that she knew was going to happen.

On the second occasion she saw Robert Robideau who now arrived and he was standing beside the abandoned car with a large gun. An interestingly enough there was something else about Robert Robideau, a hot sunny day in June he had on a ski mask. Our theory might be why does one wear a ski mask on a hot sunny day in June? Is it to protect women and children or is it to protect your identity?

When she came out she saw Leonard Peltier's van again just as Mike Anderson said it was at the fork in the road. Norman Brown further testified that he also saw the van in the area. I don't think he was specific but he said it was up there when he came. There is no question it's Leonard Peltier's van that she saw. You recall her testimony, she testified that this van had been owned by a cousin of hers, Samuel Loud Hawk, but Leonard Peltier fixed it up and it was his van. Mr. Hultman had to go to the grand jury testimony before she would give further details, but she did. She testified that the red and white van was the one she saw {4989} parked right at the "P" where Mr. Hultman indicated and that this was the same van that she knew and understood as being Leonard Peltier's van. That was her testimony.

Counsel throughout this trial has been talking constantly about a red and white vehicle. Ladies and gentlemen, there is only one red and white vehicle in it, there is only one vehicle of any kind in this area other than the agents' cars and that is a red and white van.

Defense Counsel originally apparently was prepared to make an argument that the junker found in the tree line was somehow involved.

Apparently their argument then being that this corresponded with a radio transmission that had been overheard by someone, never substantiated by anyone, but a radio transmission. Unfortunately for them, Angie Long Visitor had a good recollection of that vehicle. It had been there forever. It had been junked out and was sitting there for several weeks.

Then defense Counsel jumped on another red vehicle. The second ghost vehicle. That was Mr. Casados' vehicle where, Special Agent Williams' gun was found. The only problem with that ghost, it hadn't even been bought a month after June 26th. You recall our rebuttal testimony. Now defense counsel is left without any ghosts at all, just Leonard Peltier's van parked in the fork of the road where everybody said it was parked.

{4990}

Angie Long Visitor was seen to leave about this time. I believe both Anderson and Brown testified to that. When they arrived Anderson had gone back to the tent, gotten a rifle. When they arrived back up, both agents were still alive and were still firing. At about this time Special Agent Williams was still attempting to direct the agents into the area. He indicated they were being fired on from the rise which would have been the time we're talking about, Stuntz and Charles fired on from the rise, and he asked the other agents to get to the rise. "The only way you're going to save our lives." He also stated very ironically that if the agents did not arrive soon they would be dead men. Truer words could never have been spoken.

Other agents overheard these transmissions, Adams, Waring, Hughes. These transmissions were made, gunfire was heard in the background. Ron Williams' last transmission was that he had been hit. Dr. Noguchi, if you recall, testified this would have been consistent with him having even been working the radio at the time.

Apparently within seconds Jack Coler was sitting or standing behind the Bureau car with the trunk up. Apparently had gone to get his .303 because obviously they weren't going to hit anybody with their shortnose pistols. Gone to get the .308 and he was hit. We have already described those wounds.

{4991}

Brown and Anderson I think both testified that the agents were behind the car with the trunk up, and I don't recall if Angie Long Visitor said

that or if she described that specific part. She also saw the agents there when she left. The wound which hit Jack Coler, as I've already said, had hit the trunk of the car.

We have some other photographs that tell another interesting story. These are the photographs of the crime scene. The two dead agents lying beside the cars. Dr. Noguchi testified that this large hole was the one that he would have attributed to the wound in the arm and match it up with the blood which is found in the back of the trunk.

There is another photograph which is even more interesting, however. Line up the blood, the bullet hole on that photograph. Where do they come from? They come from the corner where Leonard Peltier and Dino Butler were firing. You can examine the photographs, if you will, in the jury room and you will find that on the side of the car where Peltier and Butler were firing there are numerous bullet holes, some of which are small and some of which are large and which corresponds to the two guns they were firing, the M1 and the AR15.

You will recall Mr. Brown's testimony. He said Mr. Peltier was standing over at the point which is circled right next to the "P" and he observed the action of Mr. Peltier getting {4992} up and firing, getting down, getting up and firing again numerous times. No question he was firing that weapon over there. Which weapon was he firing? He was firing this weapon, a weapon which before it was destroyed by dynamite and blasting powder, or whatever was contained in that vehicle in Oregon, or Wichita, looked just like this one, looked like an AR15 or 16. The gun that was designed for battle in Viet Nam with a little bitty shell that makes a great big hole.

I think that the evidence would also indicate that Special Agent Williams probably had gotten the shotgun out of the car. There was one cartridge found that had been fired by that. But we do know without any question that the agents were under heavy fire through all of this period of time. We have 125 bullet holes in those two Bureau cars. Fortunately that is replaceable personal property of the government. 125 bullet holes. But that's just what has been shown for sure. That doesn't account for the glass damage or the misses.

Dr. Bloemendaal and Dr. Noguchi testified that without any question

Special Agent Coler's wound would have been disabling or potentially fatal, massive bleeding, entire arm is almost torn off, nerves are shattered, bones shattered, arm is completely useless, bleeding through a major artery. Again appears from the photograph, and I won't {4993} show them to you again, that Ron Williams took his shirt off and helped his dying friend, applied it as a tourniquet. But the interesting thing is when he took his shirt off he had already been shot because the bullet holes which are in the shirt match up with the holes in his own arm. Special Agent Coler was totally incapacitated. It would appear at this point, and I think it's a fair assumption for you to draw, using your common sense and judgment, in all likelihood Special Agent Williams surrendered.
{4994}

No question that's an assumption because we don't have any direct evidence of it; but the physical evidence does indicate that. Examine, if you would, Special Agent Williams autopsy photos. What was found on his body, his belt loop, shell case, and a pocketful of ammunition.

Special Agent Coler was out of commission, but Special Agent Williams wasn't completely. He still had his pistol. He still had lots of ammo, ammo in the front seat of the car, several boxes of it. The defense themselves brought that out. He had plenty of ammo. He has got three, four firearms, got one good arm, the arm that Leonard Peltier destroyed at the time of the killing. He still had one good arm, could have fired at least the pistol.

What other explanation is there as to how these people got up on this man who was trained in firearms and killed him at point blank range unless he surrendered? There is none. It is in an open area. You have seen the mock-up . You have seen the diagram. Nobody could have gotten close to him. Perhaps he was completely distracted, that's possible, but I think it is more likely to assume that at that point, with his friend dying, seriously disabled himself, he can't run, he simply surrendered. There is no indication that anybody was shot as they cane down the hill to finish the deed. Leonard {4995} Peltier, Dino Butler and Bob Robideau, the three oldest members of this group, approached the agents. Peltier was firing the AR-15, as I said earlier, really no question at all about that. Every witness, every witness has put the AR-15 in his hand, even his own witness,

Jean Ann Day. This is Leonard's gun, a gun like that (indicating), the big black gun. It is the one Leonard liked. All of our witnesses have put the gun in his hand. There is only one AR-15 in the group. There is no testimony concerning any other AR-15 at Tent city or at the crime scene or anywhere else in the area, only one AR-15, and who had it? Leonard Peltier. He had it at every point he was seen. He had it at the point that he was firing, from the tree line, and he had it at the cars when he was seen by Mike Anderson down there. There isn't even any other AR-15 or .223 shells found, accounted for just about every shell found in the crime scene area with the exception of seven cartridges which are Government, Lake City Government cartridges which are normal issue for the Federal Bureau of Investigation.

There is no evidence whatsoever of any other weapon of that make or caliber in that area until after the murder.

Then there were lots of them. There were 25, 26 -- whatever the count was -- agents; but we are talking about {4996} a different incident. We are still talking here about the murder, and until that murder there was never by any witness any hint of anybody else with a rifle even remotely resembling this one (indicating) .

As I said earlier, it appears that as these three men came down, they committed the murders. Apparently Special Agent Williams was killed first. He was struck in the face and hand by the bullet, as I have demonstrated, probably begging for his life, and he was shot. The back of his head was blown off by a high-powered rifle.

Leonard Peltier then turned, as the evidence indicates, to Jack Coler lying on the ground helpless. He shoots him in the top of the head. Apparently feeling that he hadn't done a good enough job, he shoots him again through the jaw and his face explodes. No shell even comes out, but explodes. The whole bottom of his chin is blown out by the force of the concussion, He dies. Blood splattered against the side of the car.

At this point we find some physical evidence that says he did it. One shell casing is ejected into the trunk of the agents car which was open, one shell casing, perhaps the most important piece of evidence in this case. This little, small cartridge is ejected by the killers into the trunk of the car; and it is later found by Mr. Lodge. The ejection

chart was introduced simply to show, {4997} the possibility. We don't contend that it shows any definite pattern, but it shows it could have happened. It rebuts an argument that the thing would have gone then straight into the ground or something like that. That's all that chart is for. No question it is possible, no question it did happen. There is no evidence that any more than three shots were ever fired at the murder, no evidence whatsoever.

Further, there is no evidence that anybody else of the shooters ever went down to those cars, no evidence whatsoever; and there is a good reason why nobody else ever went down to those cars. By that time the entire northern area was crawling with agents. BIA Agents started to arrive, FBI agents started to arrive. There wasn't anybody going to go down to those cars again after the agents were all over the area. They would have been sitting ducks just like Coler and Williams were. There was one trip to that car by three men, and they killed these three young men in cold blood.

We also have another significant piece of evidence. I think, which was found at the scene. That's 34-H. That's the shell that was found under the bodies, a round by Montgomery, the agent. Ballistics said without any question it is an AR-15 bullet. or at least a .223 bullet, a caliber fired in this weapon; and I think we {4998} know where that bullet came from. That was the bullet that creased Special Agent Colers' forehead.

The other two murder bullets are still in the bodies in fragments, too small to even identify. The one tn Special Agent Williams' head just explodes, blew the back of his head off, and whatever came out would have been fragments so small that no trace could be found. Shell fragments were found by Dr. Bloemendaal.

The other shell going through the jaw again shatters, completely gone, all that are found are bits and pieces throughout his brain.

We have one shell that falls into a different category, 34-H. You can see by looking at the photograph, that that was a glancing show across the top of his head and it went into the ground because he was lying on the ground, and the shot came from above and downward; and I think it is a fair assumption that that's the bullet. We know, as I said, that this was a .223 bullet; and we know that it could have been fired from this gun. We don't have enough markings to say for sure, but it could have been

fired from this gun, and most importantly, it couldn't have been fired by any other gun which was present that day, any other gun which was present that day at the time of the killings.

At about this time, as I said just a moment ago, {4999} Special Agent Adams arrived, a good friend of Ron Williams. I think that was obvious from his testimony. You will recall that he was very emotional, and I think understandably so, especially from looking at his involvement in this case. He came under fire immediately. He drove into the area, he got to the area which is marked B and A. He drew fire from Norman Brown and Mike Anderson. They both testified they shot at him.

The tragic part, or perhaps the fortunate part, if he had gone a little farther, he probably would have seen Leonard Peltier standing over the bodies because it was apparently at just about this time, from all the time sequences as vague as they are from the recollection of the witnesses, obviously, it would appear that he arrived either just before or just after the killings at a hundred mile an hour. I say, the fortunate thing is that had he gone any farther, we would have probably had three dead agents instead of two. Special Agent Williams -- or Special Agent Adams would not have been here to tell his story either. His story would have been told from similar photographs. Everyone that came near this area was shot at including, I believe, there is testimony of an ambulance team coming in. Everyone drew fire. Passerbys on the highway drew fire from this blood-crazed bunch. Anyone who ever got close to the area was shot at {5000} by these quiet, non-violent people.

What happened when Adams arrived, something very obvious. Realizing that help was arriving, Leonard Peltier and his companions picked up that evidence they could, stole the agents' weapons and fled in one of their automobiles, Special Agent Williams automobile is at that point moved from where it came to rest up to the tent area where it was found. If there is anything certain in this case, one thing is certain. We know Ron Williams didn't drive that car up to the area. We know that without any question because he was lying on the ground dead with the back of his head blown off.

THE COURT: Mr. Crooks, I am going to interrupt you at this point, and the Court will stand in recess until 11:00 o'clock.

(Recess taken.)

{5001}

THE COURT: The jury may be brought in.

MR. LOWE: Your Honor, may I address the Court before the jury is brought in?

THE COURT: Just a moment.

MR. LOWE: Counsel have agreed that objections would not be raised during argument in order to try to have it uninterrupted instead of possibly popping up and going back and forth before the Court. This is the first opportunity for me to make the objection to what we consider to be seven grievous mistakes of argument and to move for a mistrial. And I'd like to start on the record with the specific instances very briefly.

Mr. Crooks tried to show Leonard Peltier as shooting, a fight started. There's absolutely not a shred of evidence. It is speculation and not fair inference as to who started the shooting. He said that they came in the early part of the month to the Jumping Bull's. That is absolutely contrary to the only evidence on that issue which was Jean Day's. She said they came in early April or in May. Mr. Crooks said Stuntz got out of the vehicle and fired at the agents. There is absolutely shred of such evidence. The evidence was that he heard some shots and ran around the perimeter and that is a complete misstatement of the evidence and it is not just arguing what it means, but he said that Anderson specifically testified to that. He said that Angie Long Visitor testified {5002} that she heard a series of firecrackers. That is absolutely false. She specifically said she only heard one shot or one sound that sounded like a shot before she came out of the house. And that is simply not the evidence, and it is not even close to the evidence.

Mr. Crooks argues that the jury can assume that Williams surrendered. That is asking the jury to speculate. It is improper argument. There is not one shred of evidence of any kind of surrender or anything like that. He says that no one could have gotten close, so we must assume that. mere were two vehicles on either side of the agents which caused a great blind zone that anybody could approach and have gotten within ten feet very easily.

Now, the most misstatement, and I would think Mr. Crooks would blush

on being pointed this out, he said that evidence 34-H was clear that it was only a .223 round. Special Agent Lodge gave clear and unambiguous testimony, and in fact is written right in the laboratory reports which he referred to and which are in evidence that the weapon only was, that it was a .22 caliber weapon and it was a .223, .222, a .221, a .22-250 or any other weapon of .22 which had that number of riflings. That's a gross misstatement of what the record shows and it was not argument. He said that it was testimony that only could be a .223 or an AR-15.

Finally, perhaps the most outrageous misstatement that {5003} I've heard in the trial, Mr. Crooks said that the people Leonard Peltier, and the people he was with did a little burglary and referred to the Rooks' rifle. Now, first of all that would be highly improper because it refers to an alleged other crime. Secondly, there is absolutely not one shred of evidence as to who took the Rooks rifle. Mr. Rooks testified that they had been taken, but the only thing we know is that sometime later they turned up in tent city.

There are three hundred and thirty-six fingerprints which have yet to be identified to anybody in tent city. There are obvious of many different weapons. There is no evidence, and I ask the Court specifically on that item, it is not only unsupported by evidence but it is a reference to another crime which is alleged to have been committed by Mr. Peltier or his associates.

Now, if Mr. Crooks were a less experienced prosecutor, I think he has something like six or seven years experience, but I think this misstatement of the evidence is deliberately to show Horn evidence into the theory and scenario of the Government's case and into the timetable which the Government is stuck with because of the various events that have been testified to. We think that these are not only objectionable but they are so objectionable that they warrant a mistrial being declared at this time.

THE COURT: Motion is denied.

{5004}

MR. LOWE: We would ask at least that the Court give severe cautionary instructions and admonish to the jury and admonish the Government in their evidence not to misstate the evidence.

THE COURT: The Court has already advised the jury before counsel started that if there's any misstatement that they should disregard it and rely on their own recollection.

Jury may be brought in.

MR. LOWE: You are denying my request then for a cautionary instruction at this time and admonition to counsel?

THE COURT: Yes, at this time I am.

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

THE COURT: You may proceed.

MR. CROOKS: Ladies and Gentlemen, immediately before the break I believe I had been discussing the, a rifle of Special Agent Adams. I think I've gone into that in some detail. And I believe I was also discussing the fact that at that point Special Agent Williams' car is moved from the bottom up to tent city.

Further evidence I think as to who moved the vehicle is in the fingerprint which was found in the inside, not the outside, but the inside of the door latch of that vehicle. This is the print of Robert Robideau, one of the individuals who was down at the bodies with Leonard Peltier. At this {5005} point, or during the trial I should say, there was a question to Mike Anderson something to the effect of how did the agents beat you back, or the culprits beat you back to tent city. I think this is the obvious explanation. They drove the vehicle. There's another vehicle in the area as I said earlier and this was the red and white van still parked at the point marked "P" on the map, exhibit 71. That vehicle also arrived back in tent city.

The question then is how did that vehicle get back. I think it's quite obvious that at the time they moved Special Agent Williams' vehicle they stopped, somebody drove the red van back at the same time.

Now, is that sheer speculation? No. What do we find in the area of the "P"? Special Agent Williams' checkbook and a red light, one of the red lights, I believe the testimony was, that you put on top of the car which had fallen out of the vehicle when they stopped, got out, changed vehicles, or one person at least changed vehicles and proceeded on to tent city.

So now we have all the vehicles back in tent city. What further evidence do we have of the hurry that they were in? That evidence is quite simple. If you recall the testimony given by Special Agent Lodge, the fingerprint expert, he examined both vehicles. One vehicle was intact. Other than the numerous bulletholes it was intact. Personal possessions {5006} were there including a wallet, cash in the wallet, shells for the guns, numerous items of a personal nature. And you recall there's even a list of those, Special Agent Lodge's list. By contrast what do we find with Special Agent Williams' vehicle? That vehicle is stripped of everything of value. There is nothing left in that vehicle of value that wasn't tied down. I believe the radio was still there, they apparently hadn't been taken out. But everything else is gone, including the spare tires.

But again it illustrates the speed in which they had to exit the scene upon the arrival of Special Agent Adams. Now, I've talked at considerable length about the tragedy of this day. But the tragic events of this day were not yet over. The agents are now dead, the sniveling coward that shot them has fled, but the tragic events are not over, We have yet another death that day, young Indian boy with Leonard Peltier in this group there to help replace ruts or whatever the explanation. But later in the afternoon he dies.

Surely he was involved, had responsibility for what had happened to the agents. But here's a young Indian boy that has also died. It's as a direct result of Mr. Peltier's leadership because he followed this man into a path which no human being should take and he's just as dead as the agents, and he'll never come back either.

Mr. Peltier left the cars, he left in a hurry. He left {5007} the one crucial most important piece of evidence, that's the shell casing, 34-B, little piece of brass. That little piece of brass was fired from this weapon (indicating). That's not speculation, that's not suggestion, that's fact. Ballistics expert testified that it was a fact from the markings on this thing. There's no other gun that could have extracted that bullet or that shell, and that evidence stands completely unimpeached by any evidence in this case.

Do we think for one minute that if some other expert would have said

that wasn't a fact he would not have been here to testify? You've heard no such evidence. What we did have was a question raised about the finding of that exhibit. Mr. Lodge apparently in his -- or Mr. Hodge -- or excuse me, Mr. Cunningham apparently in his, by an oversight, included that in his affidavit. No question that was wrong. And a great deal of testimony was taken concerning this affidavit. But the strange part is that when Special Agent Lodge got on the stand he had some notes, some old tattered notes taken a year and a half ago where he had made a list of the things he found. And the last page, what do we have? Exhibit 34-B, one .223 caliber Remington-Peters. A Remington cartridge case, R.P. and suddenly we didn't hear any more about Special Agent Cunninghams' mistake because that was found by Special Agent Lodge a couple days after when he searched for {5008} fingerprints and there's no question about that.

There's only one way that that shell casing got into that trunk. It got into that trunk when a murder shot was fired. There are other shell casings, I won't go through them or enumerate them, that were likewise found that were extracted from this gun (indicating) found in tent city, I believe one on the hood of the Ford, one in the red and white van if I recall. Apparently a whole bag of them found inside of the Ford. All of them were extracted from this gun (indicating). Not some other gun, not this gun (indicating) as we introduced as a sample, or demonstrative exhibit, but from that gun (indicating). That gun which was in the hands of Leonard Peltier on June 26, 1975.

As he left the area I believe the testimony was, if I recall correctly from Mr. Draper, that Mr. Butler carried out one of the agents handguns. Mr. Robideau carried out the two long guns and somebody else carried out the other pistol. I believe Mr. Draper could not recall who that was.

As they left to the south, numerous testimony -- or witnesses and testimony they went through the culvert. Their trail was marked by at least two exhibits, a .44 cartridge casing which I believe Anderson said that he fired and by a canteen. We have other physical evidence which is in this case and I won't go through it all because I don't think it's necessary which I can point to specifically that corroborates {5009} the stories of all the eyewitnesses again and again. I won't go through them in a great deal of detail, but I think on the map I should make some explanation as

Mr. Sikma did earlier.

These numbers correspond with various guns as is shown in 34-I. 34 series, a shell in the trunk of this car, one found up here (indicating), several up in the tent city area.

With regard to the other guns that we found put in people's hands and traced to the tent city area, or the Jumping Bull area, we have an M-1 rifle. Casings were found here (indicating), found up by the green house, Shell casings were also found, or shells themselves found in both cars. Butler had that rifle that was the testimony. He was firing that rifle from in this location (indicating). Mr. Robideau testimony was, and I'm not sure how definite it was, but at least the indication was that he had the .45 automatic. The shell casing were found by the green house, that also bullets in his cars, I believe it was Williams' car. Mr. Williams, as I said earlier, he had Mr. Rooks' rifle, the .303 British. Shell casings were found by the log house over here (indicating). Also shell casings, if I recall, by the white house. And I believe there was also one cartridge found down here in this area below the wrecked cars. {5010} Mr. Brown testified that he fired the .22. One of his shell casings was found up by the log house.

Mr. Stuntz apparently was firing two weapons. Testimony of Mr. Anderson was, if I recall correctly, that Mr. Stuntz started out with the .44, a little carbine, then he switched to the 30-30 which was found near his body when he died because the .44 got too hot. And Mr. Anderson testified, if you recall correctly, that he carried the .44 out and he fired it on the way out.

Then we come to Mr. Peltier. What weapons was he firing? He was firing the AR15, 34A. The list of where the shell casings were found positively identified with that weapon. We have two bullets, one of which I previously discussed, the other one which was found in the car could have been fired from that gun, could not have been fired by any gun, which is known to have been present that day. Could have been another gun of the .22 caliber if it had the same rifling. But there is no evidence of any other gun of that caliber or that make capable of firing those two shells on that day.

Perhaps a question should be raised why didn't we find three shell casings rather than one down by the agents' bodies? Well, the argument

there is quite obvious. There is nothing unusual about someone who just committed first degree murder picking up some of the evidence and taking it away {5011} with them. They weren't involved in a fire fight right then. The only people that were shooting at them were dead. They're down stripping the bodies of their firearms, other personal things. Apparently the checkbook is taken, or was just in the car.

But then someone arrived. Special Agent Adams. And they fled. They didn't have a chance to search long enough to find the third shell casings. That's why we found that one. The other two were picked up. We know Ron Williams and Jack Coler didn't pick them up. They were lying on the ground dead.

Let's look for a second at the agents' guns. Special Agent Coler's pistol fired one shot which is found in his car. For all we know that shell could have been shot at a gopher or jackrabbit or something. Simply in the car. But there was one shell casing found from Special Agent Coler's gun.

Special Agent Williams' pistol, I think it's fair to assume, came out of his gun that day because they were in Coler's car. Not his car but Coler's car. Apparently he ejected a couple shell casings. Why he would eject one instead of all six, nobody will know. We have three shell casings l associated with their pistols.

Then we have Coler's shotgun. One shell casing. What he was shooting at we'll never know. We have one shell {5012} casing.

Special Agent Coler's .308, we found one shell casing. Five shell casings found that were attributable to any guns that the agents had with them and had fired that day. I think it's probably fair to assume, and perhaps you can assume and want to assume, that the agents' guns were also empty at the time they were stolen, that they had shot all six rounds in each gun. There is 12 more. We come up with a grand total of possibly 17 shots fired by those agents. 17 shots. What have we had fired by the defendants prior to the death of the agents? We don't have to go count shell casings. We don't have to speculate about somebody picking up shell casings. We know how many shots were fired at those agents. There were 125 bullet holes in those cars, either bullet holes or ricocheted bullets, entry marks on those cars. 125, and that doesn't even count the shells

that went through the glass. If you look at the cars, all the windows are shot out of the things. Special Agent Williams' car doesn't even have windows in it when it gets back to tent city. How many more shots went through the glass? Who knows. How many more shots missed that never hit the cars or windows or anything? But we know there was 150 because that's there and that's countable. Here we have 125 shots as against 17 shots and that in itself tells a very, very sad story. These agents never had a chance. They never had a ghost of a chance. {5013} Pistols against rifles. They never had a chance.

The evidence is clear without any question that at Al Running's the group split up, apparently each of the main individuals, Robideau and Butler and Peltier, taking his trophy with him.

September 5 Special Agent Williams' revolver was found at the Al Running residence where Butler was staying in a room where Butler was arrested, or staying, with shells from both agents' cars, or both agents' guns. Perhaps these were the six empties that were taken out of each gun by the murderers when they got back to a safe location. But there were six shell casings, and I won't go through them specifically, you recall the testimony, from each gun found with Mr. Butler.

The pistol was found in Mr. Casados' red Jeep or Scout, whatever you call it, right outside of the cabin.

September 10th the station wagon blew up in Wichita, if I recall the date correctly. An AR15, 34A, Special Agent Coler's .308 were found and who was in that vehicle? Mr. Robideau, Mr. Charles and Mr. Anderson, several girls and I believe maybe one other person. Robideau, Charles and Anderson. And where have we seen those individuals before? On June 26th.

September 9th Mr. Peltier purchased a Plymouth station wagon in Denver, Colorado. Englewood, Colorado I believe to {5014} state it correctly right outside of Denver. Had Special Agent Coler's revolver with him. November 14 this was found, Special Agent Coler's service revolver. He had fired one shot out that we know for sure. We don't even know that for sure. Maybe that was a jackrabbit he shot at. This service revolver was found in Ontario, Oregon. How do we know Mr. Peltier was there? I think we know. It was found in this bag, little brown bag, shopping bag, with Mr. Peltier's fingerprints on it. Where was the bag found? It was found

under the front seat of the recreational vehicle that Mr. Peltier was in. And strangely enough it was found right under the front seat where he would have gotten out of the vehicle when he got out and confronted Officer Griffith. Right front passenger seat. No question that this is the same bag, same gun. It is unimpeached on that.

The individual that got out was identified tentatively by Trooper Griffith. Couldn't make a positive identification that this is absolutely the guy but he thinks it was. That individual jumped the fence, made his getaway. And what did he do when he jumped the fence? Fired back at Officer Griffith.

An individual matching Peltier's general description was seen about an hour later attempting to hitch a ride in that same area.

Peltier's fingerprints were found on the Barker ranch {5015} on the refrigerator. Blood was found in the refrigerator and was also found on the fence that he jumped back by the scene. Prints were also found on Mr. Barker's Ranchero which was found 100 miles or so from Ontario. 30-30 rifle stolen at Barker's was also found in Canada, or found in Canada, and that again has Mr. Peltier's prints on it.

Further, Mr. Peltier gave the Mounties two different versions of having been shot at in Oregon. I believe one version was to Mr. Parlane, if my memory serves me, he was taken back to the office and shot in the back and the other one was he was shot on the highway. I believe that was Mitchell, if I recall the names correctly.

There was only one person shot at in Oregon, a Mr. Griffith. The individual fleeing over the fence that had just fired at him. The only person shot at.

We come then to the question of what has the defense established in this case. They have established a couple things I would concede. They have established without any question, without any doubt, unequivocally that FBI agents are human beings and they bleed and die. They've established that they feel very badly when somebody shoots one of their friends. I suspect they have about the same emotions that you and I would have if one of our close friends was shot down in such a brutal, cowardly way. {5016}

The defense established that massive investigation was conducted

to bring these culprits to justice, and again I concede, so what. Does defense counsel really expect the FBI to have sat around in their offices and waited for these men to turn themselves in? Is that how defense counsel would have solved this crime, brought these men to justice? I don't think we'd have had a trial if they would have done that.

One other thing I think I should touch on very briefly because it is part of the charge and it's part of every murder charge is the matter of self-defense. In any murder case the government obviously has the burden of establishing that there was no justification and the principle justification being self-defense for a murder. This point needs little argument. The agents here were not the aggressors. The agents here were doing their job, were attempting to apprehend the fugitive. I believe the Court's instructions, and I won't go into them in any detail, will simply be that the aggressor cannot claim self-defense except under very unusual circumstances.

And further, the facts of this case as I've gone through them I think speak without any question to the fact that self-defense just by the physical facts is not applicable to this case. Once you have been disabled, let's assume for a second that somehow or other the agents started this fight, {5017} not for the purpose of making an arrest but simply to kill somebody. They decided that morning that they wanted to kill somebody so they started the fight and all this stuff had happened. They had been completely disabled. Even if you're not the aggressor, you can't kill the man after he has been completely put out of commission. That's first degree murder under any stretch of the imagination or law. I think the Court will instruct you appropriately on that matter. But clearly that didn't happen here. You can't even get to that argument because it didn't happen.

The question here that these men were in the performance of their duty, they were doing their job. They were attempting to make a lawful arrest. I believe the Court will instruct you that you cannot interfere with a law enforcement in the performance of his duty. You can't interfere with his arrest. If you did we wouldn't have anybody arrested, all we'd have is dead police officers. Officers even have the right to use deadly force to affect an arrest if that's necessary. You can't interfere with that. You can't claim self-defense when an officer comes to arrest you

for a felony charge. That's just what Leonard Peltier did, committed first degree murder.

A suggestion has been made during the cross-examination, I believe principally of several government witnesses, that perhaps these people were just defending women and children. {5018} I believe Mr. Brown was asked something about "be a man." Mr. Stuntz told him to be a man, go back and protect the women and children. Even if by some warped logic you could say that's applicable to the people at tent city, it certainly doesn't apply to Leonard Peltier. He knew who these agents were. He was there when it started. The women and children up there in this area weren't being shot at or threatened in any way by these officers. Where were all the women and children he was supposed to be protecting?

We come back again to the matter of self-defense. It's a very simple fact we have got two against seven, rifles against pistols. What are they defending other than Leonard Peltier from being taken back as a wanted fugitive. I think perhaps that additional comment should be made that Leonard Peltier had displayed his concern for women and children when he fired at Officer Griffiths, fired right back over the heads of the women and children to shoot down the police officer who was attempting to apprehend him. We also have his statement to the old Indian elder in Canada overheard by Corporal Dahl which again shows his concern for women and children. "What would you have done had you known these people were coming?" "I'd have blown them out of my boots," or "out of their boots". "Would you have done that even with my grandchildren here?," What was his concerned response? "My life."

Ladies and gentlemen, I think I've talked long enough for my part of this.

{5019}

I think my argument can be summed up in a very brief paragraph.

We have proved the cold-blooded, brutal murder of two human beings. We have proved that beyond any question. We have proved it was premeditated, planned in the sense that it was not a spur of the moment activity. We have proved beyond a reasonable doubt that Leonard Peltier was responsible for these senseless, brutal, cowardly murders. We have proved that beyond any doubt. We have proved that he organized and directed this camp, started

the fight, fired at the agents again and again from the tree line.

Had we proved nothing further, that in itself would have been first degree murder; but in addition, we proved that he went down to the bodies and executed these two young men at point blank range. Ladies and gentlemen, that's murder in the first degree. The United States respectfully requests that you return a verdict of guilty on both charges of this indictment.

THE COURT: Will counsel approach the bench, please?

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

THE COURT: Would you like to go into your argument at this time, or would you prefer that we break for lunch?

MR. TAIKEFF: I believe that we can break for lunch {5020} because I have to reply in a single summation.

THE COURT: Very well. We will do that.

MR. TAIKEFF: Thank you, your Honor.

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

THE COURT: In order that defense counsel will not have his summation interrupted by the noon recess, I am going to declare the noon recess at this time; and we will reconvene then at 1:00 o'clock.

The counsel have just indicated they want to take something up with me after the recess, so the jury is excused now until 1:00 o'clock.

Just a moment. My court reporter just reminded me of something. I have an arraignment on another matter set at 1:15. This was set, of course, some weeks ago, and we had no way of knowing; and the attorney, as I recall it, defense counsel in that case is from out of town, so we will have to recess until 1:30.

(Whereupon, at 11:43 o'clock, a.m. the jury left the courtroom; and the following further proceedings were had out of the presence and hearing of the jury:)

MR. ENGELSTEIN: Your Honor, may I be heard?

THE COURT: You may.

MR. ENGELSTEIN: I wonder whether your Honor would reconsider and hear argument again after the summation {5021} on the issue of charging the jury with murder two in light of the summation given by the Government?

I don't want to make the argument now, but when the summations are

concluded.

THE COURT: The Court considered very carefully what the instruction should be in that respect. The defense requested an instruction only on first degree. The Government requested an instruction on first degree, second degree and manslaughter; and the Court feels that, based on the evidence in the case, the instructions as composed are proper, and I think I understand what you are referring to insofar as counsel's argument is concerned, it still is circumstantial evidence. It is still evidence which the jury must consider, and the answer is, "No, I will not hear it."

MR. ENGELSTEIN: Your Honor is, of course, aware that the defense will take exactly the same position as the Government with respect to that question before the jury, on the question of murder one?

THE COURT: I am aware of that, but I still think it is a matter for the jury.

MR. ENGELSTEIN: Thank you.

THE COURT: Unless there is agreement by counsel on both sides that only first degree should be submitted.

MR. SIKMA: There is not, your Honor. We think that {5022} the instruction on second degree murder is appropriate.

THE COURT: Very well.

MR. TAIKEFF: One question. Normally we vacate the courtroom during the recess; but because we have all of our papers and transcript here, may counsel be privileged to stay in the courtroom during the recess? If the Marshall wants to lock the jury out, we have no objection to be locked in.

THE COURT: Does the Marshal have any problem with that?

THE DEPUTY MARSHAL: There is always somebody outside, some personnel.

THE COURT: That request is granted.

MR. LOWE: You have a 1:15 arraignment in here?

THE COURT: 1:15, we will have an arraignment.

MR. TAIKEFF: We will vacate before then if the Marshal unlocks the door.

THE COURT: Mr. Taikeff?

MR. TAIKEFF: Yes, sir.

THE COURT: The Clerk just suggested that perhaps can hold that

arraignment in the small courtroom down on the next floor, and I think that that probably is a good suggestion. Then you won't have to move.

MR. TAIKEFF: Your Honor, I believe there is a possibility we will finish with what we have to do before {5023} then. We will notify Mr. Hanson if we vacate before 1:15.

THE COURT: All right.

MR. TAIKEFF: Thank you, sir.

THE COURT: The Court is in recess.

(Whereupon, at 11:46 o'clock, a.m., the trial of the within cause was adjourned until 1:30 o'clock, p.m.)

{5024}

AFTERNOON SESSION

Whereupon, the following proceedings were had and entered of record on Friday afternoon, April 15, 1977, at 1:30 o'clock, P.M., without the jury being present and the defendant being present in person:

MR. LOWE: Your Honor, may I on the record make one objection to the latter part of Mr, Crooks' argument that he referred to Mr. Peltier having the Coler .357 with him when he bought the car in Denver. There's absolutely not a shred of evidence as to where that weapon was when Mr. Peltier was in Denver and we would, that again, we move again for all the reason we've said for a mistrial, or for a cautionary instruction to the jury.

THE COURT: The motion for a mistrial and for cautionary instructions is denied.

MR. LOWE: Okay.

THE COURT: Jury may be brought in.

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

MR. TAIKEFF: May it please, Your Honor.

THE COURT: You may proceed.

MR. TAIKEFF: Counsel for the Government and counsel for the defense, Ladies and Gentlemen of the jury: I don't think the Government has an exclusive on recognizing that June 26, 1975 was a tragic day, a day that involved the death {5025} of three young people. We have no quarrel with the extensiveness of the investigation which was conducted in an effort

to find those who were responsible for what happened on that particular day. If at any time in the course of these closing remarks you hear anything which sounds like disagreement with what happened, it's disagreement with certain things that were done which are not contemplated by our law, which in our opinion, and that's why we present these arguments to you, represent a serious intrusion upon constitutional rights and undermine, seriously undermine the very notions of freedom which are the fabric of our democracy.

I'd like to give you a very general, very brief outline of what I believe will be covered by these remarks. As you know the Government presents a first part of its summation and then when I'm concluded it presents its second part. The defense gets one opportunity to address the jury. As such we have to do three things: number one, we have to answer any of the things which the Government has said which we think we should respond to. Number two, we have to present to you our ideas as to those highlights or those aspects of the evidence which we believe you should pay careful attention to in determining whether or not you should return a guilty verdict or a not guilty verdict in this case. And finally if appropriate we have to anticipate what the Government's going to say in the next installment of its {5026} summation and answer those arguments in advance.

Now, our point of view could probably be summed up with two phrases: First, we believe that if you view all the evidence, assuming it to be true, that there is not sufficient evidence in this case to warrant the return of a guilty verdict because the evidence, even if you believe every single word of it, is not sufficient for you to find beyond a reasonable doubt the guilt of the defendant. But far more important than that we believe that we will be able to demonstrate for you that there is a substantial lack of integrity, there is a substantial lack of reliability in the critical phases, in the critical portions of the evidence such that we trust and we hope you will have no difficulty after considering these things in the jury room to return a verdict of not guilty.

Now, in the course of making these arguments to you it will be necessary, because that's what the facts necessitate to suggest, that a certain number of agents of the Federal Bureau of Investigation did some very serious things; and I know that it's going to be difficult for you,

surely not an easy, natural thing for you to do to make an assumption that it's even possible for an agent of the Federal Bureau of Investigation to do the things which we will argue have been done in this case.

We do not mean to impugn the entire Federal Bureau of {5027} Investigation. There are approximately seven thousand special agents working in the United States. Surely you must believe you're sophisticated enough to believe that amongst seven thousand agents there must be a few who would be willing to do things which are both unethical and illegal in a case as important and as significant as this. We will ask you to find that there are such agents and that they did do such things.

We'd like to point out at this particular time in a very general way, we'll get to specifics as we go along, in fact I suspect that we're going to at least at two points get to so many specifics and so many details that I fear that I will bore you. But I assure you that if I do so it's only because there are two very important analyses which must be done in this summation and there is no way to do it except to go through plodding one step at a time, one item at a time. When those moments come I trust that you will understand that it is not indifference to the fact that you've sat here silently for a long time and that you have to listen to me. You are sort of a captive audience at the moment. It's quite necessary and I hope that when it's over you'll appreciate whether you agree with the observations I make or not that at least it was necessary to go through it. I trust that you will agree with those observations.

I think as far as general remarks are concerned I {5028} should call your attention to the fact that there was a great deal of evidence in this case which had absolutely nothing to do with the events of June 26, 1975. There was a lot of window dressing, there was a lot of evidence concerning things of a prejudicial nature that might incline you to feel that Leonard Peltier is a bad man who does bad things. Perhaps we can persuade you that he doesn't do bad things, that he does what has to be done in an unusual and extreme situation. But don't let those things becloud the real issue in this case.

The real issue in this case is did Leonard Peltier kill either of those two agents or both, or did he have anything to do with their death other than the fact that he may have been present or around the scene where

their deaths took place.

You've seen a lot of unpleasant and shocking photographs and I wonder whether it was necessary to show them to you again in summation. Were you shown those photographs because they would give you some insight about the facts of this case, or were you shown those photographs because they're shocking and upsetting and to remind you only of the tragedy. But your decision is not made on the basis of emotion or sympathy, either for or against the defendant. It is a difficult job that you face and it must be done in a rational, intelligent, conscientious way, not with the image of people {5029} who are undergoing an autopsy in your mind.

Now, apropos of that, and apropos of my general suggestion to you that the Government has tried to use window dressing where they didn't have evidence, let me call one thing to your attention. I believe that Government Exhibit 59 is the book which contains the autopsy photographs. In the course of examination of Mr. Muldrow Mr. Hultman, in referring to Government's Exhibit 59 suggested to the witness in approximately these words: "I want to have you take a look at those for just a second and ask you whether or not you see anything unusual about the fact that two agents were found in this kind of condition." Key words, "were found in this condition." Now, I'm sure that every one of your realizes that when a pathologist does an autopsy he has to cut the body open. He has to do what would be a very unpleasant task for most people to watch. In posing that question and using the autopsy photographs the Government elicited a certain answer from Mr. Muldrow who obviously was shocked by what he saw. Those agents were not found that way. That is the kind of slight of hand which I call to your attention and I ask you to think carefully about as you evaluate the evidence and the arguments which are designed to get you to look at the evidence in a rational and reasonable way.

There's one incidental point which has come up and I suspect will come up in the closing argument. I don't know {5030} whether that's going to be Mr. Hultman's argument, perhaps he could nod to me if that's true so I can refer to him, and he did. It will be Mr. Hultman's argument, It has been suggested that Leonard Peltier escaped from the mobile home in Oregon and that in the process he fired a handgun, or a gun at the Oregon State Police, or the policeman and that between him and the policemen were

one or more women and children. And this was to demonstrate to you what a callous man he was to do such a thing.

There is in evidence in this case Exhibit 136 of which I'm holding in my hand, a photostatic copy. If you will bother to ask for that exhibit, and the Judge will instruct you, you may have any or all of the exhibits you choose to have, you will find very simply that what happened in that particular instance was not that Leonard Peltier fire a shot, but the person who drove the mobile home away fired that shot from a considerable distance down the road. And if you will look on that chart 136 you will find the place where that second handgun, that .357 caliber handgun, was found. That handgun was the handgun that fired the single, shot as you will recall from the witness who found that gun and watched the FBI break it open and take the shells, or rather the shell and the cartridges out. That's just another example of the kind of peripheral detail surrounding Leonard Peltier in this case so that you will not pay attention to {5031} what's important. I will try in the course of this closing address to point out to you the things which I think are important.

Apropos of my apologetic statement to you about the possibility of boring you at times, maybe it was presumptuous to think that I'm not boring you every single minute. I do want to point out to you that in the course of the trial there were long cross-examinations. I don't know exactly how many of you have sat on juries before or have experienced as spectators in trials, but when you have a witness who is coming forward to testify for you, as a general rule you sit down with the witness, you ask the witness questions, you find out what the witnesses' answers are going to be and you ask the selected questions known full well in advance what the witnesses are going to be. When you get up to cross-examine the witness, particularly one who doesn't want to tell you some of the things you want to know and which you believe are there that can be uncovered, you have to struggle. Sometimes it's like digging for diamonds. You don't find too many diamonds when you dig for diamonds and when you cross-examine a witness who is intent in not owning up to the facts as the witness knows the facts to exist it takes a long time.

To the extent that the defense prolonged this trial by that process I say to you only it was necessary. It has {5032} been said by a

well-recognized scholar of the law that cross-examination is the greatest engine ever invented for the ascertainment of the truth. We hope that that is true, and that what we have brought out on cross-examination which we will now tie together for you will demonstrate to you what the truth is in this particular case.

One last comment of an apologetic nature. Our system, which is several hundreds of years old, because we adopted it from English jurisprudence, does not allow for either counsel to have a dialogue. If it were permitted I would say to you in turn what's on your mind, what would you like to hear me talk about, but I can't do that so I have to guess what are the things that might be of interest to you, what are the things which are important. It may be that our -- I will cover some things in greater detail than necessary because you've already figured out the punch line. Forgive me, I just have to do it that way because we cannot communicate and I must make sure that I cover with you the things which the defense team has concluded is important for you to know.

You perform a very significant and very important function in our society. We say the word "jury" as you might say the word "kitchen or living room." And sometimes we don't think about what it means. The jury is an institution which grew up in England perhaps six hundred or more years ago and it was revolutionary, as revolutionary as our {5033} revolution a little more than two hundred years ago, maybe even more so It placed in the hands of ordinary citizens who know nothing about the criminal justice system, nothing about the prosecutorial team, nothing about the defense team and nothing about the defendant to come in and be the only institution, the only instrumentality by which a person in the United States may be convicted of a felony unless that person chooses to plead guilty. That's a very strong power that our constitution has given to each and every one of us. It's a very strong protection.

As you all know our Government is divided into three departments, separate departments. In this trial all three departments are represented in one way or another. The defendant is prosecuted under a criminal law that was enacted by Congress. Judge Benson is a member of the judiciary, another branch of the Government. And the prosecutorial team represents the executive branch of Government. Who are you, Ladies and Gentlemen?

You are the people of the United States, the same people that are served by that tripod type government as it sits in Washington. You have been called at various times the conscience of the community, or the voice of the nation and you perform an exceedingly important function. Not only in the life of Leonard Peltier, and I cannot underestimate the significance, the importance of that, but you say to all who have any knowledge at all about {5034} the facts of this case whether they be outside observers or insiders who have some role to play. This we will approve of, or this we will not approve of, and that's exactly what the jury system was designed for originally and that's exactly the function you have to perform in this case.

You may articulate that with the words not guilty or guilty, but that's what you are saying. You are saying as the only representatives of the citizens of the United States just as there are five hundred and thirty-five members of Congress representing all of the people, 215 million. You have a heavier role, a bigger constituency each because the twelve of you who will deliberate this case represent every single American who has any concern whatsoever of the constitution of the United States. {5035}

The government must satisfy you beyond a reasonable doubt. A difficult thing to define even for lawyers and legal scholars and judges. Sometimes that is described as persuading you to a moral certainty. That seems to have a much better ring to it. You have to be morally certain. You have to be certain in such a way that a year from today, five years from today there is a very high probability you'll say to yourself, "I'm satisfied with what I did. I didn't make a mistake one way or the other, guilty or not guilty." That is the degree to which you must be satisfied before you can return a verdict of guilty.

You may not, if you're going to abide by the law of this land, return a guilty verdict unless you are persuaded to a moral certainty of the guilt of the defendant. Then if you have a doubt or if you're not persuaded to a moral certainty, where does that doubt come from? Well, initially it comes from either the body of evidence or the lack of it, as the case may be. Sometimes a missing link is far more significant than a piece of evidence that you have to evaluate and say, "Do I believe this or do I not believe

it and if I believe it how much do I believe it?" So you may look at the evidence as it exists and you must also look and see what's not there that you think should be there. And how do you make these judgments? All you do is apply the conscience that you have developed in the course of your life. I daresay by looking {5036} at you and knowing that there will be 12 of you that there may be between you all about 500 years of experience. That's a lot of experience. 12 different points of view and you become and you are a very potent, very intelligent, very competent fact finding body.

The government has the burden, the defense has none. The defense will not supply you with any broad answers. We will not in the course of this summation attempt to paint a comprehensive picture for you, perhaps like a jigsaw puzzle that's only missing certain parts. That's not our job. That's the government's job. We will raise troubling questions. We will not attempt to trick you. We will not attempt to overwhelm you with words. We will try to make it simple and compelling and we think we will raise a number, a substantial number of very serious questions about this case, the evidence and the lack of it.

In the course of doing that and because of the role which I have just defined that is in fact the defenses, on a particular point you may hear me say "Well, consider this possibility," and then I'll turn around and say, "Consider that possibility," with respect to the same fact. Please do not think that I'm playing fast and loose with you. Please do not think that I can't make up my mind. I don't have to make up my mind. I only have to give you a solid reason, a rational {5037} reason for saying "There is something rotten around here." So if a particular fact could be interpreted from the evidence to possible ways, I may choose to call your attention to those two possibilities, either of which may be favorable to the defendant. It is not because I can't make up my mind as to what the facts are. I wasn't there. I don't know what the facts are. You might be tempted to say to yourself, "Well, Leonard Peltier was there, he knows what the facts are." The law is clear on that and the judge has instructed you more than once. He comes here presumed innocent. He doesn't have anything to do. If he chose to he could sleep throughout the proceedings. It wouldn't be very wise if he did but he could I if he wanted to. He doesn't

have to ask any questions, doesn't have to put on any witnesses, doesn't even have to sum up. He could sit back if he were that secure about the situation and literally say to you without saying it, "You look at the evidence and decide whether you think I'm guilty beyond a reasonable doubt."

Now I think I should address myself to the framework I in which this case developed. The people on this jury live l in the southeastern part of the state of North Dakota. I assume from looking at you that each of you is a Caucasian person, that none of you live on an Indian reservation and I strongly urge you not to evaluate the conduct of anyone in connection with this case as if this event unfolded in Fargo or Jamestown {5038} because it did not. For all practical purposes it occurred in a foreign country, in a foreign country which in certain ways is like a war zone. And you have to take that into consideration in evaluating every aspect of this particular case.

Let me tell you right now that I am not going to argue to you that was a war zone and Leonard Peltier thought someone was trying to kill him and he ran up and shot something in self-defense. Get that out of your mind. There is no argument like that in store for you. I am talking about the circumstances under which you should make some judgment about the conduct of people because surely if somebody walks through the lobby of your hotel carrying a loaded AR15, you would surely find that unusual and questionable. Where these events took place it is quite common and indeed necessary. That's what I'm talking about when I say this is not like a situation you'll find in your own back yard.

You must understand, as I'm sure you do to one degree or another, that about 500 years ago there were a large number of people living in the North American continent, all of whom were members of what we call the red race. And then about 500 years ago Europeans came here, although more than 500 years there were certainly Europeans who came to this continent from the northern part of Europe but they apparently did not make any settlements here. And that caused great changes to {5039} occur in the lives of these native people, these natural people who have been here for a very long time. Some scientists said 20,000 years ago they crossed the Baron Straits when there was no water there. The net result, as you can see in part by looking at the diagram immediately to your left, is

that this country is occupied in the main, although not exclusively, by Europeans and their descendants and certain areas have been set aside, not given to the native American people but recognized by the United States as part of the territory which they used to occupy and which pursuant to certain treaties, the last of which were signed around 1868, those lands were set aside for them and never to be changed, never to be altered. By signing these treaties the United States has recognized in a certain sense that they were dealing with a sovereign, foreign entity.

Since 1870, uphill now, a lot of things have changed in spite of those treaties. Times change is the commonplace expression, and as a result of changing times and perhaps to a certain extent the failure to live up to all the terms of certain treaties, and that matter is not litigated here, I merely make reference to it, the lives of the native people on those so-called reservations began to change and factions started to form. These changes which have occurred in the last 500 years, and in particular in the last 100 years, raised very complicated political, legal and moral questions and they're {5040} not to your consideration except to understand for the few minutes' worth that I have addressed myself to the question some of the framework, some of the problems.

There remain on these lands a certain number of traditional people who live their lives mostly as their grandparents and great-grandparents and great-great-grandparents did. Of course, they don't hunt the buffalo and instead many of them ride in automobiles, but to a considerable extent they live the same kind of life that was lived there 100 and even 200 years ago.

But they are not the only people on the reservation, and the existence of these different groups and the tensions which result from progress, sometimes progress isn't always progress but we call it progress, have created much of what you've heard about in this case.

These people follow a religion which is in a way strange, primarily because it's unknown to us. They live very close to the land. They view themselves as another form of life like no different than bird, fish, animal which they call the four-legged, and these people have been doing this and their ancestors have been doing it for perhaps 20,000 years or more, and they don't want to give up, they don't want to stop, they don't want

to die. They want to continue that wonderful culture and that's the centerpiece of the conflicts which raise on the reservation right up to this very {5042} minute as you sit there and I stand here. The net result is strongly opposed factions carrying guns, corruption of government, failure of government, goon squads, no policeman at the other end of the telephone, if you have a telephone.

Mr. Trimble was the head of the BIA. He was nominally the police chief. He said he couldn't do anything about it. There was a climate of fear. There was a serious problem for these traditional people, many of whom are older people because the older the people are, as you would expect, the more inclined they would be to be traditional because they would have the least influence from modern science. And these traditional people invited representatives of the certain organization whose purpose it is to advance and promote the ancient native American religion of the sacred pipe and to seek sovereignty and independence as it existed in 1868. They are not very popular because of that. They are not popular on the reservation and they are not popular off the reservation. In a sense they are very conservative. They are the ultimate conservatives. They want to conserve something that's 20,000 years old and there are many forces trying to stop them from doing that and you must understand that to understand something about this case. These people were not hired guns and they're not enforcers, they're spiritual, strong, dedicated people who came there to serve their people. It's true they were heavily armed. There is no question about it. {5043} It was necessary for their survival that they be heavily armed. You've heard enough testimony to know that AIM was not the most popular organization on the reservation.

Mr. Weston said it was common knowledge in the latter part of June, 1975, that there was an impending goon-AIM shoot out. Miss Merrival said that the goons hate AIM. She also pointed out when she was shown one of these AR15s, she said "Goons carry weapons like that."

Well, if you're there to see to it that you're going to protect people from goons who carry weapons like that, I daresay you must carry weapons like that yourself. You have no alternative.

A high ranking government official testified, Stanley Doremus, Deputy Secretary of the Interior. What did he say? There was a wide spread

perception of a breakdown in law enforcement. Mr. Hultman said to you in his opening address all people, white or Indian, have the same duties, the same responsibilities and same standards of conduct applied to them. I agree with him wholeheartedly and I ask you if the circumstances that you heard about that exist on the reservation, which the government has not said one word about not existing, which you heard from native people, AIM supporters and government officials alike, if those conditions suddenly started to develop on your hometown, what would you do about it? If you decide that you would do nothing about it {5044} but just get shot up, well, then I'm upside down and you should come back with a guilty verdict. But I don't think that's what you should do. You might regret having to do what you would do but you wouldn't do nothing about it.

The government will undoubtedly argue to you, and here I go with anticipation of what Mr. Hultman will say in his closing, that the reason why Leonard Peltier fled to Canada was because he had it continuously in his mind that he had committed murder and he wanted to.escape. That may be an arguable position but that's not what the evidence shows in this case. The evidence shows in this case, and Mr. Muldrow and Jean Day both testified on the subject, an invasion on the reservation on June 26th and for a certain period of time thereafter, a military looking invasion, armored personnel carriers, two agents carrying weapons that looked just like that AR15. But you can't tell from the picture whether it's an AR15 which is a semi-automatic or an M16 which is a machine gun. Note the agent on the left-hand side of the photograph if you choose to look at the photograph. He's got two things in his hand. They are not corn beef sandwiches, they are probably 40 banana clips for that weapon on his shoulder. And just in case that isn't enough, you've got a pistol big enough to kill an elephant.

See that picture? That's not a soldier. That picture was not made in Southeast Asia. It was made in South {5045} Dakota. There were between 175 and 200 people like that on that reservation on and after June 26th.

You see that helicopter? Where have you seen that picture before you came into this courtroom? It's a picture right out of a war zone. That picture was taken on the Pine Ridge Reservation the week following.

And then there is another photograph of another person. He's not

a soldier. He's not a Marine. An FBI agent.

We know that Leonard Peltier was on that reservation at least until the day after Joe Stuntz' funeral, at least until July 2nd or 3rd.

You heard testimony from Mr.Muldrow that the residence were terrified about this. Is it possible that Leonard Peltier was on the reservation and was sleeping all day long, that he didn't know what was going on, that he couldn't see what was happening? And if that were the case, Jean Day and others came to see him and it was clear what would happen. In fact, before that invasion began Leonard Peltier knew what the situation was trying to lead those other people, most of them very young people, some of them 15 years old, out of that tent city area. He said according to the testimony of one of the witness just before they left tent city anyone trying to surrender would probably get shot by the FBI or the police. {5046} That's how cheap life is on the reservation and that's a reflection of how Leonard Peltier felt before the invasion arrived.

What would you do? Would you try to surrender and get shot and killed on the spot? First and foremost he had a substantial responsibility to those people, most of them young people. And then once they found relative safety, don't forget the Rosebud raid on September 5, 1975. 80 agents coming to arrest five people with helicopters, automatic weapons, flak vests, camouflaged gear, and Agent Marr saying if he could he would have called in the eighth Army. I know what Mr. Hultman is going to say. They're such terrible people it was necessary to do that. "Did anybody resist" I asked Mt. Marr. "No." "Did anyone try to run"? "No." "Anyone take a shot at you?" "No." 80 agents. Today is April 15, income tax day. That's what some of your money goes for: war games in somebody else's back yard. And indeed he did say something which was a rather rough remark. He said, "Anybody panics and I'll shoot that person." Now you don't think he really would have shot one of those young people. Anyone of you who has seen any military service knows that it is a basic rule in a combat situation that you follow orders and you stay by your post and you do not desert or panic or the officer or noncommissioned officer in charge then and there has a responsibility to himself and the lives of the {5047} other men and women, if necessary, to kill that person who is panicking.

{5048}

That's what that remark was about. You have to evaluate that remark in the realities of the situation. Remember, that the persons who were frightened for their own safety on the Reservation were not persons who in any way participated in the events of June 26. They were merely residents who had been living there, and they were terrified.

Can you imagine the concern that Leonard Peltier felt? So he attempted to get to Canada, and he got to Canada and he attempted to obtain political asylum there to save his life, He did not succeed, and if you think that I am exaggerating in making this argument, I would like to remind you that with all of that show of force around when Special Agent Heffner -- I think I am pronouncing his name correctly -- he is the man who made the model, I think it is called Government Exhibit 20 -- when he went there to make the measurements after it was all over, everything had quieted down, he was guarded by three SWAT teams. The place was inundated with heavily armed people; and he went there to make some measurements with three SWAT teams. It is no picnic ground over there,

Now, I would like to make a reply to certain specific items which came up in Mr. Crooks' address to you. We will take them one at a time and identify them separately.

The Court will charge you that you may return either {5049} a not guilty verdict or a guilty verdict to murder one, or a guilty verdict to murder two. There is a slight technical difference. It is not my business to tell you. The Court will instruct you at great length tomorrow morning.

Mr. Crooks has argued forcibly that the facts and circumstances of the deaths of the agents makes it crystal clear that there was a murder, and there was murder in the first degree, and that's something else that I agree with the Government about. Indeed there was.

If you find the direct conscious participation of Leonard Peltier in the deaths of those agents, then you should convict him of murder in the first degree. Don't compromise in order to reach a verdict. If you think he is guilty beyond a reasonable doubt, he should be convicted of murder in the first degree. If you are not convinced to a moral certainty, do not compromise on murder two. Do your duty. Be brave about it. If you are not convinced, acquit him, If you are convinced, be brave, convict him. You have nothing to fear. You have a very important function, you

should not compromise. You go all the way one way or the other. That I think is where my agreement with the Government ends.

Mr. Crooks says that Norman Charles was in the van. Ostensibly the agents were chasing a van purportedly {5050} the red and white van -- we will get to that in some detail -- and Norman Charles was inside.

Now, earlier before he made that statement, Mr. Crooks said that it is unfortunate that Anderson and Draper and Brown couldn't be prosecuted, they participated in these murders; but it was necessary to give up the privilege and the experience of protecting them in order to get the leader.

Well, Norman Charles didn't testify for the Government. How come he is not sitting over there with his lawyer? You think that's mere speculation, just a wise guy question. We will get to some details, and you will think seriously about that particular question; and then you will think seriously about whether really that statement by Mr. Crooks is a valid statement, that they gave up the opportunity to prosecute Anderson, Draper and Brown in order to prosecute Peltier. You will decide whether that was true in a factual sense or whether it was just an argument being made to persuade you, with no substance to it.

The Government poses the question: How did Leonard get back to Tent City? The Government says, in response, in one or more of the vehicles which went there. Well, you think back about the time of day when that must have taken place, and then say to yourself, "All right, maybe {5051} he did," but you can't look at one fact without considering its consequences elsewhere. How did Coward see him through a telescopic sight at 3:45 in the afternoon if indeed he did go back in one of those vehicles; and riding in a vehicle, even if unfortunately it happens to be the vehicle of a murdered person, is not murder in the first degree; and it is not aiding and abetting murder in the first degree, it is riding in a vehicle.

How did those vehicles get past Anderson and Brown who, according to the testimony, were up here in this vicinity (indicating), "NB," Norman Brown on guard duty.

Joe Stuntz said, "Go check on the women and the children," but there were no infant children. They were very young female Indian people there, and they are referred to as children; and he said he stayed up there, and he could hear and see, and no vehicles went by. Is Norman Brown wrong?

Is he lying? I can't tell you what my opinion is as to whether someone is telling the truth or not, except in an indirect way because my personal opinion is of no consequence; but I think you have to go along way to find somebody who is as truthful and sincere as Norman Brown. He didn't hear any vehicle. He didn't see any people. He didn't see any vehicle. The Government says -- I don't know whether they argue it or they say it is a fact, if they said it is a fact -- {5052} there is no such evidence that when Leonard Peltier purchased the station wagon in Denver he had Coler's .357 Magnum with him. They may think that must be true if he left the Pine Ridge Reservation with it, and then it was in a mobile home with him in a paper bag which had his thumbprint on it.

Well, then there is a fair inference that he had it with him all the time, but there is no evidence that he had it with him all the time. There is only evidence that it was in a paper bag in a mobile home that had been gone over with a fine tooth comb by the Oregon State Police and the FBI, with one thumbprint. He should not be called Yellow Robe. He should be called Lennie, the Thumb. He is the only person on the North American continent who can pick up a paper bag with a gun in it with just his thumb, no other fingerprint on the other side of the paper bag.

The Government has argued that Anderson said Peltier, Norman Charles and Stuntz got out and fired at the agents, referring to the van. There is no such evidence. The Government might argue that that's what happened which is perfectly legitimate, but to say that Anderson said so, I suggest to you is a factual mistake.

Likewise, the Government said that Angie Long Visitor testified that she heard a series of firecrackers. That {5053} was just like a single short or a few shots in a row, becoming the fire of automatic weapons.

Everybody who sees those weapons sudden}y remembers that they heard machine gun bursts and when they could have not because those are semi-automatic weapons and can only be fired one shot at a time, not like a machine gun.

By the same token the Government has apparently caught that disease. Angie Long visitor testified that she heard a sound, one shot which sounded to her like a firecracker. The Government has said that Exhibit 34-H, which is a small bullet, something in the .22 caliber range, is clearly -- that

the evidence shows clearly that it was a .223 which, of course, would make it something that came out of an AR-15. That's not what the evidence was. Their own experts said that it was something in the .22 range. It could have been from the .223, a .22, a 22-50, an ordinary .22 or an .225.

The Government said that the people in Tent city didn't have anything to do with their time, so they did a little burglary on the side. They robbed the -- burglarized the home of the adjacent neighbor to the south, the Rooks' household. These are people who came there to help in a community that needed a lot of help, got no pay for it. They chopped wood, they helped older {5054} people, they organized community activities, they attended community meetings, they held religious ceremonies, and what did they get for it? A place to stay and some food, and maybe some gas money, and that's all. They could have gotten anything they wanted by just asking those people. They didn't have to expose themselves to the pettiness of breaking into somebody's house and stealing some things which they didn't need. That's one thing they had plenty of, protection, which they needed. They didn't have to steal a few more guns, right there in the place where they were trying to persuade people that their spiritual and political position should be supported. It is just not within the realm of human experience to believe that they would do so under those circumstances.

Now, I would like to address myself, with the help of Mr. Lowe who is our co-counsel and also has a position which I don't share with him, and that's chief projectionist -- there are a couple of complicated things that have to be gone into to satisfy you that a conscious effort was made to see to it that you did not hear about and see certain evidence. This is one of the two times that I referred to earlier when I will have to hazard the possibility of boring you. There is no other way. We cannot sit down around the table, and then you ask me questions until you are satisfied that you either see it {5055} or don't see it. I have got to go through it with you. Please bear with me, please pay attention.

It is predicated on the Government's claim that there was only one AR-15 at the Jumping Bull compound or community on June 26, 1975 . Their laboratory reports contradict their position. You will have to take it a step at a time.

First, I am going to refer to Defendant's Exhibit 134, and I am going

to move this lectern so that I am out of your way. I will look at a copy of the document, and the page will be put on the screen so that you can see it.

Now, on Page 3 -- could I have Page 3 of that document -- listing the Q100 to 105 and 130. I am going to get the pointer if I may.

The documents are in evidence, and you may ask for them, and I trust that it will be possible for you to reconstruct this argument. I don't know whether I need glasses or Mr. Lowe has it out of focus, probably a combination of both.

Would the jurors nod if they can see it clearly? Thank you.

You will remember that Agent Hughes said he found seven 5.56 millimeter cartridges which is the designation in millimeters of the equivalent in inches, .223. They {5056} are the same cartridge.
{5057}

Do you remember there was some dispute that in the report that it seemed that he only said one plus one which turned out to be seven all together. But that's not the issue before us at this time. There you see Q100 and to 105 which are six of them and Q130 which is one for a total of seven. Now, these cartridges, there was testimony, had sufficient markings on them so that it would be possible to determine by the usual tests whether or not they had been fired from a certain weapon.

You will also recall the testimony that these cartridges were Lake City cartridges, which means they were manufactured in an arsenal which supplies a lot or possibly all of the FBI's ammunition; but which according to Hodge was something that was sold through surplus outlets to the public so the fact that Lake City cartridges would be in the hands of a private citizen was not unusual and was not a reflection of any illegal activity.

I also call your attention to the fact that a number of Lake City cartridges of the same caliber were found in a vehicle in tent city. But now I'm only talking about the center part of Government Exhibit 71. Now, at page 22 in this first lab report, paragraph two it says, and indeed my eyes are showing my age, specimens Q100 through Q105 and Q130 are 5.56 millimeter (.223 Remington caliber cartridge casings which were identified as having been fired in the same {5058} weapon, is the only thing we know, they all came out of the same weapon. The question is, which weapon? However,

they were not fired in any weapon listed in the report, meaning in that report. Now, to save time I will tell you that in that report there is no AR-15 listed. There aren't three, there aren't two, there isn't one. Therefore, quite obviously it is not possible that the cartridge which can be fired only from, or generally speaking only from an AR-15 or an M-16, it's impossible that it would match. And indeed it does not, because there's no such weapon.

Now, we go to Defendant's Exhibit 187. On page 3 you see the same items listed again. This is the second lab and the same items Q100 to 105 and Q130 are listed with the same description. On page 11 of that report the last paragraph says "No identifications between specimens Q100 through 105 and Q130 with any weapons submitted to the laboratory have been effected."

Now, one might say upon examining this report, "Well, that's the same as the last report because there's no AR-15 listed in this report which is Defendant's Exhibit 187 which we're at the same spot." The answer is, no, that's not the case. There is under the report and this one is Defendant's Exhibit 135. And that one lists K-40 which is an AR-15 and which is Government Exhibit 34-A, this (indicating). Now, you remember the first report says those shells do not match {5059} up with any weapon in the report. In this second report, 187, it says does not match up with any weapon submitted to the lab and there you see this AR-15, what's left of it, on which tests were done and can be done had been and was in the lab. So what do we know from that? We know from that that these shells were fired because they had ejector markings on them and because the primer is showed that they were fired and because there was no bullet in the top and there was no powder inside; and we know from the Government's report that they were not fired from this AR-15 which was found in Wichita. What does that mean? If one didn't stand there with the bullet in one hand and a nail in the second hand and a hammer in the third hand and fired them that way they were fired from a AR-15 and where were they found? They were found by Hughes at the crime scene. And there is at least, at least the second AR-15.

Now there's another lab report, defendant's Exhibit 192. That lists two more cartridge casings. On page 8, Q numbers as you see bracketed and

then circled in purple, but the whole thing reads Q2535 to Q2536 which means two indications. On page 16 in the last paragraph --

MR. LOWE: I don't have page 16 on the slide.

MR. TAIKEFF: Beg your pardon?

MR. LOWE: I don't have page 16 on the slide. You'll just have to tell them.

{5060}

MR. TAIKEFF: All right. It says the Q2536 cartridge case was identified as having been loaded into and extracted from the K-40 rifle which is Government's Exhibit 34-A. So there is a cartridge that came out of this damaged AR-15 which was found at that place and in addition this does not support my point. The punch line, if I may refer to it as that, was made a few moments ago. I just want to give you the complete picture so there's no question about total number of cartridges that have been found and identified.

On page 10 you will find the second entry from the top is Q2628 which is Government Exhibit 34-B. You remember that if a weapon is called 34 it gets an "A", the chart which describes it gets a dash one, so the chart for that weapon is 34-1 and every component that's found gets the next letter, B, C, D.

Now, Q2628 which is the lab number in this case is Government Exhibit 34-B. Well, you know already what that means, but I want to show the results and the lab reports so you'll understand why it's called 34-B. That's on page 19, paragraph 3. It says the Q2628 cartridge was identified as having been loaded into and extracted from the K-40 rifle. That's this AR-15. That's the one whose chart is in front of you.

So there were indeed at least on the evidence available from a close examination of a lot of paper, the Government's {5061} own lab reports, an indication that there were at least two, and as we proceed we'll show you I believe that there were three. But that comes at a later time. I think at the moment the machine can shut down for a while and I will return the lectern to where it was before.

I'm about to move into a somewhat different area than I have been up until now. As you undoubtedly realize I have addressed you in connection with certain background matters which I think are important for your

consideration. I have answered or attempted to answer certain arguments made by the Government up to this point I think should be answered, and now I'm about to turn my attention to what this case is really about and what your deliberations are really about and that is the actual evidence that has been adduced.

What does it mean, what part of it can you trust, what part of it can you trust enough to believe it beyond a reasonable doubt? That's what I will occupy the balance of my time in doing, or at least in attempting to do. I ask you to realize that there are a limited number of areas where there is any real evidence from which you could find what was, or what was not the conduct of Leonard Peltier between 11:30 and 12:30 on June 26, 1975. There's an awful lot of evidence, I referred to it before as window dressing. There's a lot of it. But it has nothing really to do with what {5062} happened that day. So I will address myself to the testimony which concerns his presence in certain places, his supposed conduct in certain ways, his being cited, et cetera, which as far as I can tell are the only significant pieces of evidence from which you might conclude what he did that day, although I stand on my original statement.

If you took all the evidence of that time and said I believe it, and then said to yourself now what does it mean, I respectfully submit to you you cannot decide to a moral certainty that he committed murder. But in fact most of that evidence is not trustworthy, most of that evidence is not believable at all, let alone to a moral certainty or beyond a reasonable doubt. And it will be my task from this point to the conclusion of my address to analyze that evidence with you and to put questions to you, hard questions, questions which I respectfully submit to you you have a sworn duty to answer in a satisfactory way because if you can't answer these questions under the law you cannot return a guilty verdict in this case. I don't think these questions can be answered. I assume that Mr. Hultman will try to answer them. Listen carefully to his answer. Make sure it makes sense, make sure it has some basis and fact that it is logically constructed because I will attempt to put the questions to you on that basis. And I trust that he will attempt to answer them, and I trust that he will answer some {5063} of them, but don't think he will answer all of them. I don't think that he will answer most of them; that's not being

presumptuous. He and I, if we changed positions, he'd be saying the same thing to you right now. And so here we go.

The critical period of time is 11:50 A.M. to 12:30 P.M. Now, there have been hints and suggestions both in the course of the taking of the evidence and indeed in the first installment of the Government's closing address that what we have here is a preplanned ambush, if not a preplanned ambush at least one that seems to suddenly develop spontaneously. People do not just go around murdering other people just like that. There has to be some explanation for it. There has to be some rational connection between what happened and what preceded it, but you cannot find that in this particular case. It is not evidence.

It may be that there are things that none of us knows anything about, but that's not what you base your verdict on. You base your verdict on what is before you in the form of evidence and what you can reasonably infer. If a person came walking into this room which has no windows you can see to the outside through and he or she was wearing a raincoat and carrying an umbrella and the raincoat was wet and dripping and the umbrella was likewise, you might conclude that it was raining outside although that's not necessarily so. The person could have been standing in the shower. But {5064} rational thinking would first suggest to you that the person had come in from the outside where it was raining. Well, that's what you have to do with this evidence and you cannot find a rational picture of what happened you cannot find a rational picture, you cannot find to a moral certainty the guilt of the defendant.

It is stipulated between the Government and defense that death took place at approximately 12:00 o'clock. That doesn't mean we say it took place exactly at 12:00, but around 12:00 o'clock, give or take maybe fifteen minutes each side. We don't have it in the stipulation. We've agreed around 12:00 o'clock. That's why I suggested that at 11:55 A.M. to 12:30 P.M. is the key time period in this case. Everything else is part and parcel of the window dressing.

The first transmission was at 11:50 approximately and it seems that by ten minutes after 12:00, maybe 12:15 at the latest from the radio transmissions the agents, if they were not both dead were in such a condition that for all practical purposes that their death had already occurred.

Now, why do you think you heard evidence about the three young people from tent city who were stopped by the FBI when they went to take a bath or a shower at Pine Ridge or some other nearby community? Undoubtedly the Government either will or when it offered the testimony was hoping to {5065} argue that this confrontation between these three young people and the law enforcement authorities set the stage for some kind of a great anger which resulted in a decision to kill the agents if they ever came around.

Mr. Draper who testified for the prosecution said that when he came back and he told Leonard Peltier what happened and Leonard said, "Did they bother you or hassle you," and Draper said, "Not really." He testified what Leonard's answer was. Leonard said, "Okay, it's all right." You heard testimony from Mr. Weston, the missionary. He claims that after helping some people with a car, a stalled car on June 24th that he got somewhere in that road which is vertical on the chart running into the Jumping Bull area from Highway 18 and then they said, "Stop, you can't go any further. Thanks for your help but stop." Now, why did you hear that? Because the Government wants you to think that Mr. Weston is a nice guy who helped people whose car is broken down, or was the Government trying to paint a picture of some sinister plot that was going on within this compound that no outsider could come in? The trouble with that piece of testimony, Ladies and Gentlemen, is that the witness clearly said that this event occurred on the 24th. And of course if the Jimmy Eagle matter was something which these people were planning on they certainly must have had a {5066} crystal ball because by keeping this man out on the 24th in connection with a warrant for Jimmy Eagle they knew one day in advance that the warrant was going to be issued. Because Government Exhibit 5 in evidence is the warrant and it is issued June 25, 1975. So you wonder what Mr. Weston was doing here. Well, the Government will say he made a mistake. That's a nice, nice way to get out of it, always a nice way to get out of it. It would be very nice if I could get up and say to you my client made a mistake, forgive the Government for their typographic error and forgive my client for the mistake. It was no mistake at all. Just a little sloppy preparation, that's what it was. They didn't keep that man out because they were plotting any homicide. They kept him out because he was a fervent, hard-working, dedicated young missionary as they were to a certain extent part of their

life was spiritual and part of it was political and they were trying to convert people, the very same people this young man was trying to convert. They were competitors. {5067} For the spiritual lives of people on the reservation, with missionaries of God for at least 100 years and perhaps several hundred years which they can do under the First Amendment to our United States constitution. But this was an AIM encampment. They didn't need a Mormon preacher there. You can well understand that. And I'm sure as Christians you would not be offended. That's why he was excluded, not for any sinister reason.

I note, by the way, that Jimmy Eagle was not at this place on June 26th, 1975 and the government will not argue that he was there. Surely there was no preparation for a warrant that didn't get issued yet in connection with a person who hadn't yet committed the acts which was the result of the warrant. Unless you're going to believe Jimmy Eagle became part of a convoluted plot, unless he and three others got in a fight and they all get charged with federal felonies to get a warrant issued to set up one or more agents. That's a little fantastic. It's a little bit much to swallow.

Is there any evidence which strongly suggests that there was not an ambush? I call your attention to the fact that the government hasn't even argued an ambush but I am mindful of the fact that a competent lawyer by the name of Mr. Hultman is going to get up after me and I can't answer him. So I have to try to anticipate what he might say to you. Therefore, I call your attention to an item of evidence, maybe {5068} two, that strongly contradict the ambush theory if the government will argue it. If not, I've wasted your time and my time. But, as I said before, I have to do my job.

Mr. Draper testified that when they heard shots where they were, they were in tent city. Well, unless you have a cannon with a telescopic site on it and you want to murder an agent or two coming into the Jumping Bull compound, you don't get up at tent city getting ready to eat breakfast or lunch, depending on what you call it if you get up late in the morning.

Everybody except the witness Anderson who will be dealt with separately says everybody was in tent city. Although, there is a question of whether Leonard Peltier was in tent city. But at least all the other people were in tent city. The people, the government said they had to not

prosecute in order to get Leonard Peltier. They had to give up their right to prosecute them. Well, they now stand before you and allege an ambush, a preplanned ambush with the people they say are not prosecuting. If those people were in tent city, how could they have been part of the ambush. They weren't part of the ambush. Then the government isn't gratuitously giving up the prosecution then in order to get Leonard Peltier. And not only were they in tent city, what did Mr. Draper say? He said that when they heard the shooting start, they came running first without guns. Now we know that {5069} life hasn't been terribly good for the native Americans for the past couple centuries but surely, surely if they finally got themselves together to plan an ambush, they would remember to come with their guns when the shooting started. They ran all the way down to the crest without their guns. It's like going on vacation and taking 600 shots without any film in the camera.

They didn't start shooting. They didn't start the shooting. They responded to hearing shots. It is from these aspects of the evidence, from these considerations, this is the method by which a jury is supposed to work and see whether or not they have competence in the evidence. Can you explain if these people were involved in an ambush why they weren't there waiting? Only Anderson was sitting on the roof. Everybody else was back in tent city. The strangest ambush in the history of the Western hemisphere.

Now we take Norman Brown. I trust that you find him to be a rather impressive young man in a number of ways. I also hope whether you like guns or not that you are at least impressed with his skill at being able to shoot out tires with a .22 caliber rifle at 200 yards not once but twice and possibly three times. I'm not absolutely certain what the testimony was about how many tires got shot out on Gary Adams' car and the BIA car. Remember, they backed up after they had one or more tires shot out. But surely at least two {5070} tires. Now it must be clear to you all that if murder was the game and the FBI cars could be recognized and the object was to murder either FBI or BIA police, what more, what more could Norman Brown ask for? The great spirit would have delivered him exactly what he wanted, one FBI car, one BIA car and that crack shot could have killed both of the people, or maybe three of them, I don't remember how many there were in the two cars, but he shot out the tires. You say once it was a

lucky shot, twice it's half a miracle. You cannot conclude that Norman Brown if he had murder on his mind could not have killed the people in those cars. He did not. That is an example of a member of, as the Government puts it, a blood crazed bunch. Sounds like 18th century rhetoric of people who still do not understand the native American.

What are some of the things that we actually know that we can rely upon because there is corroboration for them. To these things, somewhere between 11:45 and 11:50 A.M. agent Adams testified he heard a radio transmission and he recognized the voice of Special Agent Williams. The transmission, according to Adams, went something like this: "It looks like they're going to get into that pickup." Oh, my God. I just said a dirty word. I didn't say van and I didn't see vehicle, I said "pickup." Why did I say "pickup." I said "pickup," because Gary Adams testified that Williams said on the radio "pickup." And then we had a merry chase for five weeks about {5071} it wasn't a pickup, it was a pickup, it was a van, it was a vehicle. Did you notice the number of witnesses who got on the stand and suddenly couldn't recognize a pickup anymore?

A little after 11:50, according to Agent Hughes, he heard a transmission which went something like this: "Get on high ground." You have a general idea of what the area looks like from that exhibit. You have a constant reminder of it from that chart and from the testimony. We know from the exhibit and from the testimony that there is an elevation change between here and up here that goes up and that the crest of the plateau runs something like this as indicated on the chart and that the high ground in most places is right around here right like that (indicating). We'll address later to the fact that there is something of a depression there that requires some careful analysis of certain testimony.

Now when the transmission came over it came over from Williams and there is no dispute that at that time that two cars were down here on the chart where it says "Coler's car." Of course, you recall there was only one car there when the police and FBI showed up so if they said "Get on high ground," what can you conclude from that. You get on the high ground to protect us to give us cover, fire down into the area because it's down there with us that we're having the problem. Did I just make that up? No,

I did not. Agent {5072} Skelly. Agent Skelly said that he heard a transmission and it went something like this from Agent Williams: "If someone could get to the top of the ridge and give us cover fire we might be able to get out of here." Now I ask you, at that time with their people up on that ridge shooting down on the agents and they were, wouldn't the agents know, and if the agents knew would the agents suggest that their fellow agents come and try to get cover fire for them from the same location? Of course not. Of course not. That's two separate people, Special Agent Hughes, Special Agent Skelly, one more elaborate than the other, but give you the same corroboration. The agents were calling for cover fire from the high ground because there was nobody up there because indeed the people were in tent city.

I ask you, is there any evidence from which you can find to a moral certainty as to who was down there shooting at the agents? There was no red pickup under cover at any time. There was one that disappeared at 12:18. We'll get to that in a moment. Nobody had a red pickup, no one was known to have had a red pickup, no one was known to have borrowed a red pickup.

Agent Williams said, "They are getting into a red pickup."

Does Your Honor wish me to stop at the halfway point?

{5073}

THE COURT: Are you at the halfway point?

MR. TAIKEFF: I have three minutes to go. I'd like to get credit for it.

THE COURT: I was going to recess at 3:00 o'clock.

MR. TAIKEFF: I don't have another topic, a short one I could begin. I would ask Your Honor's permission to stop now and get credit for the three minutes.

THE COURT: The Court is in recess until 3:20.

(Recess taken.)

THE COURT: The jury may be brought in.

MR. ENGELSTEIN: Your Honor, just a half word. That memo we thought we'd be submitting to you, we decided not to. I don't want you to rest --

THE COURT: Thank you.

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

MR. TAIKEFF: May I resume, Your Honor?

THE COURT: You may resume.

MR. TAIKEFF: I have had something called to my attention and I'd like to stand corrected. During the recess Mr. Sikma advised me that when the government Exhibit 59 was shown to Mr. Muldrow, you may recall the book was taken up there by Mr. Hultman and it was not shown to Counsel first. Mr. Sikma advised me that the photographs that showed the actual autopsy procedures were not in there at that time and I did not {5074} know that when I made my somewhat critical comment and I accept his version of the fact and I stand corrected in that regard.

We're continuing with the factual development, from approximately 11:50 on and we have some insight as to the approximate time table. We cannot tell it with great precision but we know that the first transmission that's heard by anybody was said to have been heard at approximately 11:50, as I said before.

There is a recordation in Defendant's Exhibit 75 which you will recall was a compilation of radio transmissions not verbatim but noted as they came in with an effort to make them accurate and complete then I'm sure you realize can't be precise like a tape recording or like it would be if the court reporter were taking it down. However, the Exhibit 75 indicates that at about 11:55 A.M. one of the agents was already hit by some fire and at 12:06 we know that Adams arrived because there was a transmission at that time in which he said that he was under fire and the reasonable inference from that is that he had arrived at the Jumping Bull area. Then at 12:18 we have a further entry in Defendant's Exhibit 75 and it reads exactly as follows: "SA," meaning special agent, "J. Gary Adams on the scene and he has been receiving heavy fire from vicinity of Jumping Bull Hall and red pickup leaving Jumping Bull Hall area, going north and {5075} Pine Ridge police were instructed to stop this particular pickup."

Now I call your attention to the fact that north is to the left on the chart and it is not in the direction of tent city, it is not in any other direction except out of the area going towards Highway 18. {5076}

Now, I would like to pose some of the questions which I said at the beginning of the summation I would pose to you for the purpose of having

you consider the specific items of evidence.

It may appear to you at this point -- and if that is your impression, it may continue for some time -- that there is not a comprehensive pattern or picture that is emerging. I must repeat, if anyone has that impression at this particular time or perhaps will have that impression when I finish, that first of all we have not offered evidence for the purpose of presenting a picture to you. We have offered what evidence we offered because we believe that it would explain certain circumstances and in certain respects rebut certain claims, certain evidence; but it is not our role or our posture or indeed our responsibility under the law to give you a comprehensive picture. We just don't have to do it, and we have made no effort to do that.

The Judge will instruct you as to our responsibilities under the law, if we have any, and what the Government's responsibility is; and it is your responsibility to make sure that in evaluating the evidence you comply exactly and precisely with what his Honor says is the obligation of the defendant, the obligation of the government, under the law.
{5077}

So you may find that what I will do is go through certain specific episodes or aspects of the evidence. I might also comment that the evidence itself doesn't present the comprehensive picture. You have little glimpses, little flashes of certain things. This is those things which we can address ourselves to.

So we don't even have a comprehensive picture that we can work with, and we are surely not required to provide some comprehensive picture for you to look at.

No. 1, I offer you no answers in some instances because I don't know that there are answers. I only think that these questions should be carefully considered by you.

According to the evidence, Leonard was carrying an AR-15. He was carrying a weapon which it is said looked like this model which is Government's Exhibit 34-AA and which has been brought here for the purposes of illustration, not because it is claimed that anybody connected with this case ever actually touched that weapon.

That weapon, as you know from the testimony, is a semi-automatic

rifle. The bullets go into this clip
(indicating), the clip goes into the gun, the gun is activated by pulling this lever back (indicating), it cocks the gun, the first round goes into the chamber as {5078} the bolt goes forward. When you pull the trigger, the hammer falls, the cartridge explodes, out comes the bullet. The gas pressure forces the bolt mechanism back, it ejects one casing. It goes forward again, the next bullet, complete cartridge is in the chamber. The gun is cocked, if you pull the trigger again, it fires again. Now, that is a description of how a semi-automatic rifle works. In fact, the semi-automatic pistol works essentially the same way as well.

The most important characteristic, I think for purposes of this particular point, is that when you fire it, you have no choice but the casing comes out. In theory you could put some sort of a device on it so it would catch whatever comes out; but in its normal mode of operation, out comes the cartridge casing.

Now, testimony has it that Robideau was carrying the Mark .345 semi-automatic which is the thing that is sometimes mistaken for a Thompson submachine gun but which is not a submachine gun. It is a semi-automatic rifle, and that too was designed the same way as you heard, long magazine, one shot at a time every time you pull the trigger, and out comes the casing.

Dino Butler was said to be carrying the M-l Gerand which is the next rifle that Mr. Ellison has just put his hand on. That too was designed in a similar way. {5079} It doesn't have an external magazine. You put a clip into the top of it, and each time it fires, out comes a shell. They are all semi-automatics, and as such and by definition practically, they all eject their casings.

Well, we heard rather elaborate testimony about a very, very careful search that took place around Coler's automobile. If I remember correctly, the diameter of the circle in which a thorough search was conducted was 120 feet, 40 yards; and everything that appeared in any way to be relevant to this case, including an effort to dig in the ground and find, I think, Government Exhibit 34-H -- I may be misquoting the number -- but there was a bullet that was taken out of the ground.

I think that should satisfy you that a very careful search was conducted. With the exception of the one .223 cartridge that was found,

I should say casing that was found in the trunk of the car, there was nothing on the ground. There were no .45 caliber casings, and there were no 30-06 casings found down near the cars.

Now, the evidence, the technical evidence from the pathologist is pretty clear-cut. Weapons were fired close to the agents causing the agents' deaths, and yet there are no casings on the ground. Well, you could say maybe the people who fired those weapons, as I think Mr. Crooks may be heard to argue, maybe they picked up {5080} their casings.

Well, I would ask you then to take a look at Defendant's Exhibit 93 which shows our infamous broken down, broken windshield vehicle, and look at the grass. It gives you some idea of the height of the grass in that area. This is looking towards the rise where the residences are. You may have this photograph if you ask for it, and you would realize that it would be pretty difficult, not using a metal detector, to find every single cartridge that was fired, the casing of every cartridge that was fired in that grass successfully so that when the FBI came and used metal detectors and went over the place literally with a comb, it would find nothing.

Is it possible under the circumstances that one or more people successfully committed the acts which were involved here with semi-automatic weapons, and there are no indications at all, not even one left behind on the ground? How is it possible then that the agents were shot at close range, and there is no cartridge casing on the ground?

Every rifle does not discharge automatically. A lever action rifle does not discharge until you work the lever one more time, and manually pull the mechanism back by lowering the lever, and then it throws out its {5081} cartridge casing. A bolt action rifle does not eject its casing automatically. You must lift the bolt, pull it back; and when you pull it back, the casing flies out.

I suggest to you that there is a very strong possibility that what happened here is that the weapon or weapons employed was not or were not semi-automatic weapons, but were either lever action or bolt action.

Now, I ask you to take a look at Government Exhibit 71, and you will notice how carefully that exhibit and the map to its left have been marked. There is the place in Canada, and the places in Oregon, and the Rosebud

Reservation; and Wichita, Kansas, and Coler's car and the "Y" intersection which sometimes has been referred to as Location Z-l, and the various houses up on the crest; and the vehicle, Williams' vehicle, and Tent City; and it is a very impressive job.

But what is missing? Is there something missing? The answer to that question is there appears to be nothing near the red and tan house, no cartridge cases are shown there, no indication of what weapon or weapons may have been fired there.

Let us take a look at that particular situation to determine whether there might be some reason for that, and again I will have to get the assistance of Mr. Lowe and make reference to some of the lab reports.
{5082}

Now, in this particular instance I will be making some reference to the 3.03 British Lee-Enfield which in the lab reports is known as K-l, which in this trial is Government's Exhibit 69-A, so that all the casings which come from it or are associated with it begin with the numbers, 69, and are followed by a letter, beginning with the letter "B". The chart itself is 69-1.

Now, we will refer first to Defendant's Exhibit 192. We go to Page 9 where we find in the third entry from the top, Q No. 2558 which is described as a 3.03 British caliber, Winchester Western cartridge case. If we then turn in the report -- and these reports are in evidence so you may ask for them and you may look at them and analyze them in any way you think appropriate.

On Page 18 we find a paragraph which makes reference to that item, and it says, Q2558, cartridge case was identified as having been fired in the K-l rifle; and then there are other words which are not pertinent, and that is as you can see from Chart 69-1, Government's Exhibit 69-A.

The testimony concerning that is that it was found near the red house, and there is also testimony that there was only one red house in that area; and it has been referred to here because of the label prepared by the Government as the red and tan house.
{5083}

Now, this is not just a matter of a 3.03 cartridge casing going unnoticed. Government Exhibit 69-A, which is the 3.03 rifle, is Norman

Charles' rifle; and there will come a time, not too long I hope,, when it will be fairly apparent what is the significance for it, possible significance of the oversight of not having any green flags around the red and tan house.

I would point out to you that on Government's Exhibit 69-1 which is the chart, you do not see any reference to that 3.03 casing. That casing is not in evidence. The lab report which reveals its existence is in evidence. It is not on the chart.

Now, we turn to another part of the very same exhibit which is Defendant's Exhibit 192. We start at Page 8. There is an entry in the lower part of the page. The Q numbers are 2543 through 2557. I trust that you will recognize that that constitutes 15 separate objects from 2542 to 2557. None of them is in evidence. The document which reveals their existence is in evidence. That's why I am able to show it to you and read from it.

There is a carry-over to the next page where the 2557, 2555 and 2556 are accounted for, and perhaps Mr. Lowe would point that out.

We had to show you two pages there, Page 8 and Page 9.

{5084}

Now, later on in the report on Page 18 -- I think I may have --

MR. LOWE: (Interrupting) Previous page.

MR. TAIKEFF: I think I may have the wrong page.

MR. LOWE: Page 17.

MR. TAIKEFF: Yes, it is Page 17. You will have to read that one.

{5085}

The paragraph says Q2544 which was the second number in the sequence, you'll perhaps that when I originally projected it it started at 2543 and it went to 2557. Well, the findings in this report show that 2544, that is to say, the second cartridge and the second casing in the sequence through 2555, that's twelve in number as well as 2557 for a total of thirteen cartridges were identified as having been fired at K-15 weapon. K-15, now, what is K-15 to begin with, is a laboratory number. But what is it in this case? It's Exhibit No. 29-A, the M-1 Gerand rifle, the one that you see the second rifle on that board back there. The chart of course is 29-1, those casings that you see are 30-06 casings fired from the M-1. A rifle it is said that one of the three people who was allegedly down by the cars

with Mr. Peltier was using. Yet thirteen rounds fired from that particular M-1 Gerand linked to it by the FBI laboratory are not shown there and they're not shown where they were found at the red and tan house.

Mr. Lowe, I think you retired too soon. There's one more entry from that report. If I could get your assistance.

MR. LOWE: I don't think we have a slide on it.

MR. TAIKEFF: Oh, we don't have a slide, all right.

There is an item in Defendant's Exhibit 192 which is first listed at page 9. It's Q2556. It, too, the object itself is not in evidence. The lab report which makes its {5086} existence known is in evidence and the results are found on page 17 of Defendant's Exhibit 192. And what is that? It's a 30-06 cartridge casing fired from a Springfield bolt-action rifle. The United States military weapon from World War I and for years after that. That weapon is not in evidence. Obviously if it was tested and determined to have come from a specific Springfield bolt-action rifle it's fairly obvious that the FBI laboratory had that particular rifle. That, too, was found in the vicinity of the tan and red house which doesn't have any green flags around it. It, according to the definition of the experts called by the Government, is a possible murder weapon. Why is it a possible murder weapon? Because it's 30 caliber or less, it is 30 caliber, it's 30-06. It's a high velocity cartridge and in particular it doesn't eject unless you open the bolt.

And between the various weapons that have been suggested as murder weapons, given the fact that there were no cartridge casings on the ground it is a very likely candidate. There's nothing about that on that chart. I can only pose the question to you, why not, why was that not suggested as a murder weapon? Perhaps because it didn't fit the Government's version of what happened here, and so there was no sense clouding the record with additional facts.

The .303 is a weapon which is in evidence and you might recall, but I want to make sure that you do without question, {5087} that's Government Exhibit 69-A. And what is it? A bolt-action rifle which does not eject its shell until and unless you open the bolt and pull it back. Angie Long Visitor testified for the Government. From the comments made by Mr. Crooks I would gather that it is the Government's position, all this I acknowledge,

that they have not specifically said so, that Angie Long Visitor told the truth as far as the Government is concerned. Well, let's look at something else that Angie Long Visitor said. She said she saw three people whom she could identify: Joe Stuntz, he was firing a .44 magnum. What did they extract from the body of one of the agents? One of the few identifiable projectiles, a .44 magnum, part of a .44 magnum bullet, but definitely identifiable as a .44 magnum number.

There was a person by the name of Robideau who one should identify as being in the ski mask, but she could recognize him by his physique and perhaps his clothing, I don't recall exactly, and his hair. And then there was a third person, Norman Charles. And what was he firing? He, according to testimony, was firing a .303 bolt-action rifle.

Now, let's take a look at Government Exhibit 71. We now know that there's evidence of a .303 linking to that .303 being fired over here (indicating). We also know from a lot of testimony that Norman Charles was up here shooting {5088} his .303 and indeed we find Government Exhibit 69-E and look over here (indicating), here's Government Exhibit 69-D, another casing fired from that same .303. Position number one, position number two, position number three. I know you can count them in a different sequence but I chose to count them that way because the activity of these young people is undisputedly up here and it's up here. And one or more of them has testified that Leonard and Dino were down here (indicating). It's very interesting. Norman Charles doesn't testify for the Government. We don't know why. A lawyer has a right to make a judgment about what witnesses a lawyer calls for any number of reasons. He might not like the way a witness combs his hair or for even more substantial reasons. But look what we have. We have Angie Long Visitor who surely has no ax to grind. She is a witness who has no ax to grind, very, very nervous. We don't know why because she's far from home, but otherwise I think showing no signs of having any particular point of view. And she flees as quickly as she can with her husband and children. And she names those three people. She tells us about Joe Stuntz and Norman Charles and the man in the ski mask and they're up there (indicating). And there is an expended casing from Norman Charles' rifle and there's another one down here (indicating).

You might say to yourself but now, or at least saying {5089} to

yourself, I'm not finished addressing myself on this, I have to talk to one topic at a time, eventually some of them hooked together I hope, now we got Norman Charles down here (indicating). Unless of course he's got such a tremendous arm that when he pulls the bolt it flies all the way from here over to here, more than a hundred yards, and that's particularly unusual because bolt-action rifles eject their shells to the right. And if he shoots this way you'd expect the shell to go north, not to the south. But here we have a lot of evidence of Norman Charles. Here we have further evidence of Norman Charles right at the edge of the woods. And then we have further evidence of Norman Charles and there is nothing to say in what sequence these bullets were laid down, which was first and which was second and which was third. But one of the possibilities is that that was first up at the residences and second down here, slightly west of the intersection; and thirdly over here. And if that's the case where does he have to pass? Do I know the answer? Of course I don't. Do I have any means of supplying you with the answer? Of course I don't.

I point out to you what is objectively before us something that you can have confidence, the underlying fact which I quoted to you cannot be disputed by the Government. The inference to be drawn from those facts is another question. Can you see yourself on that, are you satisfied as to who was {5090} down there shooting at the agents considering this particular information?

I also call to your attention that Joe Stuntz was found in an FBI jacket. An FBI jacket which came out of the car of one of the agents. Now, this is one of those things that I referred to before when I said some of the evidence comes wrapped up in two different ways and it would be inappropriate for me to not to point out both alternatives to you. They are of course mutually inconsistent, but I don't know which one is true. Can you figure out which one is true? Because if you can't figure out which one is true you better start questioning yourself about what really happened here. Who did what and when.

So we've observed that he was lying there dead, Joe Stuntz, with the FBI jacket on that concededly came from one of the FBI cars. When did he put that jacket on? Was he one of those people with a .44 magnum who went down there? A .44 magnum, if it isn't a bolt-action, will eject. What's

good for Peltier is good for Stuntz. If it's a no good argument one way it's no good the other way. It's no good one way, it's good the other way. That's the one identifiable bullet in one of the agents, a 44 magnum. And Joe Stuntz has the jacket on.

There's another possibility, a very real possibility. I'm sorry, I cannot offer you the answer. The testimony is {5091} unequivocal Joe Stuntz was found at the southeast corner of one of the residences up on the ridge, and that's where he was when he was shot and the apparently shooter, one of the BIA officers yelled out, "I got the guy in the white shirt, he just went down." The guy in the white shirt, did you see the photograph of him? The bullet entered his head right over here (indicating). He did not live a millionth of a second beyond the time that bullet penetrated his forehead. He was instantaneously dead. He did not have time to put on the FBI jacket.

How did the jacket get on him? I don't know the answer. I don't know whether he went there, got the jacket and then got shot and somebody was mistaken about saying the guy in the white shirt, or whether he had the white shirt only and the jacket ended up being on him. The evidence is before you. To determine how secure you are about knowing what did and what did not take place that day you must ponder. You must consider it all.

There is testimony that Joe Stuntz started the day with a .44. Later changed to a 30-30 because his body was discovered. A trooper took a .22 magnum revolver out of a holster and found a 30-30 near him. I just call that fact to your attention. I don't draw any inference from it, I don't suggest any particular inference to you.

Now, there's another question to pose to you. Was {5092} LeRoy Casados there that day? Again it's an unanswerable question. If he was there was he guilty of any criminal act as far as the agents were concerned? Well, he had a .357 magnum in his Scout that belonged to Williams. It was found on the Rosebud at the time of the September 5, 1975 arrest raid. He had .223 ammunition in his Scout and an AR-15 was found at the time and place of that raid. Did he do it? You don't know very much more about Leonard Peltier. In fact upon a careful examination of all of the evidence you might even know less about Leonard Peltier than you do about LeRoy Casados's

involvement in certain aspects of this. Are you satisfied beyond a reasonable doubt that LeRoy Casados is guilty? Do you think he might be? If he is, with whom was he? Was he in the red pickup, was he driving a red pickup, why were questions asked about LeRoy Casados, asked about a red pickup and a vehicle? They couldn't have been asking about the Scout for two reasons: He didn't buy the Scout until the end of August and one other reason, if you take a look at the document which is in evidence, the purchase document in connection with LeRoy Casados you will find that the body type is listed as a Travel Top which means it was a vehicle, even if it was a pickup in its design, with a travel top on it. It looks like that red and white van.

Was he there that day? What vehicle was he in? Who {5093} was driving the vehicle? How did he get that .357 magnum? What did he have .223 ammunition? What connection if any did he have with the AR-15 recovered at Rosebud? I do not know and I cannot suggest it to you. The Government has stated rather unequivocally that Government Exhibit 34-H was the fatal bullet in the case of Coler; and they explain not how they come to that conclusion but I want to call this to your attention. If 34-H as the Government claims was the fatal bullet undoubtedly you recognize that in order for it to end up in the ground it had to pass through his body. There was a stipulation entered into entitled "Stipulation regarding Government Exhibit 34-H." And it says, "It is hereby stipulated and agreed between the United States of America and the defendant as follows." Signed by Mr. Lowe and Mr. Hultman. "Government Exhibit 34-H was tested for presence of blood by the Federal Bureau of Investigation laboratory and there was no blood on the bullet fragments."

It's possible that when it went into the ground all the blood came off. I think you are probably aware that it takes only the slightest trace of blood to give a positive test. And if a bullet went through a human body it had to pick up some blood and tissue on the way. Even if it went into the ground it was recovered within twenty-four hours, carefully preserved and tested for blood and it showed none. So I don't know what's the basis of the Government's contention {5094} is that it was the fatal bullet.

Now, there were only three, and I may be wrong with this, the number

may be four, I stand corrected if it is in fact four, but I believe that there are only three expended shells near the agents' cars that belonged to the agents. Did the people who were involved in the close-up execution style killings of the agents clean up not only their own shells but the agents as well? Perhaps the Government will make the argument that they did so because they were going to reload them. They wanted to save the brass. In that tall grass, without metal detectors, they managed to pick up their own casings successfully except for the one in the trunk and all of the agents but three. Why do I say all of the agents but three? There is a possibility, a reasonable, rational possibility that somebody removed some shells. We don't know who because there is a considerable amount of testimony that the agents were seen firing a substantial number of times. One agent with a pump action rifle and the witness testified, demonstrated how he was pumping the slide and firing the gun up at the houses, and the other agent was said to be shooting with a handgun. {5095} Can you reconcile that?

How many known law enforcement people were there that day in that immediate area shooting? Could you say how many? Was it 20? 25? Was it less than 20? Was it 30 or more? Four sides of Williams' car and three sides of Coler's car were pockmarked with holes totally, at least 125. Where were all these people that could shoot from four different directions and inflict damage on four different sides of one vehicle and three sides of the other? Ecoffey testified he shot in a variety of places. For example, he saw and shot at or was shot at by four to five Indian people shooting east of tent city. Now the escape route is this way to the south (indicating). It was said that the people left and went in that direction. People shooting east of tent city would be towards the top of the chart. Who are those people? What was their role in the particular situation? Numerous special agents said that they found people, spotted people, heard gunshots from obviously people in various and sundry locations, people were shot at on the highway from unknown locations.

Adams tells us, J. Gary Adams, that at 1:30 a pickup truck came in driven by one person and left at approximately that time having stopped at the log house and when it left there were three people, two additional people in there. How do they know that? Gary Adams testified to it and

in addition {5096} to testifying to it there is reference to it in Defense Exhibit 75. Now Gary Adams insisted when we questioned him about the red pickup there was no red pickup transmission. He said, "I never made any such transmission." "Did you make a transmission, Mr. Adams, concerning a pickup?" "Oh, yes. That was at 1:30 in the afternoon," and he tied that to the event which I just summarized for you.

Defense Exhibit 75 confirms the fact that at 1:26 P.M. Gary Adams made such a transmission but not at 12:18. This was in addition to the 12:18 transmission which I read to you earlier. At 1:26 P.M. it says here, "Adams to Coward, south of Oglala. Pickup came in here and he just left. Can't get any BIA people on it." And then there are other things which do not specifically refer to that vehicle or anything relating to it directly. That transmission he surely made just as he surely made the 12:18.

The significance of that is that two people were taken out of that place in the vicinity of the log house. Who were those two people? What were they doing there? They left at 1:30. When did they arrive? What if anything did they have to do with the deaths of the agents?

There was a 223 casing which was found up near that house, Government Exhibit 34E, which means that it was fired from the AR15, the one that was damaged. Is there any connection between those two people who left in that pickup and {5097} the firing of that weapon?

Agent Hughes testified that there was heavy fire during the assault on the green house, at least one such incident of heavy fire. I'm not entirely certain about the evidence but I think there was more than one but surely there was one. They assault the house, they were stopped in their tracks by the heavy fire. When they got there they arrested nobody and there they were up on the crest so that if people had run off in the direction of tent city they would have seen them. Didn't see anybody. Where was that firing coming from? Who were those people? And furthermore, that occurred late in the afternoon. I think the time was 4:50, it might have been 5:50, but I'll settle for 4:50 which was the earlier time. I'm not certain at the moment. Your recollection will have to govern. Could those people who made that heavy fire happen have been Leonard or any of the people from tent city? No. Why not? Because at approximately 3:00 o'clock in the afternoon Leonard and the people from tent city were on their way

out of tent city.

I know that there was testimony that said that people were seen going up a hill at 6:00 o'clock. Put that aside for a moment. How do we know that Leonard left at approximately 3:00 o'clock with the others heading in a southerly direction? Because there was testimony that they got together. At first they were going to drive out, then they decided not to drive out, {5098} that they would walk out and they realized that amongst them there was one very young person, a native American boy with a name that doesn't sound very native American, but his name is Jimmy Zimmerman, approximately 12 years old. Although there was some concern what would happen to him, apparently the consensus was to let him go out and surrender himself instead of trying to make the trek with them which is further proof of how dangerous they thought it was at that particular time.

How do we know that Jimmy Zimmerman marched out going north at approximately 3:00 o'clock? Because Gary Adams told us so. He was in his car and he got a transmission on the radio and said something to the effect, "Hey, there's a kid up there." And he looked and in that area just to the left on the chart of those green flags which in turn are to the left of tent city he saw this young boy and it was 3:00 o'clock in the afternoon. And you've heard testimony from at least one witness and possibly several witnesses that the group went south and Jimmy Zimmerman went out in the opposite direction to seek safety at 3:00 o'clock in the afternoon. And it was corroborated by Gary Adams' observation which in turn is corroborated by a radio report that he got so who was doing the shooting? Who was doing that heavy shooting when they tried to assault that house? Do you know? I can't suggest to you who it was. Maybe you can figure it out. Who {5099} fired the two .22s, the 22-250s, three different kinds of 30-06s, because they came from three different rifles firing that cartridge, and according to the evidence, the government's evidence, those two .22s, 22-250s and three different kinds of 30-06s, maybe just two of the three, I don't want to misstate the evidence, don't match any of the guns that were found. Does that mean the FBI didn't look or does that mean the guns weren't there? If the guns weren't there did someone carry them away and if so who? What are the names of those people? What were they doing there? What role did they play in the deaths of the agents?

Hodge testified "I do have a large number of fired cartridge cases which I have not identified with any weapon," and the government recovered a lot of weapons from that location and there were a lot of cartridge cases that were new and shiny when they were found that could not be identified with any weapon that was recovered. Who was doing all the shooting from 3:00 o'clock until 6:00 o'clock. There was shooting going on all afternoon in different locations. The BIA and the State Troopers and the FBI were kept pretty busy running around. Who was doing all that shooting? Not the people who it is said are the group from tent city that went up the hill south of tent city at about 6:00 o'clock. They couldn't be in all those places at the same time.

If you think that that question is a reasonable and {5100} valid question, then I put this to you: Why was Gary Adams so insistent that the shooting did not last beyond the early part of the afternoon when every other witness said clearly, unequivocally there was a lot of shooting and it wasn't continuous in the sense there wasn't one moment there wasn't a shot but it went all afternoon long? What was Gary Adams doing that he didn't remember, that he didn't hear it?

I don't want to dwell too long on the question of the red pickup. If the government thinks clearly that our position was that that International Scout from amongst the junked vehicles was the vehicle referred to in the transmission of Agent Williams when he said "They are getting into a red pickup," then the government totally misconceives what was going on in that respect during the five weeks we're on trial. It was clear that was a junked vehicle. There was no question about that. The FBI didn't recognize it as a junked vehicle. They took it into custody. Why do you think they took it into custody for? Certainly not for its scrap value. Not only that, they had Lodge dust it for fingerprints. So they must have attached some significance to it.

And Ecoffey, the BIA officer, he worked close to Hughes who was a case agent and I'm sure they exchanged some comments in the course of the day. Even after the shooting was over and in Ecoffey's report there is talk about this red International in which Jimmy Eagle was supposed to be located. {5101} An interesting little twist. We've got the junked vehicle that doesn't run which is apparently occupied by a person who wasn't there.

And why at this trial did Gary Adams deny very vehemently the existence of his 12:18 P.M. transmission that he saw a red pickup going out of the place and the State Trooper should try to stop it? Is that because it was inconsistent with the theory that the vehicle in question was Leonard Peltier's sometime driven red and white van. Is there any other explanation except that it was a conscious effort on the part of Adams not to tell the truth as he knew it. Is he here to get a conviction or is here to tell the truth and let the 12 of you decide "Will there be a conviction or will there be an acquittal"? Is that what our system of justice is about, that witnesses come here and decide in advance which side is to prevail and adjust their testimony accordingly?

Well, it might be argued, "Look, a lot of things have happened since then. A lot of business was done that day. He forgot." I say to you he didn't forget because as he admitted here in the trial last summer in Cedar Rapids, he was asked whether or not he made that transmission and he said, "Yes, I did," and all of a sudden here it's no longer appropriate for him to admit that he made that transmission.

Now you remember Ecoffey, the BIA officer, was recalled in the defense case to answer some additional questions. When {5102} he was asked about what prompted him to write that paragraph in his report which apparently described the red International which is in the photographs, he said in part, "It came over the radio or something that Agents had chased a red vehicle, van or pickup into the area." Finally the case, this case has developed to a point that any reference to any vehicle that could possibly be a pickup was now referred to as a red vehicle, van or pickup. Why the great sensitivity about the red pickup? Did that red pickup carry away the people who killed the agents? Did that red pickup carry away people who were directly involved? They went out at 12:18. That is a very significant fact because that is within minutes, just a few minutes of the time by which it is fairly certain that both agents had died. Is that why there has been this evasiveness about that red pickup from a number of people, people whom the government would like you to believe for whatever they have to say? Well, in your ordinary experience do you believe people who sometimes tell you the truth and sometimes don't tell you the truth or do you believe people who virtually always tell you the truth?

If you recall, and it's perhaps a very subtle point, why did Mr. Sikma keep asking these witnesses questions which used the word "vehicle" in spite of the fact they kept answering him with the word "pickup"?

Agent Hughes as an example when shown the photograph {5103} of the International Scout, the junked vehicle, said the International was a Scout which is quite a bit different from a pickup.

Anderson was on the stand. Anderson who was on the roof of Wanda Sears' residence, the tan and red residence, Mr. Hultman was questioning him. Mr. Hultman said, "What if anything then happened?" Answer: Well, I guess they seen the orange pickup going down that way and they followed it." The "they" I assume refers to the agent. Let me read that again. "Well, I guess they seen the orange pickup going down that way and they followed it." Next question by Mr. Hultman: "Now when you say orange pickup, is that the red and white van?" What kind of a question is that? When someone says orange pickup they mean orange pickup, they don't mean red and white van.

Now you could understand Mr. Hultman's concern, after all when you're a lawyer and you have a particular factual pattern you want to present, you want to make sure that your witnesses are answering the questions in terms of your expectations. That's perfectly all right. This is not a criticism of Mr. Hultman. But the question is why did Mr. Anderson refer to it as the orange pickup? How did he convert on the stand a red and white van into an orange pickup? Does that suggest to you why Gary Adams was dodging, why Hughes was evasive? After that question was put there was some {5104} discussion between Counsel and the Court. There were no additional questions put to the witness. A few words came out and then he answered, "The orange and white and red and white van that was going down the hill." So now it was both orange and red and white and it was a van all in a few seconds. The conversion was made right here in the courtroom.

Let's take a look at the question of Mr. Eagle. The government will not only refrain from arguing that he's guilty, they won't even argue that he was present. Yet, according to his testimony, he was charged with the murders and has never had a trial. According to his testimony he was never closer than 15 miles to the area shown on Government Exhibit 71.

Mr. Zigrossi who is a high ranking official, there are only seven people holding comparable positions in the FBI, said that a key thing after the commission of a crime, particularly something like this, is to find eyewitnesses and possible participants and yet he remembers no discussion with or about Marvin Stoldt.

{5105}

There are only two people who made any identifications that day if you believe the Government's evidence. One agent said he saw Peltier, and Marvin Stoldt said he saw Jimmy Eagle. Could it be that by the third or the fourth day after the fact with the agent and Stoldt having ridden back together in the car, that word would not yet have reached the No. 1 man on the investigation that two people had been identified by name? Can you think of anything more important in terms of the investigation? Can you explain in light of that Ecoffey's report which is dated June 26 which says: I also found the red International and which the agents chased into the Jumping Bull residence. James Eagle was supposed to be in that red International. Bob Ecoffey of the BIA knew about Jimmy Eagle supposedly being in that red International and recorded it in a report dated June 26, and Mr. Zigrossi hadn't heard about it for four days. Doesn't that mean something to you? Doesn't that tell you that there is something terribly wrong with this case?

Anderson, when interviewed by the agent, according to the agent who is working from the report, basically he relies on this report, "Yes, this happened, he said this," et cetera. One wonders whether the report is written independently of the interview, or how it is done; {5106} but the agent tells us who witnessed that and who was familiar with the 302, that Anderson, when shown a photograph of Jimmy Eagle, said, "Yes, he was there with his girlfriend, Wilma, who was cooking." So not only does Anderson by some magical process place Jimmy Eagle at Tent city, but he is there with a girlfriend by the name of Wilma and she is cooking that late morning meal. How come nobody mentioned Wilma? Does that make you wonder?

Norman Brown, Michael Anderson on the stand in this case, Draper, nobody mentioned Wilma, the provider of the food. Strange, isn't it? What was going on at that interview? How did that report get written that way?

And then again -- and this is one of those things where I offer you

an alternative just to show you how unusual the circumstances are -- if Anderson, when he was interviewed, was in a position to say who was in Tent City preparing breakfast, because that's where everybody was when the shooting broke out, then how could he be on Wanda Siers' roof unless he has the capacity to fly which he does not? He might have the capacity to lie, but he doesn't have the capacity to fly.

Can you explain except by saying there is something terribly wrong here? You are asked to do a very, very serious task. Either way, just to return a verdict in this case, is a monumental act. Can you do so with {5107} comfort and assurance? Can you do so without extreme doubt about what was going on here? Why is the evidence in this state? What happened? How can we tell?

Stoldt sighting Eagle at a half mile on a summer's day over terrain that has foliage growing on it. The more moisture that is coming up, the more you get the mirage effect. If you don't hold the rifle absolutely still at such a distance, you have problems seeing, so even if you hold it still, if the target is moving at a half a mile -- we put a man on as a witness who has no position, he doesn't care one way or the other what happens in this case.

He went with a person whom he knew, so he knew when he put his eye to that telescope, he expected to see the man he knew at the other end. Now, you know as well as I do, that's not really an objective test. If he had recognized that man at the other end, it may very well be partly a result of knowing who was there; and he looked, and he couldn't tell; and he was looking over gravel to minimize the mirage effect.

So a lot of questioning was done of a number of witnesses about this: Tell us what happened, we want to know the truth, you are under oath, a man is on trial here on a very, very serious case with long-range consequences and we have heard things about a telescopic {5108} sight. I borrowed the guy's gun next to me. There were a bunch of people. I didn't have the binoculars. The fellow next to me had the binoculars. He loaned me the binoculars. It is like binoculars, binoculars, who has the binoculars?

And then the question was put to special Agent Coward: Mr. Coward, when you were originally on the stand in the Government's case and you

were under cross examination, and you were asked how the sighting was made, you said to us, Mr. Coward, "I later found out they were binoculars." Mr. Coward, what do you mean, you later found out, if you were standing right next to the man and the man either had binoculars or borrowed the binoculars from a person standing next to him? What do you mean you later found out in the answer? An example of clarity, solves the entire question.

Well, again the only thing I can think of is, you know, I think at the time that you were asking those questions to me earlier is when we were referring to when he came in and gave me the statement. Now, whether that -- well, that's what I recall; and I think basically when I made that statement, it would have to be because that's what he told; and with the two, that would have to be my observation. That's my answer. That's the only way I could make such a statement.

{5109}

Well, indeed that's the only you could make such a statement, double-talk, no explanation, double-talk.

Does that worry you? Does that concern you that agents of the FBI take an oath, come here to testify on this solemn occasion and give answers like that?

Adams, the first witness for the Government, testified the official investigation revealed nothing to indicate that Eagle was present on 6-26. Then how does it happen that Eagle is spotted through a telescope at a half mile? How does it happen that a witness who testified here that he saw Leonard Peltier down by the cars with two others, and Michael Anderson says that Jimmy Eagle was in Tent City with a woman named Wilma? How do those things happen?

Do you think something similar is happening to Leonard Peltier that happened to Jimmy Eagle, or do you think not; and if you think not, are you really sure, sure enough to come back and say "guilty of murder one"?

If, as I will argue with respect to certain aspects of the evidence, there was tampering of one kind or another, there was manipulation of one kind or another, it is no answer for Mr. Hultman to stand up and say, "Wait a second. If they were going to tamper, they would have really done a job. They would have come up with an eyewitness who would have said, `I was standing there, and I saw him do it.'"

{5110}

Well, the fact that they just couldn't find such a patsy, or maybe were just incompetent about it, is no argument, none at all. What was done was terrible, and let's review what was done.

First of all, June 30th was a very important day in the life or certain agents. There is a chart in evidence, it is Defendant's Exhibit 219 (indicating). It shows some facts concerning writings of certain agents, Gary Adams, Gerard Waring, Frederick Coward, Edward Skelly. Look at it. It is available to you. You will see that every single report concerning the events, the major events of June 26, was dictated on June 30th, the same day that Skelly said was the day for reviewing the evidence found ln Williams' car.

What was going on in that FBI office between those four agents? What kind of reviewing. Agent Waring's report -- oh, by the way, I want to call your attention to the fact that in case the Government argues, "Well, they couldn't do it until the 30th because there was a shortage of stenographers, or they were busy," I remind you they didn't take notes. They had to get it down on paper fast to make it accurate. Those are pretty lengthy reports as you observed from the questioning, The typist's initials are to be found in the last column. These four agents had access to a lot of typists. Also, they wrote {5111} other reports of not such great consequence. They were dictated, one of them on June 28th -- I am sorry -- yes, June 28th, another one on June 29th. So they obviously had facilities or they couldn't have done those other two reports.

And then of course, there is that very special problem which I will allude to in a moment; but I wanted to comment on Agent Waring's report. He is the only person who heard Agent Williams transmit over the radio the chase of a red and white vehicle.

Now, everybody else heard "pickup" who heard anything. He heard red and white vehicle. He had a special channel on his radio. It looked into the future. He is the only one who heard Williams say, "They are shooting at us from above." Everyone else who commented on the subject said that the transmission was, "Get up above and give us some cover fire."

Of course, when he wrote his report on June 30th, he already knew there were people up there later on in the early part of that afternoon.

He, of course, is the person who used two stenos because there was a shortage of stenos; and the first part of which deals with events up to 12:30, and the second part of which deals with events beginning at or about 12:30; and he is the person who could not detect the fact that the first {5112} part of the report and the second part of the report were typed with different type styles although Wayne Curry who is a local resident and has no concern about the outcome of this case, he said he just looked at it and knew right away; and of course, that's the report that was dictated on June 30th and typed on June 26th, another miraculous feat, or did someone rewrite the first half of a report which had originally been done on the 26th and the typist knew that she had gotten her latest instructions on the 30th, so she wrote down, date of dictation, the 30th, and in copying it copied off the 26th? Is that impossible? Far from impossible.

I don't think I have to address myself at any great length about the sighting of Leonard Peltier. The problems in sighting Leonard Peltier are the same as Stoldt sighting Jimmy Eagle. Stoldt told Coward that he saw Eagle, Coward saw Leonard, Coward spoke to Skelly. We don't know whether he told Skelly only that he saw Leonard or whether he also told him, as he may very well have, "Stoldt told me he saw Eagle." Coward agreed that Stoldt was there was a witness or a possible defendant, and it was a most important fact to learn as any law enforcement would, as any sensible person would understand.

Both Skelly and Waring say that at the meetings during the first few days, first three, four, five days after {5113} the event, there is no mention of Peltier's name at the agents' meetings attended by 50 or more agents.

Zigrossi, when interviewed briefly on Tuesday by myself -- and he admitted this on the stand -- was asked, "Was Peltier's name mentioned at any of the meetings during the first few days?" He said, "I don't recall that it was." The next day the same question was put to him, and he suddenly recalled. No explanation, no offer by the Government to have him explain. You wouldn't expect me to ask him because he is obviously well prepared with an answer, but they didn't ask him either; but he stated that the day before he had no recollection of Peltier's name being mentioned; and then I asked him the key question, the key question: Had he ever heard

of Stoldt during that period of time, and did he do anything about him in any way as the No. 1 law enforcement officer on the case? And he said, "No."

{5114}

There's nothing about Stoldt. Now, you've heard testimony from certain witnesses that Leonard Peltier was firing from position Z-1 over here (indicating). And it is said that he was firing a weapon that looked like Government's Exhibit 34-AA. That would be an AR-15. Well, I show you Defendant's Exhibit 221. That looks like it too. That was the one recovered in Oregon. Was he firing that one, or was he firing this one, Government 34-A? When this one wasn't burned it looked just like 34-AA. Do you think someone looking at him from a hundred and fifty yards away could tell the difference between 34-A when it was in good shape from 221? Not possible.

There's something else not possible. How could he be firing from position Z-1 and there were no .223 casings to be found there? I would suspect that Mr. Hultman might say he cleaned up his brass. He wanted to reload. Remember his fingerprint was found on the reloader's manual. Take a look at that photograph and look at the heighth of the grass in that particular area. He was firing, lying down, getting up firing, lying down, getting up firing. Those casings come out to the right five feet, ten feet, fifteen feet. In the middle of all of that he stopped and found every single round so there was none left for the FBI to find? And then I ask you if that is so how did they find ten 30-06 casings in the same area where they said Dino Butler or Robideau, {5115} I don't remember which one, was also firing, and firing the M-1? Now, an M-1, 30-06 casing is about that big (indicating). Maybe three and a half inches long. And a .223 is much smaller, noticeably smaller, You cannot miss them. Are we to believe that both of those men were there firing one, the M-1, one, the .223, one went around and picked up his brass and the other guy didn't, he didn't want to reload? And Leonard said, "Well, it's your brass, I'm not picking up your brass." It's just not possible, it is impossible.

How could you believe that it happened that way beyond a reasonable doubt. You must believe that it couldn't have happened to a mathematical certainty. It just couldn't have happened.

The Government said it found a .223 in the trunk. Let's assume it

was in the trunk, let's assume that the Government found it in there. To what weapon did it belong? lt belonged to this weapon, 34-A. Found where? In Wichita. Who wasn't in Wichita? Leonard Peltier was not in Wichita.

Well, that's kind of rough business if Leonard Peltier wasn't in Wichita. Maybe that wasn't his favorite rifle. Well, then again Indian people, particularly those who live together, under circumstances like that they sometimes let each other use their property, each others property. You heard a witness say that.

Well, maybe he got tired of that AR-15. Maybe every- {5116} body just thought it was his favorite weapon, but it really wasn't. So maybe he let the people who went to Wichita take it along. No. We know that that's not true because in Oregon in the mobile home they found this weapon, 221 in evidence, that's his AR-15. Not only is that his AR-15 but there was quite an effort to make sure that we didn't find out about that AR-15.

Photographs were made, the AR-15 was the weapon not in the photograph. Even if it was found later as Agent Hancock claimed, even if it was found late after all of that elaborate preparation to make photographs, very pretty photographs too, everything laid out very nicely, good color, very sharp focus, surely if you find another rifle all of that work, take a picture of it, too. Spread out on a nice yellow plastic on the floor, everything parallel, all the guns of the same kind next to each other, two of one kind on the left, two of another kind on the right, all the boxes of ammunition really pretty. You could use that for a catalog. Then let's assume that you find the AR-15 later. Take a picture of it, too, for your catalog.

The Government says that the .223 in the trunk absolutely, definitely, positively matches 34-A. Perhaps it does. I have no quarrel with it. It does not match 221.

Because of the pressure of time I have to turn to the last area that I have time to cover. It is the most serious {5117} area in terms of the body of evidence, in terms of the conduct which has gone undisputed in this case. I speak to you of Agent J. Gary Adams who apparently was assigned the task of handling all the young Indian people, the young men, ranging in age from fifteen to seventeen or eighteen. One of them lived in the state of Washington, one from Arizona. When another one was in Wichita

Gary Adams showed up. Another one in New Mexico, wherever any of these young people were there was Gary Adams. In fact, as you may recall from his testimony he was the first witness, it's a long time ago, a lot of words have been spoken, he went all the way to the state of Washington to serve a subpoena as if there isn't a United States marshal in the state of Washington who could serve such a subpoena.

And he said, Adams himself said from the stand it's very important to get a conviction because he feels that he didn't do enough to help his friends on June 26th. Let's see what some of the tactics were of Mr. Adams.

May I have just one moment to confer with the Clerk?

(Mr. Taikeff and Clerk of Court conferred.)

MR. TAIKEFF: When he was present with Anderson, a young man who asked for an attorney, no attorney. I'm referring to Mr. Anderson's testimony. He said, Mr. Anderson did on cross-examination, that Gary Adams said to him "If you don't talk I'll beat you up in your cell." Nice way, real nice way {5118} for FBI agents to act, especially towards young people. Really nice.

What was his understanding of the situation? He would get beat up if he didn't give him, Gary Adams, the answers that Adams wanted. And so he gave Adams the answers that he wanted. And he was the witness who testified that he saw Leonard Peltier down by the agents' cars.

Now, how about young Draper. Approximately the same age. What did Draper tell us? "They put me in a chair and handcuffed me and tied me to the chair." And they talked to him that way for three hours. That was in the United States of America, that was not in Berlin. That was in 1975, that was not in 1938. That was done by the FBI, not by the Gestapo.

How did he learn the names of the weapons? He got them from either the FBI or Mr. Sikma he testified. Now, he was clear about one thing when the shooting started because he was not particularly attracted to weapons, didn't like them, didn't know how to handle one. He went into the woods and stayed there and that was undoubtedly the truth. He probably knew very little of what went on. But that didn't, that didn't alter in any way the treatment that he got.

Michael Anderson had an initial interview with Agent Adams, and you may recall that Agent Harvey was called in that connection. And according

to Agent Harvey, as far as he could {5119} tell, Anderson had every reason to be calm, assured, he was told he was only going to be a witness, not to worry, but every reason to be truthful, completely honest and if he had any thoughts in his mind that he might be guilty or anything of that sort he was certainly put at ease, had no reason to lie to protect anybody. And what did he say on that interview? At 11:30 in the morning he was in tent city. He saw a photograph of Leonard Peltier, identified him. He didn't say, "I don't know that person." He didn't say, "I'm not sure." He answered straight away "That's Leonard Peltier." And what did he say of him concerning that particular day? He said, "Peltier was at the Jumping Bull residence on the 26th, the day of the shooting." That's it, that's all he said about him on the first interview. That when he looked down for the first time and saw the cars the agents were prone, they looked dead.

Then you take a look at the second interview. The interview in which Adams is present again. And at 10:30 in the morning he refuses to talk. By the way, Anderson is the fellow who said he was not convicted and yet he was arrested by the FBI on a probation violation which means he had to be a convicted person. 10:30 in the morning he says, "I don't want to talk to you." 1:40 in the afternoon he gives a complete statement. And what does he say when he comes here? He says that Leonard Peltier was down by the cars with Dino and Bob.

{5120}

By the way, before I pointed out to you the impossibility of Leonard Peltier being here (indicating) shooting an AR-15. There's another reason why he couldn't have been there shooting at the agents' cars. Do you remember that an FBI agent had to climb a tree in order to see the agents' cars through his telescopic sight, Agent Waring? Agent Waring was right up there (indicating) and because of the terrain he, from that point, could not see the cars. It's quite a distance to begin with. It's about a hundred and seventy to a hundred and eighty feet. And because of the nature of the terrain he had to climb a tree and look through his telescopic sight to see the cars. And yet the Government would have you believe that Leonard Peltier was there shooting at the cars, or at the agents in the cars.

Now, if Mr. Waring was wrong, if he climbed a tree when it wasn't necessary the Government could have solved that very simply. Could have

sent an agent down there just as we did a test to the telescopic sight, have the agent stand there, take a look. He could see the spot. He comes back under oath and testifies. And the conclusion would be Waring was wrong, he just climbed a tree unnecessarily. You heard no rebuttal evidence to that. Not one word.

In his second interview Anderson changes. Now, he's at 10:00 o'clock in tent city because he has to leave himself room to get up on Wanda Sears' roof. Anderson, when first {5121} asked, says Robideau was the tent city leader.

And finally we come to Norman Brown. Now, surely you must realize that when you get served with a subpoena to come to Court you go on your own steam. You get in a car, you get in a plane, you get on a train, you get in a bus. They don't say, "Get in the car, here's your subpoena, you're not under arrest, get in the car." And then you get taken a long distance with your pregnant wife left behind. This is a young man, very young man. Taken to Pierre, put in a private FBI plane, flown up here, taken to a hotel, twice or three times asking for a lawyer, no lawyer. Threats to him, threats to his mother, she sat there crying throughout the entire interview. You could just imagine what was going on in her head when that episode was unfolding.

Is it any wonder that he went before the grand jury and said, "I saw Leonard and Bob and Dino down by the cars." That would make two people who saw him down by the cars, neither of which was ever asked what did you see, what were they doing. It's enough fellows if you just say you saw him down by the cars, that's it. We'll be happy. One of those two people must have seen something down by the cars.

Ladies and Gentlemen, I have a few minutes left. I must strongly, as strongly as I can urge you to recognize that in order for you to find any actual conduct on the part of Leonard Peltier that could possibly mean criminal liability {5122} for him under this indictment you'd have to speculate. You'd just have to weave a fantasy in your mind.

It is required in this country that the twelve of you cannot unanimously return a verdict of guilty unless the evidence was so convincing, was so believable, unless there was absent serious questions so that you were convinced to a moral certainty. Otherwise you cannot return

a guilty verdict. Perhaps the Government will argue in its final summation, "Well, he was shooting at a distance." If he was shooting at a distance the only way you can conclude he was shooting at a distance is to find that he was shooting at a distance from that "Y" intersection, and from there he couldn't see the agents' cars. So even if he was, he wasn't shooting at the agents' cars because he couldn't see them.

You have to fantasize, you'd have to speculate something that was physically impossible that required the agent to climb up in the tree in order to see the cars. The Government might argue "Well, by being there with a gun in his hand he helped some, some phantoms do what was done, and as a result he was aiding and abetting." Being someplace when a crime is committed and even doing certain things doesn't constitute aiding and abetting unless you are consciously and willingly a participant knowing what the goal is or at least being in a position where you could anticipate what the outcome would be.

{5123}

To knowingly and willfully participate and involve yourself in such a thing and help somebody else get it done knowing that that's what's going on, that's aiding and abetting. Not possibly shooting a gun on the Pine Ridge Reservation when there's shooting going on all around you that nobody knows who's shooting at whom.

The Government says you must find Leonard guilty because he's responsible for everything that happened that day. I suppose they would even say he's responsible for the death of Joe Stuntz because he was the leader of the group. They call him the leader because they want to argue to you that you should hold him responsible for the conduct of God knows how many people.

The tragedy of June 26, 1975 is sufficient. We do not have to add to that tragedy two more factors: the conviction of Leonard Peltier and the corruption of our system of criminal justice. And in that regard I was contemplating what I might say to you specifically; and one of my colleagues suggested to me that there was already in existence all the words that one might want to say on that subject by a far more eloquent person than I. {5124} In closing I read those words to you and ask you to seriously consider them in light of what you have seen unrebutted,

uncontested in this particular case. Speaking about litigation. "Decency, security and liberty alike demand that government officials shall be subject to the same rules of conduct that are commands to the citizen. In a government of laws existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker it breeds contempt for law, it invites every man to become a law unto himself, it invites anarchy. To declare that in the administration of the criminal law the end justifies the means, to declare that the government may commit crimes in order to secure its conviction of a private criminal would bring terrible retribution."

Ladies and gentlemen, if you bring in a guilty verdict in this case, you will deliver terrible retribution. Thank you.

THE COURT: The Court will recess until 5:10.

(Recess taken.)

THE COURT: The jury may be brought in.

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

THE COURT: You may proceed.

{5125}

MR. HULTMAN: Mr. Taikeff, Counsel for Defendant, Your Honor, members of the jury.

There is a saying with which I know you are all familiar that the first shall be last and the last shall be first, and as to the lawyers I am now that person and I am sure that you're pleased that that is the case and welcome it.

But because trials are participated in by lawyers and because trials of necessity concern words, words of lawyers, but more importantly, and as far as only the considerations you are to make, and I know you understand that, the words of witnesses, that we not loose sight of the significance or the importance or the difference between the two, the words lawyers and the words of witnesses.

I think it's been apparent to you from the beginning of this case, and it hasn't been it certainly has been in the last hour and a half to

two hours, that there is some question as to who is on trial here, and thus so that we're now dealing with lawyers' words but with the words of those who truly make that determination, that of witnesses I want to refer back because the last may still be first in your minds to what Mr. Taikeff said within the last few minutes. Now you recall at the end of the last few moments of the first half of his remarks, I was one of those who joined, and he specifically referred to me, of being, I don't remember the exact words he used, slight of hand, as I recall it. I say {5126} without any proof, without any evidence he made that accusation for which he then a few moments after the break later apologized to you. That's important because that's significant.

But the accusation he made in the first place was the kind of accusations he's made in the last hour and a half, and I'm not going to deal with all of them, I will only deal with a few of them illustratively because I can't possibly in an hour's time deal with three hours.

There are the pictures that I showed to the witness. You've seen them. They are in a pack called the autopsy report. But those are the pictures of the agents as they were found, the condition they were in. Not if there is something slight of hand, if there is something dishonest, if there is something about this government in doing that that's not proper and appropriate, then I stand fully guilty because that's what we're concerned with here in this courtroom, not slight of hand, not remarks of lawyers, not fancy questions, not complicated questions, yes or no, but a search for truth, justice, a search for the truth.

Now the truth doesn't come in a package where everything is perfect because if it does I'm sure you would be the very first one to conclude very quickly there probably isn't very much truth in whatever that statement, that witness, that piece of testimony is, because I ask you, but in a simple {5127} illustration, and I think I asked you this, possibly some of you in the voir dire, if seven people, seven of you were at Jumping Bull's on that day and the events that did happen there, whatever they were, would it be fair for me to conclude that if you were one of the seven participants around the Jumping Bull area with which we are primarily concerned doing the things that those seven people did, that you would all sit down, under oath and say exactly the same thing. If you did, I'm

sure you would come to a very ready conclusion to use the phrase, or something equivalent, of Counsel, there is something smelling here or there is something rotten somewhere because things just don't happen that way.

Each of you would have seen and observed and reported the participant events that you made and if at one moment you're on the hill you can see what's going on at the cars and if three minutes later you're back in the tent city to pick up another weapon, then you're just not going to see at that moment what somebody else is, or one of the six of the rest of you on the hill at that moment is observing what's happening on the cars. Does that mean that we then conclude that somebody's a liar, somebody's come here and misstated? Oh, no. It means that unless it doesn't square in some way, very significant, important, that that is in fact the way things really happened honestly and fairly. But you can take a lot of reports and you can take a lot of pieces here or {5128} there like one single word out of a sentence or one sentence out of a paragraph or one sentence out of a report and you can prove something that may look right on the surface to be you know, loud and clear that that's exactly it and there is no question. But like a chameleon, when you put it in its environment and put the rest of the facts with it, the rest of the words in the sentence, the rest of the paragraphs in the report, the rest of the testimony that's involved in the evidence, you can then see the true color of what that chameleon is because it reflects all of that surrounding and the things that impact on it.

Now let me show you just one illustration, it was the last one that counsel vociferously said in effect that Waring is a liar or Brown's a liar, and that astounded me because I believe he has said time and time again that if there is anybody here that you can believe it's a 15 year old teenager at that time named Brown. But at the same time he's saying to you, he didn't mention Brown at that moment, he talked about Waring, the big bad FBI, that how could Leonard Peltier possibly be at that corner and doing the firing. Conclusion that he was asking you to make, am I fair, that's a lie, couldn't happen, he had to get in a tree.

I want you to just look at one simple photograph and you will find out very quickly whether anybody's lying, whether the FBI had to get in a tree and then falsify that {5129} they could see. You look at that photo

right there and if you can't see where Leonard Peltier was and where that car is, then I'll admit to you that everybody that's had anything to do with this case as far as the government has been a lie.

Now that's what evidence is, not what lawyers get up and conclude for you. It's what the facts with your eyes and your minds as reasonable people can conclude from the evidence in this case, and I will ask anyone of you by looking at those two photographs if there is any question in your mind and that I might get up close enough that you might see that you can stand at those autos or stand at that corner or stand anywhere and shoot point-blank as Leonard Peltier this defendant did as the truthful witness, the only one evidently, Mr. Brown said he was doing. You don't have to get in a tree to make that kind of a decision or you don't have to get fancy words accusing the FBI that you couldn't see there so you had to get in a tree.

If that isn't good enough, when you walk by the next time that mockup over there, you take a look at the same two spots and see if you have any more questions in your mind.

Well, let's talk about another one that a great deal of time was spent on with a lot of charts and a lot of views and view graphs and reports, Q numbers, et cetera. And it's significant, it's very significant and that's why I've selected it as the second one because it has to do not with the last hour {5130} and a half, when I only heard maybe in five minutes what we're really here concerned about and that is whether or not Leonard Peltier is guilty or not guilty of the crime of murder and that has to do with evidence.

Earlier a lot of discussion was told about a number of rounds that had to do with the capability and a relationship to some specific kinds of weapons, one kind here in particular, an AR15, because it has some very important significance as far as this trial is concerned which I don't think there's any doubt in your mind by now. You remember back each day with each witness when they talked about an AR15 and who the only person was on the 26th of June, 1975 that had such a weapon. Not two, not three but one, one person.

Now they said there are a lot of rounds that have to do with a certain company, and you'll remember the testimony here, and about that particular

kind of ammunition and where you can get it. Here again I indicate to you that my remembrance of what the record stated, and don't accept what I'm saying here now unless it squares with what you remember or if it doesn't square it's the word of lawyers again, only when the words of lawyers square with what the words of the witnesses were and the exhibits, ought you to even consider them in any light.

Now I want you to go, when you go to the jury, I want you to look in Government's Exhibit 34C which is the exact {5131} exhibit concerning the rounds they were talking about and look at each one of them in this package, the 20 or whatever the number was that was up there on the chart, specific reference to it that's in the report that was referred to, and you'll find out what kind of shells they are. I will venture a guess for you but you don't have to take my word. You're going to look and see what the exhibit says because that's the thing and the only thing that counts and I think you're going to find that they are not Lake City. I'm not going to spend any more time on that particular part except to draw a conclusion and that is that the rounds that came from this weapon are the rounds of significance and importance and the rest of the rounds that can come from a weapon of that kind are these rounds here that were very carefully pointed out to you on the view graph and so forth. But there are also three or four more and that will include then all of them and we'll draw some conclusions from them.

Now I'm not going to attempt in any way to go back from the beginning and challenge the things that Mr. Taikeff in great detail has enumerated because I don't have the same recollection in many instances of what he allegedly said was what the witnesses said but I'll pick off one or two more. I don't remember any testimony about a BIA agent saying "It was the guy in the white t-shirt that I saw" or words to that effect. Now if you did, that's the conclusion you should draw. {5132} But I go further and say what's it got to do with anything? What does it nave to do with anything? What does the last hour, all the questions that he asked about phantoms really have to do with anything. When you compare the phantom questions with what the evidence here specifically shows and that is what I'm gong to address with you, not whether or not I may have been there possibly on the 26th or one of you, that's possible. There isn't any question about

it. That's possible. But the things we're concerned about here are not what the possibles are, we're concerned here with what those things that are first provable beyond some given stant and it is that comparison for just a moment that I wish to make with you and I wish to do it with simply this one weapon and a round or two in the process.

Now there are some things about which there is not just something of evidence that's been proved beyond a reasonable doubt but there are some things that have been proved here beyond any doubt and that's a burden that the government doesn't even have. For example, there isn't any question that the government has proved as far as this weapon, not beyond a reasonable doubt, but beyond any doubt that certain rounds were fired from it. Do you remember the testimony of the expert? He just didn't say beyond a reasonable doubt, he said certain rounds unequivocally, scientifically beyond any doubt have been fired from this weapon.

{5133}

Just by way of illustration, now there are some other things that are proven beyond a reasonable doubt by the fact that when you take all of the facts and circumstances of the given time together you then have a right as a juror, as the Court I think will instruct you as I'm sure you conclude anyway, that you can draw a reasonable conclusion.

{5134}

Now, that doesn't mean that conclusion is beyond any doubt, like in the case of certain rounds, but reasonably, and that's why it is reasonable for you to conclude with reference to the bullet; and I say to you, is there something mysterious or did the Government in some way try and pull a fraud on you when right from the beginning we indicated that there was a classification here different from down here (indicating). This is beyond any doubt, but here is a factual circumstance, something short of beyond any doubt, and why?

Like with so many things in human life, you can go so far down the road in terms of indicia, and that's all there is. There ain't no more as the saying goes, just as with these items here (indicating).

Now, so long as you go down that road, and you swear in your own mind and draw a reasonable conclusion, then that's beyond a reasonable doubt. Now, if down the road there is something that clearly "Xes" out

that the bullet had to come from another weapon, like up here, then there is no doubt at all. You can "X" that out, and there's no, not even a reasonable doubt that it didn't come, it is absolutely certain it didn't come. Therein lies just a simple illustration of the quantum and the types of proof that are involved here; and I would like you to consider and keep in mind, as we talk for a few moments, {5135} about some specific items of proof.

That is why scientific evidence, although it is circumstantial, in some instances is the very best evidence that's humanly possible because like that thumbprint, there was only one. In a thousand persons with two eyes, 2,000 eyes might look at the same individual and say, "Yes, even at 750 yards on the 26th, I think it was somebody," and be wrong and be mistaken, honestly mistaken; and that might just be a reason why Jimmy Eagle has not been prosecuted for the crime, but there are some things beyond probable, beyond any doubt; and I am not even sure I want to respond, but I think I must because it is significantly important, that when you don't find five and a total handprint and everything else on a brown bag (indicating) that's got one of the weapons that the agents had with them the last time they were alive, the conclusion to draw there is circumstantial, but I think a reasonable conclusion to draw just from that one fact alone.

Is it just possible maybe the individual who without any question, beyond any doubt, and it doesn't take five, it doesn't take a handprint, it only takes one, the experts told you that, you don't need to be told that. When counsel says there is something mysterious, there is only one round here, that you might just conclude that the persons whose {5136} fingerprint on the bag in which there is a weapon that was in the possession of an agent at the time he is murdered and who has just run from the vehicle, in the seat where it was located, and has fired a shot as he is in the vicinity of a fence, you might reasonably conclude that that person may possibly have had something to do with the murder of that individual. I think that might be a reasonable conclusion to draw, not beyond any doubt, but even that alone may be beyond a reasonable doubt.

Now, let us go back just for a moment, you with me, and let me visit for a moment about something that I don't think really there is any doubt

about and maybe some things about which there is some difference as far as what somebody may have said at one time or another; and the only reason I am doing this is not again because if what I say, when I refer to somebody's testimony, is not what you heard; and I mean what you heard here -- and don't think anybody has got any basis to conclude here that there has been any people lying up there. I think what you have heard under oath you can reasonably conclude has been honest and fair unless you have seen something that says to you, "Oh, no, that's dishonest, there is something about that."

Let's start with why it is that two agents are doing something on that day. Now, were two agents out doing {5137} something that day that had something to do with a hundred year ago history, or what the relationship was between Leonard Peltier -- and this is the only time I am going to mention it because I don't think it has anything really to do with anything as far as the murder of two agents that day -- the American Indian Movement.

Let me ask you one question: What did Coler or Williams on the 25th, when they are looking, trying to do their job, for somebody who has been charged with a criminal act, Jimmy Eagle, have anything to do with this Defendant and the American Indian Movement?

Now, if you can put something together there as reasonable men and women and draw a conclusion from it, then that's got something to do with this trial. You draw it, and you should draw it, but all I can figure out from everything I have heard is that there were two FBI Agents going about their job, as they have to go about their job every day, doing the things, yes, doing the things that a lot of testimony here said they ought to be doing -- if there is that much concern and if there is that much going on on the Pine Ridge Reservation, they better be doing it - and they were doing it.

Now, simply they were searching for the apprehension of a person by the name of Jimmy Eagle; and some things then flow from that that are kind of reasonable for you, {5138} and as reasonable men and women for conclusions then draw, and maybe just why Jimmy Eagle's name, and when somebody said they thought they saw him at some place along the line, along with some other things, somebody may have logically concluded, "Well, maybe there ought to be some consideration made about it," but that's not the end of the road. That's not the end of the testimony, that's not the end

of the facts. That's the one word in the one line of the one page of the whole book. There are a lot more pages to be gone into and to be checked out and to be cross-checked before you draw that ultimate, final conclusion.

So what happened? The agents were charged with other responsibilities too, other warrants. They were charged if they saw or learned, or of an act committed in their presence of a crime, that's what everyone, I would hope, would pray they would do on the 25th of June, 1975, and would do this afternoon, if we are going to do something about assisting and helping to meet the challenges of law enforcement on that Reservation.

Now, I don't see what about that job and that responsibility and those acts have anything to do in any way other than a constructive way of what now, within a few hours, is going to happen.

Now, that night in seeking to find their duty, they {5139} ran into three young men on Highway 18. Now, counsel then accused the Government -- and you remember in his argument awhile ago, that there is something devious about that -- the Government bringing that in.

Well, I say to you there is something very significant and important, and I hope and pray that you will consider this along with everything else, that there was some conduct on the part of the FBI that night which is a part of this big challenge. These are the people that are on trial here, what did they do? They thought maybe one of these three young men, teen-ages, were Jimmy Eagle which is kind of a logical thing to conclude if you have heard he is in that very neck of the woods, to use the phrase, and not knowing, they took the three of them downtown. They took them into Pine Ridge to somebody who really knew or they thought could possibly know, somebody who lives there. Why? Because these are two agents that are kind of new in the territory. One of them has only been there on a 60 day assignment. It is not like downtown Fargo. As comparisons here have been made, it is thousands and thousands and thousands and thousands of acres as well as some communities.

So what do they do when they find out it isn't Jimmy Eagle? They ask that somebody escort them back to wherever it is they were going. {5140}

Now, if that's conduct that's other than expectable within the line of duty and the responsibilities of members that we charge with such

responsibilities, then I hope there is a lot more of it, and especially on Pine Ridge with the problems that have been indicated here as far as the testimony of a number of witnesses, seeking to solve a crime and protect citizens against such individuals; but that isn't the end of the story. That isn't why it is really significant because as far as the Government is concerned, that's the sideshow. That's the other trial that they would like to have you in from the beginning of this case to the end, not the Government, but the defense.

Something happened after that that had to do with that Defendant. This Defendant that's here in this courtroom in this trial. You remember what it was. When those three young lads went back, who did they check into? You heard the testimony. I won't draw the conclusion for you, and I will leave it to you, whether it has anything to do with this trial and whether the Government is trying to pull a fast one or double-shuffle or something or other; and I will ask you to remember what the remark that was made by some individual there from testimony to one of the three that was on the stand here, and that has something to do with why we are here. {5141} That individual, if you will remember, responded to that young man and the other two concerning where they had just been and what they had done with whom? With the Federal Bureau of Investigation.

Now, that had something to do with what happened on the road, Highway 18, the night before, with why we are here; but it had a little to do with some other things a little later on too. It just happens that two of those three young men later the next day see some automobiles again, and they see some people again; and it just happens to be the same two agents in the same two cars.

Now, you conclude whether that has something to do with why we are here and then what follows; and if there is something devious about it, then the Government certainly admits to whatever that conclusion is.

What then did happen the next morning? The next morning the agents, back on the job, doing the same things they have to do day after day, nothing unique, nothing unusual. In fact, it was so usual that all they had with them in their presence, when they had to respond, were their handguns (indicating).

{5142}

Now, where was this big massive bad FBI, and what were they doing, the rest of them? Well, a couple of them were taking a prisoner who likewise had committed an alleged criminal act against another Native American. They were on their way getting ready to go take that prisoner to a jail. The limited other few that were around were in other places, other jobs, other responsibilities. Waring, back at Pine Ridge. But what about the big bad BIA? What were they doing? Well, I think you can remember very clearly that their S.W.A.T. team which they had organized, and I guess there's something bad about S.W.A.T. teams, and I think again we may need a few more on Pine Ridge from what I've heard about here. I think, and I guess maybe that's what they decided at that very time and place because they had organized one in order to carry out the law enforcement responsibilities which they had. And what were they doing? They were out with dummy ammunition that very morning at the time some things are now about to happen.

Now, I don't know what's so bad and, you know, about that. They're just again kind of doing their duty, learning some new responsibilities that they might be better prepared to meet whatever those responsibilities are. Yeah. They testified without any question that they had a weapon similar in nature, but the type that they used which anyone just looking at it who really technically doesn't know the difference {5143} that there's a small slide here that makes it automatic or semiautomatic. I don't know what that's got to do with anything. As everybody has indicated and maybe one of you who may have served in the military knows the only difference between automatic and semiautomatic is in the case of semiautomatic it goes as fast as you pull the trigger. One round just as fast as you pull the trigger each time. Has something to do with accuracy, too, compared to automatic when they all go.

But what then happened? The agents still looking for Jimmy Eagle, one of the assignments they have, they go to the places they had been the night before because they had some information, sometimes not good, sometimes totally wrong, sometimes correct. And they went back to the area to look for Jimmy Eagle. And what happened ultimately? I don't think there's any question about what happened ultimately. They came back to where they had been because they had been told that the person they were looking for

had been here; and I don't think there's any question in your mind that sometime he had been there. And when they got here unfortunately for them there was somebody else there, the defendant in this action.

Now, I ask you in your mind as reasonable men and women if you were someone who had been charged with attempted murder about which there is no doubt beyond any doubt, a cold {5144} fact, not beyond a reasonable doubt but beyond any doubt and if the night before you had said something in response to three men, three teenagers who had reported to their leader that they had just had an experience with the FBI and he gave the response that he gave, you might just as a reasonable man, let alone as a reasonable woman come to the conclusion that they may be looking for me. That's what their job is as members of the Federal Bureau of Investigation, especially if you are wanted for the crime of attempted murder.

Now what happened? Very simply he made a run for it. He got in the vehicle which somehow now becomes a phantom, and, oh, we had phantom vehicles in this trial from the first day to the end; and there again I'll get back to words of counsel in his argument a second ago to you in which he specifically referred to me and my examination of a witness, and I don't know what the conclusion quite was that he was leaving with you, you draw that one, I drew my own, that I had attempted or in some way had put words in the witness's mouth. Now, you were here, you heard the testimony, you listened to me and when we ended up at the end what was it that the young man said with reference to the car, whether it was orange, whether it was red, whether it was some shade in between, whether it's a pickup, whether it's a vehicle, whatever it is? He said it is the red and white van, or whatever you want to call it by colors names, anything else, {5145} that everybody knows was right there (indicating), and is the one he had seen on numerous occasions before as many, many other people including Angie Long Visitor who knew he had repaired it and put it together.

Is there any doubt in anybody's mind as to what vehicle Leonard Peltier got in with two people at that house and took off when the two agents came in the road from Jumping Bulls'? There ain't no phantoms. It isn't an International Scout sitting down there in the junkers. Counsel concluded something to you, but I think maybe you had some doubts that might have had some significance about that one somewhere along the line. Now, maybe

that's not reasonable for me to conclude, but that phantom kind of went out the window when Angie Long Visitor said that vehicle had been sittin' there for weeks. So now you get another phantom. Do you remember the phantom automobile we next come up with? We now come up with a phantom vehicle, and also now a phantom somebody who allegedly now is the person who ought to really be here in this courtroom for you. Somebody by the name of Casados.

Well, the orange van, and do you remember the cross- examination about that particular vehicle was with certain witnesses? Counsel got into some pretty, you know, pretty sharp discussion about colors and so forth. I don't know what the reason for all the problems about the colors were. There {5146} were all kinds of reports by all kinds of people who had been witnesses here about certain vehicles; and I swear to you and I submit to you that honestly and truthfully if you'll remember the same people talking about the same vehicle that is the one Leonard Peltier was in and went to the corner in which we've shown photographs, both from the defense and from the Government and about which everybody understands is one and the same and the very car. But which has been described by many times in many ways by different people that somehow we're to conclude that there's a phantom vehicle in there of some kind that has taken the murderer out. And so that's very simply why we brought in to show to you that the van that we had -- that the International Scout that we had a lot of discussion about concerning Mr. Casados from examination by counsel for the defense wasn't even in existence on the 26th of June. So that phantom vehicle then disappeared.

But what is the evidence as far as what then did happen? Now counsel likes to take again a piece out here, but not put it all together at that time. And let's talk now about one of those illustrations again. Something very critical and very important, and I'm sure that's why he used only one particular broadcast, or what one individual heard. It's only when we put it all together and listened to what everybody said that we can draw an honest and a fair conclusion.

Now, is there any question in your minds from all of {5147} the testimony that was here concerning what Agent Williams said as to what it was reasonable men and women came down to? The words might have been a little different, and under those kind of circumstances I'll leave it

to you that the thirteen of you probably listening to the one and the same exact broadcast. Let's assume that it was one and the same, which is not the case here because there were a number of them in a sequence about which again there is no question. But I'm sure that there kind of been a little variation in how you reported it, what your conclusion was especially in an emergency when you start thinking about other things. And I submit to you that the sum total, when you put all of the broadcasts together, what did they say? I think honestly and fairly they said exactly what happened here (indicating) and isn't that what one of the witnesses likewise said? And so it isn't Agent Coler and Williams again that only speak to you from the standpoint of what happened to tell them, and how it happened to that extent that a medical examiner, an expert can tell you. But they even spoke to you the last words of their lives. One of them in particular. And what did he say? I'm not absolutely certain, but I can recall what each of these people collectively said, and I don't find anything in it that doesn't really swear or all fall together or fit together. What happens? I don't know whether it was red and white, I don't know whether it was a Scout, I don't {5148} know whether it was a van, all of them, a number of them said something different. But then they question it was one car, it was the car that Leonard Peltier got back in with the two people and took off down the road that is here and of which all of you are familiar.

There's isn't any question about that. There isn't any question about the guy making the response. Says in effect "We're going after them, we got them on the gas, or we're following them," or whatever it is. It all comes out the same. Then what's the broadcast? "They're stopped, they're getting out of their car," and what is it? "They're getting out of their car," and I'm just using cars as a word to cover any possibilities of what any of these people said that were hearing a broadcast or a little part of it, they're getting out of their car." With what? With weapons.

Now, ain't that the same thing that Anderson said, too? Now somebody's lying. The agent was lying at the time he made the radio broadcast? Now, as reasonable men and women I think it's fair to conclude that that's exactly what happened. And what was the next broadcast or words? "They're firing at us." Now, if that's an aggressive act on the part of the two FBI agents that day, as reasonable men and women you draw that conclusion. If that's

self-defense on the part of Leonard Peltier at that moment you draw that conclusion because you're the ones charged with that responsibility. {5149}

But I got another name for it. That's murder. Those two agents had a job and a responsibility at that very moment, and they were about it and doing it as a job. And they lost their lives in the next few minutes just for that reason.

Now, what then squares as far as further this defendant? Is there any doubt in your mind that Leonard Peltier, this defendant, was anything other than a person there at Wanda Sears' residence and got in his vehicle, drove it to take off, got out of it along with two others in that cross in the road. Well, you just don't have to take the radio broadcasts, you just don't have to take the physical evidence, but take now about four or five or six more witnesses and they aren't Government agents, because unfortunately the only people who can be called are literally, with one exception, somebody who participated. And they're not exactly the kind of witnesses that step forward, and you've learned that if nothing else from the testimony here, and say, "I'd like to tell you what it is I saw or observed as a witness, honestly, fairly and truthfully on the 26th of June," that the truth might be decided and determined.

Angie Long Visitor, now I don't know if the Government blackjacked her someplace or not, FBI tied her to a chair or something, I guess I don't think there was any evidence to that effect. Where did she say Leonard's car was? Where did {5150} Anderson say it was? Where did Brown say it was? Where did everybody say it was? But more importantly who is with the car, and I think that's a logical conclusion to draw, that maybe if you fixed it up and you drive it and it's your car that you just might be with it. That's reasonable to conclude. You get out of it with an AR-15 and you start blazing away at the yardage that's involved here.

Two agents in the middle of an open field down in a valley. You put it there and you take a look and I don't need to tell you it's ducks on the pond. Especially when they get out of their car and the only thing they've got to defend themselves with at that moment is something that just doesn't quite reach people with weapons of these kinds and those kinds who are now about to put hundreds of rounds into your cars and into you

personally if one of them strikes you.

Now, is there any question in anybody's mind as to who was seen observed firing his AR-15 at that time? If there is then you got to disbelieve everybody that came here and said that they saw him. Now, I think it's interesting at this point that then we've compared just for a moment who the people are. They're adults, the leader, this defendant, and the man named Butler and a man named Robideau and I said men, and Joe Stuntz, and then some teenagers, fifteen, sixteen. Well, even Little Jimmy, eleven. He isn't even a teenager. {5151} And what happens? Sure, anybody who wasn't one of the three, the other two were Leonard who got out of the car with their weapons and started blazing, you heard the reports about that, too. There wasn't any question about those reports, that they're firing on us, they could even hear the rounds, and then if you don't get here soon we're going to be dead men or whatever the words were. And then I'm hit. Now, we don't have to prove anything farther than what that is right there for you to conclude under the law and the facts of this case that this defendant is guilty of murder in the first degree. {5152} You don't think he was at least an aider and abettor at that particular time, you draw whatever conclusion you draw without us ever going from that point on.

Now who is it through all of the testimony, not just of the government but of the defendant, that on the 26th of June, 1975, in the Jumping Bull area that has an AR15 or what somebody else would say looks like an M16, and I think that's kind of a fairly logical conclusion to draw for one who might have been looking at TV or something else when it's been stated the only difference is a little selector, who is the only single person by all of the witnesses? Now if you don't want to believe those that the government has called, and the defendant can call anybody that they choose at any time if they think the government is misleading, or what about the phantoms and all that discussion. If you're really concerned about that as the attorney representing, then why don't you call that person? Now you have no responsibility to, and the Court will instruct you that this defendant stands here so innocent until proven guilty beyond a reasonable doubt. But isn't it fair for me to conclude as a reasonable person, if you know there is some witness out there or some phantoms that are really

people who saw things or did things or are guilty of things, there is a subpoena and there is a right to call those on the part of the Counsel that's been talking to you before I'm {5153} talking to you.

They did in fact call a number of people, if you remember. They called one of their defendant's former women he had been living with and what did she tell you? That wasn't the government's witness. She hadn't been blackjacked by the FBI. She told you he was carrying one of these, she had seen him with one of them.

Now, but, oh, wait a minute. Here's the one. Here's the one and the big bad government, oh, they played tricks on you again. They didn't introduce the weapon. Now there is some responsibility I believe as reasonable men and women that if you're going to put something in evidence there is kind of a responsibility for you in deciding the issue, but more importantly even for me, if I'm going to voice it upon you, as Counsel has indicated somehow or somewhere I did or didn't do for some reason, that I have got to connect for you something between this gun right here and what happened there. I ask you, is there anyplace in this record anywhere that there is anything that ties that gun there by way of a bullet, by way of a round, by way of anything anymore than if I have one and I own one, and I don't own one and I don't think any of you probably do either, would be material for me to introduce here other than the fact that was something that was in the same van. Not with a fingerprint on it but in the same van with a lot of other people. You remember there {5154} were a lot of people in that van and there were a lot of weapons in that particular van.

Now maybe it's just reasonable to conclude that the government didn't introduce it here because there is nothing in this testimony, including the defendant, that in any way ties that weapon to Leonard Peltier on that day and I submit to you that is a fact beyond any doubt. But there is one weapon that is tied to Leonard Peltier on that day, the one weapon, the one weapon that was seen only with one person. Now we're going to talk about circumstantial evidence and conclusions as reasonable men and women by taking it all, not just one word, not just one line, not just one page out of the whole book but all of it. He was the only one with one there that day. All the testimony shows that so I think you can conclude reasonably

that he had an AR15 that day.

Secondly, he's the only one with an AR15 that day so I think as reasonable men and women we can conclude that anything that has to do with an AR15 that can be tied to that one just might possibly have something to do with Leonard Peltier.

Now let's look at those rounds for a second that are tied to that given weapon. There is one there, it's 34E. Now there is something again big and bad about the government giving you these illustrations and so forth, but I say to you that it's the only way I can put the whole book together {5155} and draw a sum, honest and fair conclusion in a logical way, and with those that do tie and not by putting 2,000 more up here that don't tie to anything or a gun or a lot more guns like that one that can't be tied to anything either. I think that might confuse me and possibly confuse you.

So what we have tried to do is put those things that do tie and have something specifically to do with 34E found at the log house. Who lives at the log house? Who was seen at the log house with an AR15? And that 34E beyond any doubt ties to that particular weapon. The phantom.

34G -- I beg your pardon -- 34D is a shell casing again from an expended round. Where is it found? Is it found in some phantom's red and white van. Beyond any doubt it's the same red and white van that was there (indicating). It's the same red and white van that was there (indicating) and it is the same red and white van Angie Long Visitor said belongs to Leonard Peltier. He picked it up, everybody is in agreement, whatever color combination you want to call it. Now, and beyond any doubt, not a believable doubt, the weapon was that particular one.

Now there is another, 34F, and where is it found? It is found at the '67 Ford in tent city, and I don't need to remind you of something to do with the '67 Ford. Another phantom. And I ask you about another one, another one that is found in the trunk of the vehicle that was here at the only {5156} time as reasonable men and women it could get into the trunk, and not by a phantom but by one of those who was here with an AR15 firing it at that time on that day. I ask you as reasonable men and women to conclude just possibly who that phantom was. There is only one individual with an AR15 that day at this time and that is Leonard. He had it before,

he had it that day, he had it when they got back down here. You remember the testimony about that. No question. Two or three people. He carried it out with him. And where did they go? Well, they ended up ultimately at a place named Running's as well as Crow Dog. And what happened to the rest of the weapons down here? There isn't any question. That's the last place four weapons that belonged to the agents were. One of them was a revolver of an agent and that ends up in an RV with Leonard Peltier in Oregon with his fingerprints on the paper bag. Only one, but that's good enough as far as the experts to be 100 percent. You don't have to have five of them.

But there are seven others that the defense, you remember, spent a lot of time with. Six and one. They went through all that, but you remember Hughes, he reported on his. It was night. Getting dark. Remember all about the things, the number of items, et cetera. He made a mistake and he said, "Either I made a mistake or the lab made a mistake," and that's a conclusion I thought honestly and fairly all of {5157} us here can conclude. One of the others did because there were seven. There isn't any question about it. Now where were those seven? Where were they found? Remember where he said they found them, up by the green house. Now they don't match with that AR15. And there is a place the defense, Counsel and I wholly, heartily, unanimously agree. But I say to you as reasonable men and women, what's that really got to do with anything? Who is the phantom at that particular moment? That's why so much time was and why I did mention the kinds of ammunition that you take a look at there because that kind of ammunition that was there as well as found down here in the van which makes up then the total rounds here (indicating). Not the ones down here but the seven, the six and one that come from the kind of ammunition that FBI people get and get from certain arsenals. And if you'll remember the testimony, there were some agents late in the day who came up here and they certainly had weapons of this kind that shot those kind of rounds and they made an assault and you'll remember that there was testimony that before they got there to that point there was some rapid fire. If you have any doubts about it, you'll remember the bullet holes, at least some of them possibly that were in the houses up there at the end of the day. And when people take a look at it with photographs and in a movie that you saw as Government's Exhibit

10, there is no question where those rounds came from. {5158} They didn't come from the person who committed the murder down here, they came from the FBI. No question, when they went across here (indicating). The kind of ammunition that the FBI used. They're not the kind of ammunition that was found in the trunk, they're not the kind of ammunition that was found here, they're not the kind of ammunition that was found down here, that's the kind that you can get on the commercial market that the FBI doesn't use.

But if there was any doubt at all in any of our minds, let us just for one moment in conclusion deal with what continues to happen. I don't think there is any question in your mind as to who took out what guns from there that day. Robideau took out a shotgun and the other long weapon of the FBI agent. No question. Do you remember what one of the witnesses said? "Green sticker, FBI." Never had seen them before until they were taking them out, and that just might be the reason why he left the Commando down at tent city, because it's pretty tough to carry three they have had and through testimony had been firing.

Dino Butler, he carried out the long gun, the big gun, the M1. No question about that, where he was, and that's why he put the specific items up there. Where he was, where the testimony says he was is where the rounds from the big gun are, and the same with all the rest of the basic weapons.

But some other interesting items. There were two {5159} revolvers. Remember. And they had never been seen before. A long one and a short one. But who loads up then part of the gear that's involved in the take out? Some of the same participants. And what happens with the same kind of massive guns and everything else that goes with the guns? There is so many of them that it blows up on the turnpike.

Now I don't know what these weapons are but they aren't at Pine Ridge. You aren't defending the women and children on the highway in Wichita with these weapons and with these kind of weapons. You buy a vehicle and do you use your name, Leonard Peltier? You use a name Martenez, and I think if you look at the defendant since the time you have been here you might conclude that might be a pretty good name to kind of reflect maybe what some people conclude your name might be or your heritage. And you move on out, and what kind of artillery, to use a phrase, do you have to protect

the women and children in Oregon, not on Pine Ridge. The same kind of weapons. Now maybe you can buy all of those military weapons, the ones that are military weapons at the corner gun shop. I don't know. But I just ask you as reasonable men and women, how many times have you seen that many in the presence of one man without drawing a reasonable conclusion from it. What difference does it make whether he had Coler's pistol in the car in Denver? The government isn't contending anything about it being significant or important or even a {5160} conclusion that the pistol was in Denver. The significant, important point is that it is in the vehicle of this defendant where he is seated with his fingerprint on it in Oregon and it's the same one that was in the possession of one of the two FBI agents when they were executed.

{5161}

But let's visit just lastly about some of the things that may show a state of mind or a frame of mind, that might or might not exist as far as what this Defendant's actions were. Beyond all the guns, beyond the fact that he was wanted at the time the two agents appear on the scene, what was the reaction to the next group of officers that he had a meeting with? The same thing exactly, go out blazing.

Now, defense can argue all they want to about again that some type of thinking or reasoning or something else about a conclusion that, "Well, it couldn't have been this fellow because he was not the driver that drove the van down on -- down the highway."

Now, you might be able to convince yourself of that, but I know there is an officer who sat on that stand that's not going to be convinced of that because he was there. You heard his testimony, you heard where he said the shot came from. It came from somebody who left the van and took off and did it blazing at about the point he is going over the fence. Maybe possibly circumstantially we might conclude then when he shot a round in return and it was buckshot, that maybe, just possibly the injuries that were sustained by this Defendant that were known at a little later time, just might as reasonable men and women happen at that time and on that occasion.

{5162}

Now, doesn't that kind of sound like the same kind of an encounter?

An officer just trying to do his job, as you expect him to do, not Pine Ridge but on Interstate 80, Interstate 80 out there.

Now, what about the next, the next time there is an encounter? Once again with arms, loaded, you heard the testimony, even rounds in the chamber; and what does he say on that occasion, as well as what the physical evidence shows? The same attitude and frame of mind for which he is wanted, for which two agents paid their life for, the matter of this trial, law enforcement officers, not FBI, highway patrol, whatever they were, in Oregon, and the same thing up in Canada; and "I would have blown you," whatever the phrase was, I don't remember what it was, but I think as reasonable men and women you concluded something.

Now, where there is self defense for the protection of women and children involved in what that evidence concludes as reasonable men and women, I say to you, there is not one scintilla, that when you put all the pieces together as a puzzle, or when you put all the words, lines, paragraphs, pages into the whole book together as reasonable men and women now, at this point, at this time in the trial you can come but to one reasonable conclusion.

{5163}

Maybe Leonard Peltier didn't beyond any doubt pull the trigger with his AR-15 down at the scene; but I think as reasonable men and women you could conclude that honestly and fairly -- but I don't think there is any doubt in anybody's mind that he didn't aid and abet and participate in the killing, mercilessly of two FBI agents that day, because if you only would take the testimony of what may be, might be called or referred to as the Defendant's witness, Brown, and what he said and what he observed, and with what else you know, I think as reasonable men and women you would have to conclude that he at least, when he got out of that vehicle with his gun blazing -- and you remember what Brown said, he was down when he saw him and he was up, and he was down and he was firing -- what way, what way could you claim that two agents with pistols at the beginning, that that is self defense, that that's not aiding and abetting in cold murder. Then you draw whatever conclusion you have.

Lastly, I believe that our view of this total situation speaks loudly and clear to you as to the part that Leonard Peltier plays. There was another

person who died that day, and he had a right to live too just as much as two agents except for his actions that day. What was he doing? I submit to you he was doing exactly {5164} what his leader, Leonard Peltier -- the testimony doesn't say it, it says -- that Leonard said it to Joe, but he said it to the young teen-agers that were there, "That if you don't stand and if you don't do certain things, then there are certain consequences."

And I submit to you, Joe Stuntz unfortunately carried out those very kind of orders that day, and not at the time that two agents were killed but in carrying out those orders at a later, subsequent time in blazing away when people came out of the woods and said, "Throw down your arms," not the word, "please", or "pretty please", but almost words to that effect. "Throw your guns down and come out," but they came out once again just as the Defendant came out of his vehicle at the "Y" in the road, with his guns blazing; but the difference was at that time, instead of two agents with just pistols and then trying to get at two weapons in a trunk, one of which is a shotgun which literally again was of no value or help to him, that there were people with other weapons of the same type and nature at that time, and there was return fire.

THE COURT: Mr. Hultman --

MR. HULTMAN: (Interrupting) Could I just conclude with one sentence, your Honor?

THE COURT: Very well.

{5165}

MR. HULTMAN: In conclusion, you, not the lawyers, are the first and the last in this search for truth. I believe justice today in this courtroom is just as precise and is to be tested in this time as in those times that counsel referred to, when a very wise man said, "Justice is the virtue of the soul, distributing that which each person deserves."

The Government in this case is asking nothing more, but justice demands nothing less.

THE COURT: We have kept you later today than we normally do, but we will start later tomorrow, so the jury is now excused until 11:00 o'clock tomorrow morning. The Court has a few more things to take care of. The Court will remain in session. The jury may leave.

(Whereupon, at 6:33 o'clock, p.m., the jury left the courtroom; and

the following further proceedings were had out of the presence and hearing of the jury:)

THE COURT: Mr. Lowe, I believe you wanted to make a statement on an offer of proof?

MR. LOWE: Your Honor, I would be happy to do it now, but in view of the hour would your Honor prefer to convene a little bit before 11:00 o'clock? I think we are all pretty well dragged out today.

It may take a little while to read some of these things. I was, frankly, not anticipating your Honor would {5166} ask for that now. I had anticipated it would be after the charge, after the Jury was sent out to deliberate.

I don't even have my notes with me on that.

THE COURT: Very well.

What we will do then is reconvene at 10:30 tomorrow morning.

MR. LOWE: Fine. I do have one matter I would like to take up. I would like to make an objection on the record to Mr. Hultman using the evidence of the events in Oregon to show the propensity or character of Mr. Peltier rather than merely to argue a motivation for flight. I believe the essence of your Honor's ruling, if anything, was it was relevant to show reason for flight.

Whether that was specifically stated or not, it would be clearly the only tolerable purpose which would be proper for that evidence. Mr. Hultman went far beyond that.

We believe it is objectionable and move for a mistrial on that ground.

THE COURT: The motion for a mistrial is denied. The jury will be appropriately instructed on that matter, on the matter of what that evidence can be used for.

MR. LOWE: Of course, the problem is Mr. Hultman already argued on an impermissible basis, so nothing the {5167} Court can say now can possibly change that.

THE COURT: That is true. If it was on an impermissible basis, there has been other argument also that was on an impermissible basis; but I think that frequently happens, and I am speaking -- well, I am just speaking to comments that Mr. Taikeff made which I construed to be in violation of the previous rule that I had laid down, but I do not intend to do anything about either one of them. I think the jury is capable of sorting this matter

out and following the instructions of the Court.

MR. TAIKEFF: Would your Honor inform me what rule your Honor thinks I violated?

THE COURT: Yes. You quoted two different times direct quotes from the transcript, and I had laid down the rule that there was to be no direct quotes.

MR. TAIKEFF: I wasn't reading from the transcript, but notes which I had made.

THE COURT: They were directly taken from the transcript.

MR. TAIKEFF: From my understanding, we were not to reveal to the jury we were reading from the transcript so that they would not be impressed with the fact that we had a better source or a better recollection than they, and at no time did I have any page from the transcript with me. I had only handwritten notes.

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MR. HULTMAN: I did want to object on the record --

THE COURT: (Interrupting) As I say, I am ignoring it all.

MR. HULTMAN: I have one comment. I think it was very unfair -- I did not respond because I think it would have put it in a worse light -- when counsel referred specifically to the trial in Cedar Rapids, and I do object to that on the record.

THE COURT: The Court will then stand in recess until 10:30 tomorrow morning.

(Whereupon, at 6:37 o'clock, p.m., the trial of the within cause was adjourned until 10:30, on Saturday, April 16, 1977.)