VOLUME X

{1935}

TUESDAY MORNING SESSION

March 29, 1977

(Whereupon, the following proceedings were had and entered of record on Tuesday morning, March 29, 1977 at 9:00 o'clock A.M. without the jury being present and the defendant being present in person:

MR. TAIKEFF: Good morning, Your Honor.

THE COURT: Good morning.

MR. TAIKEFF: There's just one matter for the Court, and that is to ask whether or not Your Honor has ruled on Defense Exhibit 75.

THE COURT: I was going to take that up.

MR. TAIKEFF: Thank you.

THE COURT: First of all with regard to the request that the jury be permitted to view an object through the rifle telescope measured a half a mile, that some site be selected, that request is denied. The reason for the denial is that there is no way to duplicate the exact conditions that may have existed on the 26th of June, the exact distance there which the witness testified that he had viewed the object is not known. It was only an estimate. And the Court is of the opinion that differing conditions of light, atmospheric conditions, background and even the viewer itself are such that to go through that exercise would have no probative value.

With reference to the exhibits that were offered {1936} yesterday afternoon and specifically Exhibit 122 the Court notes that page 18 which appears to be the last, the last pate of Exhibit 122, the following statement appears: "The aforementioned inventory was divided in the search as follows: Special Agent Robert D. Harvey and Harry Thomas Evans inventoried items 1 through 103.

"Special Agent Kenneth J. Andrus and Special Agent Cortlandt Cunningham inventoried items 1 through 6. List had a page 9 dealing with radio equipment and ending on page 11 through 12.

"Section dealing with firearms and explosive specimens, items 1 to 33 was inventoried by Special Agent Cunningham and Special Agent Edmund W. Kelso.

"Items listed under miscellaneous items, 1 through 32, were inventoried by Special Agents Robert D. Harvey, Kenneth J. Andrus and Harry Thomas Evans."

It's obvious that on the basis of the decision of the Court of Appeals in the United States v. Cloudman, 534 F.2d 123 (1976), and from the nature of the exhibit, that Exhibit 122 is not admissible.

MR. LOWE: That would be until such time as we produce or lay a foundation with the other people and then only as to those portions that individuals could themselves identify I presume?

THE COURT: Well --

{1937}

MR. LOWE: If what you've said so far any way.

THE COURT: Yes. That may make it admissible. I'm not ruling at this time.

MR. LOWE: Yes.

THE COURT: On Exhibits 120, 121 and 123 it appears to me that those exhibits may be cumulative and to the extent that they are cumulative they have no probative value. On the other hand I believe it to be within the discretion of the Court where these exhibits are simply a listing by the special agents of the items found, the Court will admit Exhibits 120, 121 and 123.

Court had reserved ruling on Exhibit 106. That exhibit will not be received, again on the basis of the United States vs. Cloudman.

MR. LOWE: Could Your Honor just identify by some description what 106 is. We don't have a --

THE COURT: It is the 302 prepared by Special Agent Frederick Coward relating to Stoldt.

MR. LOWE: And Your Honor is using the Cloudman decision. I'm not sure I understand just by citing that case what the reason is. Could Your Honor just state it so that we have guidance on that.

THE COURT: I'll just read the appropriate paragraph. "It is next claimed that the trial court erred in refusing to admit into evidence Defendant's Exhibit A. Exhibit A was an {1938} FBI report of an interview by Agent Flynn with Charla Kalsato, a government witness. Prior to the testimony of Kalsato defense was furnished a copy of Agent Flynn's report. It was not a signed statement nor was it adopted by the witness, but was merely a reduction to writing by an FBI agent of an oral interview. As such it was hearsay and the District Court properly excluded it. Defense counsel used the report in cross-examination of the witness and then offered the report itself into evidence.

"The FBI agent who made the writing of the report was present and available for calling, yet counsel chose not to call him. This would have been the proper --"

MR. TAIKEFF: Your Honor, may I inquire whether the last offer that Your Honor rejected, I think the number was 103, was it a paragraph in the

report? It's hard for me to keep track of all these documents by number. My recollection seems to be 103. We're talking only about a single paragraph in that report, or maybe it's 106.

{1939}

THE COURT: 106 is the one you have reference to.

MR. TAIKEFF: Am I correct, Your Honor, that that paragraph is contained within a 302 which was authorized by Coward?

THE COURT: Yes.

MR. TAIKEFF: And it concerns what was said to him by Stoldt?

THE COURT: That's right.

MR. TAIKEFF: Your Honor, that was offered to show what Stoldt said to him on that particular occasion and he said that he could not testify from his own memory. Therefore, I not only could not use the report to impeach his memory but couldn't get into evidence out of his mouth what Stoldt said to him, he being the only witness to what he heard. And so I then questioned him as to whether or not that when written represented what was a fresh recollection in his mind at the time and it was specifically offered as a past recollection recorded. So Your Honor's citation to the eighth circuit rejection of the appellant's position on the basis of hearsay is not apt with respect to that particular paragraph because it is, I trust, basic that a past recollection recorded is an exception to the hearsay rule so that if it's hearsay it's not restricted as hearsay normally is on the one hand. On the other hand, the eighth circuit case refers to the fact that the document was employed {1940} sufficiently or adequately in cross-examination and, hence, the jury was able to hear it as impeachment evidence as opposed to evidence in chief. But in connection with my inquiry of Agent Coward, there was no evidence in chief because he said he can't remember what he was told and so I laid a proper foundation to introduce it as evidence in chief, not as impeachment material and, hence, I believe that the basis of Your Honor's ruling is not appropriate to that particular paragraph.

THE COURT: You are seeking through this paragraph to have Coward testify as to what Stoldt said to him?

MR. TAIKEFF: That is correct, Your Honor. To show what Stoldt said.

We obviously take the position that the facts asserted by these two people are not true. That alone takes it out of the definition of hearsay. Hearsay is defined as an out of court declaration which is offered to prove the facts asserted therein. Our position is to show that the facts asserted are false, they are not true, so it isn't hearsay to begin with. However, perhaps it may be hearsay. If it is, there is an exception to the hearsay

rule.

Mr. Lowe encourages me to call Your Honor's attention to the fact that what I am trying to do is prove the utterance, not the content. I want to prove the utterance because our position is that the utterance is false and the {1941} content of that paragraph helps us establish that fact. So it's not hearsay to being with and if it is there is an exception for it.

THE COURT: It seems to be the difficulty with your position is that the utterance isn't before the Court.

MR. TAIKEFF: It is before the Court, Your Honor. There is testimony from the witness that there was such an interview. Am I correct that that is the 302 of September 4? Lower left-hand corner date is the one I'm referring to.

THE COURT: September 4.

MR. TAIKEFF: Yes, Your Honor. There was testimony that there was an interview on that day. That was the delayed interview for which he had no time on June 26th because he was preoccupied and it was two or more months later when he finally got around to interviewing Stoldt and no longer remembered what Stoldt said to him. Now I offer that to show what Stoldt said to him.

In addition to that, it also shows what he wrote on that day purporting to be what Stoldt said to him. Now that then would be an act of his. He can't remember out of his mind what he act was, i.e., the dictation to the stenographer. But there is no question but that the typing of that followed upon the dictation so it is an accurate reflection presumably of what he said to the stenographer-typist, and he then looked at it and initialed it for accuracy which is further {1942} confirmation of the reliability of the text to show what he said Stoldt said. That's all I want to show.

I specifically, and I think it should be clear from the defense position thus far that we do not acknowledge the truth of those statements. Quite the contrary. I want to show either what Stoldt purportedly said to him that day because of certain arguments that may be made with reference to it, through the significance of him having said that, if he said it, or in the alternative the physical act of Coward in writing or dictating that paragraph.

MR. SIKMA: Your Honor, may I be heard for just a moment?

THE COURT: You may.

MR. SIKMA: It seems to me that it's totally irrelevant. Defense counsel indicates that a prospective witness, the defendant indicated he's going to call that witness, has made a statement sometime during the course of

the investigation. The government has not called that witness. The defense counsel is saying that that witness made a statement that was not true but he wants to use this hearsay statement, this transcript, or, it isn't a transcript, it's a summary of an interview. It isn't even a verbatim statement of that particular witness, and use that as evidence of some sort of defense. Well, it seems to me that it's totally immaterial and irrelevant. It's sometime during the {1943} course of an investigation that a witness or prospective witness made a statement that is not used as proof against the defendant concerning his guilt, number one, and, number two, isn't even being called as a government witness. That seems to me to be totally irrelevant. Even if there is some theory under with the statement could be used, if it were used for some legitimate purpose, there still has to be some materiality to the information which is contained in that statement.

The defense can't set up straw men. The defense can't call witnesses concerning things that have nothing to do with this case in an attempt to use that as a defense in this case.

The government isn't calling this witness, it isn't being used as evidence against the defendant so it seems to me rather strange that the defendant here should be trying to introduce evidence that someone made a statement which they're now claiming isn't true. Since it isn't being used in any sense in this case, the best evidence would be the witness who could be called to testify to that, if it in fact were even relevant in this case. We submit it's totally irrelevant.

MR. TAIKEFF: Your Honor, I just wanted to point out that I think the defense needs a Sikma English interpreter because I'm not entirely certain that Mr. Sikma has said {1944} anything that one could make sense of.

First of all, I think it appropriate to observe that something cannot be irrelevant and immaterial and he interchanges the use of those words so I don't know what his argument meant.

The point is, it's not hearsay. We do not offer it for proof of the facts asserted therein so his entire argument on the subject of hearsay is meaningless. His argument is irrelevant.

{1945}

We offer it to show that an event took place and that it was so said to the agent, or that the agent wrote those words on a piece of paper by the facilities of a FBI stenographer. That is the purpose offering that paragraph.

THE COURT: I think, Mr. Taikeff, it you will review Rule 401, you will probably conclude that a piece of evidence can be both irrelevant and

immaterial. 401 is the definition of relevant evidence.

MR. TAIKEFF: I am afraid that I don't share your Honor's view.

THE COURT: Very well.

MR. TAIKEFF: It says, if I read it correctly, that something is relevant if it tends to show that a fact in dispute is either more likely or less likely to have occurred. That is exactly why we offered that paragraph.

THE COURT: With reference to Defendant's Exhibit 75, the first two pages of that exhibit are in evidence.

The Court on examination of the exhibit, finds that there are many items contained in that exhibit which are hearsay and for which there are no exceptions; and therefore, the balance of Exhibit 75 is not admitted.

MR. LOWE: Your Honor, so that our record may be protected, if not for persuasion of your Honor as to alternative bases for admitting it, I would point out that {1946} by any stretch of any person's imagination what took place on June 26th as to the FBI Agents and BIA Agents, using the radio, was excited utterances; and by that basis alone the radio transmissions would be exceptions to the hearsay rule where the presence of a declarant is immaterial.

Secondly, what we are really offering that for, one of the reasons is what Ann Johnson perceived in terms of what she heard taking place on the radio network. It is not for that purpose offered for the truth of what took place, but to show the occurrence of certain radio traffic at certain times.

It is certainly under that sense a presence sense impression of an event or condition that is taking place which was made contemporaneously with or shortly after the occurrence of the event and was taken down in her instance in shorthand. While it does not purport to be verbatim, she certainly adopts it as being as accurate as she could make it, that she was personally observing the times on the clock. We offer it at least on that basis to show an event that was taking place, that is, the reception of the radio traffic and what she perceived.

We feel for that purpose at least it is relevant.

THE COURT: If it is offered only for what she perceived and not for the truth of what she perceived, then it seems to me it is relevant.
{1947}

MR. LOWE: No, your Honor. If she perceived that an agent said at two -- let's say at 12:18 an agent said, "There is a red pickup truck that just left the area," we do not offer it to prove that a red pickup truck just left the area. We do offer it to prove there was an utterance by Special

Agent Gary Adams at that time to the effect that a red pickup truck just left the area.

She obviously has no way of knowing whether Agent Adams was actually observing that or not. She does know that is what Agent Adams uttered at that time.

That is why we are offering it, as a primary reason, all of the traffic, just to show at those particular times the people -- Agents or BIA officers made the utterances at that time, not to show that the utterances were factually correct or true at the time they made them.

THE COURT: Secondly, the Court does not construe these radio communications beyond the first two pages to be excited utterances.

You have in this case trained investigative law enforcement personnel of two or three different agencies -- considering the South Dakota Highway Patrol, I do not know whether they appeared -- you have the BIA and the Federal Bureau of Investigation, routinely in the course of making a search making radio transmissions. I do not construe that as excited utterances.

{1948}

MR. LOWE: I understand your Honor's ruling on that. I want to be sure your Honor understands that is not the supporting foundation I said, that the utterances were made by these officers on their radio at the time they made them.

There are two distinct categories, I think your Honor is expressing. I want you to understand that's my reasoning.

THE COURT: Very well.

Are we ready for the jury?

MR. TAIKEFF: Yes.

THE COURT: They may be brought in.

(Whereupon at 9:27 o'clock, a.m., the jury returned to the courtroom; and the following further proceedings were had in the presence and hearing of the jury:)

GERARD P. WARING,

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

MR. TAIKEFF: May I proceed, your Honor?

THE COURT: You may proceed.

CROSS EXAMINATION

By MR. TAIKEFF:

Q Mr. Waring, what time did you leave this courtroom last night?

A I think it was approximately 5:30 or so.

{1949}

Q And between that time and now have you discussed any of the testimony you gave yesterday with anybody?

A No, sir.

Q Have you reviewed any documents or other matter?

A No, sir.

Q After the jury left at approximately three minutes to 5:00 last night, you gave additional testimony in the absence of the jury, did you not?

A Yes, sir.

Q At this time is there any reason you have to change any of the answers you gave in the absence of the jury?

A No, sir.

{1950}

Q Has anything come to your attention, or to your recollection since yesterday at 5:30 that suggests to you that there is a possibility that you might be uncertain about any of the answers that you gave in the absence of the jury?

A No, sir.

Q Now, when you first went on the stand yesterday to give your direct examination were you then or had you recently been aware of the fact that on a certain 302 of yours the date of dictation was listed as June 30, 1975 and the date of typing was listed as June 26, 1975?

A I had been aware of that for some time, yes, sir.

Q But my specific question was: Were you aware of it at the time you got on the stand?

A Yes, sir.

Q I'm placing before you Defendant's Exhibit 83 for identification. Is that the 302 I just referred to?

A Yes, it is, sir.

Q Am I correct, sir, that the document has eight pages?

A There's eight pages. Page 4 is about, approximately one-half a page to a quarter page.

Q But it has eight separate sheets with at least some typing on each of them?

A Yes, it does.

Q And the pages are numbered 1 through 8?

A Yes, sir.

{1951}

Q Now, page 4 isn't a full page of typing; is that correct?

A That's correct, sir.

Q It's as you said, what, about a quarter of a page or a third of a page?

A Runs about a quarter of a page, yes, sir.

Q The rest of the page is blank?

A Yes, sir.

Q Now, at the top of the next page, which is page number 5, the report continues to describe events which you experienced on June 26, 1975?

A Yes, sir.

Q And what is the earliest time mentioned at the top of page 5?

A 12:30 to 1:00 P.M.

Q What is the earliest time mentioned?

A That would be the first sentence. It says approximately 12:30.

Q 12:30.

Now, would you look at pages 1 through 4 and then again pages 5 through 8 and tell us whether based on your own personal observations at this time the material on pages 1 through 4 is typed on a different typewriter than the material on pages 5 through 8?

A I can't say definitely if it was or was not.

Q As you look at pages 1 through 4 and then again at 5 through {1952} 8 do you not detect an entirely different appearance in the type styles without getting down to the specific details of any letter or number, just a general sense impression?

A Like I previously stated I don't see a difference in it.

MR. TAIKEFF: Your Honor, I offer that document in evidence so that the jury may evaluate that answer.

MR. HULTMAN: Your Honor, the Government resists on the grounds that it is very obvious. This is an attempt to get before the jury a document which counsel has questioned and can continue to question this witness about; and the document itself is purely cumulative and repetitive and it's not the best evidence.

If he wishes to specifically point out anything by this witness or any other concerning what might appear there, there is a proper method in which to do it and I would object for these reasons.

THE COURT: Sustained.

Q (By Mr. Taikeff) Sir, I ask you to take a look at the first page and the sixth page. With respect to the first page, please look at the second paragraph on the fifth line and tell me whether it contains the date June

25, 1975?

A That's the first page, second paragraph, line 5. It does, sir.

Q On that same page look in the lower right-hand corner and tell me whether there is a code number or serial number which {1953} is an FBI case number or the equivalent?

A In the corner --

Q Lower right-hand corner after the word "South Dakota".

A It says "MP".

Q Yes. Do you recognize that as a code number, case number, some sort of an FBI serial number?

A It just designates a case number.

Q Okay. And it's present there in the lower right-hand corner, is it not?

A Yes, sir.

Q All right. Now, would you take a look at page number 6. In the upper left-hand corner of that page do you find that case number which was in the lower right-hand corner of the first page?

A yes, sir.

Q And in the, roughly the middle of the first full paragraph which you might call the second paragraph, the one that begins at this point, do you find reference to two hundred fifty, written out as a number, yards?

A Yes, sir.

Q In the last paragraph on that page do you find on the third line 75 yards, but with the 75 written as digits?

A Yes, sir.

Q Now, sir, I ask you to compare those portions of page 1 that I've called your attention, with portions of page 6, {1954} specifically looking at the seven which appears in both places on page 7, and the seven which appears in both pages on page 6 and tell me whether or not you are fairly certain that they are distinguishingly different sevens?

A I can't be certain that they are, sir.

Q Now, I want you to take a look at the five which appears in June 25, 1975, twice on page 1 and the five which is in two hundred fifty yards, and seventy-five yards on page 6, and looking at the five in both instances tell me whether or not it is your perception that those fives are clearly different shape characters?

A I'd have to say again not clearly.

Q Tell me, sir, whether Defendant's Exhibit 126, which I place before you, is a reproduction on clear celluloid of page 1 of Defendant's Exhibit

83? Yes or no.

A Yes, sir.

Q Tell me whether Defendant's Exhibit 127 is similarly a duplication of page 6?

A Yes, sir.

Q Tell me whether Defendant's Exhibit 128 contains that portion of page 1 which has the date and the word before it and the two words after it from the second paragraph of page 1?

MR. HULTMAN: Your Honor, at this time the Government, I think the questions have been asked and have been answered and asked again and answered again to the best of ability of {1955} the witness. I have no objection at this time that if counsel wishes to stipulate into the record that it would appear with those letters that it could so be interpreted, to so stipulate into the record at this time.

MR. TAIKEFF: Your Honor, I appreciate Mr. Hultman's offer at this particular time but I believe this witness's credibility is in issue and I am at this time attempting to explore his credibility if I may be permitted to continue. I reject the stipulation.

MR. HULTMAN: I again would then enter my objection that these particular questions have been asked and answered and asked and answered and it's repetitive.

MR. TAIKEFF: I don't see how he could say they have been asked and answered. I have one more exhibit I haven't made reference to.

MR. HULTMAN: He excluded the two by way of comparison and anything else by way of any of the letters on the pages not in issue in any way.

MR. TAIKEFF: Your Honor, I am using these exhibits and these questions to lay a foundation for further cross-examination.

THE COURT: Counsel please approach the bench.

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

THE COURT: I am having difficulty understanding how {1956} this could impeach this witness. In the first place he has testified that he dictated to two different stenographers. I don't think it's particularly inconceivable that two different stenographers would type on two different typewriters.

MR. TAIKEFF: That's precisely where it is a serious credibility question because he persists in not admitting what is clear to the naked eye.

I think the jury is entitled to evaluate his testimony, his candor in light of what is clear in the face of these documents.

THE COURT: The second problem that I see with that is that under the

modern typewriters if you change the ball you've got a different type.

MR. TAIKEFF: I understand that, but that doesn't go to the question of admissibility. That goes to the question of weight and it's the Government's function to bring that out.

THE COURT: I'm aware of that, but it seems to me that you are getting into a collateral issue here which really gets down to an argumentative basis without any, that has no relevancy to the credibility of the witness or anything else.

MR. TAIKEFF: Your Honor, I'm not seeking to call an expert to the stand to testify in rebuttal on a collateral issue. I am questioning this witness's veracity and his {1957} willingness to answer forthrightly and candidly.

THE COURT: He has answered and you are bound by the answer.

MR. TAIKEFF: I'm not bound by the answer, Your Honor, only in the sense that I cannot call a witness in rebuttal am I bound by the answer. I am not bound by the answer in that I cannot probe him.

THE COURT: You are bound by his answer that he can see no particular distinction.

MR. TAIKEFF: But the jury must be in a position to evaluate the truthfulness of that statement.

THE COURT: He can be perfectly truthful and still see no distinction.

MR. TAIKEFF: But they can decide that that isn't true. That's a question of fact for the jury, not for Your Honor or for the Government or even for me. Only they can determine that.

MR. HULTMAN: Your Honor, I would just come back to the fact that the questions have been asked and asked. It's a very simple question about a specific two numbers. I submit it's not as plain. I looked at the pages myself, Counsel, and I thought they were typed on exactly the same.

Frankly, when you point -- now, wait until I finish.

MR. TAIKEFF: I wasn't going to interrupt.

MR. HULTMAN: When I finally looked at the two specific {1958} numbers to which you are referring I have difficulty myself, and I think I would probably give the same answer or the same response that you're trying to elicit a hard yes or a hard no from this witness. He has given an answer that falls somewhere between those two particular categories and I submit the question has been asked Your Honor. It's been answered and for that reason I object.

THE COURT: The other problem you have here is really what you are doing, you're not probing the direct testimony of the witness. You are simply

setting up straw men and then attempting to knock them down.

MR. TAIKEFF: Your Honor, this witness has perceived things which he's testified about. If his ability to perceive in the eyes of the jury is so ineffectual that he cannot see the difference between the fives and the sevens on those typewritten samples then he's a cripple and the jury should know that he's a cripple.

THE COURT: The objection is sustained. There will be no further inquiry on this point.

MR. TAIKEFF: Well, they're marked in evidence.

MR. LOWE: May we have a clarification, Judge, as to your practice. When we mark something for identification is additional proffering necessary in order to make it a part of the record for proffer purposes for an appellate record? Do we actually have to say we offer this as a proffer?
{1959}

THE COURT: I will direct as long as you offer it, or I mean you've marked it, and have offered it I will direct that it be made a part of the record.

MR. TAIKEFF: Could I just ask one more foundation question for the purpose of protecting the record?

MR. LOWE: Let me just ask one more thing with regard that we would ask Your Honor any time we make an offer and you reject it that it can be considered that that is a proffered item, that's all. I think that's what you said.

THE COURT: I think it should properly be made a part of the record, not a part of the exhibit record to the jury for its deliberations, but a part of the record of the case for appeal. If an appeal should arise in this case it would go to the Court of Appeals.

MR. LOWE: That's all I want to clear, is that that is what your understanding is because that's my understanding.

THE COURT: That is my understanding, right.

MR. TAIKEFF: I was wondering whether the Government had lost interest. There was a matter I'd like to -- could we invite them back.

THE COURT: Yes.

The conference, bench conference is still on.

MR. HULTMAN: I thought the Court ruled and I assumed that was the end of the matter, Your Honor.

MR. TAIKEFF: Okay. There are two points. I just want {1960} to lay additional foundations on my record so it is complete, and I don't believe the question with respect to 129 was answered. So if I go back, I don't want

to be considered to be repeating myself. I'm repeating the question only because there was not an answer. It was interrupted by objection.

Secondly, Mr. Hultman on a number of occasions that I'm aware of has said that a question has been asked and answered. Now, in reviewing the record I find that he makes that statement when indeed no question has been repeated. It's maybe that he feels that a certain subject has been gone into too much and I would trust that if that is his opinion he would state his objection that way so there is no confusion in the record or in the minds of the jury as to what his position is.

I don't want to end up having an exchange with him through the Court over a matter such as that, but I think it is unintentional, but nevertheless unfair for him to characterize an objection one way which is factually unfounded when he has from an advocate's point of view a legitimate basis for making his objection. But he shouldn't misstate what the basis of that objection is.

MR. HULTMAN: Well, could I respond to that, Your Honor?

THE COURT: You may.

MR. HULTMAN: I've tried to do my best and if my memory is correct, and I don't have the transcript in front of {1961} me to find the exact page instantaneous, Counsel, as you can well appreciate, but I would state that to the very best of my ability that the very question, in substance, not exactly may be the exact words from first word to last, of the last question has been asked and answered, and not once but at least twice or more times, and that was the basis, one of the basis for my objection just now.

MR. TAIKEFF: I would just say that if I didn't think that Mr. Hultman was doing his best and what he believes to be, and I don't say that facetiously, appropriate and honest way, I would not have brought the matter up here in private. I would have said some thing about it before the jury.

MR. HULTMAN: I understand, and I will do my best.

THE COURT: Very well.

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

MR. TAIKEFF: May I proceed, Your Honor?

THE COURT: You may.

{1962}

Q I believe, sir, I was up to showing you No. 128 for identification and at that time you had before you both Defendant's Exhibit 83 and 127 and 126 for identification and the question I put to you is whether 128 contains the date June 25, 1975 from page 1, including the word before it and the

two words including the punctuation after it? You can lay them over each other and hold them up to the light if you like.

A Yes.

Q Okay.

Finally, would you tell us whether Defendant's Exhibit 129 for identification contains elements from page 6; namely, the case number from the upper left-hand corner, the phrase, "250 yards west," from that same page and the phrase "75 yards" from that same page all as circled in green on 127 for identification?

A Yes.

MR. HULTMAN: Your Honor, could I ask just a question of Counsel at this particular point?

MR. TAIKEFF: No objection, Your Honor.

MR. HULTMAN: Counsel, is it my understanding that Exhibits 126, 127, 128 and 129 are parts of exhibits, proposed Exhibit 83?

MR. TAIKEFF: Yes. Two of them are full pages and correspondence. Each of those full pages are excerpts of the specific material referred to.
{1963}

MR. HULTMAN: Now, Your Honor, I reimpose my objection but additionally that because of the response which Counsel has now asked, just has given to Counsel that 126, 127 and 128 serve no purpose whatsoever. They are merely parts of the exhibit that's already been discussed and ruled upon here so I would enter my objection on each of those for the previous reason and now for the additional reason it's repetitive, serves no probative value, cumulative.

MR. TAIKEFF: Your Honor, before I make any offer I'd like to ask one or two more foundation questions and then make my offer so the record is clear.

THE COURT: You may proceed.

Q (By Mr. Taikeff) With respect to 126 through 129 inclusive, you're satisfied that they duplicate one portion or another of Defendant's Exhibit 83, your 302?

A Yes, sir.

MR. TAIKEFF: First, Your Honor, I reoffer 83 so that the jury may not only compare --

MR. HULTMAN: If it please the Court, at this time I'm going to object to any statements made by Counsel and request we approach the bench.

MR. TAIKEFF: I offer 83 for the jury's perusal, the entire document.

MR. HULTMAN: And I object, Your Honor, for all the reasons that I

previously have stated.

{1964}

THE COURT: The objection is sustained.

MR. TAIKEFF: Now, Your Honor, I offer 126 and 127 which are respectively the duplications of pages 1 and 6, that is to say, less than the entire report. Just those two pages.

MR. HULTMAN: And I offer the same objection for all the previous reasons.

THE COURT: The objection is sustained.

MR. TAIKEFF: Now, Your Honor, I offer Defendant's Exhibits 128 and 129 which contain only the small elements from pages 1 and 6 respectively and none of the other words except one or two words sufficient to identify the elements.

MR. HULTMAN: Same objection, Your Honor, for the previous reasons.

THE COURT: Objection is sustained.

MR. TAIKEFF: And finally, Your Honor, I ask permission of the Court to be able to project any or all of the transparencies on the screen so the jury may see what I'm talking about rather than just hear what I'm talking about in questioning this witness further.

MR. HULTMAN: If it please Your Honor, could we approach the bench one more time. I'm going to make an objection.

THE COURT: You've made your objection. The objection is sustained. Let's get on with it.

{1965}

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

THE COURT: The Court has ruled that the matter is irrelevant.

Q (By Mr. Taikeff) As you recall, was there anything special about June 30, 1975?

A June 30 is the date that I dictated my report concerning the June 26th shooting.

Q Anything else special about that day that you can recall?

A Just that I conducted investigation involving the, investigation involving the death of Agents Coler and Williams.

Q In or out of the office?

A At this time I can't recall whether I spent the entire day in or out of the office.

Q Is there anything that you know of that's in existence that would help you remember? A diary or anything at all?

A No, sir.

Q Do you have any means of reconstructing that day in terms of your professional activities?

A The only thing that I'm confident I did that day was dictate my report, as I remember, and that I did continue to work a full day that day.

Q What time did you start working that day?

A At this time I don't know exactly, sir.

Q This was four days after the incident, was it not?

A Yes, sir.

{1966}

Q Do you recall generally what sort of schedule you were working during the first week after the incident? I don't mean from what hour to what hour necessarily but were you working an eight hour day, a 15 hour day?

A Generally, sir, the days were running from maybe an hour to an hour and a half prior to 8:00 A.M. and would go until the evening hours.

Q Did you have any meetings on June 30 with any agents in a group of three or more?

A Well, I can't recall exactly, sir, but there were many conferences that took place during the course of our investigation.

Q I'm talking only about the first four days until such time as I indicate to you otherwise. Do you understand that?

A Yes, sir.

Q June 26th was a Thursday, correct?

A Yes, sir.

Q I want you to focus your attention on that Thursday and the following days, Friday, Saturday, Sunday and Monday. Do you understand that?

A Yes, sir.

Q During that period of time did you have conferences with your fellow agents working on this case?

A Yes.

Q Did you meet with Agent Adams?

{1967}

A Yes, sir.

Q Did you meet with Agent Skelly?

A I believe Agent Skelly was in the area; yes, sir.

Q I asked you whether you met with him, I didn't ask you whether he was in the area. Did you meet with him?

A I don't recall at this time if I specifically met with Agent Skelly.

Q Agent Coward?

A Yes, sir.

Q Agent Hughes?

A Yes, sir.

Q Did you all meet together as a group to discuss the case and how the investigation was developing?

A Yes, sir. As I stated, we had many conferences with many agents, including those agents.

Q Were those conferences, at least in part, scheduled for particular times of day or particular periods in the day?

A Normally they just call a conference, the bosses that were running the investigation.

Q Who were those people?

A That was Mr. Meincke for one, Mr. Zigrossi was there, but I can't recall exactly what day he arrived.

Q Who was the case agent?

A I don't know sir.

Q Wasn't it agent Hughes?

{1968}

A I really don't know who the case agent is at this time, sir

Q Didn't you meet every morning?

A Yes, sir. In a large group.

Q That's what I'm asking you about.

When you met in a group of three or more, how many agents met during those first four days at the morning meetings?

A Normally all of the agents that would be working the investigation would have a conference in the morning.

Q Do you understand that the phrase how many means a number?

A I don't know how many exactly.

Q What's your best estimate?

A I'd say approximately 50.

Q You met in an auditorium?

A No, sir.

Q Where did you meet?

A Met in the building there at Pine Ridge that was opened up. There's a room that's large enough, you sit on the floor and so forth.

Q Did the agents, were the agents free to speak and offer suggestions and comments?

A Yes, sir.

Q Was the development of the investigation from day to day brought to everyone's attention so everyone would know what was going on?

{1969}

A Yes, sir.

Q Did you meet again in the evening?

A On some days we did, sir.

Q I'm talking about those four days only, up to and including Monday, June 30, 1975.

A At this time I don't know if we had a meeting every night those four days, sir.

Q Could you say whether there was a meeting on Monday morning, June 30?

A We were holding regular morning meetings; yes, sir.

Q Did someone preside over the meeting?

A Yes, sir.

Q Was it the same person on each of those four days?

A I can't recall if this was the same individual each day.

Q Can you name the person or persons who presided at any of these large meetings?

A Well, Mr. Zigrossi, Mr. Meincke.

Q Did you have occasion during the period which is under scrutiny right now to speak with any of the BIA people?

A I might have spoken with some of the BI people but specifically I don't recall that.

Q Did you ever speak with anyone by the name of Ecoffey?

A I know Mr. Ecoffey and I have spoken with him; yes, sir.

Q Did you speak with him on the 26th?

A I don't recall if I spoke with him.

{1970}

Q Did you ever read anything which he wrote or purportedly wrote?

A I'm sure I've written things that, excuse me, I'm sure I've read things that he has written; yes, sir.

Q Do you recall whether or not you read a report of his dated June 26, 1975 relating his version of what occurred that day based on his activities and observations?

A No, sir.

Q Would you say that as a general rule, and based upon your years of experience that the FBI hires stenographers who are competent and who do in the main accurate work?

A Yes, sir.

Q In fact, when you cannot recall a date you're satisfied to look

at a 302 and rely upon the date that's on that 302, isn't that correct?

A It's contained in the body of the report; yes, sir.

Q Well, you check reports, do you not, before you initial them?

A Yes, sir.

Q And I assume that you check them for accuracy and completeness, isn't that true?

A Yes, sir.

Q And if you see something which you think at the time you're checking on it doesn't belong there, you would ask the stenographer to correct it, wouldn't you?

{1971}

A If I see it, sir; yes, sir.

Q Now you did check your report that has a date of transcription on it June 26, 1975, did you not?

A Yes, sir.

Q And you initialed it, did you not?

A Yes, sir.

Q And if you found any mistakes you had them corrected, did you not?

A If I found typographical errors; yes, sir.

Q Well, sir, can you tell us why that report reflects the fact that it was dictated on June 30, 1975 but shows a date of transcription of June 26, 1975?

A Yes, sir. Because it was a typographical error that I didn't see before I initialed it.

Q But, sir, which of those two dates was the typographical error, the June 26th or the June 30?

A The June 26th, sir.

Q We can agree, can we not, that it's impossible to dictate something on June 30 that's typed on June 26th?

A That's correct, sir.

Q Isn't it a fact that the first four pages of your 302 which is Defendant's 83 for identification was rewritten on June 30, 1975?

MR. HULTMAN: Your Honor, I haven't objected up until this time but I am now. This whole series of questions and {1972} this whole matter was gone into yesterday and I do object.

THE COURT: I will allow the witness to answer that question.

A Can I have the question again, please.

MR. TAIKEFF: May it be read back.

THE COURT: The question will be read back by the reporter.

(Whereupon, the last question was read back.)

A That's not correct, sir.

Q (By Mr. Taikeff) In connection with writing it, when I say writing you understand that I mean either writing or dictating so that it becomes typewritten, do we have that understanding?

A Yes, sir.

Q Because you are the author of that report, are you not?

A Could I see the report that you refer to?

Yes.

Q Yes. No. 83.

A Yes, sir.

Q When you wrote that portion of 83 for identification which is now the first four pages, isn't it a fact that you recorded certain information there which you did not see or hear on June 26th but wrote it up as if you did?

A That's not correct, sir.

{1973}

Q I am referring to Pages 1924 and '25 of the transcript in this case.

I think you said a few moments ago that the reason why the report shows a transcription date of June 26 and a dictation date of June 30th is because the typist made a typographical error, is that correct?

A That's correct, sir.

Q Now, tell me whether or not the following question was put to you and the following answer given in the proceedings which occurred after the jury was excused last night.

The bottom of Page 1924.

Question: Do you now know something that made you say they may be wrong? There is something on your mind that prompts you to use that phrase "they may be wrong"?

Answer: Well, I know that the date on the other 302 that you're referring to, when the stenographer transposed the date from the dictation dates of the transcription date, they inadvertently put the date of the entry, I believe, or the date of the events of the shooting on the one that I wrote.

Did you give that answer to the question yesterday?

A Yes, sir.

Q And were you referring there to the fact that a typographical error was made?

A Yes, sir, transposing the date would be the typographical error.

{1974}

Q Now, when you gave your direct testimony, you referred to the shooting as that of automatic fire?

A Yes, sir.

Q Is that correct?

A Yes, sir.

Q Now, automatic fire refers to the kind of firing that comes from a machine gun or a sub-machine gun, isn't that true?

A It comes from an automatic weapon which in not every case is described as a machine gun.

Q Well, an automatic weapon is one where, if you pull the trigger once but keep the trigger down, and if the gun keeps working, it shoots out all the bullets until the magazine is empty, isn't that correct?

A Yes, sir.

Q Now, neither you nor any of your fellow agents found any weapons or any evidence of weapons that were automatic, isn't that correct?

A I didn't, sir.

Q Do you know anyone who did?

A You would have to ask the other agents.

Q I asked you if you know anyone.

A No, I don't know of any, sir.

Q It is a fact, is it not, that under the law only law enforcement personnel and the military, except in the very special case of someone who gets a special license, can use an {1975} automatic weapon such as the one I described a moment ago, isn't that correct?

A I think that's correct, sir, but I am not absolutely positive of the law. It is not something that I have studied.

Q Well, if you saw somebody with a sub-machine gun out in the field firing at tin cans, with a Thompson sub-machine gun, and you were still a Special Agent of the Federal Bureau of Investigation, would you arrest that person?

A Not right at that point, sir.

Q You would ask him a question, wouldn't you?

A I would talk to him, yes, sir.

Q You would find out whether that person was a law enforcement officer?

A Yes, sir.

Q Or whether that person was in the military?

A Yes, sir.

Q Or whether that person had a very special and hard to get license permitting that person to possess a fully automatic weapon, right?

A Yes, sir.

Q And if the person didn't satisfy you with respect to one of those three, you would arrest that person, wouldn't you?

A Me personally, sir, I would most likely contact the local police agency.

Q To arrest that person?

{1976}

A To do whatever he feels is proper to do with that individual.

Q And if that person started walking away, would you restrain that person's movement?

A At this time I can't say exactly what I would do in that situation.

MR. HULTMAN: Well, your Honor, I would object now as to any further questions as being highly speculative, no probative value and irrelevant.

THE COURT: Well, he has answered the question.

MR. TAIKEFF: I have no further questions on that point, your Honor.

THE COURT: Very well.

Q (By Mr. Taikeff) Didn't you testify on your direct examination and describe the firing you heard as automatic in a conscious effort to prejudice the jury's mind so that they would believe possibly that automatic weapons were possessed by some of the people from Tent City?

A No, sir. I said that because that's what I heard that day, sir.

Q You had examined the weapons, have you not, which have been introduced into evidence?

A I haven't examined them, sir, but I have seen them, yes, sir

Q You have weapons' training as an FBI Agent?

{1977}

A Yes, sir.

Q Are any of those weapons automatic weapons?

A I would have to look at the weapons, sir, that have been introduced.

MR. TAIKEFF: May the witness do so, your Honor?

THE COURT: You may.

(Witness leaves witness stand and returns.)

A Yes, sir, there are two automatic weapons, sir.

Q (By Mr. Taikeff) Automatic weapons?

A Yes, sir.

Q Would you be kind enough to tell us the exhibit numbers -- do you mean semi-automatic or automatic?

A I didn't look at the exhibit numbers, sir; but the one that is on the top appears to be an automatic weapon, and the second one, I believe,

can be fired in either a semi-automatic or an automatic position. I don't know that for a fact, but I think so.

Q Did you see any of those weapons before you testified yesterday?

A Yes, sir.

Q Now, do I understand that you distinguish between a weapon which is automatic and a weapon which is semi-automatic, as being two different kinds of weapon as far as mode of fire is concerned?

A Yes, sir.

{1978}

Q Now, a semi-automatic weapon is one that doesn't require any movement of the bolt manually but does require a separate pull of the trigger every time you want a bullet to come out, correct?

A That's correct, sir.

Q Now, when you looked at those weapons before you testified, was it then your belief, as it is now, that two of those weapons were automatic weapons? "Yes" or "no".

A When I first saw those automatic weapons, I knew they were automatic weapons, yes, sir.

Q I see. Would be kind enough to take those weapons off the rack?

MR. TAIKEFF: If he may, your Honor.

THE COURT: You may step down.

(Witness leaves witness stand and returns.)

MR. TAIKEFF: The witness is holding Government Exhibit 37-A and 34-AA.

Q (By Mr. Taikeff) Now, the larger weapon, 34-AA, do you know what that is?

A I know it is a .45 caliber.

Q No, the larger one. I don't mean the larger caliber. I mean the longer one.

A This one here, sir?

Q Yes.

A It is an AR-15.

{1979}

Q What is an AR-15, is that a semi-automatic or an automatic weapon?

A I could be fired in either position, sir.

Q Is there a selector switch on there?

A Yes, sir.

Q Isn't it a fact, sir, that it is the military M-16 which is essentially identical to that which is an automatic weapon, and that the AR-15 is a civilian model which can be purchased in a hunting supply store or a gun

store by an adult citizen?

A Well, the AR-15 looks like a M-16, but I don't know all of the differences between the two, sir.

Q O.k. Now, take a look at the other weapon.

A Yes, sir.

Q Isn't that a commercial .45 caliber weapon which is designed to resemble the famous Thompson sub-machine gun, but in fact is nothing more than a semi-automatic rifle with a long clip?

A I don't know whether this is semi-automatic. I said it appeared to me to be an automatic weapon.

MR. TAIKEFF: I am wondering whether at this time, your Honor, the Government will stipulate that both of those weapons are semi-automatic weapons?

MR. HULTMAN: I probably will, your Honor, after I have a chance to voir dire on just one question or two, at the most, of this witness. {1980}

MR. TAIKEFF: All right.

MR. HULTMAN: Mr. Waring, do you know whether or not, by a very simple manipulation such as the shaving of the shear pin on a semi-automatic weapon, if you can make it automatic?

THE WITNESS: I don't know if that's so, sir.

MR. HULTMAN: Secondly, are you an expert of any kind on firearms?

THE WITNESS: No, sir.

MR. HULTMAN: Is it your opinion that you are giving here the best of your opinion?

THE WITNESS: Yes, sir.

MR. HULTMAN: All right, and not based on any scientific knowledge or any specific examination other than as cursory here in the courtroom?

THE WITNESS: That's correct, sir.

MR. HULTMAN: Your Honor, the Government -- and counsel has known from the beginning that there is no weapons that have been introduced as exhibits that are technically automatic weapons, and no such claim at any time; and further the record will show that the additional questions on direct examination that were asked of this witness so indicated that.

MR. TAIKEFF: Your Honor, there is no dispute about that. I was just exploring this witness' understanding {1981} which may have been a mistaken one, in connection with his testimony, that's all.

Q (By Mr. Taikeff) Now, sir, is it not a fact that the reason you testified on direct examination that you heard automatic weapons firing was

because you thought that those two guns were automatic weapons and not because you heard anything like that at that place at that time?

A That's not correct, sir.

Q You consider yourself a careful, competent law enforcement officer?

A Yes, sir, I try to be.

Q You told us yesterday that 302's should record what in the opinion of the agent who offers them are all the important details and facts concerning the event, is that right?

A Yes, sir. I believe I said at the time when they are recorded, what I believed to be the significant facts at that time.

Q Don't you think that the presence of automatic weapons, military type weapons in the hands of civilians in connection with an incident like this is an important fact?

A More observation than fact, sir.

Q I asked you, sir, whether you would consider such a fact a significant fact?

A If I just saw the weapons being fired, yes, sir.

Q Don't you trust your eyes and your ears also?

{1982}

A I trust my ears, but I trust my eyes more so.

Q If you thought you heard automatic weapons fired, coming from one or more civilians, non-law enforcement people, wouldn't you as a law enforcement officer think of that as a significant fact? "Yes" or "no".

A Yes, sir.

MR. HULTMAN: Your Honor, I object.

MR. TAIKEFF: He has answered the question, your Honor. I would like to proceed.

MR. HULTMAN: Well, counsel, if I don't have an opportunity to make an objection, go ahead and proceed.

Q (By Mr. Taikeff) Would you please tell us on what page in your 302 you make a reference to that significant fact (handing)?

A I did not make reference to it in my 302, sir.

MR. TAIKEFF: Does Mr. Hultman have an objection, now, your Honor?

MR. HULTMAN: Proceed, counsel. I will make my objections, not have you decide when I am going to make them.

Q (By Mr. Taikeff) Now, sir, I am going to refer to Government Exhibit 71. There came a time shortly after your arrival on the scene when you found yourself in the vicinity of Agent Adams, somewhere near Highway 18 in the upper left-hand portion of 71, correct?

{1983}

A Yes, sir.

Q And then there followed this activity by one routing or another, I think you said this path which is about three or four inches to the right of the left-hand edge and is shown with dotted lines, you worked your way down into the woods, some of which can be seen in the lower left-hand corner of 71, is that correct?

A Yes, sir. I didn't say that I traveled down that path. I said some members of the group. We were spread out from that path, going over past the edge of the map.

Q All right. I hope that I indicated that I was uncertain about the exact path, but generally speaking, you moved in a westerly direction from where Adams was, down into the woods or near the creek; and that is depicted generally in the lower left-hand corner of 71, is that right?

A Yes, sir.

Q Now, is it true or is it false, that while moving along the creekbed, sporadic firing could be heard in the distance in the direction of Special Agent Adams and Special Agent Breci?

A That's true, sir.

Q Now, would you explain whether that fact, which you said is true, means that firing was coming from where they were or that firing was going to where they were?

A The only thing I meant by that was that the fire was back to the east of my location at that point, sir.

{1984}

Q Well, what did you mean when you chose the words "in the direction", meaning that the sound was coming from that direction?

A Meaning that the sound was at that point then east of where I was located down there in the creekbed, that I just used that previous position as a reference point.

Q I see. Then I assume that you couldn't say whether it was Adams and any other law enforcement agent shooting in a southerly direction, correct?

A That's correct, sir.

Q Nor could you say whether it was one or more other people from any number of locations shooting in any particular direction?

A That's correct, sir.

Q So basically all you heard was shots east of where you were?

A Yes, sir.

Q And that could have been up here by Highway 18 (indicating)?

A Permit me, sir, could have been anywhere generally.

Q I want to ask you about specific locations. I do want to ask you about specific locations. Could it have been up by Highway 18?

A Could have been.

Q Could it have been from Jumping Bull Hall?

A Could have been.

{1985}

Q Could have been from the area of the residences?

A Yes, sir.

Q And possibly other places?

A To the east of where I was, sir.

Q Well, when you say "to the east" --

A (Interrupting) That general area.

Q (Continuing) -- above the lower edge of the chart and perhaps above the center line of the chart, going from left to right?

A Yes, sir.

Q The eastern half of the chart.

How many shots did you hear?

A I didn't count them, sir.

Q Can you give us some idea, order of magnitude, are you talking about two, are you talking about something like 20?

A I couldn't guess the number, sir. It was just periodic, sporadic.

{1986}

Q When you were with Agent Adams there was some evidence of shooting, was there not?

A Well, I never was right with Agent Adams. I was some distance from him, but there was shooting, yes, sir.

Q Well, when you were relatively close to Agent Adams, I didn't mean that you were necessarily shoulder to shoulder, there was evidence of shooting, right?

A In our direction, yes, sir.

Q Now, what was the evidence that the shooting was in your direction?

A I could hear the bullets going over my head, sir.

Q Hear any bullets impacting on the ground around you?

A Yes, sir. There was some hitting on the hill.

Q Did you hear any other shooting that might not have been directed at you?

A Well, I could hear shots being fired, and I was only interested

in the ones that were coming close to me at that point.

Q I readily understand that. My question is: Did you hear other shooting which you could not identify as being shots specifically coming overhead or in your general vicinity?

A I would say that every time I heard a shot, I can't say if a bullet came in my direction, no, sir.

Q But there were some times when you knew for sure?

A Absolutely, sir.

{1987}

Q And there were other times when you couldn't tell which way it was going or where it came from; isn't that correct?

A That's correct, sir.

Q Could you identify for the Court and jury specific places that you have personal knowledge of from which shooting by non-law enforcement people occurred that afternoon?

A Yes, sir.

Q Would you be kind enough to do that?

A Yes, sir.

It would have been when initially when I pulled out into the area at this location (indicating).

Q That's the so-called Adams' location, just for a shorthand?

A Yes, sir.

Q All right.

A Okay. Bullets were hitting into the hill, but like I said going over my head at that point.

Q Now, wait, let me stop you.

A Okay, sir.

Q Now, I want to know where that shooting was coming from.

A It was coming from the vicinity of this area right in here (indicating).

Q How do you know?

A Because that's the general direction where the shots were being fired from.

Q How do you know?

{1988}

A From my hearing.

Q How do you know that that shooting wasn't coming from Jumping Bull Hall?

A Because I was right here, sir, laying up in this high ground right

here (indicating) and if the shots were coming from here it would come from this way instead of hitting over this way (indicating).

Q You mean when the shot hit the ground you could tell the direction from which it came?

A Well, I could tell the general noise level was down in here, and that the bullets were going over my head and hitting around me there.

Q I'm not disputing with you that you heard noise coming from this area. I want to know what observations you made when you were at the so-called Adams' position and bullets were either whizzing overhead or digging into the ground and making some sort of a noise that permitted you to know the direction from which that shot came.

A Just an observation that I made at that point. That's what I felt at that point, sir.

Q That was your belief at that time?

A Absolutely, sir.

Q Could you tell us what if anything you observed with your eyes or ears or otherwise that would indicate to you that the shooting had not come from, let's say, back up here on the plain {1989} (indicating)?

A Nothing that I observed, sir.

Q Could you discount that possibility that some of the shots that were whizzing over your head or hitting the ground came from up here (indicating), and for the benefit of the record I'm talking about a place which is close to the curved line that say "crest of plateau", to the left about six inches of the word "of". Could you discount that possibility?

A No, sir.

Q Could you discount the possibility that shooting came from this point right here (indicating), which is about four and a half inches to the left of the lower left-hand corner of the plowed field. That is immediately to the right of the word "crest". How about that location, could you discount that as a possibility?

A Discount that now, sir because this sits low, you'd have to shoot over high ground if you know where.

Q Could you stand on something and shoot?

A You're up on the crest, you're up here on the top. If you're level ground essentially --

Q Any where along that crest a person could be shooting and land shots up here at the Adams' location; isn't that correct?

A That could have been, yes, sir.

THE COURT: Court is in recess until 11:00 o'clock.

(Recess taken.)

{1990}

THE COURT: Counsel ready for the jury?

MR. TAIKEFF: Yes, Your Honor.

THE COURT: Jury may come in.

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

MR. TAIKEFF: May I proceed, Your Honor?

THE COURT: You may proceed.

Q (By Mr. Taikeff) Mr. Waring, I think we were trying to identify the various places from which, based on your own observations, you believe firing was coming, non-law enforcement firing that day, am I correct about that?

A Yes, sir.

Q And I believe we got the point where you had talked about investigating fire at the Adams location, and then we got to discussing this high ground here around the crest of the plateau, and I think at that point the Judge called a recess. Is your memory the same as mine?

A Yes, sir.

Q Now, would you be kind enough to indicate to the Court and jury any other locations that you have a belief based on your own observations was a place from which non-law enforcement firing was coming.

A Sir, it would have been right at this approximate point (indicating).

Q Now, you are referring to a location that has been previously {1991} marked?

A Z-1, sir.

Q Z-1. And where were you when you made whatever observations provide the basis for that conclusion?

A At that time I had just walked out from some brush cover, tree cover.

Q Immediately adjacent?

A Just took a few steps out into the open.

Q And then what did you observe?

A I heard a rifle fire and I took cover.

Q Now, can you point to where you were at that time.

A Well, approximately it would have been right out here (indicating), just out in these trees.

Q Okay. I may have misunderstood you. When you pointed to Z-1 you meant that's where you were?

A That's where the group was that I was with. We were gathered at

that point, sir.

Q But I'm talking about the location from which firing came. Can you tell us where that shot came from?

A Not exactly. The sound was up in this area (indicating).

Q All right. May I indicate for the record that you've pointed to a place along the line marked "crest" and roughly on the bisector of the "Y" intersection. Is that a fair description? Bisector being the line that equally divides those two roads.

A It's this general vicinity. I didn't see the fire.

{1992}

Q I understand. I'm just describing the place on the chart that you pointed to so the record is complete.

Do you have any quarrel with my description?

A No, sir.

Q Okay. Any other locations that you can identify as places where non-law enforcement firing came during the course of that afternoon from the time you got there until all firing had ceased?

A Yes, sir. Shortly after that one shot was fired. We moved down just a little bit and two individuals appeared at the, it was marked the green house, right on this side (indicating) and rifle fire between our group and those two individuals.

Q Am I correct, sir, that when you said "this side," you were at that time pointing to the south side of the building?

A It was right there at the, what I would call the northeast corner, just out from the house a few feet, sir.

Q Did you see that individual?

A I saw two individuals, sir.

Q Did you see those individuals?

A Yes, sir.

Q With your naked eye?

A Yes, sir.

Q How were they dressed?

A One had a dark top, dark trousers and the other had a white, I believe it was a "T" shirt.

{1993}

Q Could it have been a regular shirt?

A When I saw it then I thought it was a "T" shirt, sir.

Q At or about that time did anyone in your group or near your group say something about having hit one of those people with fire, with bullets?

A Yes, sir. There was a brief exchange of gunfire. An individual to my right yelled, "I think I've hit one."

Q Did he say which one?

A No, sir.

Q Are there any other places where you think or believe firing came from?

A Yes, sir. Again when I was at Z-2, which is the location where I was observing Agent Coler's car from the tree, it was at that point that we had another brief exchange of gunfire from an individual now on the west side of the green house.

Q Any other locations?

A The next time that rounds came near me, sir, is when I left point Z-3, proceeded up toward the green house.

Q And do you know the location from which those shots came?

A At that time I believed them to be coming from this plateau up here. But I didn't see them being fired.

Q I gather then your belief was based upon your earlier observations as opposed to what you were then seeing?

A Yes, sir. And also the sound and the rounds were coming.

Q Are they any other places from which you heard firing that {1994} you believe or know to be non-law enforcement firing?

A Yes, sir. Later on in the day after we believed that the area was secure and we hadn't found any individuals up there, with the exception of the body of Joseph Stuntz, that there was one round of fire that came in and hit into something in the vicinity of the houses.

Q Do you know where that came from?

A No, sir, I have no idea.

Q Approximately what time of day was that?

A Would have been approximately 6:00 P.M.

Q Did you hear the report of that round when it was fired as opposed to the sound when it came into your area?

A No, sir, not at that time.

Q So what you heard was either the bullet impacting or passing overhead.

A It hit something, sir, and that's when I hit the ground.

Q Okay. Then would you be kind enough to resume your seat.

And let's go back to the person or persons who appeared, did you say, at the northeast corner of that house?

A Yes, sir. That's the approximate locating. They were standing out a few feet from the house.

Q And I may have asked you this before, but frankly I forgot if you answered, what time of day would you say that was? About 2:30?

A It would have been sometime shortly after arriving in the {1995} area. Between 2:00 and 2:15.

Q Now, when you finally saw the body of Joe Stuntz where was it lying?

A Right where I indicated yesterday, sir. Right again what I described as the northeast corner of the green house, sir.

Q So I gather then that sometime between 2:00 and 2:30 approximately, I have no intention of pinning you down to time here, you made an observation of two people, one of whom was wearing a light colored top which you believed to be a "T" shirt; is that correct?

A Yes, sir.

Q And that there was an exchange of fire between your group and perhaps both of the individuals spotted at or about that time?

A Yes, sir.

Q And one of the people in your group of law enforcement officers said something about I think I got one of them, or words to that effect?

A I believe he said, "I think I've hit one of them."

Q Okay. And those people, non-law enforcement people were in the vicinity of the house at a point that you describe as the northeast corner of the house; is that right?

A Yes, sir.

Q And that later it was at that same location that you found {1996} the body of Joe Stuntz?

A Yes, sir.

Q Now, isn't it a fact that the person who said something about believing that he hit one of those two people not only said that, but indicated that he thought he hit the guy with the white top?

A He didn't indicate either way, sir.

Q Did you not put in your 302 a statement to that effect?

A I'd have to see my 302 to recall exactly. But I believe there was another individual that yelled, "The guy in the white shirt is hit also."

Q Okay.

A Or words that effect. But I'd have to see it.

Q That's what I'm asking you about.

Now, you saw the body of Joe Stuntz personally, did you not?

A Yes, sir.

Q And what was he wearing?

A He had on a FBI U.S. Army-type fatigue jacket.

{1997}

Q And under that he was naked?

A No, sir.

Q What was he wearing under the jacket?

A He had on a, at this time I can recall he had a light colored shirt on.

Q Was it not a white shirt with a very, very pale print on it?

A I don't know sir. I'd have to see the photograph.

Q All right. I'll show them to you.

I am now placing before you Government Exhibit 54 to which I have turned the page designated 16 and I call your attention to photographs B, C and D on that page and in addition I place before you Government Exhibit 23. My preliminary question is whether 23 appears to be a blowup, in particular of photograph D for David?

A Yes, sir.

Q Now, sir, is it fair to say that underneath the FBI S.W.A.T. team jacket Joe Stuntz is wearing a white or very light colored shirt? Yes or no?

A Yes, sir.

Q Beginning at what time of the day on June 26, 1975 did you hear any radio transmission which you believe to be and now believe to be those of Williams or Adams?

A I can't give you a time, sir. It was, I left the motel between 11:00 and 11:15 A.M. that morning. It would have been {1998} approximately half the distance to the Pine Ridge Indian village.

Q Give us your best estimate of the time. I do not intend to pin you down to the minute or even to the nearest five minutes. I want a rough idea.

A It would have been sometime between 11:30 and noon time.

Q Okay.

But surely by noon you were hearing those transmissions?

A Yes, sir.

Q What time did you arrive at the scene, first arrive at the scene?

A I don't know, sir.

Q What's your best estimate?

A Be hard for me to estimate at this time because I wasn't paying attention at all to time right at that particular instant

Q Well, you got there before 12:30, did you not?

A Oh, yes, sir.

Q Could you say how much before 12:30?

A Not really, sir.

Q When you pulled up into the vicinity where Agent Adams was, were you able to communicate with him on your FBI radio?

A Yes, sir.

Q Did you communicate with him on your FBI radio?

{1999}

A I notified him that we were --

Q I didn't ask you what you said, just whether you communicated with him on your FBI radio.

A Yes, sir. Briefly.

Q And were you able to hear any transmissions that he was making?

A Just the one that he acknowledged to me.

Q That's the only one you heard?

A Yes, sir.

Q At or about 12:18 P.M. did you hear Special Agent Adams say anything to the effect that he's on the scene and has been receiving heavy fire from the vicinity of Jumping Bull Hall?

MR. HULTMAN: Your Honor, I only enter an objection on the grounds that part of the question, that there is no basis at all foundationwise. This witness has been asked as to times. He's clearly given his best estimate and now Counsel is using an exact time, 12:18, and I object to that part of the question. This is improper. This witness has indicated he didn't know any times during this period of time. I have no objection if he asks him whether he heard a transmission but I do object when using a specific time because the questioning is clearly laid. No foundation that this witness can say anything about 12:18, and in fact his earlier statement was he wasn't going to tie this witness down or even try to tie him down to a specific time.

{2000}

MR. TAIKEFF: As to whether he arrived on the scene or first heard the transmissions and I stand by that. I was only trying to get a general focus.

THE COURT: Will the reporter read the question back, please.

(Whereupon, the last question was read back.)

THE COURT: I think the witness can answer that question.

A No, sir. I didn't hear him say that.

Q (By Mr. Taikeff) Now it is correct to say, is it not, that that is Jumping Bull Hall, right (indicating)?

A Yes, sir.

Q And that's the area you said no firing came from, right?

A I didn't --

MR. HULTMAN: Just a minute, Your Honor. Just a second. I'd like the statement by Counsel read back to me he just now stated. I'm not sure whether I was hearing what he said or not.

MR. TAIKEFF: You want me to repeat it?

MR. HULTMAN: I'd like to hear it back from the reporter.

THE COURT: The reporter may read the question.

(Whereupon, the following questions and answers were read back: Q Now it correct to say, is it not, that that is Jumping Bull Hall, right (indicating)? A Yes, sir. Q And that's the area you said no firing came from, right? A I didn't --

{2001}

MR. HULTMAN: I withdraw my objection, Counsel. I couldn't hear.

THE COURT: You may answer the question.

MR. TAIKEFF: Your Honor, for clarification, I think I understand what Mr. Hultman was concerned about.

Q (By Mr. Taikeff) When I made reference to your statement, possible statement there was no firing coming from that direction, I was referring to your earlier testimony.

MR. HULTMAN: Yes.

Q (By Mr. Taikeff) When you were up in the Adams' location. Did you say concerning Adams' location in your presence there that you didn't believe any firing was coming from Jumping Bull Hall?

A Yes, sir.

MR. TAIKEFF: Okay?

MR. HULTMAN: Clear.

Q (By Mr. Taikeff) Did you at any time before you were joined by Special Agent Price and Special Agent Hughes hear on the FBI radio by either Agent Adams or someone else that there was a red pickup leaving Jumping Bull Hall area going north and a suggestion that the Pine Ridge police were to stop that particular vehicle?

A No, sir.

Q Have you had occasion, sir, to take a look at the model which I think is Government Exhibit 20?

{2002}

A Yes, sir. I've seen it before.

Q And what's the total amount of time that you personally spent in the area which is designated by the center of Exhibit 71? I'm referring to

that circular road area, the houses around it, et cetera, total amount of personal experience you have being on that scene?

A I would say an estimate would be just a few hours.

Q As far as you're concerned is Government's Exhibit 20 a reasonably fair representation of that area looks like and the interrelationship between the parts? I'm not asking you for scientific accuracy, just general qualitative appearance.

A Yes, sir.

Q Isn't it a fact though that the houses which are on that model appear to be in much finer repair than the actual structures as seen by the naked eye when one is present at that location?

A Yes, sir.

Q In fact, they show evidence of being in rather bad condition, isn't that a fact?

A Yes, sir.

Q I show you what has been marked Defendant's Exhibit 133 for identification. It's not in evidence, should not be displayed to the jury.

MR. HULTMAN: Your Honor, I would indicate at this time to Counsel this is an exhibit which was provided to the {2003} defendant and if Counsel wants to mark it and introduce it at this time for the purposes that it is photographs of specific buildings and a general drawing, the government has no objection and Counsel could then proceed accordingly.

MR. TAIKEFF: Yes, Your Honor. It was supplied to us by the government and we do offer it pursuant to that proposal.

THE COURT: 133?

MR. TAIKEFF: Yes, Your Honor.

THE COURT: Exhibit 133 is received.

Q (By Mr. TAikeff) Now I would ask you whether the diagram reproduces the central part of Exhibit 71 and depicts with photographs that have been incorporated the various buildings which you have referred to in your testimony, or the various buildings which are actually located there.

A Yes, sir.

Q And do those photographs fairly represent the way those buildings looks?

A Yes.

Q On or about June 26th, 1975?

A Yes, sir.

MR. TAIKEFF: May I have a moment to circulate this amongst the jurors, Your Honor?

THE COURT: You may.

{2004}

MR. TAIKEFF: Thank you.

(Exhibit presented to jurors.)

MR. TAIKEFF: Is it Your Honor's practice not to have testimony while something is circulating?

THE COURT: Yes.

MR. TAIKEFF: Thank you.

Q (By Mr. TAikeff) Mr. Waring, at approximately what time did you first enter the woods at the lower left-hand corner of Government 71?

A It would have been shortly after 1:00 P.M. sometime.

Q In your direct testimony you said, did you not, that sometime that afternoon you heard explosions?

A Yes, sir.

Q I think you described them as dynamite explosions?

A That's what I believed them to be at that time; yes, sir.

Q Did you consider that observation to be important?

A Yes, sir.

Q Could you tell me on what page your 302 reference is made to that?

A It's not, sir.

Q Approximately what time did you get to location "Z1" up near the Y intersection?

A It would have been approximately 2:00 P.M. to 2:15 P.M., sir.

Q And from that vantage point could you show or tell us what your perspective was, what you could see looking in {2005} different directions. I'm not interested in the specific things you may have seen as much as I am in how far you could see generally in different directions.

A I could see the ground going to the green residence, the crest of that hill, the slope towards me which was, would come down on that little road that goes by "Z1." I could turn back and see basically across the plowed field area.

Q Into the trees?

A And then into the trees.

Q Okay.

That takes care of roughly north through southeast or maybe even south southeast. How about counterclockwise from north, what were your perceptions from that vantage point?

A What I just stated was about all I could see. You can't see on that, once you've hit the crest where it's marked "crested plateau," you can't

see on top of that plateau from where I was. I couldn't see down across the open field.

Q Which open field are you talking about?

A Talking about the field now that comes back towards Agent Coler's car. Not from that position.

Q You couldn't see the car?

A Not from there; no, sir.

Q Okay.

MR. TAIKEFF: Excuse me one moment, please. May I {2006} confer with one of my colleagues, Your Honor?

THE COURT: You may.

{2007}

Q (By Mr. Taikeff) I may not be precisely right, but I think on your direct examination you were asked whether you were SWAT trained, am I right about that question being put to you?

A Yes, sir.

Q Briefly -- I think you said "no", is that correct?

A That's correct, sir.

Q Briefly, what does that mean, SWAT training?

A It is a specially trained tactical group of men.

Q Do they learn how to handle special kinds of weapons?

A Yes, sir.

Q What kinds of weapons?

A I believe they have a tear gas gun and a M-16 rifle, sir.

Q That's an automatic weapon?

A It is either semi-automatic or automatic.

Q That is to say, the same weapon can be used either semi-automatically or fully automatically?

A Yes, sir.

Q By throwing a switch on the outside or a lever?

A Yes, sir.

Q And the jacket that was found on Mr. Stuntz is the kind of jacket that is issued to FBI SWAT team members, is it not?

A Yes, sir, it is a fatigue jacket.

Q Now, I draw your attention to the area immediately surrounding Point Z-1, I think you told us that there was some {2008} junk cars up there?

A No, sir, not at Z-1.

Q Not exactly at Z-1, I mean in that vicinity, I stand corrected on that.

A May I go to the board, sir?

Q Yes. I think what you are referring to here is this group of cars (indicating) which seems to have a "93" within the circle, is that correct?

A Yes, sir.

Q I ask you whether Exhibit 93 in evidence is a photograph taken in the immediate vicinity of the junked cars with the camera looking roughly northeast?

A (Examining) If this was taken of those cars, that should be the ones. I am not sure because I didn't look at the cars.

Q All right. Can you identify the scene for us?

A Well, if this picture depicts that line of junked cars, I would say that would be it.

Q I understand that's a big "if". That's what I am trying to find out from you.

Based on your observations, both there and here, would you be prepared to say that that photograph is a view taken, as I suggested before, from behind the junked cars looking northeast?

Q (Examining) Do you have another photograph that shows more background? I can't necessarily tell from this. If those {2009} were the cars, I did not examine them.

Q O.k., thank you.

Am I correct in stating that -- as being your testimony and is your testimony, that when you were in the Gary Adams' location or area, you could not see anyone who may have been shooting from the vicinity of the residences or that you did not, did not see anyone?

A That's correct, sir.

Q You had at the time some belief that that was either the specific location or the general location from which shooting was coming, right?

A Yes, sir.

Q But when you looked with the naked eye, you could not see anyone, correct?

A I didn't look very long, sir, because of the rounds that were coming in over my head.

Q But you did look?

A Quickly, sir.

Q And you did not see anyone?

A No, sir.

Q Did you lift up your rifle with the telescopic sight on it and attempt to see whether you could see who or what was at the location from which you

thought the shooting was coming?

A No, sir.

Q Why not?

{2010}

A Because the grass was rather high in there, and if I had to get above the grass with the rifle to look down range, I would have been relatively exposed.

Q Couldn't do that by standing behind the car, could you?

A The car was behind a small rise in the ground. I couldn't see down range at all from the car, sir.

Q You couldn't get behind that rise and just position yourself so that only the rifle was sticking out of the grass, see where the shooting was coming from?

A No, sir.

Q What kind of a rifle were you carrying?

A Had a 3.08.

Q And what kind of a scope did it have?

A It has a telescopic scope.

Q Any special characteristics?

A If you are referring to what power, I have no idea what power that particular scope is.

Q Was it a variable power scope that permitted you, by rotating a ring or some other device, to vary the power with which it worked?

A I didn't vary the power on it, and I don't believe it does.

Q But it was a 3.08 caliber?

A Yes, sir.

Q Manufacturer's name, do you know that?

{2011}

A No, sir.

Q Was it a bolt action?

A No, sir. It is a slide action.

Q Do you want to say something?

A I was going to say, more clearly it is a pump type action.

Q In your opinion was the scope capable of assisting you in seeing from where you were to the houses?

A If I would have been able to position myself and hold it steady, I believe I could see that range, yes, sir.

Q And in fact, it was a high-powered scope, was it not, even though you don't know the exact magnification?

A That's correct, sir. It is referred to as that.

Q Now, in addition to the 302 relating to the events from the morning until roughly 6:00 or 6:30 in the evening, you put your initials on another 302 which, I believe, could be referred to as a report of a crime scene examination, is that correct?

A Could I see the report, sir?

Q Yes, I would be happy to show it to you. I would just like to know whether of your own memory you could answer that question.

A I have initialed a lot of 302's, and the one I believe you are referring to I did initial.

Q You are thinking about a crime scene examination report, are you not?

A Yes, sir.

{2012}

Q Tell me whether it is Defendant's Exhibit 84 for identification (handing).

A (Examining) Yes, sir.

Q Did you read that before you initialed it?

A Yes, sir.

Q Is it your practice to initial 302's after you have read them and satisfied yourself that as of that time there are no mistakes, errors, oversights, et cetera?

A Yes, sir. I checked it for accuracy concerning the examination and how it is set forth there, yes, sir.

MR. HULTMAN: Counsel, could I look at 84 to see what exhibit we are talking about?

MR. TAIKEFF: Here it is (handing).

MR. HULTMAN: (Examining) Fine.

Q (By Mr. Taikeff) Now, as you sit there and without the benefit of seeing the exhibit which I have taken back from you, can you tell us on what day you dictated that report -- withdraw it.

I understand you did not personally dictate that report, is that correct?

A That's correct, sir.

Q Could you say on what date you reviewed that report before putting your initials on it?

A No, sir.

Q Could you say as of what date, could you say what is the {2013} earliest date on which you might have seen that report?

A It would have to be sometime after it was dictated and then typed, sir.

Q Can you say when it was dictated and typed?

A Not without looking at it, sir.

Q All right. I will show it to you again (handing).

A (Examining) Yes, sir. If these are accurate, it says the 28th of June, 1975, that it was both dictated and transcribed.

Q All right. I understand, sir, what it says, and I understand that if what it says is accurate, then it states a fact; but that wasn't my question.

My question is: Can you tell us, based on whatever you deem an appropriate basis, when that report was prepared or when you first saw it?

A Well, I know that it had to be prepared sometime after the crime scene search itself.

Q All right. I think --

A (Interrupting) But I have no --

Q (Continuing) -- it is clear.

A I have no personal knowledge. I wasn't there when the agent that dictated that report dictated it to a stenographer.

Q Well, in looking at the report, you find, do you not, that the date of transcription is listed as June 28th, 1975, and the date dictated, June 28th, 1975; and the date of the events, June 26, 1975, isn't that correct? {2014}

A Yes, sir.

Q And do you have any basis for believing that those dates are incorrect?

A No, sir.

Q Do you know whether anyone made notes of any kind which were used in connection with the writing, the preparation of Defendant's Exhibit 84?

A No, sir.

Q Do you have any knowledge whether it was done strictly from memory?

A No, sir.

Q Now, you identified certain physical exhibits which were offered in evidence yesterday and which contained the little slips of white paper, correct?

A Yes, sir.

Q And those were slips of paper which you had some involvement in either writing or marking in some way, isn't that correct?

A Yes, sir.

Q Generally speaking, those slips of paper indicated what was found, roughly where it was found, and then there are initials of various one or more people, is that right?

A That's correct, sir.

Q That was a way of helping you keep track of what you found that afternoon or that evening in connection with your crime {2015} scene examination, right?

A Yes, sir. When we pick up the evidence, we put these pieces of paper with our initials in there and the description, so that they can be maintained separately from all other evidence that is described.

Q As a rule, it is a practice amongst law enforcement authorities to put some mark on a piece of real evidence so that at a later date in court a person can identify the object in court as being the same object as was originally found, isn't that generally true?

A No, sir. It can be handled either way.

Q I am not saying that's the only one. I am saying that is one of the methods employed?

A Yes.

Q For instance, you put your initials on something, on the back of a piece of paper, and then later on if you see your initials, you have some belief that's the same piece of paper that you saw maybe two years ago?

A Yes, sir, that's one method.

Q You couldn't write, could you, on shell casings with either pen or pencil?

A That's correct.

Q So you wrote on a separate piece of paper and you keep the shell casing and the slip of paper together, and that's essentially much like writing right on the object?

{2016}

A Correct.

MR. HULTMAN: Counsel, could I interrupt?

MR. TAIKEFF: Yes.

MR. HULTMAN: May we approach the bench?

THE COURT: You may

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

MR. HULTMAN: Your Honor, the reason why I have requested -- because I don't want to interrupt counsel's examination with any questions that's in any way going to take away from what his cross examination may be, so I thought we could clear the issue here.

MR. TAIKEFF: Much better during the preliminary phase than at the climax.

MR. HULTMAN: That's right. I am trying to abide by the general plan.

MR. TAIKEFF: Thank you.

MR. HULTMAN: It is my understanding, your Honor, that with the exception of six specific items that we have agreed that there would be no problems, issues concerning change from the time an object was found until it is introduced in effect, in evidence.

MR. TAIKEFF: Mr. Hultman is correct, and there is no challenge of that kind developing at this point. I want to assure you of that.

{2017}

MR. LOWE: As to the exhibits, is what we are talking about?

MR. HULTMAN: Yes. We can't talk about --

MR. TAIKEFF: (Interrupting) Mr. Hultman, I give you my assurance that nothing like that is coming. It is something entirely different.

MR. HULTMAN: Very good. I wanted to make sure.

MR. TAIKEFF: I appreciate your concern.

THE COURT: Very well.

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

Q (By Mr. Taikeff) I think I was at the point where I was reviewing some of the field techniques which may have been employed, and my next question is this:

If more than one set of initials is on the piece of paper, does that mean that more than one person participated in some way in the collection and retention of that evidence in the field?

A Yes, sir. That normally is the case of the agents that initialed or police officers, as the case may be, when they pick up that piece of evidence, it means that each was there to observe the location and the fact that it was being retained as evidence.

Q Now, when you read the report, the 302 which has been marked Defendant's Exhibit 84 for identification, were you {2018} satisfied that, to the extent that you had any knowledge on the subject, it was an accurate reflection of the crime scene examination as done by you and your colleagues whose names appear at the bottom of the report?

A Yes, sir. The particular parts of that crime scene search that I was involved in, yes, sir.

Q Right. Exhibit 84 does not present a picture of every single search that went on that day, correct?

A That's correct, sir.

Q It is just those activities which covered a certain area and were participated in by Agents Hughes, Taubert, Wiley, yourself and Price?

A Yes, sir.

Q Now, could you delineate with the pointer, or if you can do it more easily with words, the area that was enclosed -- withdraw it.

Can you indicate on Exhibit 71 the area that you searched by showing us some shape that approximates the outer boundaries of the area that you and your colleagues searched that day?

A Yes, sir.

Q All right. Please understand that as you move your pointer, I will have to dictate into the record what you are doing. If you disagree with my description, would you please say so?

A Yes, sir. I was primarily concerned with the crime scene {2019} search in the vicinity of Agent Coler's car, and that would take in, I believe it was -- this was also an abandoned automobile, so go from that side.

Q North side?

A North side of the abandoned car, back up, I would estimate 20 to 30 yards to the east of the car, and approximately 20 yards out in the other directions, and anything from that area in toward Agent Coler's car.

Q Would you say that the distance between that emblem for a junked car and the center of Coler's car is somewhere in the vicinity of 60 feet or 20 yards?

A This represents -- I would say approximately.

Q Then would it be fair to say that you and your colleagues searched an area which would be described as follows: A circle whose center was Coler's car and whose radius was 20 yards or whose diameter was 40 yards, is that a fair description of what you pointed out on the chart?

A That's the area, sir, that I personally was involved in.

{2020}

Q Did any of the agents whose names I mentioned assist you in that particular activity?

A The agents, the pieces of evidence that I found, whose ever initials are also there would have assisted me. But there were, the other agents were doing some other things.

Q When you say "the other agents," do you mean Hughes or Taubert or Wiley or Price or are you talking about all the other agents who were around the place?

A Those particular agents that are on that 302, sir.

Q How many of those, whose names I've read twice, assisted you in that circle that has been described?

A Well, that particular area that I described, we were all within that area.

Q Okay.

A At some time.

Q All right. Now, I don't know that you answered by question, whether my description was reasonably accurate. That circle that I described, is that reasonably accurate?

A As far as I'm concerned in my personal involvement, yes, sir.

Q Okay. And just to make sure that we have all the geometry pinned down, the emblem on 71 that represents a single junk car sits on the circumference of that circle?

A In that direction, yes, sir.

Q Yes. In a roughly north, northwesterly direction, right?

{2021}

A Yes, sir.

Q Okay. Now, that was one area that you searched. Approximately what time was that, sir?

A Would have been some time after 6:00 P.M. that night, sir.

Q By the way, do you recall what time it got dark that day?

A No, sir. It was late sometime.

Q About 9:00 o'clock?

A I'd say it would have to be sometime after 9:00.

Q And during the afternoon, let's say from 3:00 until 6:00, what were the general weather conditions?

A It was a clear, absolutely clear. If I recall the day it was no clouds and it was about 90 degrees?

Q Light was good?

A Excellent.

Q What other areas did you search?

We'll do it the same way you did it before. You can use the pointer and I'll try to describe it for the record.

Q Well, on that particular day, sir, after just surveying the top of the plateau after we arrived and secured the residences, then I saw the body of Joseph Stuntz. That's when I left that area and walked back down and I was only concerned with the crime scene search of Agent Coler's car, or in that general area.

Q Now, you made a search, or more than one search at a later time;

is that right?

{2022}

A Yes, sir.

Q And you wrote a separate report, a 302 concerning that, am I correct?

A Yes, sir.

Q And that's the one page document previously referred to as Defendant's Exhibit 125 for identification, is that not correct, sir?

A Yes, sir.

Q Now, with respect to the search which is reflected in 125 for identification, please tell us in the manner we used before what the total area was that you searched.

A I could show you. On that particular day I had walked across this field, and when I got in this general --

Q Let me just describe which field you are talking about. It's the field that separates Coler's car from the residences?

A That's correct, sir.

Q Okay. You walked in a --

A This was on June 28th.

Q Yes. Southerly direction roughly?

A Yes, sir. We came from over in here (indicating) just walking through this entire grassy area.

Q All right.

A And when I got over in this area (indicating) I just happened to be closer to where these abandoned cars sit and I noticed shell casings in the grass.

{2023}

Q All right. Do you know in connection with your official function whether anybody else searched the area around the junk cars, let's say within a circle that had a ten or fifteen or twenty yard radius with the junk cars at the center, do you know if anybody made a search of that area? And just to make sure that there's no misunderstanding, I'm going to move my hand on the chart, but I'm not going to cover the area that's wooded to show you what area I'm talking about (indicating).

The circle somewhat like the one around Coler's car, but with the middle junk car at the center of the circle.

MR. HULTMAN: Might I ask just one question for purpose of, by voir dire for purpose of an objection, Your Honor?

MR. TAIKEFF: No objection, Your Honor.

THE COURT: You may.

MR. HULTMAN: I just ask you one question, Agent Waring. Was anybody else with you during the time that counsel has been referring to, or at any time during this period of time including down at the junk car area?

THE WITNESS: Yes, sir. There was Agent James Morton.

MR. HULTMAN: I have no further questions.

Q (By Mr. Taikeff) Now, did you search together that area around the junk cars?

A Yes, sir.

Q How far out from the junk cars did you go in making the {2024} search of that area? In other words, I'm trying to get an idea of how big a circle you took a close look at.

A Well, generally as I walked along that day Agent Morton and myself were some yards apart, a few yards apart, and as we walked along we just happened to notice those particular shell casings.

MR. TAIKEFF: Excuse me one moment. May I confer, Your Honor?

THE COURT: You may.

(Defense counsel conferring.)

Q (By Mr. Taikeff) How much time did you and Agent Morton spend on June 28th searching around that area of the junk cars?

A It wasn't long, sir. As soon as we picked those up we marked them and just maintained them in a bag.

Q Did there come a time while you were on the scene at that immediate location that the two of you had any occasion to separate more than a few feet or a few yards.

A No, sir.

Q I'm talking about one of you going away someplace?

A No, sir.

Q Do you know whether Agent Morton wrote a 302 covering the same subject matter as your one page 302 which has been marked Defendant's Exhibit 125?

A If I can see that, I believe Agent Morton initialed that {2025} also.

Q In fact you are correct. My question is: do you know whether he wrote a separate document?

A No, sir. He wouldn't because once we record it, be I dictate or be he dictate it, that's it. Essentially just the one document.

Q You are the one who dictated this; is that correct?

A Yes, sir.

Q And then both of you initialed because it reflected joint activities of the two of you?

A Yes, sir.

Q And then there would be no need for him to write the exact same thing on a separate piece of paper, is that what I understand?

A That's correct, sir.

Q Is it fair to say that you were thorough in your efforts to find anything that might in some way relate to the events of June 26th?

A Yes, sir. At that particular time it was the only thing I observed on the ground in that area.

Q Now, going back to the circle surrounding Coler's car. Can you tell us how many empty casings from either the shotgun, pistol, pistols, rifle or rifles of the agents were found within that circle twenty yards in radius?

A No, sir, I can't tell you.

Q Is that because you have no knowledge whatsoever or that you {2026} didn't count it?

A I've got knowledge of the three that I saw, I believe it was yesterday. That I picked up, that could have been shell casings from our weapons.

Q And do you recall what the caliber was of those particular shell casings?

A One was a 38 caliber from a handgun.

Q 38 Special?

A Yes, sir.

Q Let's stop for a moment.

A .357 magnum is a handgun; is that correct?

A Yes, sir.

Q And the caliber of the bullet that goes through the barrel is the same caliber as a .38 Special?

A Well, it's .357. They call it .357 ammunition, sir.

Q But it's really the same caliber?

A Yes, sir.

Q In fact it would be fair to say that a .357 is a stepped up or souped up .38 Special?

A It's a heavier weapon, yes, sir.

Q You can fire .38 Special bullets from a .357 magnum, can't you?

A Yes, sir.

Q But not the other way around unless you want to blow your hand off? {2027}

A That's correct, sir.

Q Now, you found how many .357 casings?

A I believe that particular shell I looked at was a, what they call

a .38 plus "P".

Q I stand corrected, it was a .38 Special.

MR. HULTMAN: I did the same thing yesterday.

MR. TAIKEFF: Okay.

Q (By Mr. Taikeff) How many of those casings did you find?

A I found the one I marked for evidence.

Q Just one?

A Yes, sir.

Q Any of your colleagues find any others?

A I don't know, sir.

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

THE COURT: You may.

MR. TAIKEFF: Could I have a moment to confer with Mr. Hultman, Your Honor?

THE COURT: You may.

(Mr. Taikeff and Mr. Hultman conferred.)

Q (By Mr. Taikeff) Now, sir, I have in my hands Government Exhibit 30-AA and 36-A already in evidence. They are, are they not, in their general style and design similar looking weapons; is that correct?

A Yes, sir.

Q And they are what you call pump action guns?

{2028}

A Yes, sir.

Q When you pump the handle backwards it loads the chamber, cocks the gun, you push the slide forward, pull the trigger, it fires. So far am I correct?

A But when you bring it back it ejects the shell there --

Q I'm talking about the first shot.

A It reloads and cocks your weapon, yes, sir.

Q Then when you do it a second time as you bring the slide back a casing drops out or flies out and then on the forward stroke of the slide the next bullet or cartridge is picked up off the magazine and put into the firing chamber, the gun is cocked again. If you pull the trigger again it will shoot again?

A Yes, sir.

Q Both of these work essentially according to that general description?

A Yes, sir.

Q The one in my right hand, which is 36-A, is a shotgun?

A Yes, sir.

Q The one in my left hand, which is 30-AA, is a rifle?

A Yes, sir.

Q Okay. How many discharged shotgun casings did you and your colleagues find within that circle surrounding Coler's car?

A I personally found the one that I initialed and if there {2029} are any others I'd have to look at that 302 related to the crime scene search to determine if any had been found.

Q All right. To save time would you be willing to look at this report during the lunch and recess if you're still under cross-examination at 12:30, and then report back to us on that subject later?

A Yes, sir.

Q Okay.

MR. HULTMAN: I have no objection, Counsel, if you know and it is in the report that you so indicate.

MR. TAIKEFF: I'm afraid that I would not take the responsibility for the many details which are in there. I don't want to make my assertion. I'll let the witness testify as to what he knows.

Q (By Mr. Taikeff) Now, I notice in the answers which you have given in the last three to five minutes you emphasis what you found. I don't quarrel with your statement that that's what you found. What I want to know is are you saying by that that it is your belief or understanding based on your official knowledge in your official capacity that other people in your group found other objects of a similar kind?

MR. HULTMAN: Could I again, Your Honor, just voir dire one or two questions?

MR. TAIKEFF: No objection.

MR. HULTMAN: In order for a possible objection.

{2030}

Agent Waring, counsel has asked you a number of questions about a search within a given area here to which is the general vicinity as Coler's car. Do you recall those questions?

THE WITNESS: Yes, sir.

MR. HULTMAN: Now, you also indicated in response to questions there were certain people, I believe Agent Hughes, Wiley, a Price, Taubert, maybe the question wasn't asked, but referred to on the 302, other agents that were there at the same time conducting the search in your presence; is that correct?

THE WITNESS: That's correct, sir.

MR. HULTMAN: Now, was this search at that time done in more or less

together in that narrow, very limited area?

THE WITNESS: Yes, sir.

MR. HULTMAN: And were you aware of the things that were found at that time by any of these agents in and about that limited area to which counsel is referring?

THE WITNESS: Yes, sir. There were things found that I did not necessarily indicate that I was right there when they were located.

I placed my initials on items with other agents while I was standing there observing them from where they were picked up, and then placed in a separate container for evidence.

MR. HULTMAN: All right. So is it fair for me to {2031} conclude that all of the items that were found by that group at that time were in the presence of each other?

THE WITNESS: That's correct, sir.

MR. HULTMAN: And you were aware of what those items are, or you were at that time? I don't know whether you are now by memory.

THE WITNESS: I was aware -- I took a look at the items as they were placed and put into evidence.

MR. HULTMAN: I have no further questions.

Go ahead.

Q (By Mr. Taikeff) Let me see if I can hasten this process by making clear to you what it is that I'm after.

My question as predicated on the following position which I think is the Government's position, I would like to be corrected if I'm wrong, that between the two agents they had two handguns, each designated a .357 magnum, one pump shotgun, one pump rifle and except for a piece of evidence that may have been in the glove compartment of one car no other weapon. Now, that's the foundation of the position that I'm in in questioning you.

Now, I'd like to take it a step further. Those handguns which are in evidence in this case, and which are designated as .357 magnums, they're not in evidence yet I'm informed by the Clerk, they've been identified, are capable of firing a .357 magnum cartridge, or a .38 Special cartridge, {2032} correct?

A Yes, sir.

{2033}

A Yes.

Q And, of course, the shotgun, the twelve gauge shotgun fires twelve gauge shotgun shells and the other rifle which I think is a .308 fires that caliber. What I'm interested in knowing, based on your activities with your

fellow agents when you searched the immediate vicinity of Coler's car is how many .38 specials, how many .357 nagums, how many twelve gauge shotgun shells and how many .308 shells did you find within that circle with Coler's car at the center and a diameter of 120 feet?

MR. HULTMAN: Counsel, I have no objection at all, and I think to get the answer you're trying to get, if you showed him the exhibit now. If he could refresh his recollection and give you the response you're seeking.

MR. TAIKEFF: I have no objections doing that at all.

A At this time, this took place in June, 1975. I'll have to, I can read it to you from --

Q (By Mr. Taikeff) I have no objection if you have confidence in what it says there.

A Number one indicates expended, one expended shotgun shell found near the right tire. Number two has some other items in addition to, but I'll just list the shells. One expended .308 round, one live .308 round.

Q I'm only talking about evidence of things being shot.

A Okay, sir.

{2034}

Q If I didn't make that clear to you I apologize.

A Number three indicates there was one expended round of .38 caliber.

Q And you're speaking now of both in and out of the car, I assume?

A These were found outside of the car.

Q Okay.

A Without reading the entire document through in the list of items found, those would be the items that were expended shells.

MR. TAIKEFF: Your Honor, to make sure I might not be taking unfair advantage of this witness' failure to locate something, I would ask Mr. Hultman to state whether that is in fact a complete and accurate list of either what's in the report or any information he has. I want to make sure there is no misunderstanding about that.

MR. HULTMAN: Well, as I understand, you're talking about, one, he responded to you a search outside the car, not inside the car?

MR. TAIKEFF: That is correct.

MR. HULTMAN: And I would refresh my own self here just to make sure.

MR. TAIKEFF: I summarized it as one .308, two .38 calibers and one twelve gauge shotgun shell all expended.

MR. HULTMAN: If Counsel indicates that is what the {2035} 302 indicates, I have no argument, but I'm not certifying it's the case.

MR. TAIKEFF: I understand that. I'm only trying to make sure because

the witness said he thinks that's the complete list that I don't take advantage of an oversight on his part that Mr. Hultman might be aware of. I'd like to be corrected if I'm taking advantage of that.

MR. HULTMAN: Indicates one expended, apparently .38 caliber round.

MR. TAIKEFF: I see. So instead of four there might have been only three but surely not more than four, am I safe in understanding the testimony that way?

MR. HULTMAN: One expended shotgun shell he's referred to, one expended .308 round, one expended, one round, one expended round, apparently .308 and that's all I --

MR. TAIKEFF: Thank you.

Q (By Mr. Taikeff) Now, sir, do you know of anything picked up that day that was carried away by the agents and not reflected in this report in the way of expended .38 caliber, .357 caliber, twelve gauge or .308?

A No, sir. The reason for conducting the search is to obtain everything that would be considered evidence and all expended rounds in addition to live rounds would be considered evidence when we picked them up.

Q Now you've fired a .308, haven't you?

{2036}

A Yes, sir.

Q You fired a pump action shotgun, haven't you?

A Yes, sir.

Q Pump action rifle?

A Yes, sir.

Q How many years ago did you first encounter the use of rifles or shotguns?

A When I was in the U.S. Army, sir.

Q About how many years ago?

A 1967.

Q So for ten years you have had experience with rifles, long guns, shotguns of different kinds, is that correct?

A Had some experience; yes, sir.

Q I'm not trying to qualify you as an expert, just ten years of experience both as a military person and a law enforcement person, isn't that correct?

A Yes, sir.

Q And you fired guns from time to time on the practice range, don't you?

A Yes, sir.

Q And also handguns would be included in that, wouldn't it?

A Yes, sir.

Q Now is it possible by any technique or method that you might know to take a twelve gauge shotgun, pump it so that it's {2037} loaded and cocked, fire it and pull back the slide so hard that the casing goes out more than 60 feet away?

A No shotgun that I've ever seen, sir.

Q Is it possible to use a pump action .308 rifle in such a way that you use the slide to cock it and load it, you fire it, you then pull the slide back again in such a vigorous way that the bullet, the cartridge flies out more than 60 feet away?

A No, sir.

Q Now when you fire a handgun that is not a semi-automatic pistol, I'm talking about a revolver, okay?

I should have worn my six gun. They're not here.

When you fire a handgun which is not a semi-automatic pistol, what is commonly referred to as a revolver, as you fire it, what happens to the empty casing?

A They stay in the cylinder, sir.

Q And as a general rule, I'm not asking you whether it's true for every revolver ever manufactured, as a general rule you either break the gun open or break out the cylinder to expose the fired cartridges?

A That's correct.

Q And then there is, depending on the particular design of that handgun, either an ejector rod which sits underneath the barrel and parallel to it or is part of the axis or the axle of the cylinder that you can push and eject either one at a {2038} time, depending on the design, or all at one time, the casings which are in the cylinder, is that right?

A That's correct.

Q Now, sir, based on your experience of ten years with handguns, is it physically possible to fire a .357 magnum or any other handgun and then break out the cylinder and push the ejector mechanism with such force that the empty casings fly out of the cylinder and go more than 60 feet away?

A No, sir.

Q Did it rain anytime that afternoon?

A No, sir.

Q Is it therefore fair to say that at no time prior to your search on June 26th was it possible for it to have rained so hard that any casings on the ground would have dissolved?

A It didn't rain that day, sir.

Q No, sir, let's direct your attention to the other area that you searched on another occasion up here (indicating). On June 26th did you walk through or come close to that area?

A I was close to that area, sir.

Q Did you ever examine that area in any way, cursory or otherwise, on June 26th?

A Just looking it over from the position of the trees.

Q You didn't look on the ground at any time, did you?

A No, sir.

Q Now you came back to that particular location on June 28, {2039} correct?

A Yes, sir.

Q Were you in the Army?

A Yes, sir.

Q Did you ever see a weapon like Government Exhibit 29A?

A Looks like an M1.

Q It's an M1 Gerand rifle, right?

A I know it as an M1; yes, sir.

Q What caliber does it fire?

A I believe it's a 30 caliber bullet.

Q Is it a fact that it fires 30-06?

A Could, sir.

MR. TAIKEFF: Will the government stipulate that rifle fires 30-06?

MR. HULTMAN: I think there will be testimony by such a person who would respond, whatever the answer would be. I'm in no position to respond, Counsel.

MR. TAIKEFF: Well, subject to his testimony, would the government stipulate that that --

MR. HULTMAN: I can't, Counsel.

MR. TAIKEFF: That M1 rifle fires 30-06? I'm only asking will the government stipulate.

MR. HULTMAN: I'm not objecting. There will be a witness that can answer specifically that question. I'm not going to stipulate something I myself sitting here not being {2040} expert doesn't know. That's all.

Q (By Mr. Taikeff) When you went back on June 28, you searched the ground around those junked cars, right?

A Yes, sir.

Q And you found ten 30-06 casings, is that right?

A Yes, sir.

Q And they were the ones offered in evidence yesterday except that one of them was missing?

A Correct, sir.

Q Now can you pinpoint for us where you found those 30-06 casings?

A I'd have to refer to the 302, if I have a distance in there. At this time I just don't. To the rear of the automobile I pointed to yesterday.

IT would be the last car in the line in the southeast.

Q Southeasterly direction?

A Southeast. Right off the, I call it the left rear as you stand facing the rear of the car parked (indicating).

Q Let me put it this way: if a person were standing behind that last car, and generally speaking I'm pointing in a southeasterly direction, and he were generally speaking facing the direction where Coler's car is designated on the chart, then you are talking about a place which is somewhat to the right of that?

A Yes.

{2041}

Q Okay.

Now that M1 rifle, it loads its ammunition in a clip through the top, does it not?

A Yes, sir.

Q And when it fires the ejected cartridges come out to the right, do they not?

A That's correct.

Q They don't make a left-handed model for that particular gun, isn't that correct?

A I don't recall any. Haven't seen any; no, sir.

Q And so if someone were standing behind that car, that last car, shooting in the direction of Coler's car, you would expect to find 30-06 rounds roughly where you found them, isn't that correct?

MR. HULTMAN: I object.

MR. TAIKEFF: I'll withdraw the question.

Q (By Mr. Taikeff) Now, sir, tell us where you found the .223 casings at that location.

A I didn't find .223 casings, sir.

Q I'm sorry, sir. I must have misspoken.

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

(Recess taken.)

{2042}

AFTERNOON SESSION

(Whereupon, at the hour of 1:30 o'clock, p.m., the trial of the within cause was resumed pursuant to the noon recess heretofore taken; and the following further proceedings were had, the Defendant being present in person:)

THE COURT: Is counsel ready for the jury?

MR. TAIKEFF: Yes, your Honor.

MR. HULTMAN: Yes, sir.

THE COURT: The jury may be brought in.

(Whereupon, at 1:32 o'clock, p.m., the jury returned to the courtroom; and the following further proceedings were had in the presence and hearing of the jury:)

THE COURT: You may proceed.

MR. TAIKEFF: Thank you, your Honor.

GERARD P. WARING,

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

CROSS EXAMINATION (Cont'd.)

By MR. TAIKEFF:

Q Mr. Waring, do you recall that just before the luncheon recess was announced, we were looking at the facts surrounding a search of the area surrounding the junked cars?

A Yes, sir.

Q And do you recall that I put to you the following question {2043} and that you gave the following answer:

Question: Now, sir, tell us where you found the 2.23 casings, at that location?

Answer: I didn't find 2.23 casings, sir.

Do you recall that question and answer just before the luncheon recess?

A Yes, sir.

Q I am bringing before you Government's Exhibit 34-AA. Do you recognize that as an AR-15, do you not?

A Yes, sir.

Q And that is the kind of gun which ejects its spent casings out the right-hand side, isn't that correct?

A Yes, sir.

Q The pedestal on which I am resting Government Exhibit 34-AA is the clip, is it not?

A This is the magazine (indicating), I believe they refer to it.

Q O.k., and the bullets sit in there on a platform which is motivated by a spring, is that right?

A Yes, sir.

Q As you load each one, the platform goes down and that spring provides pressure, correct?

A Yes, sir.

Q And that pressure is needed because as each bullet is fired and then ejected, the next bullet has to be raised up {2044} to an appropriate level so the bolt, when it is pushing itself forward, catches the next bullet on top and puts it into the place from which it is fired, is that correct?

A Yes, sir.

Q And there is a little trapdoor here (indicating), is there not?

A Yes, sir.

Q On the right-hand side, and it is out of that trapdoor that the casings come, one at a time, as you fire each round, correct?

A Yes, sir.

Q Have you ever fired any weapon like this?

A Not that -- a M-16, sir.

Q Basically the difference between the M-16 and this is that the M-16 is capable of firing in a fully automatic mode?

A Yes.

Q If you load that with a 10 shot clip and you pull the trigger, and you hold it in for a fraction of a second, you will hold it until all 10 shots have come out, one right after the other, correct?

A Yes.

Q When you fired the M-16, do you know what caliber ammunition it was firing?

A I fired the M-16 in the Service, sir.

Q What caliber ammunition?

{2045}

A 2.23.

Q And does the 2.23 casing have a distinctive shape so that if you saw it you would know it?

A It had a marking on it, I would know it. Not necessarily at this time if I looked at it without seeing the marking on it, I wouldn't know.

Q But the marking would tell you the caliber?

A Yes, sir.

Q And it doesn't specifically say whether it should be used in an

AR-15 or a M-16, is that correct?

A No, sir, it describes the type of ammunition.

Q O.k., and 2.23 is a specific designation for a certain cartridge, is that correct?

A That's correct, sir.

Q And as far as you know, that number in that form is used only to define that particular kind of cartridge?

A Yes, sir.

Q Now, have you ever known an AR-15 or an M-16 to eject its empty casings 60 feet from the gun?

A No, sir.

Q Based on your own experience, what would you say the average distance is?

A I would say not more than just a couple of feet.

Q Now, sir, I am placing before you the Commando Mark III, Government Exhibit 37-A. I am going to stand over here so the {2046} jury can see the weapon. I may have blocked the jury before.

Now, basically this weapon works the same way as the AR-15, isn't that correct?

A I have never seen this one fired.

Q Well, why don't you take a look at it, and based on your own experiences, tell us whether or not, generally speaking, it functions in the same way?

A I would say it is magazine fed. Yes, it would be similar.

Q It ejects out of a port on the right-hand side, is that correct?

A That's correct.

Q And the bullets come up one at a time in the magazine, and as they are fired, the slide comes back, the empty casing goes out, the slide goes forward, the next bullet goes into the chamber, is that right?

A That's the way it should work, yes, sir.

Q Do you have any reason to believe that this particular weapon is capable of firing in such a way that the empty casings would be ejected more than 60 feet to the right of the shooter?

A No, sir.

Q Did you find any .45 casings in the vicinity of the junked cars?

A No, sir.

Q Now, I would like to draw your attention to the assault on the green house. That specific event occurred at approximately {2047} 5:50 p.m., is that correct?

A Yes, sir.

Q And your focus of attention on the green house -- I am not suggesting it was absolutely uninterrupted -- but the general focus of attention on the green house began at what time prior to 5:50?

A Well, when I first got into the area at Z-1, which was approximately 2:00 p.m., to 2:15 p.m. --

Q (Interrupting) I am talking about a period beginning sometime earlier than 5:50, where for all practical purposes there was an uninterrupted -- I don't mean it every minute -- but generally speaking, an uninterrupted period where your principal focus of attention was the green house, was that a half hour before 5:50, an hour before, or an hour and a half before 5:50?

A Generally we were focusing -- or I was focusing my attention on the plateau, including the green house, from the time that I mentioned earlier through the rest of the afternoon, sir.

Q O.k. Now, in the latter part of the day, let's say within an hour or perhaps an hour and a half before 5:50 p.m., were you under the impression that you or the law enforcement people you were working with were receiving fire from the vicinity of the green house?

A Well, as I stated earlier, the last fire that my group {2048} received, really the last firing that I heard, was sometime after 2:30 p.m., 2:30 to 2:45 p.m.

Q Not later in the day?

A No, sir.

MR. TAIKEFF: If I may have another moment, your Honor, please?

THE COURT: You may.

Q (By Mr. Taikeff) Is it possible, sir, that you are mistaken about receiving fire from the green house at or about the time of the assault?

A When I began to move from the corral area, Z-3, out into the open area, the only thing I could tell, that there were rounds coming in my direction; and as I said, I believed at that time they were coming from the plateau area of the green house.

Q Well, is it not a fact that in your 302 of that date you wrote: Shortly after the assault teams began the assault, they moved into a position which would not allow me to fire from my position; and I immediately left and proceeded toward the green house, across an open field. Approximately half way across the open field, the Sheriff's Deputy, myself and other members of the assault team came under fire, believed to be coming from the direction of the green house?

A Yes, sir.

Q Now, can you identify in any way, by name, height, {2049} general description, kind of clothing or otherwise, the person or persons who may have been firing at you from the green house at that time?

A No, sir. As I stated earlier, when I went across and I started to hear the rounds go over my head, I got down on the ground and was going for cover. I didn't look, and I didn't see anyone.

Q Now, at or about that time, isn't it true that a certain number of law enforcement people were at a point west of the car location, Coler's car, on a road called Highway 35, keeping an eye on what was happening east of them and checking out the whole scene to the extent that they could see it, weren't they there at 5:50 p.m.?

A I don't know, sir.

Q Did your group have radio equipment?

A We had one radio, sir.

Q Was it on the FBI frequency?

A Yes, sir.

Q Did you hear or were you ever advised that there came over that radio any report that when you were assaulting the green house from which you thought firing was coming, people were seen running from the green house, or a person was seen running from the green house?

A I was never advised of that, no.

Q Now then, you secured the green house, is that correct?

{2050}

A Well, we secured the residences located on that plateau, yes, sir.

Q And how many people did you arrest at that time?

A We didn't arrest anyone.

Q Well, how many people other than law enforcement officers did you find there at that time?

A We didn't find anyone there with the exception of the body of Joseph Stuntz.

Q Well then, isn't there a substantial possibility that the firing that you were receiving at or about the time of the assault was coming from an entirely different locale?

A I believe all I stated was that I believed it was coming from there.

Q But when you got there, you found nobody there?

A That's correct, sir.

Q Did any of the agents or other law enforcement people enter those residences?

A Yes, sir. I saw some people go in and out of the residences, yes,

sir.

Q You saw them both go in and go out. Were you in the area while they were inside?

A Yes, sir.

Q Did you hear any shooting?

A Not at that time, no, sir.

Q After that time?

{2051}

A Not after that time, no, sir.

Q Only before that time?

A Yes, sir.

Q Did you notice any time that day or on any later occasion whether the southern end of any of those houses or outbuildings had bullet holes?

A I didn't examine the buildings, sir.

Q Well, "examine" means something special, doesn't it? My question is: Did you see any bullet holes?

A I didn't see any, no, sir.

Q Was BIA Officer Ecoffey in your group that afternoon?

A I don't believe he was, sir. I think I stated earlier the only BIA Officer I am sure was there was Delbert Eastman.

Q How about Billy Allen?

A I don't know, sir.

Q Joe Jacobs?

A I don't know, sir.

Q Phil Clifford?

A I don't know, sir.

Q Frank Two Bolts?

A I don't know, sir.

Q Now, I would like to return your attention to the period immediately following June 26th; and in order to limit the scope of what you have to pay attention to, I want you to take into consideration from 5:50 p.m., on the 26th, until you went {2052} to sleep on the night of the 30th. During that period you had occasion to speak with your colleagues and fellow agents about the developing investigation, isn't that right?

A Yes, sir.

Q And in the course of that, or those discussions with your colleagues, the name, Leonard Peltier, came up, did it not?

A I don't recall his name coming up at that time, no, sir.

Q Now, putting aside your group meetings, if I may refer to them that

way, did you in private conversation with one, or just a relatively small number of agents, discuss the possible involvement in the events of June 26 of Leonard Peltier?

{2053}

A I didn't specifically have any talks with or conferences with anyone concerning Leonard Peltier.

Q I'm sorry for interrupting you.

I'm not quite sure what you mean when you say "I didn't specifically have any conversations." Is that your way of saying I definitely had no conversations period, end of subject, or is there something else in your mind?

A I didn't have any conversations at all about him.

Q Okay. Now, how about what you heard about conversations when you speak. How about when you overheard? Hear any of your fellow agents who were working on this case talking about the possible involvement of Leonard Peltier?

A In that time frame I don't believe that Leonard Peltier's name had come up at that point.

Q Did the name James or Jimmy Eagle come up?

A Yes, sir.

Q Was it in the context that the deceased agents were trying to effectuate an arrest warrant on Eagle?

A That's correct, sir. We felt that as I stated previously myself, Ron Williams and Jack Coler that Jimmy Eagle was in the Oglala area.

Q And with respect to that four day period was the possibility discussed that an ambush had been laid by Jimmy Eagle and others for the agents?

A No, sir.

{2054}

Q Now, other than the fact that the deceased agents and possibly other agents had been attempting to effectuate an arrest warrant on Jimmy Eagle, do you have any recollection of his name coming up in any other context with respect to the events of June 26th, 1975?

A Yes, sir. After the shooting there was talk that since we had originally gone out that day, or Jack and Ron and I had intended to join them to locate Jimmy Eagle, that the possibility existed that Jimmy Eagle had been in the area. And so therefore we wanted to continue efforts to locate Jimmy Eagle.

Q And is it fair to say that this state of mind or collective state of mind which you've just described existed on the 27th, the 28th, the 29th

and the 30th without major alteration?

MR. HULTMAN: Well, Your Honor, I haven't entered any objection, but I now do. I don't want the collective state of mind of anybody or any group or any time. I object to the indefiniteness and it's been asked and answered, and I believe any questions are, one, repetitive and, two, are not relevant.

MR. TAIKEFF: I'll withdraw the question as asked.

Q (By Mr. Taikeff) You said that there was belief that it might be worthwhile pursuing Jimmy Eagle to see what involvement he may have had with those events; is that correct?

A Well, the main reason for pursuing him was there was still -- {2055}

Q Just answer my question.

A There was a warrant outstanding for him.

Q But answer my question.

Did you not say two minutes ago that he was being sought perhaps in addition to the outstanding warrant because it was believed that he might have had something to do with those events of June 26th? Yes or no.

A Yes.

Q Now, do you know anything that occurred during the period 5:50 P.M., June 26, 1975, from the time you went to sleep on June 30, 1975 that changed your mind about that possibility, either expanded or contracted your thinking on that subject? Yes or no.

A Sir, could I have that read back to me?

Q If the Judge will allow, I have no objection.

THE COURT: Question may be read back.

(Whereupon, question read back: "Question: Now, do you know anything that occurred during the period 5:50 P.M., June 26, 1975, from the time you went to sleep on June 30, 1975 that changed your mind about that possibility, either expanded or contracted your thinking on that subject? Yes or no.")

A I'd say no, it wasn't.

Q (By Mr. Taikeff) I'm holding in my hand Government Exhibit 55 and I've turned to page, or pages 33 and 34. They're both in evidence. I'd just like the jury to know what I'm {2056} referring to.

(Counsel showing jury Exhibits 33 and 34.)

Q (By Mr. Taikeff) Ask for you to take a look at that photograph or those photographs.

A Did you also say page 34?

Q Yes, both sides.

Same vehicle, right?

A Yes, sir.

Q Just slightly different views?

A Yes, sir.

Q Now, in that four day period which I've been questioning you about discussion came up concerning that vehicle you just looked at?

A It was talked about, a red and white vehicle, yes, sir.

Q Was there any discussion concerning the fact that Leonard Peltier was known from time to time to drive that vehicle?

A Not that I recall, sir.

Q Now, at the end of your working day on June 26th it is a fact that you knew from your own personal observations or believed, knew or believed, that there were people up here in the vicinity of the residences shooting, correct?

A Yes.

MR. HULTMAN: Well, now I object, Your Honor. That clearly is not a fair statement of the record.

This question has been asked now at least three times {2057} as to establish what it was he honestly and fairly saw up there. This witness has responded that he saw, one, he saw nobody there; two, that he -- firing came in on them; three, he did not know specifically, but gave his best opinion, and that is what the record indicates.

So I object on the grounds that, one, it's a misstatement of the record and that, two, it is cumulative. The questions have been asked and answer in this area, time and time frame.

MR. TAIKEFF: Your Honor, I thought I said knew or believed. And I'm asking it as a foundation question just to summarize so that I can proceed to the point of which this is a part of the foundation.

MR. HULTMAN: And I object again, Your Honor, for its foundation. We've been through the foundation at least three times.

THE COURT: I'll allow the question.

MR. TAIKEFF: It was answered in the affirmative I believe, Your Honor.

Q (By Mr. Taikeff) Is that correct, sir?

A Did you say earlier in the day?

Q I said by the time the end of the working day came on June 26th, based on what you had seen there and all of your activities that day, you knew or believed that there were people in the area of the residences sometime in the course of {2058} the day who had been shooting?

A Yes, sir.

Q And that you were also aware of the fact that these residences were

on high ground relative to the location of Coler's car; is that correct?

A Yes, sir.

Q Now, sir, I want to see if I have an extra copy of a certain document.

I'm placing before you Defendant's Exhibit 83 for identification which is the 302 which you wrote concerning your activities on the 26th, and I ask, sir, whether or not the first paragraph on page 2 --

MR. TAIKEFF: I'm wondering whether the Government has a copy handy so that all of us can be looking on together.

MR. HULTMAN: I have my own.

Q (By Mr. Taikeff) The question then is on page 2, paragraph 1, without referring to the content specifically, is it not a fact that that paragraph describes what you say you heard on the Bureau radio in the early afternoon? That is to say prior to 12:30.

A Yes, sir.

Q Are all of the statements made there factually true as you knew them then and know them now?

MR. HULTMAN: Well, now I object, Your Honor. That calls for something -- clearly that's not a part of the record. {2059} I have no objection to counsel if he's asking questions as he has as to what the witness knew and saw at the given time. But for now to interject something without any foundation of any kind as to what he does or does not know, now is clearly an improper question and for which no foundation has been laid.

MR. TAIKEFF: I don't understand. My question was to make that kind of an inquiry. I merely asked him what he wrote.

MR. HULTMAN: Read the question back, will you please, Mr. Reporter.

THE COURT: Question may be read back.

(Whereupon, question read back: "Question: Are all of the statements made there factually true as you knew them then and know them now?")

THE COURT: Objection is overruled.

A I wrote down what I believe I heard.

Q (By Mr. Taikeff) Okay. Now, you wrote in that paragraph that you heard Special Agent Williams make a transmission asking for assistance to get people off the ridge since there were people up there firing down on them, is that not correct?

A Yes, sir.

Q Now, did you hear such a transmission?

A Yes, sir.

Q Isn't it a fact that what you heard was a voice you believed {2060} to be Agent Williams, and there's no dispute about the identity of the voice,

saying that help should come and should get up on the ridge so that the people up on the ridge could fire down on the people who were shooting at the agents?

A What I heard, sir, is what I wrote on the 302.

Q So you are saying no to my question; is that correct?

A That's correct, sir.

Q Okay. Is what you wrote here, as far as you know, in any way that you are consciously aware of, any way influenced by way of what you observed in the course of the afternoon, namely what you either knew or believed to be the case that at some point during the day there were people up on the ridge shooting?

A No, sir.

Q You did write this report, by the way, eight pages long, single-spaced, strictly from memory, did you not?

A Yes, sir.

Q You didn't consult with anybody else and you didn't have any notes; is that right?

A That's correct, sir.

Q Now, sir, in that same paragraph you report a transmission by Agent Williams in which he says, according to your report, that he or they, as the case may be, were located in an area near the Little, L-i-t-t-l-e, residence.

A Yes, sir.

Q You heard that?

{2061}

A Yes, sir.

Q Did you hear any other voices at or about that time trying to find out where he was?

A No, sir.

Q Wasn't Agent Adams trying to discover where his friend and colleague was so he could come and help him?

A Yes, sir. But Agent Adams asked Williams prior to Williams making that response. That was Williams response to Agent Adams' question.

Q And which is the Little residence with a capital "L"?

MR. HULTMAN: I object, Your Honor. Again this has been asked and answered and this witness has indicated that he has no knowledge as to what was in the mind of Agent Williams at that particular time. It's an improper question to ask of this witness with the foundation that's been laid.

MR. TAIKEFF: Your Honor, --

THE COURT: The question that was asked is "Which is the Little

residence".

MR. TAIKEFF: That's correct, Your Honor.

MR. HULTMAN: And in the time frame of the questions that are being asked, and I'll have no objection is he's going to now move from the time frame that we're talking about, what he's hearing in a radio broadcast and asking point blank whether he now has an idea or a concept.

MR. TAIKEFF: If that's Mr. Hultman's point, I don't {2062} take exception to it. I'm asking this witness whether he knows now as he sits there which is the so-called Little, with a capital "L".

MR. HULTMAN: And with inference as a result that is connected with what he at the time and basically concluded from the broadcast that he heard. As he previously testified he didn't know any particular residence of that kind at that period.

MR. TAIKEFF: I was wondering when the signal was going to be given. We finally heard it.

Q (By Mr. Taikeff) Did you hear that, sir? Did you hear what Mr. Hultman said?

MR. HULTMAN: I object, Your Honor, to the characterization. I have a right to make the objection any time I wish to make an objection.

THE COURT: Objection is sustained. The witness may answer the last question.

I mean the question --

MR. TAIKEFF: Before?

THE COURT: --before the objection.

MR. TAIKEFF: I understand, Your Honor. I understand all too clearly.

A Can I have the question read back?

Q (By Mr. Taikeff) I can repeat this one. It's a short question. {2063}

A Okay, sir.

Q Which is the Little residence?

A At that time I knew only one Little residence. Little Ranch they called it.

Q Did I ask you what you knew at that time? I asked you which is the Little residence, isn't that a simple enough question?

A Yes, sir. I don't know which one is the Little residence.

Q You don't know which residence, if any on Government's Exhibit 71, is the Little residence?

A No, sir.

Q Do you know which is the so-called Wanda Siers' residence?

A No, sir.

Q Now, you started saying before at that time. Did there come a time when your state of knowledge changed?

A No, sir.

Q Then why did you say "at that time"?

A Because at that time I knew having only been on the reservation for a short period of time prior to that day that I knew of one location. Was know as the Little ranch.

That's the only Little residence or ranch that I knew of, sir.

Q Would you be kind enough to tell us the location of that.

A Well, it's not on this map, sir.

Q All right.

{2064}

MR. TAIKEFF: Your Honor, Mr. Hultman was curious to know whether that was a signal to Mr. Ellison. It was. For him to sit down. It was not to tell him what answer to give.

If I may have a moment, Your Honor, please.

THE COURT: You may.

(Defense counsel conferring.)

{2065}

Q When you were first assigned official duties on the Pine Ridge Reservation, were you given a map which designated on it in one form or another the Little ranch, as you refer to it?

A No, sir.

Q Do you know whether or not the residence on Exhibit 71 which is designated with a movable magnetic device as the tan and red house is the home of a woman by the name of Wanda Sears?

A No, sir.

Q Have you ever spoken to a young by the name of Michael Anderson?

A No, sir.

Q Now, sir, getting back to the paragraph in 83 for identification, first paragraph, page 2, you report that Agent Williams' voice on the bureau radio said something about a red and white vehicle.

A Yes, sir.

Q Did you hear the words "red and white," those three words, "red and white," on the radio that day?

A Yes, sir.

Q What was he saying? Don't look at the report. Do it from memory, if you can. What do you recall Agent Williams was saying about the so-called

red and white vehicle?

A Said that the vehicle was traveling near him with a number of individuals in it.

{2066}

MR. HULTMAN: Let the record show, Your Honor, those are the exact words that are in the report without looking at it.

MR. TAIKEFF: Does that mean without the agent looking at it or without Mr. Hultman --

MR. HULTMAN: Without the agent looking at it per your request, Counsel.

Q (By Mr. Taikeff) What else did he say, if anything, about the red and white vehicle?

A That's all that I heard him say, sir.

Q And when did you write the report from which we have just discussed the contents of the reported radio transmission, what date?

A On June 30.

Q 1975?

A 1975. Yes, sir.

MR. TAIKEFF: No further questions.

MR. HULTMAN: I have no further questions, Your Honor.

THE COURT: You may step down.

MR. TAIKEFF: May I have a moment to confer, Your Honor, please.

THE COURT: You may.

MR. TAIKEFF: May the witness remain with us for a moment, please.

{2067}

Thank you, Your Honor.

THE COURT: Are you through with the witness?

MR. TAIKEFF: Yes, Your Honor.

MR. HULTMAN: Your Honor, we have a witness that's been waiting, standing by at the request of Counsel for defendant since yesterday morning. I'd like to proceed now with him.

MR. SIKMA: Special Agent Cunningham.

THE COURT: Very well.

MR. LOWE: The time isn't appropriate to continue.

MR. HULTMAN: I think it is appropriate. He's been standing around, sitting around. I would move we do proceed.

THE COURT: Mr. Cunningham has been recalled.

MR. LOWE: I'll take Mr. Cunningham anytime they want to serve him up, Your Honor. I'm ready for him now.

CORTLANDT CUNNINGHAM,

being previously sworn, testified further as follows:

CROSS-EXAMINATION

BY MR. LOWE:

Q Mr. Cunningham, I should say Agent Cunningham, you were testifying yesterday, I believe you were testifying from among other things some papers and notes there. I wonder if I might see what it was that you were testifying from. You have some notes of some sort. I think I may have a copy of some of it and I just want to be sure that --

MR. SIKMA: Your Honor, I think I prepared a copy for {2068} all of Counsel.

MR. LOWE: I have got a copy. I wanted to see if it was the same thing I had so I knew if I was referring to the right document.

Q (by Mr. Lowe) When you made your examinations back on June 28, 29th and 30th of the four vehicles, and I'm speaking now of Agent Williams' vehicle, Agent Coler's vehicle, the red and white van and the 1967 Ford Galaxie, did you make notes as you went along as to things which you found or observed?

A No, sir. Inasmuch as I on one occasion dictated a list right at the scene and the other case I had the evidence in envelopes marked.

Q Let's take the first day chronologically, the 28th. That was the day you examined Special Agent Williams' car, was it not?

A Yes, sir.

Q Will you state generally what happened. I'd like to have you start from when you arrived at the BIA compound, who met you and what you did and who was with you, first of all, when you arrived.

A Special Agent Edmond Kelso was with me.

Q When you arrived the two of you together presented yourselves to somebody at the BIA compound to gain access to the vehicle, I trust?

A Yes, sir.

{2069}

Q Do you remember who the person who took you in?

A No, sir.

Q Was it a BIA police officer or an agent, Special Agent of the FBI?

A I don't recall, sir.

Q Was the vehicle in a fenced in area or in a building?

A It's in a fenced in area.

Q And was access gained through a gate of some sort or through a building that was attached to the fenced in area?

A If I recall, it was through a gate, sir.

Q Who went inside of the compound with you and accompanied you or was in the general area that you were in while you were making your examination other than Special Agent Kelso, if anybody?

A I believe, if I recall, sir, there were two technicians that came along with us. I do not recall their names.

Q These would be FBI employees?

A Yes, sir.

Q But not special agents as such?

A No, sir.

Q What type of technicians would they have been?

A If I recall, sir, I think they were radio technicians.

Q Radio you're saying?

A Yes, sir.

Q Were they just simply in the area with you or were they {2070} involved in examining Special Agent Williams' car as such?

A They were used to, because they had tools, anytime that we found, like in the doors, we found holes in the doors that didn't exit where obviously a bullet could possibly be in the door, the two young men had the tools and they would take off the panel and everything so we could, I could reach down and pick out whatever was in it.

Q As far as you know then the four of you were basically making the examination of the vehicle and for all intents and purposes nobody else was immediately in the area?

A If I recall, sir; that is correct.

Q Following examination of that car on the 28th, that is, Williams' car, you had collected certain samples of various types. Where did you go and at what time of the day did you go when you left the Williams car itself, or the compound?

A It was during the daytime, sir. If I recall, it was in the afternoon.

Q And when you left there where did you go?

A I went to the building that was being used by the FBI and I turned in the evidence to the evidence room.

Q Now was that near the BIA compound in Pine Ridge?

A Yes, sir.

Q Would you give just a general idea of how close, was it like 100 yards away or immediately adjacent or a mile away?

A It would be one very short block.

{2071}

Q And when you got to that building, you say you turned over your

evidence and things you had collected to somebody at that building, is that true?

A Yes, sir.

Q When did you actually make your first written or dictated notations as to what you had found during your examination of Williams' car?

A Well, on the evidence that I saw I had written where it came from and that it was from Special Agent Williams' car.

Q So that you did have notes that you could refer to as you did your 302's, at least as to some of the items, and those notes were as you have, I think somebody has pointed out, put inside of the plastic evidence envelope in which there were located various items that you found, isn't that true?

A Yes, sir.

Q So it is not to be understood from your earlier answer that you did not have anything in writing from which you dictated the 302 because in fact those constituted notes you had made, isn't that true?

A I thought I mentioned, sir, that I dictated from the envelopes.

Q Okay.

As to any of the items that did not actually have such a note or piece of paper inserted in the evidence envelope {2072} or attached in some way to it, did you have any other kind of notes that you kept in a notebook or a journal or anything of that nature?

A I didn't have any of those items, sir.

Q What time of the day and on what day did you actually dictate the 302 with regard to Williams' car?

A If I recall, sir, it was the 1st of July. The time of day I do not remember.

Q And do you remember where you were when you did that?

A That was in the same building where I delivered the evidence, if I recall.

Q Did you make any kind of list as to either the number of items or the types of items that you found in the car during your examination which you left with the items? In other words, sort of an inventory on that day when you turned them into somebody or did somebody give you a receipt of some kind on that day which contained a listing of those items?

A I do not believe so, sir. The only thing I recall is I did dictate approximately July 1. If I may look at the 302 I can tell you.

Q I'm asking you for your memory just generally at this point.

A It was approximately July 1 I dictated and it was the list of what I had found in Williams' car.

Q I will show you what has been marked as Defendant's Exhibit {2073} 121 which is a 302 relating to Agent Williams' car and ask you if that is the document you have referred to that you prepared on July 1 as a result of your examination of Williams' car on June 28th.

A Yes, sir, it is.

Q So that the first time you actually reduced to writing in the form of dictation or any identifiable list as such the various items that you had collected and made individual notes about would have been on July 1 when you dictated this 302?

A Yes, sir.

Q And I'm going to ask you a series of questions that may be difficult for you to answer and that's the very reason I'm asking you because trying to establish this, as best you can recall prior to your reading your 302s before coming on the stand to testify here yesterday I believe you said you read them and reviewed your 302s before you testified yesterday, am I correct?

A Yes, sir.

Q A little background. When was it that you actually read those 302s, was it the night before or morning or a day or two before?

A It would be the day after I arrived. I was here in the office; yes, sir.

Q Do you know what day you arrived?

A It was last Wednesday.

{2074}

Q So it would have been perhaps Thursday of last week that you reviewed your 302s and read them and then you testified yesterday?

A Yes, sir.

Q Calling your attention to the day or two prior to your arriving here, you had not reviewed your 302s preparatory to testifying. Can you tell us now what items that are contained in Exhibit 121 you actually read without the aid of your recorded list that is shown in the 302 which is called Exhibit 121? In other words, can you tell us now what things you still recalled as opposed to those things which were refreshed in your recollection after you read the 302 last Thursday?

A Very few, sir.

Q Very few things would have been actually recalled?

A Yes, sir. Because they were either bullet fragments or bullets and where they came from I wouldn't remember that; no, sir.

Q I do not mean this in any way criticizing you but with all of the cases that you have had since June 26th, 1975 in you work in the firearm

section of the FBI, it would be virtually impossible for you to keep straight in your mind without some sort of a recorded record all of the various bullets, casings and other pieces of ballistics and firearms material that you look at in different cases, wouldn't it?

A Yes, sir.

{2075}

Q That's common sense, I realize, but I wanted you to confirm that. You don't even make any attempt to remember all these things separate and apart from your 302s, do you?

A No, sir.

Q IF you do remember anything it's purely coincidental, wouldn't you say that's fair?

A Yes, sir.

Q Would it also be fair to say that it would be virtually impossible for you to come to a trial like this and testify about all of the items that you've identified so far and to state exactly where they were found and under what circumstances without referring to your written records which take the form of the 302 such as the one you have in front of you?

A Yes, sir.

MR. SIKMA: Your Honor, may we approach the bench?

THE COURT: You may approach the bench.

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

MR. SIKMA: Your Honor, I believe you've admitted certain of these. I don't know whether this is one of them.

THE COURT: This is one of them.

MR. SIKMA: Then we have then at that point no objection to the admissibility of those. Further questions on them would be cumulative.

MR. LOWE: Last summer at the trial the catch words {2076} were irrelevant, immaterial and incompetent. This year the catch words were cumulative, repetitive and argumentative and I think it's objectionable for them to interrupt my cross-examination for a non-objection. If they have an objection, they can state it. I think what I'm asking is background, it goes to the credibility of the witness. The 302s which have been admitted are not the only 302s that this man wrote, they are not the only records he made and I think I am entitled to make inquiries of this nature, specifically since the government has raised those questions, as a foundation for objecting to previous on the grounds the man remembers when he testified. He was the best evidence.

MR. SIKMA: The point I'm making, Your Honor, is that the Court has

already offered them and they are in evidence at this point. I don't quite understand the relevancy, nor the necessity to this line of questioning. If this witness' questioning is going to go on as the other one did, which I think carried into areas of repetition and waste of time, it's kind of difficult to carry on an orderly procedure of trial, going to repeat again and again this material that's already in evidence and that's why I think the objection generally, and make known to Counsel, opposing Counsel, that we strenuously object to this continual repetitious of the same stuff over and over and over again, from a cumulative standpoint. Also from a nit picking standpoint of immaterial matters.

{2077}

THE COURT: Well, he stated this is preliminary to some other questions he has so I will allow that.

MR. LOWE: Thank you.

{2078}

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

Q (By Mr. Lowe) Now, what you have said about Defendant's Exhibit 121, which was just one of your 302's that I have put in front of you for this preliminary inquiry, would be true of virtually any 302 in any case, would it not?

A Yes, sir.

Q Particularly I would show you two others, Exhibits 120 and 123; and if you would just verify that those are two of the other 302's that you made in this case?

A (Examining).

Q That would be true of those also too, wouldn't it?

A Yes, sir.

Q I now show you what has been marked for identification as Defendant's Exhibit 131.

A (Examining).

Q Which purports to be another 302, and I ask you if you can identify that as being a 302 which you wrote in regard to the examination you made on another vehicle in this case, and tell the jury which one?

A It was the red and white suburban van.

Q Now, what is a Form FD-192, if you remember the number? I don't know if that kind of number sticks in your mind or if I have to give you a description; but if you do, tell us what it is.

{2079}

A I don't.

Q Like the 302, I thought that might be catchy one if I identified an FBI form.

I believe it is an FBI Form for bulky exhibit inventory of property acquired as evidence, FD Form 192. Does that mean anything to you?

A Yes.

Q All right. Could you tell the jury what the purpose of that document is in general terms?

A In general terms it is a document that is kept with the evidence in the bulky storage room.

Q So if you have a number of items -- let's say if you have a hundred cartridge cases as one exhibit, or perhaps as a number of different exhibits in a case, might this form be used as a sort of an inventory of what is in the box or in the room for purposes of identification?

A Yes, sir.

Q And is that a form which is made up by the agent in a similar manner that the 302 form is made up, but for a slightly different purpose?

A Yes, sir.

May I say, I made out very few of these forms. I have been in the laboratory for over 18 years.

Q O.k. That's fine. I am not trying to qualify you as an expert FBI Agent, I am just asking you questions about the form, {2080} as much as you do know.

Would you have any normal practice in your experience, however limited it may be, as to whether that is normally filled out at the time you fill out your 302, or is it normally something that you do later when the items are assembled for some purpose; could you just give us some idea when, in the normal practice, you would use one of those forms or fill it out or cause it to be filled out by dictating it, if that's what you do?

A It would be done as soon as you can, sir.

Q O.k. Now, in this instance, a few minutes ago, you said that the first time that you made any written recording or dictation of an inventory of the items you found in the Williams' car would have been on July 1st when you dictated your 302; and if you had made an inventory, 192 Form for the Williams' car, would it be reasonable to assume that you would have done that at the same time?

A Yes, sir. The list is the same.

MR. LOWE: O.k.

Your Honor, out of the presence of the jury the Court has sustained

the defense offering of three exhibits -- I believe the numbers are 120, 121 and 123; and I don't think the jury knows that, just so that the jury understands.

MR. SIKMA: Your Honor, I would object to this procedure. There is a reason why the Court sustains the {2081} objections outside of the presence of the jury, and it is highly improper for counsel --

THE COURT: (Interrupting) I think you misunderstood what counsel said. Counsel was referring to the three exhibits that were offered outside of the presence of the jury and that were received in evidence.

MR. LOWE: I believe they were offered, your Honor; and an objection was made, and you reserved ruling on it; and you made the ruling out of the presence of the jury.

I just want the jury to understand that you did make a ruling and that we have now those in evidence, and I can use those properly.

THE COURT: That is a correct summation of what happened.

Exhibits 120, 121 and 123 have been received in evidence.

MR. LOWE: Thank you, your Honor.

Q (By Mr. Lowe) Now, you have before you Defendant's Exhibit 120, and I will ask you to look at it; and first of all, let's take a look at the first page -- and this may not all fit on exactly. The part that I am going to push up is just the heading, Federal Bureau of Investigation, so we can have the dates on both instances; and I will ask you whether that is apparently a copy -- and I will represent to you that it was made -- a copy of the first page of Exhibit 120 which you have {2082} before you?

A Yes, sir.

Q And is this a normal form that you use in filling out a Form 302, for what is captioned "An Interview," but which we have already identified with other witnesses might be an observation made by an agent when you examined an automobile?

A It was the only one that -- I say there again, this is a field office form, and this was the form that I was told it had to be filled out on.

Q You understand the jury hasn't seen the 302 Form yet, and I am trying to give them some familiarity with the layout. When we talk about it, there will be some understanding about it.

This indicates here on the next page a list of the specimens collected by Special Agent Cortlandt Cunningham which are attached. Of course, that's you, isn't that correct?

A Yes, sir.

Q And on Page 2 of the exhibit is the beginning of a list of specimens.

It states: Specimens collected on June 29, 1975, by Special Agent Cortlandt Cunningham from the Bureau car -- and in this case -- of Special Agent Jack R. Coler; and it lists, for example, specimens taken from the front seat, specimens from the frame on the right side, specimens taken from inside the trunk, specimen from the left front door; copper jacket; and all the various places enumerated. It lists a long list in the trunk, it says -- I gather that you collected {2083} a .38 Special Remington - Peters, a .25 Auto Gevelot -- if I am pronouncing it correctly -- cartridge, three .38 Special Winchester-Western wadcutter cartridges, twelve .38 Special Winchester-Western cartridge cases, two pieces of metal, two pieces of copper jacket and three buckshot.

That would be an exhaustive list of what you found inside of the trunk, isn't that correct?

A Yes, sir.

Q So it as to various portions of the car that you examined?

A Yes, sir.

Q And I trust that when you filled this out -- I might just, so the jury understands and sees it -- this is the last page, just three more items, isn't it, on the 302?

A Yes, sir, that is correct?

Q When you filled this out, I trust that you tried to use care and precision in listing items and identifying who found them, where they were found and so forth, so that this, as a permanent record, is as accurate as possible?

A Yes, sir.

Q I may not have pointed out, on the first page of this 302, we referred on a number of occasions to different dates; and I will point out for the jury the word "interviewed" -- (indicating) -- that is the date down here -- up a little bit so the jury can see -- interviewed on -- in this case -- June 29, 1975, which was the date that you looked at Special {2084} Agent Coler's car, isn't it?

A Yes, sir.

Q And then when you dictate it, you put the date down here in the "date dictated" part; and in this case, as you indicated before, that it was July 1, 1975, that you dictated this?

A Yes, sir, the 302.

Q O.k. Up on the top is a date that presumably is put in by the stenographer who actually prepares the document which, in this case, is July 2, 1975, isn't that correct?

A Yes, sir.

Q And I think it can also be noted that down below here, you have Agent Kelso; and you presumably -- those are your initials, after you have gotten it back from the stenographer, that you have read it and put your initials on it, isn't that correct?

A Yes.

Q The "SKS" in here would indicate the initials of the stenographer that actually typed it, wouldn't that be the practice?

A Yes, sir.

Q So from the face of the 302 you can tell the date of interview, the date of dictation and the date of transcription by looking at the face of it, can't you?

A Yes, sir.

Q I now show you what has been marked as Defendant's {2085} Exhibit 132, and ask you if you can identify it and tell the jury what it is?

A This was the evidence listing that would be kept with the evidence collected from Special Agent Coler's automobile.

Q All right, and is this the FD Form 192 that we discussed before?

A Yes, sir.

Q And would I be correct in presuming that prior to your reviewing your various documents preparatory to testifying here today, that you would not have remembered the information on that form independently of seeing the form?

A No, sir; but the same information on this form, basically the list of the materials from the car, would be the same as on my 302.

Q I understand that, and that's precisely my point. The same is true with this form as with the 302's, you would not expect to have any independent recollection of the information which you recorded and kept as a record in such forms, would you?

A No, sir.

MR. LOWE: All right. Your Honor, I would move the introduction of this Exhibit 132 on the same basis as Exhibit 121 which has substantial portions the same, on the strength of the same foundation and the testimony of this witness.

{2086}

I would show it to counsel -- I don't know if you have a copy there at your table or not -- prior to the Judge ruling.

MR. SIKMA: No, we haven't.

(Counsel examine document.)

MR. SIKMA: Your Honor, I would object to this as cumulative. I think that the only purpose of this document is for matters of chain of custody; and as I understand it, as to all the items on here counsel for the Defendant has agreed to the chain of custody. I can see no further purpose for it except to clutter up the record.

MR. LOWE: I will vouch, your Honor, that there is a specific purpose, that it is not cumulative. I will vouch before this witness leaves this stand today I will connect it up in a very relevant and significant way.

MR. SIKMA: I think, your Honor, there ought to be some showing of what the purpose is.

MR. LOWE: If we could approach the bench -- I don't like to do this -- I would be happy to approach the bench and advise the Court at the side bar with counsel -- even have the Government come up and tell them too.

THE COURT: You may.

MR. LOWE: There is nothing they can do until cross examination.

(Whereupon, the following proceedings were had at {2087} the bench:)

MR. LOWE: I would like to speak so the witness cannot hear me.

The contents of this document are virtually the same, substantially as the inventory contents of Defendant's Exhibit 121.

This witness testified that the first time he reduced that information to writing was July 1.

I showed the front page of Defendant's Exhibit 121, and it shows the date of July 1. He said that before he even saw the 302, so that there is no question that the date is fixed in his mind.

This document which has his name on it, as I propose to elicit additional information that he did prepare, the same secretary, shows a date of June 30, the day before he says was the first time he ever reduced it to writing.

June 30 is also the magic date on which we have been trying to establish a proper foundation to show that there were changes made in documents on that date. I believe it is very relevant in the impeachment of this evidence. It is documentary recordings, and he has testified that he has no independent recollection. What he has testified to today has come from the 302's; but I believe it is proper for me to impeach the validity or the accuracy of the 302's or the honesty of them, if that be the question, {2088} by showing, among other things, this inconsistent testimony.

MR. SIKMA: Your Honor, the only inconsistency it shows is that this document was written before the other one. These items -- if you will check on the items presently in evidence, those that are in evidence -- this was taken right off of the little tags that are attached to the exhibit. There

seems to be nothing sinister about that. Certainly there is no claim that a change has been made here.

THE COURT: I will admit it for the purpose that he has indicated.

MR. LOWE: Thank you, your Honor.

THE COURT: You can make that argument to the jury.

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

THE COURT: Exhibit 132 is received.

(Exhibit No. 132, having been previously duly marked for identification, so offered in evidence, was received.)

MR. LOWE: I had Exhibit 132 back to the witness, your Honor.

Q (By Mr. Lowe) Would you examine Exhibit 132 a little bit and let me ask some questions about it.

I particularly call your attention to the lower part of the first page where various names and initials are contained. {2089} Would you just take a moment and review it so that you have it fresh in your mind?

A (Examining).

Q I will show you this, which I represent to you is a copy of the first page of the document you are looking at -- and particularly I would point out down in the lower part of the document and ask you if you can identify that as a Form 192 which was prepared and filled out by you with your name on the bottom of it?

A Yes, sir, it was.

Q And I will represent to you, as you have already, that the list in this document is substantially the same, if not identical, to the one in Defendant's Exhibit 121, your 302 form; and I will ask you if this "SKS" is not the initials of the same stenographer in fact that prepared the other form?

A Yes, sir.

Q Now, you testified earlier as to the first time you made a written recording or dictation of the items that you found in that car; and I ask you if you can explain to this jury how the date on that document could be June 30, 1975, if the first day you ever recorded or dictated was July 1, 1975?

A If I may also qualify what I said, if I recall, sir, I did not obviously --

Q (Interrupting) Excuse me.

MR. HULTMAN: Let him answer.

{2090}

MR. SIKMA: Let him answer.

MR. LOWE: Just a moment. I am addressing the Court. This witness is not being responsive to my question. I ask that the court reporter read the question back and let him be responsive. I don't mean that he can't explain his answer, but I want his answer to be responsive to my question. That's all I ask. I ask that the question be read back by the court reporter, and have your Honor monitor whether he is being responsive to my question.

THE COURT: The reporter will read back the question.

(Question was read by the reporter.)

{2091}

THE COURT: The question is then can you explain.

A Yes, sir.

Q (By Mr. Lowe) All right. Would you explain.

A I obviously, I told you, I didn't recall the exact date that I had done it except by use of the 302. I obviously had dictated on the 30th a list of those items.

Q Well, can you explain to the jury then, perhaps I put the wrong question to you.

If you dictated on June 30th, then can you explain why the date July 1, 1975 would have been on the bottom of the first page of Defendant's Exhibit 121, and if that wasn't your recollection, without even looking at that exhibit, that that was the first day you dictated was July 1?

A I dictated the 302, sir. And this wasn't the only time that this happened.

I can go to Defendant's Exhibit 131 and Defendant's Exhibit 123. The 302's reflects that I dictated a 302 on the 3rd and the 4th of July which is correct.

Q But as to this list, the same list --

A But this -- if I may, sir.

Q I'm trying to get an explanation and I'm going to give you all the time and all the opportunity to explain this difference because that's not the only question I have.

MR. SIKMA: Your Honor --

A I dictated the list of evidence to a stenographer out when {2092} we were going over these two cars. In other words, my 302 didn't get dictated until later, sir.

Q (By Mr. Lowe) Agent Cunningham, maybe I misunderstood what you've just said. Did you just say that you dictated your list to a stenographer when you went out to look at the cars?

A Not only on the two in the BIA compound, sir.

Q All right. Let me ask you as to Special Agent Coler's car. That was not in the BIA compound, was it?

A No, sir.

Q It was in a place called Hot Springs, was it not?

A Yes, sir.

Q How far was that from Pine Ridge?

A Sixty miles.

Q And who accompanied you when you went down there?

A We were there?

Q Well, when you say "we were there," were you staying in Hot Springs?

A Yes, sir.

Q All right. So that morning presumably you got up and went over to Hot Springs, whatever the area was that the car was being kept?

A Yes, sir.

Q Who went with you?

A Special Agent Kelso.

{2093}

Q And did your technicians go with you again?

A I believe that they were present, sir, yes, sir.

Q All right. And did you approach somebody at the compound or the, whatever the area was in Hot Springs, to gain entry to the car?

A Yes, sir.

Q And was the car in a fenced area or in a building?

A It was in the garage, the sheriff's office garage.

Q So it was inside of a building of some kind as opposed to being out in the open?

A Yes, sir.

Q I mean, I assume a garage, by a garage you mean an enclosed building?

A Yes, sir.

Q And who gave you entrance to the place?

A I do not know the gentleman.

Q It was a sheriff's deputy, employee of some sort?

A Yes, sir.

Q And you and Special Agent Kelso went inside?

A Yes, sir.

Q Did he allow you or did he just let you in and go about his duties?

A As a matter of fact, sir, we had -- it must have been the sheriff's office or somebody that they could get. We had them pull the car out of the

garage so we could examine it.
{2094}

Q All right. And you say you do not remember whether the technicians were there or not, but you're guessing that they were, is that your testimony?

A Yes, sir.

Q You had no stenographer with you, though, did you?

A No, sir.

Q Well, then perhaps I misunderstood what you said just a moment ago about having a stenographer when you went to inventory the cars or something to that effect. Would you explain what you meant when you said that.

A Yes, sir. I do not recall, sir, on the one that you are asking me about, but I do recall because of the intense heat, and on the 30th I personally dictated a list from the red and white van and from the Form Galaxie on the 30th.

Q Do I understand that right now you are telling this jury that you have an independent recollection, regardless of what documents you have read before you testified in this case, that you have an independent recollection that June 20th was a very hot day and that you dictated the items of Special Agent Coler's car for the purpose of that form 192?

A No, sir, I do not. What I'm saying is I recall because of the hot day and the stenographer sitting out in the hot sun when Special Agent Kelso, and there were two other special agents there. And at the examination of the red and white van and the Ford Galaxie I remember we had a stenographer out there {2095} that we dictated to.

Q Well, now talking now about the day after you were in Hot Springs when you were looking at the van and the 1967 Ford, aren't we?

A Yes, sir.

Q And that was in fact June 30, 1975?

A For the van, yes, sir.

Q And that was at the BIA compound in Pine Ridge?

A Yes, sir.

Q And do you remember now independently, I don't see any of these forms, it was a hot day, you are remembering that of your own recollection I take it?

A Yes, sir.

Q And there's nothing about a stenographer being there, so I trust that's also your recollection that the stenographer was there?

A Yes, sir, I do. That's the one recollection I do because due to the high heat and having a stenographer sitting out there in the hot sun.

Q S.K.S., was that a woman stenographer or a male stenographer?

A I don't know, sir. I'm sorry.

Q You recall that it was a hot day and you felt sorry for the stenographer, but you don't remember whether it was a male stenographer or a female stenographer?

A It was a female stenographer.

{2096}

Q Al l right. Do you know whether that stenographer had a name with the initials S.K.S.?

A No, sir.

Q Do you remember now, personal recollection, not what's on the documents --

A By the way, sir, I'm not saying that S.K.S. --

MR. LOWE: Your Honor, this is not responsive to the questions. And it's -- there's no question pending and I ask that the witness be instructed to refrain from making voluntary, unsolicited comments on the witness stand.

THE COURT: You should confine yourself to answering the questions that's asked.

THE WITNESS: Yes, sir. I would like to clarify an answer to a question he's already asked. I'm sorry.

MR. LOWE: There's plenty of opportunity on redirect examination, if Mr. Hultman wants, as to what it was that you want to explain.

I have no objection to it, but right now I'm on cross-examination and I want to say --

MR. HULTMAN: It isn't my witness.

MR. SIKMA: Your Honor, counsel has just asked a question about whether he knows something about the identity of S.K.S. and I think that prior to the time that he really got started on the next question the witness apparently had something to answer about his knowledge about that. And I {2097} think that it's only fair that he be --

MR. LOWE: I'll withdraw my objection.

Q (By Mr. Lowe) I offer and ask the witness as my next question, tell us anything you want about the stenographer, about S.K.S. or any other stenographer you had any contact with in regard to this investigation.

A I do not remember S.K.S. stenographer. We had several stenographers out there, sir.

But you asked the question and I gave you an accurate -- was the stenographer out there, S.K.S., and my answer would be, no, that it was another stenographer. Because I can remember the first name of the other

stenographer and it began with a "D". So it would not be S.K.S.

Q Would the initials "D.L." be the other stenographer whose first name began with "D"?

A I don't know, sir. I just knew her as Donna and I do not know.

Q You're saying Donna, D-o-n-n-a?

A Yes, sir.

Q That's all you want to tell us about? I'm not cutting you off about the stenographer S.K.S.?

A No, sir.

Q Okay. Getting back to June 30th, you said it was a hot day, you felt sorry for, or had some concern about the stenographer being out in the hot sun and therefore you remember {2098} specifically in your own recollection, without being refreshed by anything in writing, that you dictated something to her on that day. Did you remember that what you dictated on that day had to do with Special Agent Coler's car and the examination you made of it the day before?

A No, it didn't, sir.

Q Do you know what it did have to do with?

A Yes, sir.

Q Will you state what it had to do with.

A It had to do with the items that were found in the Ford Galaxie and the red and white van.

Q So that as to Government Exhibit 123, which is in front of -- excuse me, Defense Exhibit 123 which is in a 302 on the 1967 Ford, that would have been dictated by you on that day to this stenographer in the hot sun; is that correct?

A The list, yes, sir. Not the 302.

Q Not the 302.

What purpose would the list have been dictated for other than to put in a 302?

A I would imagine, sir, that it would be the same as the list I obviously dictated on June 30th for the items collected from Special Agent Coler's car for the form F.D. 192 to be put with the evidence.

Q Now, you just said "I would imagine". You were the one who were dictating it and I gather you were not under somebody's {2099} supervision directly on that day, that is of the people that were inventorying the '67 Ford. I presume you were the one that was in charge of that examination, weren't you?

A Yes, sir. This was the day after the examination and I obviously

dictated the list on the 30th of June.

Q Now, I think you just said that on the 30th of June you remember specifically dictating a list of items which you found in the 1967 Ford and in the Chevrolet van, that you were dictating about that. Am I remembering --

A That is correct, sir.

Q And that you specifically said that you did not dictate anything concerning what you found the day before in Special Agent Coler's car. Do I remember correctly in that regard?

A If I did, sir, I obviously was one day off, sir. I had done it the day before. I do not have recollection except for the form.

Q Agent Cunningham, do you understand the question that I just asked you?

A I thought so, sir.

Q I don't think you did, and rather than have it read back it would be quicker for me to state it.

Do you understand that two minutes ago or three minutes ago you said that you did not dictate anything on June 30th to that woman out in the heat of the sun relating to your examination of Special Agent Coler's car the day before. Now, {2100} did you or did you not testify to that effect a few minutes ago?

A I obviously -- if it's the initials are S.K.S. I must not have dictated anything to her.

I do not remember dictating anything to the young lady except the list of evidence from those two cars. That's the only thing I remember because of the heat and that she was out there at the time we were going over the two vehicles.

MR. LOWE: Your Honor, I think I'm being quite clear in the questions I'm asking and the witness simply is not answering. I ask you to encourage him if not direct him to be responsive to my question and not to give the answer to what he wants to talk about.

I think I asked him a very simple question.

MR. SIKMA: Your Honor, I submit that counsel is trying to confuse the witness in order to make, to draw some inference that he's not being honest with him. I think he's trying his best to remember. I think that's quite clear from his answers.

MR. LOWE: I appreciate the recuse efforts of Mr. Sikma. I repeat my request to the Court that the witness is not being responsive to the question. That's a simple premises that are responsive to the questions asked, and

I don't think he's answering my question.

My question was whether he had testified three or four minutes ago to the effect that I described.

{2101}

THE COURT: You may repeat your question.

Q (By Mr. Lowe) I will rephrase it again. I'll try and keep it very, very simple.

Several minutes ago in response to a question I asked you I believe you testified to the effect that on June 30th on this hot day when you had a stenographer present at the 1967 Ford and the red Chevrolet inspection that on that date you did not dictate anything to that stenographer about Special Agent Coler's car, and the examination you had made of it the day before. Now, am I or am I not remembering correctly what you testified to earlier today?

A As I recall, sir, that is correct.

Q Thank you.

THE COURT: Court will recess until 3:30.

(Recess taken.)

{2102}

THE COURT: The jury may be brought in.

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

MR. LOWE: May I proceed?

THE COURT: You may.

Q (By Mr. Lowe) At the recess we had been talking about your dictation on June 30 of certain information regarding a 1967 Ford and red and white van and we also talked about your earlier testimony to the effect you did not dictate anything about the Colar car on that date. I want to move on to another area and I want to talk a little bit about some of the items you did find in the vehicles. I'm particularly going to try to focus on shotgun shells from a twelve gauge shotgun. .38 special or .357 magnum ammunition which is susceptible to being fired in a .357 pistol, .308 cartridges, .223 cartridges. So I'll try to be specific in my questions so that we can go through this without too much time.

First of all, I would ask you to look at Government's Exhibit 123 in front of you which is a 302 relating to the 1967 Ford which is in evidence and I simply want to go through that with you as to the items we were talking about, the ones identified.

Going down the list, you'll follow me, I'm just going to read this

through as we're all looking at it up there and see if I'm not properly reading it. We have one .223, then {2103} number two is the .38 special Remington Cartridge Casing. Is that possible to fire that in a .357 magnum?

A AYes, sir.

Q Number three, that's a .30 caliber. Number four is 22.223 cartridges. I'm going to go down to number six. One .38 special; number seven is four .38 special. I'll go down to item ten which is twelve .223s, then eleven is 19 .38s. I'm correct so far, am I not?

A Yes.

Q And in fact if you look at the next page, how many pages is that 302 that you have there?

A Two.

Q The second page you do down to item 14 which is four .38 specials, item 17 is 37 .38 specials. There is an empty box for .357 magnum but apparently did not have any cartridge cases in it, is that correct?

A That is correct.

Q So as to the 1967 Ford, the items that we have called off would include all of the items that I listed before, any shotgun shells, .223, .308 or .38 special would be listed here and we have identified those that you did find or have turned into you by Mr. Kelso?

A By whom, sir?

Q Special Agent Kelso, if he did any of that.

A Along with Special Agent Kelso I collected it; yes, sir.

{2104}

Q That would be a complete list of those four types of ammunition that were found in the '67 Ford?

A Yes, sir.

Q Now I want to do the same thing as to Special Agent -- let's take first, I've got before you there, I believe it's Exhibit 134 which is a 302 dated July 10 for transcription in the upper right-hand, I think it's on the right-hand side there, relating to firearms items that were found in the red and white van and I ask you if you can identify that as a 302 prepared by you?

A Yes, sir.

Q And that was prepared and I believe your name is the only one on that one, is it not?

A Yes, sir.

Q And was that prepared in the same manner as Defendant's Exhibit 120 and 121 was prepared generally?

A Generally speaking.

MR. LOWE: Your Honor, I offer this in evidence on the same basis as items 120 and 121. It's the same list relating to a different vehicle, that' all.

THE COURT: What is the number of that exhibit?

MR. LOWE: 134 I believe.

THE WITNESS: 131.

MR. LOWE: I misspoke then. 131.

{2105}

MR. SIKMA: May I see it, Your Honor?

MR. LOWE: I thought I showed it to you just before we came back into the court.

MR. SIKMA: Same objection, Your Honor.

MR. LOWE: Thank you. Would you give that --

THE COURT: 131 will be received.

Q (By Mr. Lowe) Now if you look at the first page of Defendant's Exhibit 131, I want to do the same thing there. Looking for those same four types of ammunition, down the list, item three is a .223 cartridge, item four is an item with one .357 magnum and two .357 magnum cartridges, different manufacturer. Then I look at item eight and ask you if the two Remington .357 caliber Western cartridge cases shown in item eight would be capable of being fired in a .357 magnum pistol?

A Two Remington .357s. Yes, sir.

Q I'm going to underline that one item and circle item eight because the other two there would not be able to be fired in a .357 magnum, would they?

A No.

Q And that's all I believe on that page of that exhibit.

We have the second page and looking down that list it does not appear to me on that page there are any. Excuse me. I beg your pardon. Item 13 is three twelve gauge shotgun casings. Do you see any other items on that page, and you look at the exhibit in front of you or this up here, which would be {2106} in the category of those four weapons that I described?

A No, sir.

Q And on the third page of the 302 there does not appear to be any of that ammunition either.

A No, sir.

Q I would ask you to look at Defendant Exhibit 121 which is before you which is Special Agent Williams' car and ask you if you can tell from

that list whether there are any of the four types of ammunition components that I described earlier. I don't have a slide for this to put up on it.

A No, sir.

Q There are none.

And finally I think we already looked at this at one time for another purpose. The list on Defendant's Exhibit 120, going down the first item there, "specimens from front seat." It says, ".38 special" and another ".38 special." Those two would be capable of being fired in a .357 magnum, wouldn't they?

A Yes, sir.

Q And then the next item is item three. In the trunk of the car you found a .38 special Remington. Let me underline the .38 special items here. And three .38 special Winchester Western wad cutters. Would those be fired in a .357 magnum?

A Yes, sir.

Q And how about the next one, twelve .38 special Winchester {2107} Western cartridge cases?

A Yes, sir. Well, they could have been fired in them.

Q Yes. That's right.

A Yes.

Q All right.

And in the trunk there are no shotgun shells or .308s or .223s or anything like that on that list, are there?

A No, sir.

Q And going on down further do you see any other pieces on that page which relate to any of those ammunition components?

A No, sir.

Q I don't either.

How about this last page of 120, you don't see anything there, do you?

A No, sir.

Q I don't think anybody testified to this yet. This is a general background information question. When you make a 302, that's not an affidavit, that is, a 302 is not under oath or anything, is it?

A No, sir.

Q It's just a memorandum?

A No, sir.

Q I'm sorry. Your answer?

A No, sir.

Q Now based on what you have just said, to try and summarize, {2108}

let's take Special Agent Colar's car first. That is the last one I went on. .38 special, you had one round in the trunk and three rounds in the trunk and twelve rounds in the trunk and in the front seat you had two individual rounds and I believe you identified those as being the only ones. I trust that what we said then was that there were no shotgun shells, no .223 shells and no .308 shells found in the automobile by you in the Coler automobile, is that correct?

A No, sir.

Q No it's not correct or no you didn't find them?

A I only found, sir, what is on the 302.

Q Out of those four categories of ammunition in the Coler car, you only found .38 special ammunition, is that correct?

A Yes.

Q Did you ever tell anybody -- let me ask you whether you ever testified or gave an affidavit, I want to talk about some .38 cartridges for a moment, .38 specials which are capable of being fired in .357 magnum weapons. Did you as a matter of your official duties give an affidavit in support of an extradition proceeding regarding Mr. Peltier some time in 1966? Excuse me. 1976.

A Yes, sir. And there were mistakes in that particular --

Q And you gave that under oath, did you not?

A Yes, sir. The best of my recollection.

Q And I trust that when you gave something under oath you {2109} read it first and you're testifying in that affidavit that it is true to the best of your knowledge and belief at the time you made it?

A Yes, sir.

Q I show you what has been marked as Defendant's Exhibit 124 and I just ask you to look at it for a moment to see if you can identify it. Look at it particularly to see if you see your own signature on it and also if you can state what the date is. The date frankly is not legible on my copy. Perhaps you can tell if not the exact date the approximate date of that affidavit.

A I can't read the month. It was the 11th day of some month.

Q Generally what time of the year, do you remember? Was it the fall or spring?

A I don't recall, sir.

Q You recognize your signature on that affidavit?

A Yes, sir.

Q You did give the affidavit under oath, did you not?

A Yes, sir.

Q When you gave the affidavit, did someone in requesting that from you indicate that it would be used in an extradition proceeding in Canada, a legal proceeding, in other words?

A Yes, sir.

{2110}

MR. LOWE: Your Honor, I would like at this point to approach the bench, if we could, for a moment?

THE COURT: You may.

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

MR. LOWE: We have had some false starts. Mr. Taikeff particularly did earlier this day about when a question has been asked and answered and whether it inhibits the use of documents and so forth, and also on the procedure for admitting documents into evidence.

I want to explain to your Honor, what this is and what the significance is, and what I want to do with it in advance so that I am not interrupted at a critical phase when this witness is perhaps waiting, thinking of an answer, this is an affidavit which was given by this man which directly contradicts what he has just testified to under oath here and that is, it states, this right here (indicating), just read that, your Honor (indicating).

It says in the Coler car, directly contradicts his statement he just made that he found no .223 cartridge in the Coler car.

This cartridge is the single most important cartridge in this entire investigation and trial in the opinion of the defense; and what I would propose to do and what I would like to do is right now at the side bar offer this {2111} in evidence and have you rule so that I can use it in what I consider to be a proper way without a lot of interference -- whether proper or improper interference -- that would be disruptive to my question.

I believe it is certainly relevant. It is a direct contradiction of his testimony here by an earlier sworn statement. I want to be able to use it and use a slide of this when I am questioning the witness. I don't know whether your Honor would feel I could use a slide of this before it is introduced into evidence; and that's what I would like to do, either offer it now or have your authority to use the slide before it is exactly in evidence. I don't want a Catch 22 where I can't use the slide or I can't get it in evidence.

I asked for a side bar so you could rule on that now before I get a witness in a situation where I don't want to be interrupted.

Did you read it?

MR. SIKMA: I am familiar with it. I will stipulate that it is error on his part. It isn't in the form of -- at least as it is written there -- it is not totally in error with regard to his custody of it, but it is in error as far as his particular finding of it. I think that it was found by Special Agent Hodge, and he has not testified in court here, that he found that. That's in {2112} an earlier affidavit. It can be used as a prior inconsistent statement. There is nothing I can see that's wrong with using it as a prior inconsistent statement; but I think that in a sense it is the use of a straw man once again. They are using something that was in error and has not been testified to by this witness.

THE COURT: But he has testified as to what he found in that vehicle?

MR. SIKMA: Yes, he has. I have no objection to the questioning.

THE COURT: Is this the only part that --

MR. LOWE: (Interrupting) That's the only part that is inconsistent. I can block that out and show -- I think the jury should be entitled to read the entire document. It is only in context that the jury can see that this is not just a typographical error; that the context of all the other things that are said specifically refers to findings. I think on the previous page it enumerates things found and where they were found.

I feel this is a critical piece of defense evidence, and by any standard it is admissible. This is sworn, Judge. This is on two different sworn occasions when he has testified differently or made an affidavit on one occasion and both times under oath; and I --

MR. SIKMA: (Interrupting) You mean that he made {2113} two affidavits?

MR. LOWE: He made an affidavit under oath he found it here, and today he testified under oath that he did not find it.

THE COURT: Well, you are certainly entitled to show that discrepancy and introduce the exhibit.

MR. LOWE: I move to introduce it now.

MR. SIKMA: I would -- I think I would object to items which are not inconsistent with his testimony.

THE COURT: Well, it is a part of the total. I would agree with counsel, it is part of the total affidavits.

MR. LOWE: Thank you, your Honor.

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

MR. LOWE: I would move the admission into evidence of Defendant's Exhibit 124.

THE COURT: 124 is received.

(Defendant's Exhibit No. 124, having been previously duly marked for identification, so offered in evidence, was received.)

Q (By Mr. Lowe) Now, Mr. Cunningham, I invite your attention to Paragraph 6, top of the second page, and you can read along with me and the jury can read along; and I will read Paragraph 6, says that: Also in the said 1972 Chevrolet Biscayne automobile I found one .223 cartridge case in the trunk which {2114} I took into my possession and placed in an envelope marked "Items recovered from trunk, Jack R. Coler automobile"; and I ask you, first of all, if that is an accurate recital of what is contained on Page 2 of your affidavit under oath?

A Yes, it is.

Q And I will ask you if the 1972 Chevrolet Biscayne automobile which is referred to there was Special Agent Coler's car?

A Yes, it was; and that, by the way, sir, is not correct.

Q It is not correct?

A No, sir.

MR. LOWE: Well.

I have no further questions of this witness, your Honor.

THE COURT: Very well.

MR. LOWE: Would counsel like me to leave this up for him? I have no objection to counsel using this machine for some of these exhibits.

MR. SIKMA: You may take it down.

MR. LOWE: Thank you.

You can't fall over it, is that what you say?

MR. HULTMAN: Mr. Crooks will fall.

MR. LOWE: You have trouble negotiating it?

MR. CROOKS: Would I be permitted to take it down?

MR. LOWE: I will take it down in just a second.

{2115}

REDIRECT EXAMINATION

By MR. SIKMA:

Q That statement you say is inconsistent with the statement, things you have testified to in court here today?

A No, sir.

Q The statement on the affidavit is inconsistent with the -- or incorrect with what you stated in court today, is that it?

A No, sir, it is not, not what I testified to, sir.

Q O.k. Were they facts -- I am talking about the affidavit now, that

statement in the affidavit you said is incorrect?

A Yes, sir. I did not find that cartridge case.

Q Can you explain that?

A I had no way -- it was pure recollection. When I was making out this affidavit, I did not have any 302's, I had nothing. They were all in Rapid City, and inadvertently -- I was told that time was of the essence. I read it over, and to the best of my recollection it was substantially correct in all ways.

Q Now, at the time when you did the affidavit, you did not have the items of evidence with you, is that correct?

A I had nothing.

Q Do you in fact know who did find that?

A I have since -- reviewing records, yes, sir.

Q And who was that?

{2116}

A That was Winthrop Lodge, if I am not incorrect.

Q And who is Winthrop Lodge?

A He is a fingerprint examiner in the FBI.

Q Do you know when found that?

A No, sir, I do not.

MR. SIKMA: Your Honor, if I may have just a moment?

THE COURT: You may.

Q (By Mr. Sikma) With regard to the Sierra loading manual, you were asked some questions about a lever action or types of ammunition it could be used in a .30 caliber lever firearm, is that correct, do you recall that?

A No, sir.

Q Those questions on cross examination -- if I can refresh your recollection, I believe you testified that the lever action, .30 caliber, or 30-30 rather, are somewhat slower in muzzle velocity than the M1-30 aught six, is that correct?

A That is correct.

Q Substantially slower.

Now, you indicated, I believe, that the slower caliber or the slower muzzle velocity rounds cannot -- or the weapons that fire slower muzzle velocity rounds cannot use -- or you cannot use high velocity rounds in their chambers, can you explain that?

MR. LOWE: Your Honor, I object to the form of the question. That was not the testimony. That was never {2117} testified to by this witness. That's the first time that has been said in this courtroom, and I object and I move

to have the question rephrased.

MR. SIKMA: Your Honor, I would state that that is not a misstatement of the record. Counsel was examining the witness concerning what rounds could be fired in a particular firearm, in particular the 30-30 lever action; and this witness stated that the firearms -- the high velocity rounds could not be fired in those particular weapons, and I want him to explain the reason for that.

MR. LOWE: That was not the testimony, your Honor.

MR. SIKMA: Well, is that a fact -- I will withdraw the question.

MR. LOWE: Thank you.

Q (By Mr. Sikma) Is that a fact, Mr. Cunningham?

A I personally would not advise firing high velocity rounds in a lever action rifle.

Q Why not?

A Because due to the action itself, the cartridge isn't contained, as they say, in a bolt action rifle.

Q And would that make it dangerous?

A Yes, sir.

Q Now, can you tell me whether or not the information that would tell you the safe loading or reloading of rounds to be used in different types of firearms is generally found in this {2118} Sierra bullet reloading manual?

A Yes. All reloading manuals set it forth.

Q Is it a fair statement that that's one of the uses of the reloading manual, so that you don't overload it, overload a round so that it would be dangerous to use?

A Well, partly, partly. In other words, your loading manual also gives various loads for various cartridges. Normally, in your -- say in the 30-30, they will give you a load that is the same as factory load along with various low velocity loads, also the load for cast bullets and various things such as that.

{2119}

Q Now, would that be a reason, or can you tell me whether or not that would be the reason why someone might save the brass that they find, empty cartridge casings, so that they could be reloaded?

A If a person reloads, yes, sir, that's why they would save the brass.

MR. SIKMA: I have no further questions.

RECROSS-EXAMINATION

BY MR. LOWE

Q Special Agent Cunningham, in regard to your last answer about people

picking up brass for the purpose of reloading, based on your training and experience as an FBI agent in the field of firearms identification, do you think that your expert opinion would be that if a fire fight with people shooting at you with automatic weapons, perhaps M-16's and so forth, that somebody's going to stop and pick up their brass and be only selective and pick up one kind and not another kind? Is that a logical thought --

MR. SIKMA: Your Honor, I object to this as calling for a conclusion of the witness which might not be within his knowledge. I would make competency.

MR. LOWE: He was invited.

I'll withdraw the question, I'll withdraw the question, Your Honor.

This witness may not be competent to answer that any more than he did the last one.

{2120}

THE COURT: I don't think it's a question for an expert any how.

MR. LOWE: I dare say, Your Honor, I know twelve people that can answer that question.

Q (By Mr. Lowe) You said you would not advise using high powered ammunition in a lever action and it might be dangerous?

A No, sir. I was talking about 30-30, sir.

Q Only 30-30?

A Yes, sir.

Q Let's talk about 30-30, which is a lever action rifle.

I believe your testimony was that you would not advise somebody to use high velocity loads, ammunition in such a weapon because it might be dangerous; is that correct?

A Yes, sir.

Q Let me give you a situation, though, where somebody feels -- hypothetically now, that there is an occurrence and some sort of event in which they have very little choice and they only have certain types of ammunition available. If they were to use the ammunition of that 30-30 it's entirely possible that they would use it for many, many rounds and not have anything actually happen, isn't it?

A Yes, sir.

Q Are you familiar with the M-1 Grand rifle?

A Generally, yes, sir.

Q And you can clear up the dispute we had, does it fire {2121} 30-06 ammunition?

A Definitely, sir.

Q Thank you.

MR. LOWE: Is counsel now willing to stipulate that the M-1 fires --

MR. SIKMA: There's no issue to stipulate.

MR. LOWE: I thought you indicated that until you had an expert that you weren't going to stipulate.

MR. SIKMA: Your Honor, I have no further questions of this witness.

MR. LOWE: I'm not through with him yet. You don't mind if I finish my recross-examination I'm sure.

Q (By Mr. Lowe) Now, at the time you made out the affidavit under oath that you found the .223 cartridge in Coler's car, is it not a fact that you knew that that was considered by the people conducting the investigation of this incident and the people who were trying to extradite Leonard Peltier from Canada that those people believed that to be an essential element of proof in their case that Leonard Peltier somehow was connected up to that cartridge?

A No, sir, I did not know that.

Q Is it not true that you understood that that element of proof, that the .223 cartridge was in the trunk of Coler's automobile, was an essential element of some sort to the theory of the Government on the case and the efforts they were {2122} making to extract Mr. Peltier from Canada?

A No, sir, it is not true.

Q Isn't it true that at the time you made that affidavit that you knew that that .223 round allegedly found in Coler's trunk was a very significant round among all of those that were collected in this investigation?

A No, sir. Obviously I did not recall it.

Q And you can't even give us a general idea what part of 1966 -- or 1976 it was that you filled out this affidavit, whether it was November or January, you can't even give us a rough idea?

A No, sir.

Q But in any event it would have had to have been at least six months after this event took place and you made your investigation at Pine Ridge and at Hot Springs, isn't that true?

A Yes, sir.

And as I testified earlier, sir, at your questioning, without reading my 302's I cannot, and I could not remember what was collected.

Q Well, then can you tell this jury if you didn't have your 302's were you relying entirely on your memory? How could you single out one round out of all the rounds that we've already heard about plus those that perhaps

were collected and not discussed yet in testimony, how could you remember that one single round and put a statement under oath to the effect that {2123} you found it, and you found it in Coler's trunk?

A Obviously, sir, I made a mistake at the time I made the affidavit. I was basing it on my recollection which obviously was not very good.

Q Do you understand the question that I just asked you?

A I thought I answered it, sir.

Q No, I don't think you understood the question. Let me ask it again.

MR. SIKMA: Your Honor, I'd object to this. He's arguing with the witness.

MR. LOWE: I'm not arguing with the witness. He's obviously was not responsive to my question. Rather than have it read back I'll rephrase it unless Your Honor would rather have it read back.

THE COURT: You may restate it.

Q (By Mr. Lowe) Can you tell this jury why it is that you remember that one single round at the time you made out this affidavit among all the rounds that were collected from various places in this so-called crime scene at the time you made that affidavit why it would be that you would remember that one round and say that you found it in Coler's trunk?

A I obviously didn't remember it, sir.

Q Can you tell the jury then why you would say in your affidavit that you remembered it if you didn't at that time at {2124} least think that you remembered it?

A I thought the person -- to the best of my knowledge I had no 302's. I did not obviously remember what I had, and I thought that the information that was being given to me was what was coming from my 302's. And obviously based on my recollection of what I collected, my recollection was not good at that time.

Q Would I be correct in saying that what you were about to say at the beginning of what your answer was, just then you started to say something about you thought "that the person" and you stopped. Isn't it true that somebody else made that affidavit up for you and gave it to you to sign?

A Yes, sir.

Q And isn't it true that you signed that affidavit because they told you to sign that affidavit without even reading it?

A No, sir.

Q If you read it you would have understood that you were making a representation that you found a round in Coler's trunk, wouldn't you?

A I found other evidence in the trunk. I could not obviously be

specific.

I thought that it was coming from my 302.

Q Let's try it again.

I thought I asked a very simple question.

MR. SIKMA: Your Honor, I object. Counsel is arguing {2125} with the witness. It's obvious that --

THE COURT: The question I think has been answered.

Q (By Mr. Lowe) Now let me ask you this question: You read the 302, you read the affidavit before you signed it, is that what you are telling the Court?

A Yes, sir.

Q When you read that paragraph 6 did you understand when you read it, did you comprehend that, representing to anybody that read the affidavit you gave under oath that you found the .223 cartridge in the trunk?

MR. SIKMA: Your Honor, I'd object. The question has been asked and answered a number of times and counsel is just arguing with the witness.

MR. LOWE: He has not answered whether he understood upon reading that paragraph that that is what it said.

MR. SIKMA: That's precisely the same question that was asked earlier, Your Honor.

MR. LOWE: It is not.

THE COURT: You may answer.

A I did not know there was any significance, which I answered previously, to that particular paragraph and any of the rest.

I do not, the significance of that paragraph at the time I signed this affidavit was not apparent to me.

MR. LOWE: Your Honor, I am saying I know he's not answering my question and I ask that the Court direct him to be {2126} responsive. I'm not asking whether it's significant. I'm asking whether he knew when he read that paragraph that it was holding out to the reader of that affidavit that he found that round in the trunk. And I am entitled to an answer to that question.

THE COURT: Do you understand the question?

THE WITNESS: I do not know, sir.

MR. LOWE: Shall I restate it or would the reporter read it back?

MR. SIKMA: Your Honor, he's answered the question now.

THE COURT: I think he may have answered it.

Reporter will read it back.

(Whereupon, question read back: "Question: When you read that paragraph 6 did you understand when you read it, did you comprehend that,

representing to anybody that read the affidavit you gave under oath, that you found the .223 cartridge in the trunk?")

THE COURT: And his answer was "I did not." So I think that answered the question.

Q (By Mr. Lowe) Who made up this affidavit if you know?

A I do not.

Q Who sent it?

A It was sent in from Rapid City.

Q Who signed the cover letter or whatever document that came {2127} with it explaining that you were to --

A I don't know.

Q Did it have anything other than just the bare affidavit in an envelope?

A I do not recall, sir.

Q Did you have any telephone conversations or other correspondence with regard to this affidavit prior to the signing, time you executed it?

A I do not recall.

Q Would it be fair for me to say that at the time you signed this affidavit under oath you did not know whether or not the information contained in paragraph 6 was true or not?

MR. SIKMA: Your Honor, I'd object. This question has been asked and answered a number of times. Counsel has gone over it a number of times and I think it's -- the Court has ruled on this objection.

MR. LOWE: I have never asked that question, Your Honor.

MR. SIKMA: Your Honor, he probably changed a word or two in the question, but the matter was gone over about a half a dozen times now and I object, Your Honor.

THE COURT: I think he has answered it. He stated he thought it came off his 302, so I think that answers the question.

MR. LOWE: Your Honor, I think this is critical and I think it's important that he make a stand as to whether he knew {2128} at the time he signed the affidavit whether the information was correct or not. I'm not asking that he knew it was false, but that he knew, whether he knew it was true or not true, or whether he just didn't do anything and was relying entirely on the fact that somebody has prepared the affidavit purportedly in his 302's. And that's a critical piece of information right now.

MR. SIKMA: Your Honor, I'd submit it's not a very critical piece of information. The witness has testified to his knowledge at this particular time with the use of these, with the use of these documents which he has

vigorously attempted to get admitted into evidence, which have been admitted into evidence.

The facts to the best of his recollection are before the jury at this time. Counsel is complaining that this document is wrong and no one has offered it into evidence except counsel himself. And I would submit, Your Honor, that the matter is simply repetitious and therefore objectionable.

THE COURT: I think it's repetitious, but you may ask the question once more and that's it.

Q (By Mr. Lowe) For the first time I have ever asked you this question in these words, you've read paragraph 6 and I ask you at the time you signed the affidavit did you know whether that was true or not, or were you relying on the fact {2129} that somebody had put it in the affidavit?

A Well, I read the whole document as well as that paragraph. To the best of my recollection it was true. Otherwise I wouldn't have signed the affidavit.

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

(Defense counsel conferring.)

MR. LOWE: No further questions, Your Honor.

MR. SIKMA: That's all I have, Your Honor.

THE COURT: You may step down.

MR. SIKMA: Plaintiff calls Michael Gammage.

MR. LOWE: May we approach the bench, Your Honor?'

THE COURT: You may.

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

MR. LOWE: Your Honor, we would move under the authority of Brady against Maryland to have the Government disclose information to us, or documents to us, which would fall under the Brady guidelines for exculpatory or possible exculpatory information, namely that the Government disclose and provide us with copies of any covering documents that were sent to Special Agent Cunningham with the affidavit as well as the information, and who prepared the affidavit. And any documents that accompany it when they were sent to Special Agent Cunningham.

MR. HULTMAN: Your Honor, the Government resists. First {2130} of all on the ground that it's been at least six months that counsel has known of the very things that they are projecting here. That they could have made any such request at the proper time and, nextly, that there is no knowledge. And the position of the Government on the part of of the U.S. Attorney at this time, he had no knowledge of what is now being presented, and thirdly that in the judgment of the U.S. Attorney doesn't constitute Brady material.

THE COURT: It was Brady v. ?

MR. LOWE: Brady v. Maryland.

I'm not sure what Mr. Hultman is talking about, and I say this, correct me if I'm wrong, but I believe the first time that I saw that material was when the 3500 material was given to us. I don't know when it was, a couple of nights ago, something like that, several days ago is the first time I saw it.

And secondly under Brady against Maryland those disclosures must be made at any time. There's no disclosure on Brady.

THE COURT: I will take your request under advisement.

MR. TAIKEFF: Your Honor, I'd just like to add one legal observation.

Often it is my experience that the Government argues that it need not comply with Brady well in advance of trial, but that the appropriate time for it to comply with Brady is {2131} just at the beginning of, or during the trial when the need for the information becomes apparent.

I think the cases tend to support that view. But if any case deviates from that it's only because they accelerate the time. They don't put it in at the end of the trial or after the trial.

Obviously during the trial is the last time when Brady could ever be operative.

MR. HULTMAN: Well, my posture is, one, that that is the case; and two, that under, I'm taking the position unless the Court would rule to the contrary, that it doesn't constitute "Brady Agurs".

MR. TAIKEFF: That's a separate question.

MR. HULTMAN: We understand what we're talking about by Brady. But my position is there's later cases that modify and put it in a different posture and that's why I use the term Agurs, Brady-Agurs so everyone understands.

MR. LOWE: To the extent that we may end up arguing at the sidebar or in court at some point --

MR. HULTMAN: You haven't been damaged.

MR. LOWE: You just let us know what those cases are so if they are raised before the Court we will be able to talk about them intelligently.

MR. HULTMAN: John, I've stated on the record, and I think we know the issue we're talking about. I mean you can {2132} brief it the same as I can brief it to the Court.

MR. LOWE: I'm saying if you are going to refer to cases, it would be helpful to read them before.

MR. HULTMAN: It's the last issue in the case. Your Honor, you are

very familiar with the Agurs case.

I'll give you the citation, John. 427 U.S. 97. That's June 24, 1976. U.S. v. A-g-u-r-s.

MR. LOWE: That's the only case you're speaking of? You mentioned several cases. Now, you said several cases, that's why I asked.

MR. HULTMAN: I didn't mean to say --

MR. TAIKEFF: I have a matter which I think will probably be easily resolved. I just want to make sure that the testimony to be offered by the next witness, Michael Gammage, G-a-m-m-a-g-e is going to relate to the weapons which were found in Wichita and the weapons only.

MR. HULTMAN: That's right.

Well, is it weapons only? No, I think he'll relate to the scene and photographs and so forth which tie to the weapons and the event itself.

MR. SIKMA: Also, unless you want to stipulate to the identity of Robert Robideau who identified himself as Robert LaMonte, if you want to stipulate to that fact I won't go into it.

MR. TAIKEFF: You mean he was the person who was injured {2133} in the scene?

MR. SIKMA: Yes.

MR. TAIKEFF: Yes, of course.

MR. SIKMA: And that I'll just read that stipulation. Then we won't, I won't go into it with this witness if that's all right, I mean if you prefer that.

MR. TAIKEFF: Either way.

MR. SIKMA: I think it would save us time if we stipulate to it.

MR. TAIKEFF: Okay. I just want to make sure that the kind of evidence, whether it's pictorial or verbal or real, that we made reference to in our trial memorandum is not displayed to the jury until his Honor has a chance to consider it, because as far as the incident is concerned we've taken a general position that the entire episode is not relevant, and we don't have to argue that again because I believe His Honor has overruled our objection.

However, we now have the question of certain elements here being prejudicial, and if you would use those photographs I hope before you offer any photograph you give us a chance to look at it.

MR. HULTMAN: Let's get them now.

MR. TAIKEFF: May we do that now, Your Honor.

THE COURT: Very well.

MR. SIKMA: Take this one out, but it does identify {2134} the vehicle.

MR. TAIKEFF: We have no objection to the license plate, Your Honor.

Now, Your Honor, pages 1, 2 and 3 show the vehicle after the explosion. There has already been testimony on that subject which followed our original position that this entire episode is irrelevant to the issues in this case.

I don't see why the necessity is to show them these photographs and emphasize the nature of that incident. The defendant is not purported to have been there. Am I correct about that, Mr. Sikma?

MR. SIKMA: That's correct?

THE COURT: The defendant is what?

MR. TAIKEFF: Not purported to have been there.

And I admit that it has a certain amount of drama to it. In fact, one might even think that it would give Detroit a new idea.

However, I really don't think it's appropriate. Although I could surely understand the Government's desire to introduce it.

MR. SIKMA: I think that it is, Your Honor, I think that it shows number one, the number of weapons involved here. Some of the weapons directly related to tent city.

MR. TAIKEFF: We have no objection to that. We believe it's proper for the Government to introduce that {2135} evidence.

MR. SIKMA: this is a hand grenade which is the type found in the testimony, both at tent city and at the Al running residence, which will come up at a later time. Exactly the same type of things which were carried away from the scene on this day.

The firearms there --

MR. TAIKEFF: We have no objection to the photograph which is on page 10. And assuming that my eyesight is serving me well, and there are only weapons and a belt, firearms when I say weapons, then we have no objections to 11 and 12. And we object, specifically object to 13. That's the kind of material we think is inappropriate and I'll state it very briefly, Your Honor.

Off the record.

(Discussion off the record.)

THE COURT: What is that, a hand grenade?

MR. SIKMA: That is a hand grenade that was found near this thing.

MR. TAIKEFF: Your Honor, we believe that the photographs we've objected to would compound a problem. This is to begin with proof of another crime and it has to do with a time and place where the defendant was not involved. So it's proof of another crime of another person well after the event.

I believe it's between four and five months after the {2136} event, June of '75. It's too far removed and too far attenuated from either the

defendant or the events of June 26th.

THE COURT: Are those hand grenades tied up to tent city and the --

MR. SIKMA: Yes, Your Honor.

THE COURT: -- and the Jumping Bull compound?

MR. SIKMA: Yes, Your Honor.

MR. TAIKEFF: Those hand grenades?

MR. SIKMA: Exactly the same kind.

MR. TAIKEFF: At tent city?

MR. SIKMA: Yes. I believe they were --

MR. TAIKEFF: I believe you are mistaken, Mr. Sikma.

MR. SIKMA: I believe they were carried away from that area.

MR. TAIKEFF: I believe you are mistaken. If you look at your other photographs or review your testimony you will find that what you are dealing with there was a homemade soda pop bottle or beer bottle.

MR. SIKMA: But I think one other thing, Your Honor, these kinds, precisely this same thing was found at the Al Running residence where, which is the area to which Leonard Peltier --

THE COURT: Where is the Al Running residence?

MR. TAIKEFF: Rosebud Reservation.

{2137}

MR. SIKMA: Rosebud Reservation.

THE COURT: Yes, I know now.

MR. SIKMA: Where the weapons were found, and I think there's a rational relationship between these items and the Al Running residence which I think connects this defendant to other persons, such as Mike Anderson, Robert Robideau and Norman Charles who were in this vehicle, and also Dino Butler who was at the Al Running residence and who was arrested there with these items in the same room with him, and on the same compound, and I think that there is a relationship which ties the two together.

I think that the weight to be given this evidence is a matter for the jury to decide, but I believe that it does rise to the level of admissibility.

MR. TAIKEFF: I wasn't addressing myself at all to the question of weight. I was merely trying to persuade Your Honor that if Leonard Peltier himself four months after the even had certain materials or weapons in his possession, that there would be a serious question as to whether evidence of that other crime would be admissible out of consideration of possible prejudice.

This is a step further removed than that. This is the conduct of other people with the defendant in no way connected with these events, except that

at one time several months earlier he was in a certain relationship to them. It would {2138} that if this case were tried a year from now and in the course of that year these people, most or all of whom are free at this time except Mr. Robideau, committed further criminal acts, it would be adduceable because of an earlier relationship which had existed in June of 1975.

So it is both the problem of proof of other crimes and particularly aggravated by the fact that they're not the crimes of the defendant. If they were the crimes of the defendant they'd be questionably admissible.

MR. SIKMA: Your Honor, I think that it does relate to state of mind that was present at the Jumping Bull residence, the tent area in particular. I think that the Court will find that wherever this defendant is followed, every place where this defendant sets up residence and the people that are associated with this group, you will find that you don't find one or two weapons, a variety, a great variety of weapons. You find a great variety of explosives and very dangerous items which certainly goes to rebut the statement which has been made in the argument that from time to time that the defendant's activities and those activities of persons associated with him are principally religious in nature.

I would submit that that is not the case and this certainly goes to rebut that.

THE COURT: What is the significance of 9?

{2139}

MR. SIKMA: Right there, the hand grenade that's found there, and also a piece of weapon. And here's another one.

THE COURT: What is the significance of --

MR. SIKMA: Okay. This shrapnel which is the explosion of one of those.

MR. TAIKEFF: May the record reflect that Your Honor is looking at number --

THE COURT: It's hard to see because there's no number there.

MR. SIKMA: Oh, I'm sorry. Should be.

THE COURT: There's 7 and 8, and then no number on that. Then 9 and 10 presumably.

MR. TAIKEFF: The photograph which precedes 9 that Mr. Sikma was addressing himself to, it shows the force of the explosion.

MR. SIKMA: And the shrapnel, pieces of shrapnel from these various items.

THE COURT: What is the significance of 7?

MR. SIKMA: There are a number of cartridge cases which are identified that relate to the weapons here.

The weapons are not being carried just by themselves. There are a number of weapons being carried with substantial amount of ammunition.

THE COURT: What is the significance of 6?

{2140}

MR. SIKMA: The significance is just the explanation of the explosion which is shown on other pages. One is a rear view I think, and one of them is a front view.

THE COURT: Well, it seems to me that 4, 6 and the rest of these should be received.

And 5, 3, 2 seem to be just cumulative.

MR. SIKMA: Okay. I'll take those off, 5, 3 and 2.

THE COURT: Those appear to be cumulative.

MR. SIKMA: I will remove those photographs, Your Honor.

THE COURT: That's the ruling of the Court.

MR. TAIKEFF: Thank you, Your Honor.

{2141}

MICHAEL GAMMAGE,

being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SIKMA:

Q Please tell the jury your name.

A My name is Michael D. Gammage.

Q What is your occupation?

A I'm a special agent of the Bureau of Alcohol, Tobacco and Firearms for the United States Treasury Department.

Q Was that your occupation on September 10, 1975?

A Yes, it was.

Q And were you also working in, where were you working on that day?

A I was working in Wichita, Kansas.

Q Did you have a call to go out and make an investigation in the afternoon approximately 4:00 o'clock on that date?

A Yes, sir, I did.

Q Would you please tell the jury where it was that you went and for what purpose at that time.

A I went to an area on the Kansas Turnpike which is an extension of Interstate 35. It's not Interstate 35 but it's where Interstate 35 crosses the Kansas-Oklahoma border and back east the Kansas Turnpike. This area was identified by mile markers and the area I was in was milepost 29 which is south of Wichita in Sumner County.

Q And did you go to that place?

{2142}

A Yes, I did.

Q And what did you observe there?

A When I arrived in the vicinity of milepost 29, I was in the southbound lane and I observed in the southbound lane on the west shoulder, which was to my right, what appeared to be a very late model, not a late model, '65 model, in that area, station wagon that appeared to have been involved in an explosion and fire. The roof had been torn from the vehicle and was standing perpendicular to the pavement straight up and down and the car had smoke marks and it was very badly rusted.

To the rear of the car I observed nearest me, which would be north of the car, a pile of clothing which consisted of blankets, clothing, a pack. South of that pile near the rear of the vehicle I observed a pile, a group of firearms that had been grouped together.

Q I will show you what is marked for identification as Government Exhibit 62 and ask you whether or not you recognize those photographs?

A Yes, sir, I do.

Q Now do those photographs accurately reflect what you observed at the time on the 10th of September, 1975 in Wichita?

A Yes, sir, they do.

MR. SIKMA: Your Honor, I would offer these photographs into evidence at this time.

{2143}

MR. LOWE: Your Honor, we would have no objection as to general depiction. There may be specific items we'll have specific objections to in some instances but as to the general admissibility, and also subject to the record.

THE COURT: Subject to the record that has been made with reference to those photographs, they're received in evidence, Exhibit 62 is received in evidence.

Q (By Mr. Sikma) I would ask you to look at the photographs and describe for the jury generally what you observed in the photographs and what you saw at that particular time you made those observations.

A First paragraph is or a license plate that is normally affixed to either the front of the rear or both places on a vehicle. It says, "'75 Oklahoma is okay" and the number is "P" as in Paul, "E" as in Edward, "3445." The license plate is white background with green border and green lettering and numbering. This was found in the vicinity after I arrived and initiated

the search of the area.

This photograph is looking from --

Q Which page are you on?

A I'm sorry. This is page 4. Now the first one was page one.

Q Page 4 is a photograph of the vehicle looking from the left rear quarter panel. That would be to the north and slightly east of the vehicle. It's taking a shot of the left {2144} side. The left rear door is open exposing the interior of the car.

Page number 6 is a photograph taken due north of the vehicle in the immediate foreground. It shows the pile of clothing and between the clothing and the car there is a piece of metal that was off the car, debris, and then the stack of firearms are directly to the rear of the vehicle.

Then there is the vehicle with the rear shot showing that the tailgate has been blow off the car and the top is raised and the interior is charred.

Photograph number 7 is a closer shot of the debris directly near the bumper. This is a metal piece off the car and also showing debris that includes the shotgun shells and rifle shells and .45 caliber automatic Colt pistol shells and what appears to be the upper forearm of an M1 carbine which is this piece right here (indicating).

Number 8 is the photograph on the west side of the vehicle. This is near the right rear tire which is pictured here (indicating). This would be the right rear quarter panel (indicating). Directly below this was pictured what we believed at the time was a homemade hand grenade. This is a portion of the car and this article here is a canteen with the cover partially burned off (indicating).

Mr. Sikma, I don't have a page number on this {2145} photograph.

Q What is the page that follows that photograph?

A It's page 9 but it's on the back side.

Q So it would be the reverse side of page 9, is that correct?

A Yes, sir, it would.

Q What is on the reverse side of page 9?

A This is a closer shot into the interior of the car from the east side of the car shot through the left rear passenger door. You see the holes in the vehicle. You see the main strut where the roof had been attached and also inside you see the frame where the seat was and also some charred areas.

Photograph number 9 is taken on the west side of the car photographing the right front tire. Directly under the right front bumper was another device that we believe to be a homemade hand grenade. This is part of the spare tire that had been on top of the car directly behind the driver's seat that

had subsequently caught fire and separated and burned.

Photograph 10 is the stack of weapons after they were separated and placed in a line by myself and also shotgun shells and debris. This is a shotgun, this is a rifle, that's a rifle, that's a rifle, that is a rifle and that is a rifle and these two are revolvers (indicating). This article is a seat belt (indicating).

Photograph number 11 is a closer view at a different {2146} angle of essentially the same weapons. Again we have the rifle, rifle, double barrel shotgun as pictured in the other photograph, rifle and these two are also rifles and here's a closer shot of the belt (indicating).

Photograph number 12 is a photograph of the two revolvers, another photograph of this same rifle and then this rifle is again photographed (indicating). The double barreled shotgun and the other rifle here (indicating).

Number 13 is a photograph that has a background of the grassy area of the turnpike which is a bar ditch, it's not the median, it's over on the left side of the highway on the southbound lane. In the middle of the photograph is another device that we picked up that we suspected of being a homemade grenade at the time.

Q I would show you what has been marked as Government Exhibit 30A. Can you tell me whether or not you recognize Government Exhibit 30A?

A Yes, sir, I do.

Q And where did you first see Government Exhibit 30A?

A I saw this exhibit in the stack of firearms that were to the rear of the vehicle pictured in Exhibit 62.

Q And what did you do with this item when you found it?

A It was processed as evidence and taken into our custody and subsequently shipped to Washington, D.C. for laboratory analysis.
{2147}

Q How did it get to Washington, D.C.?

A I personally transported it there.

Q And to whom did you deliver it?

A It was delivered to our lab people on September the 12th, approximately 8:00 A.M. on the body of Elliott Biel. I went back to our headquarters building and at 10:30 I was again called to the laboratory and I witnessed Mr. Biel open the container that I had given him and witnessed him disassemble or take out the weapons and I picked up this weapon and one other and personally handed it to FBI agent Evan Hodge at 11:00 o'clock in the morning on September 12, 1975.

MR. SIKMA: Your Honor, first I would offer into evidence at this time Government Exhibit 30A.

MR. LOWE: We have no objection, Your Honor.

THE COURT: Exhibit 30A is received.

Q (By Mr. Sikma) Would you tell the jury what kind of firearm that is?

A This firearm is a Remington model 760 Game Master, caliber .308 pump action rifle.

Q Do you have any knowledge of your own experience as to who uses that kind of firearm?

A This is a firearm designed of the general sporting caliber. I have not seen any in possession of anyone other than the Federal Bureau of Investigation.

{2148}

Q I would ask you to look at Government Exhibit 30-AA and tell me whether or not you know what kind of firearm that is?

A (Examining) Yes, sir, I do.

Q And what kind of firearm is that?

A This is a Remington Model 76, Game Master, Caliber 3.08 rifle.

Q Is that similar to the firearm which is Government Exhibit 30-A?

A Yes, sir, it is.

MR. SIKMA: I would offer into evidence at this time Government Exhibit 30-AA.

MR. LOWE: No objection.

THE COURT: 30-AA is received.

(Plaintiff's Exhibit No. 30-AA, having been previously duly marked for identification, so offered in evidence, was received.)

MR. SIKMA: I guess that's already in evidence.

THE COURT: The Clerk tells me that is in evidence.

MR. SIKMA: Thank you, your Honor.

Q (By Mr. Sikma) I will show you what is marked as Government Exhibit 34-A.

MR. LOWE: Your Honor, we would object to any testimony about this particular item, and on the ground that it is irrelevant; and I would like in support of that objection to be able to have a couple of questions on {2149} voir dire.

THE COURT: Excuse me just a moment. What is the number, what have you designated that?

MR. SIKMA: 34-A.

THE COURT: 34-A.

You may voir dire.

(Mr. Lowe hands document to Mr. Sikma.)

(Counsel confer.)

MR. LOWE: Could we have a moment, your Honor? We are trying to resolve the question.

THE COURT: You may.

MR. SIKMA: Your Honor, while Mr. Taikeff is attempting to check his records on this particular item, the Defendant and the Government agree to stipulate that in the vehicle which is portrayed in Government Exhibit 62, that Robert Eugene Robideau, who on that date identified himself as Robert LaMonte, was riding in that vehicle with Norman Charles and Michael Anderson.

MR. LOWE: Your Honor, we have agreed to stipulate that the vehicle portrayed in Government's Exhibit 62 does so show; and I believe the Government has conceded also that Mr. Peltier was not in that vehicle, is that correct?

MR. SIKMA: Yes, your Honor, we agree to that.

THE COURT: The stipulation then is that Mr. Robideau --

MR. SIKMA: (Interrupting) Mr. Charles and Mr. {2150} Anderson.

THE COURT: (Continuing) -- Mr. Charles and Mr. Anderson were in that vehicle. Mr. Peltier was not in the vehicle.

MR. SIKMA: That's correct, your Honor.

THE COURT: Very well.

MR. LOWE: In order not to mislead intentionally other counsel, there were other people in the vehicle besides those three, Jean Bordeau, Dennis Banks and Bernie Nichols, I believe is the other name.

MR. SIKMA: Yes, your Honor, that's correct, we will agree.

THE COURT: Three other vehicles besides Anderson, Mr. Charles and Mr. Robideau.

MR. LOWE: Three other people besides Mr. Anderson, Mr. Charles and Mr. Robideau; also a one and a half year old baby named Kashima Banks.

MR. SIKMA: We will agree to that.

THE COURT: The jury will remember that a stipulation may be taken as evidence on which the parties agree.

MR. SIKMA: Your Honor, may I have just a moment here?

(Counsel confer.)

MR. LOWE: Your Honor, I believe I am on voir dire. I have a problem. It is now seven minutes before 5:00. {2151} I do not think that voir dire would possibly at 5:00. I don't want to get in the middle of an important

series of questions and one which requires some continuity. If you want to we could recess now and take this up the first thing in the morning, let me begin and finish. I don't think it is going to take very long. My option is to recess for the last six minutes and start at 9:00 o'clock.

I see the book is closed, I see a decision has been made.

MR. SIKMA: Voir dire generally is a couple of questions. I would appreciate it if counsel would go on. I think it is perfectly proper to continue on. He probably would like to save this until tomorrow, but I have a witness here who has been waiting around here for a week to get on the witness stand.

MR. LOWE: We are certainly going to have cross examination.

THE COURT: You are going to have this witness tomorrow anyway?

MR. SIKMA: He will be here.

THE COURT: I have another matter I am going to have to take up after 5:00, so I will not be allowing the court session to run beyond 5:00 o'clock, so I will grant Mr. Lowe's request that we recess at this time.

MR. LOWE: Thank you, your Honor.

{2152}

THE COURT: The Court will recess until 9:00 o'clock tomorrow morning.

(Whereupon, at 4:55 o'clock, p.m., the trial of the within cause was adjourned until 9:00 o'clock, a.m., on Wednesday, March 30, 1977.)

{2153}

(Whereupon, the following proceedings were had in chambers, the Court, Mr. Taikeff, Miss Bennett, Mr. Lowe and Harold Warren being present:)

MR. TAIKEFF: Your Honor, Kathy Bennett is with me.

THE COURT: I have not met her.

MR. TAIKEFF: You probably noticed she sat with us during the jury selection.

I have a very brief application to make. Diane Wiley had to return to Minneapolis.

THE COURT: Have a chair.

MR. TAIKEFF: And is not able to return because of other commitments and we ask Your Honor as a threshold application that Your Honor permit Miss Bennett to substitute for Diane Wiley and maintain the same number of people, just a replacement of one person, if Your Honor grants that application.

THE COURT: Diane Wiley was what: an investigator?

MR. TAIKEFF: She was appointed, she was working as a volunteer but she was a regular named member of the defense team. WE want to eliminate her and appoint ourselves, not under the Criminal Justice Act, Miss Bennett.

That's the threshold application.

THE COURT: I see no objection to that.

MR. TAIKEFF: Now I understand that generally Your Honor's order concerning visitation would permit up to two {2154} lawyers and one person.

THE COURT: Did you bring my material in off the bench?

MR. TAIKEFF: Before the trial began, Your Honor's order for an agreement reached with the sheriff permitted two counsel and one non-lawyer person on the defense team to visit.

THE COURT: I have that in my file on the bench. I just wanted to --

MR. TAIKEFF: Should I wait until it comes in?

THE COURT: You may continue.

MR. TAIKEFF: There was certain hours set aside which are in conflict with the hours that were on trial. We're not asking Your Honor to arrange a long range or permanent schedule for visitation because in fact we have an opportunity to see Mr. Peltier in the morning, during lunch and afterwards. However, now that we're getting very close to beginning our case, we have to consult with him and we ask that consistent with the earlier provision during the morning and afternoon that we have the specific opportunities which are listed in that Order for one counsel and Miss Bennett to visit in the evenings. Because of the added name and because of the variation in the hours from those recorded in the letter, the two page letter, we feel that an order is necessary. Both the sheriff and the marshal apparently would feel much {2155} more comfortable about it if it came directly from Your Honor.

THE COURT: I'm not sure I know what you're asking. Now during trial, and I'm look at the letter, it requests "Specific daily conference hours of 9:30 A.M. to 10:30 A.M. and 2:00 P.M. to 3:30 P.M. be approved for each day, Monday through Friday the case is not in trial. After the trial is commenced and for its duration we request Saturday conference hours of 9:30 A.M. to 10:30 A.M."

MR. TAIKEFF: I don't believe that is in the present application. Your Honor may be looking at a proposed order or an application made in some earlier date.

THE COURT: I'm not looking at your present application.

MR. TAIKEFF: Yes.

IF so, that matter was either ruled upon by Your Honor or if not I withdraw that application.

THE COURT: That was ruled upon and those times were set up with a provision. There was an order then on the 7th of March, "The defendant moved

the Court for an order amending the conditions under which Counsel is permitted access to and provide an attached copy of February 18, '77 letter to Sheriff Olson. AS stated, Defendant moves for an order amending these conditions to allow access by those individuals listed in said letter to meet with defendant during any time {2156} during the normal business day and no limitation be made of people allowed to see the defendant at one time as long as the individuals named in the court's letter of February 18. IT was ordered the provisions of February 18 letter not be enlarged except as maybe allowed at the discretion of the Clay County, Minnesota sheriff consistent with their security requirements."

MR. TAIKEFF: Yes, Your Honor.

THE COURT: That's the last thing entered.

MR. TAIKEFF: That's quite correct. I'm sorry. For a moment I wasn't certain about the history that Your Honor was reviewing.

It is that order which has caused us a considerable amount of difficulty in getting an understanding.

I believe that I addressed myself to this question in Your Honor's presence sometime ago, perhaps a week ago, and reported to Your Honor that I went to Mr. Warren and asked him whether in his opinion the order which Your Honor just quoted said that if we can persuade the sheriff and he was willing that he, Mr. Warren, should not interfere and he said, "No. I do not read that order that way. As far as I'm concerned the conditions set out in the letter of February 18 continue unless modified by order of the Court."

Now I don't want to debate over again or present to Your Honor over again the arguments.

{2157}

THE COURT: No. I have --

MR. TAIKEFF: How to interpret that order. It's because of Mr. Warren's position with respect to that order.

THE COURT: I don't know whether you talked with me or one of my law clerks after that or with Ralph. After that I talked to Mr. Warren and what Mr. Warren, as I recall the conversation, had reference to was that powwow that was desired.

MR. TAIKEFF: It was a pipe ceremony.

THE COURT: Pipe ceremony. All right. I plead ignorance on some of these terms.

And that was what Mr. Warren was objecting to.

MR. TAIKEFF: That's quite correct, Your Honor.

THE COURT: On security grounds. And I told him that I would not interfere with the marshal's service with anything they considered necessary.

MR. TAIKEFF: I understand that.

THE COURT: That is the last thing that I have had to do with it.

MR. TAIKEFF: That's quite accurate, Your Honor. It was in the course of trying to discuss with him the pipe ceremony that I presented to him in the order which Your Honor last referred to and asked him whether he recognized that that order left it up to the discretion and the convenience of the marshal, of the sheriff and he said, "No, I do not."
{2158}

I thought as a threshold I would see if he agreed with me that there had been a change with respect to visitation. I thought if I could convince him of that perhaps I could convince him that the sheriff should make up his own mind about the pipe ceremony but he emphatically said he did not read Your Honor's last order on the subject to alter in any way the visitation or to allow us to negotiate directly with the sheriff.

I have no quarrel about that except that I think Mr. Warren's position is going to be the same and that's why the order that is now before Your Honor was presented so that we do not go around the circle again: ask the sheriff, he calls Mr. Warren, Mr. Warren apparently tells the sheriff it's not okay, the sheriff says, "I'm sorry, I can't do it because we have a federal prisoner and the marshal says no," I say, "Here's the court order which says it's up to you," the sheriff says, "I'm sorry, Mr. Warren says it can't be done." So I know that the circle is sacred to the native American people and I'm tired of running around that circle. I'd like Your Honor's signature on that order.

THE COURT: Mr. Warren?

MR. WARREN: Well, I think my position remains unchanged, Your Honor. If the sheriff inquires of me, if I'm in favor of anything beyond the initial visitation privileges, I think my standard answer, and I agree with Mr. Taikeff, my answer {2159} is, "No, I don't." I'm not in harmony of any change or variation and I maintain that it's based on security measures. IF the sheriff takes it upon himself without inquiring of me, that's his thing.

MR. TAIKEFF: But he never does. That's the problem.

MR. WARREN: AS long as he inquires of me whether I have any objections to any extensions or variations of the initial letter, I say, "Yes. I don't agree with it." But each time that he calls I say, "It's your jail, Mr. Sheriff, and I can't dictate policy to your jail, but you're asking for my feeling on the matter." It's remained unchanged since the outset.

Their personnel are limited over there in number.

THE COURT: The application, you haven't seen the application?

MR. WARREN: No, I haven't.

THE COURT: The application I have before me now is for Miss Bennett to be allowed together with an attorney of record for the defendant access to the defendant for a reasonable period of time during the evenings of March 29th, 30th and 31st. That's tonight, tomorrow night and the night after.

MR. WARREN: For what hours?

THE COURT: The hours aren't stated.

MR. TAIKEFF: I think that's much narrower than the {2160} original arrangements. It's one less person and fewer hours per day.

MR. WARREN: Talking about night visitation.

THE COURT: You're talking about night visitation because this is during trial.

MR. TAIKEFF: Yes. Otherwise I'd much rather have my evenings free.

MR. WARREN: Before I even comment, if Your Honor is asking for my comment from me, I would have to say the hours would have to be specific based on the limitation of personnel in the Clay County jail and the business activity over there. It seems like he's asking for an open door according to that for all hours visitation, for all hours of the night hours of visitation.

MR. TAIKEFF: I can understand that observation by Mr. Warren. We were trying to allow some flexibility on the part of the sheriff to make a selection that is most convenient to himself. But I think if a two hour period were designated, we would have no objection to something like 7:00 P.M. to 9:00P.M.

THE COURT: Well, I think tonight is out because you haven't had a chance to visit with the sheriff on it and why don't you visit with the sheriff and see what -- it's your representation this is necessary for preparation of the defendant's case?

{2161}

MR. TAIKEFF: A, I represent that's necessary and, B, I represent that it is specifically geared toward the evidence that we will be introducing in the course of our case in chief.

THE COURT: Well, you still have him available next door.

MR. TAIKEFF: Yes, sir. That's correct.

THE COURT: You're not going to get to visit him at the Clay County Law Enforcement Center tonight so I would suggest we terminate this meeting so you can take advantage of your opportunity to visit with the defendant now and then MR. Warren, you can visit with the sheriff about this and get

back to me.

MR. WARREN: So we're clear, that would be Miss Bennett?

THE COURT: And one attorney. Right.

MR. TAIKEFF: Thank you, Your Honor.

I assume, Your Honor, that then the application will be treated as one for three nights beginning tomorrow evening?

THE COURT: That's the way I would construe it.

MR. TAIKEFF: Thank you, Your Honor.

THE COURT: Thank you.

(Whereupon, at 5:15 o'clock P.M. a recess was taken.)