VOLUME IX

{1690}

MONDAY MORNING SESSION

March 28, 1977

Whereupon, the following proceedings were had and entered of record on Monday Morning, March 28, 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: May I be heard, Your Honor?

THE COURT: You may.

MR. TAIKEFF: Your Honor, sometime last week arrangements were made between myself and Special Agent Biner for the production of the rifle with the telescopic sight that was supposedly used to identify Mr. Peltier from the distance of approximately a half a mile. He brought that telescopic sight to the office and we've made a tentative sighting out of the window of the courthouse. And then made no completely definite arrangements, but nevertheless general understanding was reached that some morning he would send that rifle and scope along with us to a place where we had measured off a half a mile so that we could conduct certain sighting tests.

I was informed on Friday I believe by Mr. Ellison that those arrangements were no longer to be made without the direction of the Court. So at this time if in fact that is the situation I would ask that Your Honor direct the Government to {1691} produce that rifle with scope because we have found a place where we have measured a half a mile with a clear view and we'd like to conduct a test there as soon as possible, sighting test.

MR. HULTMAN: Counsel, if you'll just indicate now when it is that you want to do it, I'll make sure somebody's available in order to accomplish it. I just want to make sure I got somebody available. That's all.

MR. TAIKEFF: At 12:30 this afternoon would be fine, Your Honor.

MR. HULTMAN: I assume we can do that at 12:30, Your Honor.

THE COURT: Well, then it's understood that this is a matter then that can be worked out with counsel?

MR. HULTMAN: Right.

THE COURT: So that there's no reason for the Court to act on it?

MR. HULTMAN: Right.

MR. TAIKEFF: Your Honor, then apparently I get the sense that there may have been some misunderstanding about whether the line of communication directly with Mr. Hultman were still open. I'll defer. I had a few other

matters here on my list, I'll defer until Mr. Hultman and I have a chance to talk during the recess. And if we can work out the other things which I think have to be done it won't be necessary to involve {1692} the Court.

MR. HULTMAN: The only thing I want to make clear on the record is that I'm not going to go back and redo discovery that people already had the opportunity to make. That's my only point. If it's something within my capability right now, like with the scope, I'm willing to do it. But I'm not going to go back through, and I want it made very clear on the record, and go search documents that defendant has had in their possession from the very beginning.

And I just make that as a general statement because I think that time is long gone and it's within your own capability. But let's talk about whatever the specifics are. Go from there.

MR. TAIKEFF: All right. Thank you, Your Honor.

THE COURT: Is that all?

MR. TAIKEFF: Yes, sir.

MR. CROOKS: Your Honor, there is one other matter which should be brought up now. Our next witness to be called will be Mr. Ronald Hlvinka, a police officer in Milwaukee, Wisconsin, who will introduce and give testimony concerning an incident in which he was involved in in which charges arose against Mr. Peltier charging him with attempted murder. And those charges being outstanding at the time of the incident of June 26, 1975. {1693}

Counsel has asked that we give them notice of the, or the Court notice prior to calling Mr. Hlvinka so that they can complete their record with regard to this matter. The matter has already been briefed by both sides extensively and I merely bring it to the Court's attention at this time. So if counsel wishes to make further comments out of the hearing of the jury they can, and then the United States will respond if there is a further record to be made by the defendant.

But it is our intention to call as our first witness Mr. Hlvinka.

THE COURT: Would you state for the record specifically what evidence you intend to elicit from this witness.

MR. CROOKS: Your Honor, basically the United States intends to elicit from Mr. Hlvinka and introduce there him copies of the Wisconsin warrant and the Federal UFAT warrant, unlawful flight warrant, as I believe the Court is fairly well aware from the briefs. Basically what happened in November of 1972 Mr. Hlvinka, an off-duty Milwaukee policeman, was assaulted y Mr. Peltier with a loaded pistol. Numerous appearances were had in Milwaukee.

The matter was called for trial, Mr. Peltier jumped bond. Federal charges were then instituted for unlawful light to avoid prosecution.

All of these charges, both of these charges, were outstanding on June 26, 1975. Mr. Peltier was wanted therefore for a fugitive, or as a fugitive on at least two felonies at {1694} time. That principally will be offered to show the possible motive for the defendant reacting in the way he did when confronted by Special Agents Coler and Williams. We think it's vitally important to show the fugitive status for that purpose, and we think on the face of it the fact that he is in a fugitive status at the time that the agents come down looking for Jimmy Eagle is explanation of his actions, and it's further corroborated by testimony which we will introduce through the Canadian officials wherein a statement was made to one of the Royal Canadian Mounted Policeman that Mr. Peltier believed that he was the one that they were really after on June 26, 1975.

So it is tied together again by that matter. We further feel that we're entitled to show the circumstances of this incident to show a like and similar crime. Basically the evidence through Mr. Hlvinka will show an unprovoked attack upon an off-duty policeman. He will indicate that he did not know Mr. Peltier, had never seen him before, but he did recognize one of his companions as being an individual who he had seen in court associated with the case that he had been investigating, not as a defendant I believe but he had seen him there as a friend of an individual that he had arrested or was investigating.

We we think that in addition to showing the motive simply through the warrants themselves we are entitled to show that this was an unprovoked attack similar to the unprovoked {1695} attack which we have here. In other words, a deadly reaction to police officers. And this again goes to negative of the points which had been made again and again and again in this trial that there was some sort of a tortured self-defense; and also that it may have been some mistake.

We think that it goes directly to these two points that the very nature of the attack against Mr. Hlvinka is relevant to demonstrate and to negative the defense which have been tentatively offered and counsel have indicated an opening statement will be offered in this case.

{1696}

MR. LOWE: Your Honor, I don't know whether your Honor is entertaining full argument now. I think you were asking merely for an idea of what they intend to prove.

We vigorously oppose it. We filed a memorandum. We feel there ought

to be a hearing out of the presence of the jury, I mean, at some point before the jury is brought in so we can have available at counsel table our papers.

We very strongly oppose this. We think we have all the law on our side, and we think the facts -- the Government cannot even prove what they are stating they want to prove with regard to this. I will say no more until your Honor sets up what procedure you want to follow.

THE COURT: Is this the next witness that you intend to call?

MR. CROOKS: Yes, your Honor, this would be the very next witness.

THE COURT: It seems to me it has to be resolved right now.

MR. LOWE: I would agree.

MR. CROOKS: That's why we brought it up right now, so we would not be calling the man in in the presence of the jury, if the Court deems otherwise.

MR. LOWE: Might I have 10 seconds to go into my office and get my file? I did not know they were going to call him this morning. I have some files sitting there. {1697} I will be right back.

THE COURT: You may.

(Mr. Lowe leaves the courtroom and returns.)

THE COURT: Before you proceed, Mr. Lowe, I would ask Mr. Crooks to state specifically the Rule that you feel under which this evidence can be admitted or should be admitted.

MR. CROOKS: Well, your Honor, the specific Rule would be 404(b), Crimes, Wrongs and Other Acts; and basically, as I said before, the principal thrust of our argument is simply the fact that these warrants are outstanding and were outstanding. He was a fugitive at the officers arrived -- it is vitally important to go to establish his state of mind, motive, intent, things of that nature, all of which are included under Rule 404(b); and that is the principal thrust of our argument.

The secondary thrust is that the very similarity of the acts is relevant to fill further the state of mind; but certainly the fact that the warrants were outstanding, the warrants were in full force and effect -- the Defendant obviously knew about it because he jumped bond on it -- is vitally important to show the state of mind of this Defendant when confronted by police officers in the immediate proximity; and the Court will recall the testimony was from Mr. Anderson that the red van, red and white van {1698} was being chased on the Jumping Bull property; and the evidence was that Mr. Peltier was driving it, which again shows, I think, it very clearly, his state of mind, that he would react with deadly force to avoid apprehension for the outstanding felony warrants.

THE COURT: Mr. Lowe.

MR. LOWE: Your Honor, we take as a starting point, Rule 404(b) of the Federal Rules of Evidence which is the only justification, if there be any at all, for such evidence to come in.

404(b) says: Other Crimes, Wrongs or Acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person, in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

Now, this is a major departure or a major difference between Rule 404(b) and Rule 403. Rule 403 is the balancing test between relevancy on the one hand and the possible prejudice caused by confusion, misleading, or prejudice because of the inflammatory nature of the evidence, the balancing test between probative value and possible prejudice.

Rule 403 involves evidence which is actually evidence {1699} in the case about the event that is on trial, that is to say, in the case, let's say, of the post-mortem photographs. Those were evidence of things involved in this case in this incident. The only question is whether they are so prejudicially as to require the Court to exercise discretion to exclude them. The presumption in Rule 403 is the general presumption of the Federal Rules of Evidence, that all evidence is competent relating to the case and comes in, generally speaking, unless there is a reason to keep it out, so Rule 403 has a sort of a presumption that the evidence will come in unless the Court in its discretion keeps it out.

The opposite is true of Rule 404(b). Rule 404(b) concerns evidence which is not a part of the case. It is not around the incident which is involved in the case itself, but is external, extrinsic, collateral evidence of other cases, other issues; and the presumption there is that evidence of other crimes is not admissible unless the Court, in the exercise of discretion, finds that it fits within other purposes for which it may be admissible, so the entire inertia is different.

In Rule 404(b) the presumption is that it stays out unless the Court lets it in, so the question in Rule 404(b) is whether it fits within the guidelines of allowing it in and whether the prejudice is so light, that is, that the {1700} Court finds that it is not prejudicial to the extent that the Court will allow it in.

The burden in Rule 403 is on the person who would keep the stuff out because presumptively evidence in the case is admissible so the burden in the case of the post-mortem photographs was on us to persuade you, the Court,

that it was prejudicial.

In Rule 404(b) the other is true. The person wanting to bring it in has the burden of showing that there is no prejudice which outweighs the status quo of the Rule, the momentum of the Rule, which is to keep it out.

Now, turning for a moment to the facts, I would like to point out a couple of factual issues which are very important. Mr. Crooks has made an advocate statement. I have no doubt that Mr. Crooks in good faith thinks that that's what he would prove by Mr. Hlvinka.

However, I would point out that this involved an incident that occurred in Milwauke in a restaurant or a bar, and Mr. Hlvinka is going to claim that Mr. Peltier -- and in fact does claim in previous testimony, I believe, in a preliminary hearing, that he didn't know Mr. Peltier. I think he said he had never seen him before. He had no reason to know why Mr. Peltier would accost him. He made, as described by Mr. Hlvinka, as a virtually unprovoked, unexplainable attack. There is no evidence in that {1701} preliminary hearing -- and I vouch to the Court that as far as I know there is no evidence in existence, nor could there be produced here any evidence to show that Mr. Peltier knew or reasonably should have known that Mr. Hlvinka was in fact a police officer. He was in plain clothes. There were no badges, no identifying him by calling him Sergeant Hlvinka or Patrolman Hlvinka, as far as I am aware; and I would challenge the Government to make an offer of proof if they think they know of some.

There is no evidence Mr. Peltier knew he was a police officer. That would undermine the principal theory of the Government's offering this evidence, and that is to show that Mr. Peltier has made other unprovoked attacks on people he knew were police officers. That is a factual question that is very important.

Secondly, at this point in this trial there is no evidence that Mr. Peltier knew that Agents Coler or Williams were police officers. There is no evidence at this point that he knew that, and that would be a second reason because they can't even at this point assert, based on the evidence, that Mr. Peltier was making an attack on people that he knew at that time were police officers, so that destroys completely any link or connection to show motive or intent even if that were admissible for that purpose because there is no showing that he knew either {1702} one of them were police officers or that Officer Hlvinka was a police officer.

Further, I will vouch to the Court that there will be a substantial dispute in fact over what Officer Hlvinka said to him in Milwaukee. This would require in effect a mini-trial within this trial. Your Honor would

be conducting an attempted murder trial in Milwaukee within this courtroom with all the plenteous witnesses and evidence in order to determine whether this particular episode would be admissible before the jury.

Even if your Honor in a hearing outside of the presence of the jury were to rule that a showing of sufficient certainty had been made by the Government, the defense would then be entitled to present the same evidence before the jury, having again a mini-trial, as it were, in front of the jury to dispute the purported explanation of what this event in Milwaukee showed.

Now, it is clear to us that the Government has a second purpose and they have explained this; and that is to show a reason for flight, that is to show that Mr. Peltier knew that there was a warrant outstanding for him from Milwaukee. We believe that that would not be admissible for that purpose.

However, to the extent that your Honor would rule that it would be, we would offer to stipulate that at the {1703} time, June 26, when this occurrence that we are dealing with in this courtroom took place, Mr. Peltier had outstanding against him, and knew that he had outstanding against him, a warrant for a serious felony in Wisconsin.

{1704}

And to stipulate that that was not only in existence but Mr. Peltier knew about it. If necessary also to stipulate that he had jumped bond there. We would offer that in the faith of an adverse ruling on the relevancy of that particular element of proof. We would offer to stipulate that.

Now how is that relevant to the argument I am making now? It is relevant in two ways: first, we have stated time and again neither party must accept the stipulation from the other side. That is conceded. That's certainly law. However, the case which the government relies on and really the only case which gives them any kind of support for introducing such prejudicial material is the Puff case which is cited by both parties in our respective briefs on this point. The Puff case particularly tries to cite here, is a second circuit case in 1954, had a very significant underpinning as to why the court allowed it and the court stated this at page 175, which is at page 8 of our brief, and I'm quoting: "Up to this time in the trial there has been no concession by the defense that the defendant at the time of the shooting knew that he was wanted for a felony, and as the judge pointed out, there was no way of bringing it home except to show that by reason of the acts by the defendant he knew and had reason to know he was on July 26, 1952 sought as a fugitive from justice.

{1705}

"It was not until the summation that it was conceded that the defendant

entered the hall knowing he was wanted. It is highly likely that without this evidence, the concession would not have been made even then and even then it was not conceded that the defendant was wanted for a serious crime, a fact which would bear heavily on the issue of motive.

"On the question of whether the deceased was engaged in the performance of his official duties, counsel would have or could have conceded the fact, of course, many concessions could have been made but counsel did not choose to make them. It is urged that trial counsel offer to concede that the deceased was engaged when killed in the performance of his official duties, but the trial records show to the contrary.

"In the opening statement, the defense did not disclose an inclination to make any factual concession except as might be dictated by trial tactics. The court also observed that at that start of the trial the defendant had made two limited concessions: one, the deceased at the time he sustained the injuries from which he died was in fact an FBI employee; two, he died as a result of gunshot wounds inflicted upon him.

"The remarks of the court were followed by no further factual concessions and the defendant rested without {1706} making any."

In that case the government made an argument and the Court made a finding that there was no other way for the government to get this evidence which was proper before the jury and therefore that gave a justification for letting this highly prejudicial information in before the jury, because one of the problems which has been recognized, as recognized by Winstein On Evidence and other authorities is that the necessity of the government brining it in because they cannot prove this element by any other way as a factor which the court may properly consider in exercising its discretion to allow in otherwise inadmissible evidence.

Now in this case, that is why it is so significant that in the face of an adverse ruling as to the general relevancy of that Milwaukee incident at all, we are prepared to stipulate or concede that Mr. Peltier on June 26th did not have the existence of an outstanding warrant for a serious felony. That eliminates the entire rationale which Puff used because it is no longer unavailable to the government to prove or introduce to the jury the proof of the knowledge of an outstanding felony warrant to show why he might have acted in a certain way on June 26th. We feel that that is a very significant differential here and that is why in this case, although the government does not need to accept the stipulation, they cannot be heard to complain if they do not {1707} accept that stipulation and the court properly says the general testimony about the event in the bar in Milwaukee

is not admissible. And there is no justification for changing that general presumption of inadmissibility for one of these other purposes.

We believe that the prejudice which will be involved because of having to try a mini-trial, a separate trial within this trial, is just incomparable.

Wigmore who is the great guru of evidence for all of us from back in our Anglo American juris prudence has stated the general reason why this type of evidence should not be let in when he stated, "The deep tendency of human nature to punish not because our victim is guilty this time but because he is a bad man and may as well be condemned now that he is caught and that is a tendency which cannot fail to operate with any jury in or out of court."

The point is that if the jury is told in gory detail about an allegation of an event in Milwaukee which is disputed but nonetheless the officer Hlvinka comes in and says, "Mr. Peltier aimed the gun at me, pulled the trigger and it clicked and it didn't go off, then he did it again and said, 'I'm going to kill you,' or words to that effect," that the jury, it's entirely possible and it's entirely too likely that the jury will think he may not have been guilty on June 26th but he was guilty of bad things in general and we might as well convict {1708} him this time and get him off the streets. That's the great danger of introducing other crimes evidence. That is why the Rules are set up in such a way to make it inadmissible unless it is found by the court to be admissible for these other purposes. That's why the Puff decision pointed out, I think it's fair for the court to say the Puff decision would have been the other way had the defense made the concession, had they stipulated the elements that the government is trying to prove. That is why in this case we believe we cannot allow into this case, at least we're willing to make the concessions over objection on general relevancy.

I would point out that there is a third factor which may not be as important as the others but which is nonetheless a significant question of law involved in the Milwaukee case. The gun that was used by Mr. Peltier allegedly in Milwaukee was functionally inoperative. It had a firing pin that would not function. I think I'm correct in saying it was broken off. But in any event, it would not fire the cartridges and I believe I'm correct, it didn't even make an impression on the cartridges in the gun.

I point out two things about that: first of all, the evidence would be that Mr. Peltier knew when he was carrying the gun that it was inoperative and you'd have a serious question of law as to actual impossibility as to whether Mr. Peltier can even be convicted of an attempted murder when he {1709} uses an instrumentality which is incapable of carrying out the act,

which he knows is incapable of carrying out the act. That again would have to be tried as a mini-trial in front of this trial in front of the jury in order to reach a fair disposition of this issue.

If Your Honor allowed it to be taken before the jury, then as a matter of law we would have to object to the introduction of this evidence for all these reasons, and I think I said this, but I would vouch, Your Honor, there would be a dispute factually whether what officer Hlvinka said happened was all that happened or whether it was all that happened.

We believe the court must exercise its discretion, first must rule it's inadmissible because it is irrelevant generally because this was two and a half years prior to this incident. It is an isolated incident. There are no other incidents, I believe the government will show, prior to June 26th. This is not a series of incidents which is the general way of proving a predisposition, for example, to shoot at police officers, to show at least two or three. This is an isolated incident two and a half years earlier where there is no evidence that he knew he was a police officer at the time. There's no evidence at this point he knew these two men were police officers and so the only real rational basis for admitting it would be on the theory he knew there was a serious {1710} felony outstanding and this somehow made him a more desperate man. We are willing over your adverse ruling on relevancy, if that comes, to concede or stipulate he knew there was an outstanding serious felony warrant for him and, of course, he had jumped bond. The same would be true of the unlawful flight, if that's part of the stipulation.

For these reasons, Your Honor, we vigorously oppose admitting this and ask Your Honor to make rulings in conformity therewith.

I would not point out all, I am not going over the whole memorandum on file. I would adopt it by incorporation by referring to it. We believe there are other detailed explanations in our memorandum or brief which the court would want to consider before ruling.

{1711}

MR. CROOKS: Your Honor, if I might respond very briefly. It seems to me counsel again is doing the same thing that they've done repeatedly throughout this trial. They're offering to stipulate but not stipulating.

Counsel stands up and says, "We will offer to stipulate if we lose, then we'll offer to stipulate." And I think that's a rather absurd argument. But I think it's also more, even more absurd that counsel would stand up and argue that the fact that this man is wanted on two serious felony warrants when Agents Coler and Williams are down in the area and in the point of,

at the point of apprehending him that the fact is not relevant to his state of mind. I can't believe that counsel said that because on the face of it that is extremely relevant to show what his state of mind was when confronted by police officers.

Also this is not an isolated case. Evidence will come in through the Oregon incident that the exact same thing happened. Again Mr. Peltier was confronted by police officers and he fired at them. We have now three incidents where he's done the same thing on each occasion and it seems to me that that speaks very clearly to his state of mind on June 26, 1975. That what we're talking about here is a man that every time he sees a police officer within his immediate proximity apparently takes a shot at the individual. {1712}

Now, I won't go into our legal argument. I think that has been completely argued in our briefs. It seems to me that the outstanding, the nature of the outstanding warrants and so forth is vitally important to show the state of mind of this defendant when confronted by Special Agent Williams and Coler; and this again as I said ties up with the statement made by Mr. Peltier when arrested in Canada that he thought that was the reason they were there. He thought they were there to arrest him.

And so again I think it was something that was on his mind and something that we are entitled to show. And counsel offers to stipulate, and I am not sure that they would offer to stipulate to the extent that the United States would be willing to accept it. Basically what counsel is attempting to do by offering to stipulate is cut down their exposure on things that the United States is entitled to show. These are facts that happened and the United States had not intended to go in at great length in Mr. Hlvinka into all of the details of this crime. But we do think we're entitled to show in addition to that the warrants were outstanding, that it was an unprovoked thing on an off-duty policeman, and the general nature of what happened so that the jury can understand something about this man's state of mind which is the same state of mind found from the evidence thus far on June 26, {1713} 1975.

THE COURT: Specifically what are you planning to have this witness testify to relating to the incident?

MR. CROOKS: Well, basically, Your Honor, that as I had intended to go into the matter, would be first of all to introduce copies of the warrants themselves which were marked as Exhibit 8. Included within that would be the criminal complaint signed by Mr. Hlvinka which of course does contain a brief description of his version of the incident. The information filed

by the county prosecutor attached to that, and I have not yet separated, but would be willing to are the docket entries which showed the failure to appear. We don't have any particular need for those or the bond itself.

We would assume that Mr. Hlvinka could testify orally that he did jump bond and did not appear. The next item in Exhibit 8 then would be basically the unlawful flight warrant which does have attached to it copies of the same Wisconsin papers which again we would be willing to take off. I have not done it to this date because it's part of the certificate. But I would be certainly willing to take that off because they would be duplicated.

But in addition to that we would offer to have Officer Hlvinka testify as to the unprovoked nature of the assault; that he was sitting with a friend after he had gotten off duty having a meal at approximately 12:00 o'clock, or {1714} shortly thereafter of that evening and Mr. Peltier -- and have him identify Mr. Peltier as being the man that stated certain words to him. Basically the words "you're not laughing now, are you," and an expletive used there. "And I'm going to kill you." And this happened immediately outside the restaurant.

He again stated, Mr. Peltier again stated, "I'm going to kill you," pulled the trigger on the revolver which was pointed at his head, or the pistol which was pointed at his head. The weapon misfired. Mr. Hlvinka and his friend jumped him, took the gun away. Found there was a loaded round in the cylinder read to fire. And that would be basically the extent of the testimony.

And those are I think facts that we're entitled to show for all of the purposes stated earlier.

MR. LOWE: May I just say, Mr. Crooks had a specific term which I understand to mean one thing and I may understand to mean another thing. Mr. Crooks, when you say "misfired" you don't mean that the cartridge misfired, you mean the weapon failed to strike the primer; isn't that all?

MR. CROOKS: What I mean is that this gun clicked and it didn't go off.

MR. LOWE: You are not indicating that the cartridge misfired and it just hit the primer and it didn't fire? There's no evidence of that.
{1715}

MR. CROOKS: I don't honestly know that, Your Honor. All I know is that the testimony will be from Mr. Hlvinka that the hammer was pulled back, the finger depressed, the hammer went forward and normally Mr. Hlvinka would have been a dead corpse on the sidewalk. I know that that will be his testimony.

But through the grace of God the thing did not go off and he was apprehended. Later lab examination indicated that the firing pin was defective and that the weapon would not fire. But to say that there was not an attempted murder I think is a little bit absurd. The circumstances will be shown. _

MR. LOWE: Well, maybe a little bit absurd, but it's a serious question of law. I only have three points to close my argument, Your Honor. First of all Mr. Crooks supports my argument by the total failure to make any offer of proof. As I stated I don't believe they can make an offer of proof that Mr. Peltier knew this was an off-duty police officer, and that's because they're trying to show some nexus between violence toward Mr. Peltier and violence towards law enforcement officers on another, and it's absolutely necessary as a foundation for that to show that he knew that Mr. Hlvinka was a police officer. Otherwise he might have been a butcher, or a tailor or a who knows what.

Number two, an absolute foundation even for showing {1716} the warrant outstanding to show that he was somehow motivated to flee because he thought he was about to be apprehended for an outstanding felony warrant, absolute foundation for that would be to show that Mr. Peltier knew that Special Agents Coler and Williams, or thought were law enforcement officers as opposed to goons who were just attacking their camp. Until such time and unless the Government shows some evidence, some rational basis for concluding that Mr. Peltier thought that they were law enforcement officers rather than just bushwhackers of some kind, they have not even established a foundation for introducing evidence of a warrant outstanding for a serious crime. Because otherwise he would have no reason to connect a couple of bushwhackers, a couple of goons of Dick Wilson's that's outstanding in Milwaukee, Wisconsin. There has been no factual showing to this point.

My third point is Mr. Crooks said, "Well, we probably wouldn't be willing to stipulate." All I'm saying is we've made an offer to stipulate in the face if you do make an adverse ruling to stipulate that Mr. Peltier knew that there was an outstanding warrant for a serious felony in Milwaukee.

Now, if Mr. Crooks thinks that there's something additional that would be required to be stipulated in order to complete that element I call upon him to tell the Court now whether we would be willing to make that additional stipulation.

MR. CROOKS: Well, Your Honor, again I'm confused by {1717} counsel. They're willing to stipulate, but they're not. To solve the impasse what counsel apparently wants to do is have it both ways. They lose the ruling

and then maintain an appellate record and then they want to stipulate to cut down their exposure also. The United States at this time, to avoid any further problem on this area, will agree that we will not call Mr. Hlvinka if counsel will stipulate to the following facts: That, and without any ruling of the Court, it seems to me that they've got to make a choice if they're offering a stipulation. First of all, that Mr. Peltier was charged on November 22, 1972 with the attempted murder of Ronald Hlvinka.

That on or about July 30, 1974 Mr. Peltier jumped bond on that charge and his bond was forfeited.

Third, that on the 9th day of August, 1974 a federal felony warrant for unlawful flight to avoid prosecution was issued by the United States. And fourthly that this charges were still outstanding on June 26, 1975 and that the defendant was aware on that date that he was a fugitive from justice with regard to those charges.

If counsel is willing to stipulate that flat out, then we will not call Mr. Hlvinka. We will type an appropriate stipulation and read it to the record.

MR. LOWE: May we have just a second, Your Honor?

(Defense counsel conferred.)

{1718}

THE COURT: While counsel are conferring would you permit me to see the proposed exhibit?

MR. CROOKS: Surely, Your Honor.

MR. LOWE: When Your Honor is finished reading that I'll be prepared to respond.

THE COURT: You may proceed.

MR. LOWE: Let me respond first, Mr. Crooks misunderstands our position with regard to the stipulation. We are not trying, to have our cake and eat it too. We made two objections. The first is that this information would not be admissible at all, not because it's prejudicial but because it's not relevant. We believe that Your Honor, or that no foundation has been laid yet, namely to that he knew there were police officers, or FBI agents. That's our first objection, on relevancy and foundation. That is for the Rule 404 B, balancing test. That simply has to do with the ordinary relevancy arguments and foundation if Your Honor overrules us on that.

THE COURT: I might mention that I am prepared to rule on that. That on the basis of the testimony of specifically Michael Anderson I believe that the jury could find that the defendant knew that Coler and Williams were special agents of the FBI when they appeared the next morning. And the

ruling of the Court is therefore that that is relevant.

MR. LOWE: So that you have ruled against us on the relevancy? {1719}

THE COURT: I have ruled against you on the relevancy.

MR. LOWE: Fine, all right. That's all that was about.

Now, given your ruling there we are now addressing the question of prejudice and Rule 404 B on that. We are willing to make a stipulation in order to permit the Government, because of your rulings, to introduce what we think they're entitled to introduce under Rule 404 B.

We are willing to stipulate and to enter into a written stipulation, or do it in the open court with the defendant, however Your Honor wants, first that there was a warrant charging Mr. Peltier with the commission of a serious felony. And I think the date is July, 1972. I missed the date, in Milwaukee, Wisconsin.

Secondly, that on July 30, 1974 he, failed to appear and his bond was forfeited. Whatever language is required there of the specific terminology. I'm sure we can work that out without any problem.

Third, we, with regard to the unlawful flight to avoid prosecution warrant, I don't believe that there in fact Mr. Peltier knew that that warrant was outstanding. I don't know that that is a part of what the Government has offered and required to stipulate because factly I don't think they would even assert that they knew that Mr. Peltier knew about it. I think that they were talking about just stipulating that it was in existence and we have, we would, as a part of {1720} the stipulation, stipulate that the warrant was outstanding without stating whether or not Mr. Peltier knew about it.

Finally, that on June 26, 1975 he was aware that there was an outstanding warrant for serious felony in Milwaukee, Wisconsin for which he had failed to appear; and that he was in a status, I don't know whether the word fugitive has any significance, but certainly he knew that he was wanted in Milwaukee, Wisconsin pursuant to that serious felony warrant and the jumping of bond.

I will, to the extent that I can vouch to the Court, that Mr. Peltier did not know about the unlaw flight warrant, so I can't stipulate that he knew about it on June 26th. But we certainly have no objection to stipulating that it actually existed and was outstanding on June 26th.

Now, we fell that it is irrelevant as to what the nature of the serious felony was, whether it was attempted murder or sale of heroin or bank robbery, or whatever it was does not in any way change the nature of the state of mind with reference to a face to face confrontation with law enforcement officers and the desire to flee.

Serious felony is all that is necessary in that regard and it certainly is irrelevant in any event as to the name of the person against whom the felony was purportedly perpetrated. And that absolutely, whether the man's name was Hlvinka or Smith or Roosevelt wouldn't make any difference, and would not {1721} be an element of their proof under 404B that it would be relevant.

So we are certainly prepared to give them that, and to the extent that Your Honor has found that it would be relevant to show some reason why Mr. Peltier might react very badly at police officers or might even have a motive to neutralize them so that he cannot be captured, the stipulation we have offered gives the Government everything they're entitled to. It does not give them prejudicial information that they are not entitled to, and we don't think we are required to stipulate that.

Now, the Government doesn't have to accept our stipulation, I understand that. But in the Court making a decision as to whether a showing of necessity has been made by the Government to justify such a serious incursion in the general presumption against evidence of other crimes, we believe that our stipulation is of sufficient basis for Your Honor to rule that we have met it.

MR. CROOKS: Your Honor, I rise again on this matter. Mr. Lowe is attempting to play games on the thing.

He wanted to know what the United States was willing to accept by way of stipulation, and I told him very specifically on the record. I will not accept Mr. Lowe's modified version.

I think it's relevant to show what we have offered the warrants for. If Mr. Lowe wants a stipulation insofar as the {1722} Government agreeing to it basically he's going to agree to our version or none at all because we feel that the warrant should go in and we're prepared to go forward just as planned

{1723}

If Mr. Lowe apparently feels that by offering a stipulation I have conceded something, and I haven't, we are prepared to go forward and put the warrant in and do it just as we planned.

If Mr. Lowe is willing to accept my version of the stipulation, then we are willing to not call Mr. Hlvinka and not do it through the warrant, but we are not going to accept a cut-down version. Attempted murder is the charge . Attempted murder is what the warrant shows. I think we are entitled to show that, and we are also entitled to show the other things that were mentioned in my oral recitation; and I think we can show it through Mr.

Hlvinka.

THE COURT: The Court will make a further ruling, and that is that it is relevant to show the nature of the offense, in other words, something more than a serious felony. A serious felony, for example, could be burglary. Attempted murder is considerably different than a burglary.

MR. LOWE: In the face of that ruling, your Honor, could we confer for a moment?

THE COURT: You may.

(Counsel and the Defendant confer.)

MR. LOWE: Your Honor, in the face of your last ruling, the Defendant will enter into the stipulation that {1724} on the date -- I don't recall the date Mr. Crooks stipulated to, July of '72, I think -- do you have the date there so I can state it correctly?

MR. CROOKS: The attempted murder charge was on November 22nd, 1972.

MR. LOWE: Thank you.

That on November 22nd, 1972, there was an attempted murder charge filed against Leonard Peltier in Milwaukee, Wisconsin; that on July 30, 1974, he failed to appear pursuant to the terms of his bond, and his bond was forfeited; that on August 9, 1974, a Federal unlawful flight to avoid prosecution warrant was issued, although there is no showing or stipulation as to whether Mr. Peltier knew about that or not; and on June 26th, 1975, Mr. Peltier was aware that he still had an outstanding warrant charging him with attempted murder in Milwaukee, Wisconsin, and whatever consequences there were in his having failed to appear in 1974, pursuant to his bond.

I believe that is the statement that I made before with the exception that over objection to your ruling we are adding the additional information that it was a warrant for attempted murder. I believe I have correctly stated it, and we would be willing to do that pursuant to my earlier discussion and subject, of course, to all of our objections, and reduce that to writing. {1725}

THE COURT: The record is clear as to your objections .

MR. CROOKS: Your Honor, I think the stipulation must also include -- I am not sure that I specifically stated that earlier -- that the original warrant, the attempted murder warrant had been served on him in Wisconsin so that that would be clear from the stipulation to the jury, that he was fully aware and he appeared and jumped bond on it, but that that warrant had been served.

MR. LOWE: I thought that was implicit in what I said. We would certainly add additionally that we stipulate that the attempted murder warrant had

been served on Mr. Peltier in Wisconsin, and he had been bonded pursuant to the warrant; and that it was pursuant to that warrant and that bond that he failed to appear in 1974.

MR. CROOKS: Well, your Honor, in view of that agreement, the United States would be willing to abide by its earlier statement that we would then not call Mr. Hlvinka.

However, two points should be made: No. 1, that we assume from this that the defense will not themselves go into the facts of this matter after Hlvinka has left. If they have any intention of doing that, then the United States would insist on going forward right now during the proper order; and I don't know whether they intend to, but if they intend to come in with any testimony which goes {1726} in the facts of that incident, then the United States will not feel bound in any way by our stipulation or offer to stipulate; and we will intend to go ahead and put Mr. Hlvinka on right now as planned, just so that's understood.

The second thing is that I don't know what Mr. Lowe specifically is referring to as to the wording of the fourth paragraph. Now, the wording that I dictated was that the Defendant knew -- well, basically the wording that I dictated earlier was that these warrants, speaking of both warrants -- and I would modify that to include only the attempted murder warrant -- I don't know that, and obviously we cannot establish, whether or not he actually knew of the outstanding nature of the flight act; but I would modify it, that the warrant for attempted murder was still outstanding on July 26th, 1975, and the Defendant knew that he was a fugitive from justice with regard to that charge on June 26th, 1975.

Now, if that is agreeable with Mr. Lowe, so that we don't get into a hassle later as to the wording, then we will concede to the stipulation.

MR. LOWE: Let me speak to the last point first. The term "fugitive from justice" may very well have some particular legal connotations, maybe a legal conclusion or statutory status even in Wisconsin, or perhaps in the Federal law. I don't know if it has any significance, and {1727} it is very unlikely; and I would think the Court would realize that Mr. Peltier or anybody who is not a law enforcement officer, would say, "Oh, my God, I am a fugitive from justice."

It is certainly clear that he knew these warrants were not satisfied, he was wanted under them. He had jumped his bond in Milwaukee, and that the Government may very well characterize that fairly as being a fugitive from justice.

I cannot stipulate Mr. Peltier knew that because in fact he never

thought those thoughts. I don't think it is fair to ask for that stipulation. It is not his thought. It does not mean that the Government is not correct in characterizing it as that. They certainly would not be prevented from arguing he was a fugitive from justice. I don't see any purpose in stipulating that particular phraseology.

MR. CROOKS: This is the reason I raised it, your Honor. I want to know before we release Mr. Hlvinka: What wording are they willing to stipulate to with regard to the fourth paragraph? I don't want to get into a hassle after Mr. Hlvinka is gone, then we can't agree on the wording. I want that in the record so that I can get a copy of the reporter's notes and prepare something in accord with that; and I am asking Mr. Lowe to state what {1728} wording he is willing to accede to on the fourth paragraph; and if he will state that, I will then indicate whether or not the United States is also willing to accede to it.

MR. LOWE: I have already stated exactly in detail.

Will you let me finish? I sat there quietly and politely while you spoke for 20 minutes. I want to have an opportunity to say my piece.

We are willing to state in narrative form in any normal lay terms as to what the status is. All I am saying is I don't want to use "fugitive from justice", which may have some magic connotations. It is not a term Mr. Peltier would use or think. If we can work out now in open court or any time at a break what specific language in lay terms describes Mr. Peltier's state of mind, that he knew the warrant was outstanding, he knew he was being sought by police officers, that he knew if he was captured and they found out about it, he would be returned to Milwaukee for trial -- however they want to phrase it in ordinary simple, simple terms. We are not trying to play word games. We don't want word games played on us.

Going back to Mr. Crooks' first point, I certainly understand that the premise of entering into a stipulation to avoid Mr. Hlvinka testifying and so forth would be {1729} premised on the fact that we do not raise it in any form at any time; and that if we raise it -- and I vouch at this point we do not have position with regard to our defense, we don't know who the witnesses will be, we don't know whether we are going to rest at the end of the Government's case or put on a lot of evidence, much will depend on what the Government's case is, I think we know what we are going to do -- but if at some point we address the charges in Milwaukee, the Government will have a free rein to put on Mr. Hlvinka and anybody else. That is understood. I take no issue with it.

I am sure the Government would not want to release him from subpoena,

but just simply tell him he probably will be needed. We have done that with many of our witnesses and with some of the FBI Agent witnesses already, in fact. That's quite understood. We take no issue with that.

As far as the wording on the fugitive status, as I say, we are willing to use any lay terms that Mr. Crooks wants to put out. I think I have made it clear on the record that we are not trying to play word games with what his state of mind was.

MR. CROOKS: Well, I think one further comment is warranted, your Honor. That is fine, that's why I wanted to make it clear, so that there is no question as to what {1730} we are putting in that stipulation. We will avoid the words, "fugitive from justice". We will prepare a stipulation along the line of what Mr. Lowe has indicated.

However, I think our position again should be stated, that we understand this stipulation to have laid to rest once and for all the Wisconsin incident; and the United States will object violently to any attempt by the defense through any means or method to go into the facts of this case.

If they have any intention of doing that, then we feel that we should not be bound at this time by any offer of stipulation, that we proceed to call Mr. Hlvinka in the normal order of proof and go into the facts; and it seems to me that counsel has stated -- that they are the ones that don't want this brought up, and it seems to me they have got to make a stipulation that they are not going into it any further, or they are. If they intend to go into it any further, then we are simply going to back off with what we have been discussing here and proceed as planned, assuming that the Court does not rule the matter relevant, because we are not going to want to leave that door open.

Counsel has been aware of this situation for a long, long time; and it seems to me that they have either got to fish or cut bait and decide if this stipulation as {1731} envisioned by the Government covers the Wisconsin incident and closes it, that's fine. We are willing to stipulate. If they want to play games again and leave it open and possibly go in and retry the thing themselves, then we prefer to do it right now as we originally planned to do.

THE COURT: I may just make a comment at this point. If the stipulation is entered into and if an effort were later made to go into the facts of this Milwaukee incident, it might very well result in opening up the factual allegations as set out in this complaint; and I would expect that counsel on both sides, if a stipulation is entered into, would just as soon leave that closed.

MR. LOWE: Could we have just a word?

(Counsel confer.)

MR. LOWE: Well, your Honor, you said it is our understanding as well, if the Defendant were to raise this issue at a later time in any way, that would open it up for the whole warrant to come in, all the documents to come in.

At this point, certainly from what I have read of them, it would be very undesirable and prejudicial. We understand that's the premise on which the stipulation is entered, that we would be imperiling the very prejudice we are talking about by mentioning or going into the facts of it. That would bring it all in later, so I think at {1732} this point we have no intention of right now going into -- that. It would require opening up the door intolerable prejudice in our judgment right now, so I don't think we have any anticipation of doing that at all.

MR. CROOKS: With that the United States will agree and accede to the stipulation, and prepare a written stipulation. I would ask the court reporter to furnish us with a copy of my remarks capsulizing the situation as well as Mr. Lowe's. We will then prepare an agreeable stipulation which we will then read to the jury in lieu of Mr. Hlvinka's testimony.

THE COURT: Very well. Now --

MR. CROOKS: (Interrupting) We would do this, of course, at a later time.

THE COURT: That was my question, as to whether it would require it to be done in order to have an orderly presentation of the evidence or whether it could be later.

MR. CROOKS: No. I don't believe it is necessary. I think Mr. Hlvinka would fit in now or also at a later time. We would prepare the written thing and bring it up at an appropriate time.

THE COURT: Very well.

Is there any problem with reference to the next witness that has to be resolved before he is called?

{1733}

MR. SIKMA: I don't believe so, Your Honor.

THE COURT: The jury may be brought back.

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

THE COURT: Members of the jury, I can, well, you know that you have been standing by for an hour and ten minutes and I can tell you that the reason you were standing by is because a legal matter was argued and I can

further tell you that your time was not wasted because the resolution of that legal matter undoubtedly saved at least two or three hours of additional testimony that will not have to be presented. Even though you were not in the courtroom you were rendering a service.

MR. LOWE: May I have a word with Mr. Sikm?

THE COURT: You may.

MR. LOWE: May we approach the bench?

THE COURT: You may.

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

MR. LOWE: Your Honor, on one exhibit which will be relevant to this witness, it's a two twenty-three cartridge casing, there are some reasons why we feel that the stipulations with regard to chain of custody ought to be done in more specifics than we are generally doing, generally we have stipulated to chain of custody of cartridges and things {1734} like that without having them in testimony. This particular cartridge was found in the trunk of Coler's automobile and is of a little more significance than most of the others. I just told Mr. Sikma it wasn't until I read the three hundred materials that it might be better to do this. I think we can work out stipulations such as what different people in the links of chain of custody have called so they wont' have to call them all. But I think it would be better to do detailed stipulation on this item than just a general wave of the hand on chain of custody.

The reason I approached the bench, it would not necessarily be in sequence and we're not going to raise objections to having witnesses in the sequence they are calling them on, the understanding being simply by the end of their case we will be stipulation. There is already one or two other witnesses I think they plan to call who are involved in the link of the chain of custody and we will have a detailed record on what the chain was, or at least purported to be.

I wanted to explain to you so you'd understand without having to explain in open court what we're doing.

MR. SIKMA: I can state for the record this particular chain of custody, Hodge, Cunninghma, Hodge.

MR. LOWE: It may not be any problem at all. It's Exhibit 34B. I want you to understand it may be a little out {1735} of sequence and we're not going to object to that and we're not actually going to raise objections to foundation. We just understand that will be something that will be subject to eventual connection. That's all.

(Whereupon, the following proceedings were had in the courtroom in

the hearing and presence of the jury:)

MR. SIKMA: The government calls Cortlandt Cunningham.

CORTLANDT CUNNINGHAM,

being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SIKMA:

Q Please tell the jury your name.

A Cortlandt Cunningham.

Q And what is your occupation?

A I'm a special agent of the FBI.

Q And where is your place of employment?

A I am assigned to the firearms and tool march units in Washington, D.C.

Q What's your position there?

A I am chief of firearms, tool march unit.

Q What was your occupation on the 27th of June, 1975?

A The same as it is today, sir.

Q And where were you on the 27th of June, 1975?

A I was in Pine Ridge, South Dakota.

Q And on June 27th did you have occasion to go to an area _ near Oglala, South Dakota, which is known as the Jumping Bull {1736} residences?

A Yes, sir.

Q And to what area did you particularly go on that residence or in that area?

A What we call tent city.

Q And what were you doing there on that date?

A First of all, I was assisting Special Agent Kelso destroy some explosives and then we went on from there to the tent city area.

Q I want to ask you a few questions. You're specially trained, are you not?

A Yes, sir.

Q And what is your special area of training?

A Firearms identification.

Q And in that particular regard did you have any special training?

A I did.

Q And what generally did that consist of?

A Upon entering the FBI laboratory, underwent an extensive training course under the supervision of experienced examiners in the field of

firearms identification. This training consisted of making thousands of examinations and comparisons of bullets, cartridge cases and weapons and other related examinations. I've done extensive reading on the subject. I've conducted research on the subject and, of course, I've done {1737} thousands of examinations on my own.

Q Did part of your training include examining of vehicles and crime scenes to find pieces of evidence or things that are things of evidentiary nature?

A Yes. That's the main thing we do is handling of evidence.

Q You do this at the scene as well as in the laboratory?

A I have been called out; yes.

Q Now I would direct your attention once again to the 27th. You indicated on the 27th of June that you were in an area called tent city. While you were in that particular area, did you see any vehicles?

A Yes, sir.

Q And what were the vehicles which you observed in that particular area?

A I observed a Ford Galaxie and a red and white van.

Q I will show you what has been marked and is in evidence as Government Exhibit 55 and direct your attention to photograph C on page 11 and ask you whether you can identify that photograph.

A Yes, sir.

Q And what is that?

A That is the Ford Galaxie.

Q Is that the Galaxie which you observed in tent city?

A Yes, sir.

Q I would direct your attention to Government Exhibit 55, {1738} page 31, 32 and 33 and 34 and ask you whether or not you can recognize what is on those pages.

A Yes, sir, I can.

Q Now you spoke earlier of a red and white van. Tell me whether or not that's the same red and white van that you observed in tent city on the morning of the 27th?

A Yes, sir.

Q Now on the same exhibit, Government Exhibit 55, I would direct your attention to photograph F on page 37 and the photograph on page 38 as well as photographs on page 21 and 22.

A Yes, sir.

Q Do you recognize what is portrayed in those photographs? Would you

tell me what it is?

A Two tires, sir.

Q And what are they in particular?

A They're two tires which were removed from the red and white van and the label on them says, "Special Agent, FBI, U.S. Courthouse, 260 Federal Building, 550 Ninth Street, Rapid City, South Dakota."

Q I will show you what's marked as Government Exhibit 49A and 49B for identification, after showing them to counsel for his inspection, and ask you whether or not these generally portray the same items as you have indicated in Government Exhibit 55?

A Yes.

Q And where did you find those particular items?

{1739}

A I observed them in the red and white van.

Q Do you know what they are specifically?

A They're two tires.

Q Do you know what the tags on the tires relate to?

A To the FBI.

MR. SIKMA: I would offer into evidence at this time, Your Honor, Government Exhibit 49A and 49B.

MR. LOWE: No objection, Your Honor.

THE COURT: Exhibits 49A and B are received.

Q (By Mr. Sikma) Now on the morning or part of the day of the 27th you were in the tent area, is that correct?

A Yes.

Q Now on the following day what did you do?

A I went to the BIA compound where I examined special Agent Williams' car.

Q Okay.

Would you tell the jury how it was that you made an examination of that car, how you went about making an examination of Special Agent Williams' bureau car?

A First I was being assisted by Special Agent Kelso also of the FBI laboratory and I personally made notes, drawings of all the entrances and exit holes that were obvious in the body of this vehicle. Then in a systematic examination of the car I along with Special Agent Kelso found evidence such as bullets and bullet fragments and other types of firearms evidence in {1740} this car.

Q I will show you what are marked for identification as Government's

Exhibits 29F, 33F, 33K, 33G and 37B and I ask you to examine them. {1741}

MR. LOWE: Your Honor, if Mr. Sikma will make a representation that these were items found by Mr. Cunningham on June 28th in Agent Williams' car and state what they are for the record, I believe we could probably just stipulate on those.

MR. SIKMA: I could do that, Your Honor, but I think that it would probably be just as quick for the special agent who examines them and is more familiar with them actually to tell where he found them. But other than that is there's no objection to that we would offer them into evidence at this time. Then he could, the witness could speak about them freely rather than going through the technical aspects of offering them into evidence.

MR. LOWE: We'll stipulate that they were receivable. There's no problem. We're just trying to save time if we can.

THE COURT: Would you restate the numbers again?

MR. SIKMA: Yes, Your Honor. Government Exhibit 29-F, 33-F, 33-K, 34-G and 37-B.

THE COURT: Exhibits 29-F, 33-F, 33-K, 34-G and 37-B are received.

Q (By Mr. Sikma) Okay. Would you look at these items and tell the jury what they are and where you found them.

A From inside the right rear door, two bullet fragments.

Q Do you know what -- okay. That was in Government Exhibit 2 9-F; {1742} is that correct?

A This is all 29-F.

Q Okay.

A From inside the left rear door again bullet fragments.

From inside the trunk, bullet and bullet fragments, several bullets, several fragments.

Q How many of them are there, do you know?

A Oh, there's one bullet, two bullets and then the rest are fragments.

Q When you look at these items would you explain to the jury which exhibit that you are looking at and also make it part --

A This is all 29-F.

Q Very well.

A From the floor of the back seat two bullets.

From under the hood a bullet fragment. Several bullet fragments.

From inside the left front door several bullet fragments.

From inside the front seat a bullet and several fragments. That is Exhibit 29-F.

Q Okay. I want to go on before you go into Government Exhibit 33-F and explain what you did with these items. Who was the next person to have custody of these items?

A I personally turned over these items in the FBI laboratory to Special Agent Evan Hodge.

{1743}

Q And what then did Special Agent Evan Hodge do with them?

A He made the actual examination of the evidence.

Q And what kind of examination was that generally?

A Firearms identification.

Q Now, you are in charge of the laboratory; is that correct?

A I'm in charge of the firearms tool march unit, yes.

Q And so you had assigned this to Special Agent Hodge to make this examination; is that correct?

A I did.

Q Okay. I direct your attention to Government Exhibit 33-F and ask you to do the same thing as to where you found the items contained in Government Exhibit 33-F and to explain to the jury what these items are.

A From inside the trunk a bullet.

From the floor of the back seat a bullet.

That is Government Exhibit 33-F.

Q Then I would direct your attention to Government Exhibit 33-K.

A On the floor by the left side of the front seat a bullet.

That is Government Exhibit 33-F.

Q Then I would direct your attention to Government Exhibit 34-G.

A From under the hood a bullet fragment.

From the floor of the backseat bullet fragments.

From inside the left front door a bullet fragment.

And that is Government Exhibit 34-G.

{1744}

Q Then I direct your attention to Government Exhibit 37-B.

A On the floor by the right front seat a bullet.

And that is Government Exhibit 37-B.

Q Now, all of these items were bullets or bullet fragments taken from Special Agent Williams' car; is that correct?

A That is correct.

Q Now, what you had instructed Special Agent Hodge to do then would be to examine these with known firearms; is that correct?

A Yes, sir.

Q And determine whether or not these projectiles or bullets bad been fired from a particular firearm?

A Yes, sir. That is firearms identification.

Q Now, I will show you what is marked as Government Exhibit 58 and it's already admitted into evidence and I ask you to examine the photographs in Government Exhibit 58 and tell me whether or not you recognize them and --

A I do.

Q And that is Special Agent Williams' car, is it not?

A Yes, sir.

Q And you conducted an examination of that vehicle counting the bullet holes and the entrance wound, or the entrance holes Ln the body of the vehicle; is that correct?

A That is correct.

Q Okay. Did you make a record or keep track of the number of {1745} bullet holes in the direction generally which these bullets entered from?

A Yes, sir, I did.

Q Okay. Would you explain to the jury first of all on Special Agent Williams' car what side did most of the bullets enter?

A On the left side.

Q Okay. How did you make the examination?

A Visually.

Q Okay. And did you do it one panel at a time?

A Yes, sir, I did.

Q Okay. Would you tell the jury in your examination of this vehicle what you found as far as where the bullet holes were in car specifically and how many bullet holes there were entering the vehicle.

A In the left rear fender on that vehicle there were at least sixteen entrance holes.

In the left rear door there were at least eight entrance holes. In the left front door there were at least twenty entrance holes.

In the left front fender there were eleven entrance holes.

In the hood and windshield there were at least twelve entrance holes. {1746}

In the front there were at least four entrance holes.

In the roof and rear area there were at least three entrance holes.

In the right front door there was one entrance -- at least one entrance hole.

In the right rear door and post I found no entrance holes. And in the

right rear fender I found no entrance holes.

Q When you examined that vehicle you found almost all of the, or the most number of entrance holes, bullet holes in the left side; is that correct?

A Yes, sir. At least seventy-four entrance holes in the left side.

Q Now, I would direct your attention to the following day, June 29, 1975. Can you tell me where you were on that day?

A I was at the Fall River County Garage in Hot Springs, South Dakota.

Q And what were you doing there?

A I was examining Special Agent Coler's car along with Special Agent Kelso.

Q And is it fair to state that you conducted the same type of examination of Special Agent Coler's car that you conducted on Special Agent Williams' vehicle?

A I did.

Q I will show you what have been marked as Government Exhibits 29-G, 33-J and 35-B after showing them to defense counsel

{1747}

(Government counsel showing exhibits to defense counsel.)

MR. SIKMA: And again does counsel have any objection to these?

MR. LOWE: No objection to their being entered except as we've discussed previously on Exhibit 34-B, I think we have some specific things on that.

MR. SIKMA: Yes. That is not a part of these. They were not found by this particular witness.

MR. LOWE: All right.

THE COURT: Would you state the numbers again?

MR. SIKMA: 29-G, 33-J and 35-B.

THE COURT: 29-G, 33-J, 35-B are received.

Q (By Mr. Sikma) I would ask you to examine those and as you did with the items, bullets which were found in Special Agent Williams' car, would you advise the jury what you found in Special Agent Coler's car.

A On the frame on the right side of this vehicle I found a bullet fragment.

On the back of the front seat again a bullet fragment.

From beside the radiator a bullet. From the radiator a bullet.

And that is Government Exhibit 29-G.

Q Okay. Then I would direct your attention to Government Exhibit 33-J.

{1748}

A A bullet fragment.

From the rear of the front seat a bullet fragment.

Back seat, on the floor of the back seat several bullet fragments and what appears to be a piece of buckshot.

From the deck behind the back seat a bullet fragment.

And that is Exhibit 33-J.

And Exhibit, Government 35-B, from the front seat a cartridge case.

Q And what kind of cartridge casing is that, if you know?

A It's a Winchester Western cartridge case.

Q Now, that was in the vehicle itself?

A Yes, sir, it was.

Q Okay. Do you know what caliber that is?

A 38 Special.

Q Now, I will show you what is Government Exhibit 57 and I ask you to look at the photographs in Exhibit 57. If you would just page through that exhibit for a moment and tell me if that, you recognize that as Special Agent Coler's car, if that's the same car that you examined on the 29th of June at Hot Springs, South Dakota?

A I did.

Q Would you tell the jury, if you would, as you did with Special Agent Williams' car the results of your examination of that vehicle as far as the bullet holes and the entrance bullet holes.

{1749}

A There were at least three entrance holes in the left front door.

THE COURT: Excuse me. You stated Williams' car.

THE WITNESS: Coler.

MR. SIKMA: Coler's car, thank you, Your Honor.

A From the hood and windshield area of this car there were at least fifteen entrance holes.

The right front fender, one entrance hole.

From the front grille area, two entrance holes.

The right front door there, where there was at least one entrance hole.

From the right rear door there were at least two entrance holes.

{1750}

From the trunk of this car there were at least 10 entrance holes.

Q Now, I want to ask you a question, if I may, just a moment, about the entrance holes in the trunk.

What direction were these bullets coming from that entered the trunk?

A From right on the front of the vehicle.

Q O.k., and were they coming -- if the trunk were closed, what direction would they be coming from?

A They would be coming -- if the trunk were closed, they would be coming from above and to the right of the front of the vehicle.

Q So in other words, unless someone was straight above the car and slightly to the right --

A (Interrupting) No, sir (indicating). If the trunk is closed, the shots came from above the car, from the right front.

Q Now, if the trunk lid were open?

A If the trunk lid's open at the time that it was struck, then it would be at approximately ground level.

(Counsel confer.)

Q (By Mr. Sikma) This car as shown on Government Exhibit 71, if the car were in this position, can you see, Mr. Cunningham?

A Yes, sir.

Q This is a car, car facing in this direction (indicating) {1751} toward the area which is indicated as a green house; if the car were in that direction, and the trunk were open, then the bullet holes, you say, would be coming from the right, slightly to the right and to the front?

A Yes. The amount of the round definitely coming from the right, from the front towards the rear of the vehicle.

MR. LOWE: May the record show that the direction of the car indicated by Mr. Sikma was due east, perhaps very slightly to the southeast of east, so that there is no confusion in the record as to the direction being pointed out.

MR. SIKMA: Pointing, I believe, toward the green house, if the line were drawn from the front to the back of the vehicle would be straight toward the green house.

MR. LOWE: Yes. You agree it is generally east or east to southeast?

MR. SIKMA: Yes.

THE COURT: The record may so show.

Q (By Mr. Sikma) You have indicated that there were 10 entrance holes in Special Agent Coler's trunk, is that correct?

A Yes, the trunk lid.

Q Now, on the right rear fender?

A There were three entrance holes, at least three entrance holes.

Q Do you know what direction these bullets came from?

{1752}

A No, sir. I didn't make any note as to that.

I am sorry, there were at least four entrance holes in the right rear fender.

Q O.k., and you examined the roof, is that correct?

A Yes, sir.

Q And how many entrance holes did you find in the roof?

A Three.

Q And what direction were these bullet holes?

A Generally they were the same as in the trunk lid.

Q And that would be slightly to the front, right?

A From the front and slightly to the right, yes, sir.

Q O.k., and at about ground level?

A I can't tell that, sir. In other words, that they were entrance holes in the roof.

Q Now, what were the total number of entrance holes in Special Agent Coler's car?

A There were at least 41 entrance holes.

Q And the total in Special Agent Williams' car?

A There were a total of 75, at least 75.

Q That would be over 116, at least over 116 in both cars?

A Yes, sir.

Q Now, you say "at least". Why do you say "at least"?

A Because most of the windows were broken out. I would have no way of knowing how many bullets passed through the windows.

Q Then in addition to this, I take it that there were some {1753} ricochet marks in the vehicles as well, is that correct?

A Yes, I found some.

Q Do you know how many you found?

A In Coler's car I found eight ricochets, and in Williams' car I found one ricochet.

Q I would direct your attention to the following day, June 30th, 1975. Where were you on that day?

A I was in the BIA compound at Pine Ridge, South Dakota.

Q And did you have occasion to make an examination of any vehicles on that day?

A I did.

Q And what kind of vehicles did you examine on that day?

A I examined a Ford Galaxy and a red and white van.

Q Now, the Ford Galaxy that you examined and the red and white van, were those the vehicles which you indicated earlier that you saw in the Tent City area?

A Yes, sir.

Q On the 27th, is that correct?

A Yes.

Q I would like to show you, after showing defense counsel, Government Exhibits 33-D, 34-C, 37-D and 47-A for identification.

(Counsel examine documents.)

(Counsel confer.)

MR. SIKMA: May we approach the bench?

THE COURT: You may.

{1754}

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

MR. LOWE: We have previously indicated that we object to the entry of Exhibit 47-A on the grounds of prejudice -- well, first on the grounds of relevancy, but on the ground of prejudice which outweighs probative value.

I believe that the only valid basis for introducing that is because there were some fingerprints on it. Certainly, at least, it is true that there were fingerprints identified on the manual. We are prepared to stipulate as to the fact that one or more books were found in the area with the fingerprints of Mr. Peltier or Mr. Robideau and Mr. Butler, or whoever they may want to offer in terms of the fingerprint identification. We will concede that or stipulate that because we feel that the introduction of a gun manual or a reloading manual or a bullets manual is so prejudicial and so without -- so absent of probative value of its own right as to call for a prevention of its introduction under Rule 403. Certainly it is proper for the Government to introduce the fingerprint information, then we will stipulate to that.

MR. SIKMA: Your Honor, we think that it does have some probative value. In addition to the fact that the fingerprints were found there, I think that it is important as it relates to the activities concerning firearms in the {1755} tent area, tends to rebut the Defendant's arguments with regard to the purpose of the tent area. It, therefore, relates to state of mind.

In addition to this, I believe that it does show some greater knowledge of firearms than a mere passing knowledge I of firearms; and I would state that for these reasons I believe that it is relevant to the state of mind of the individuals.

Certainly, I suppose that it is arguable, and the Defendants may argue this, that a lot of people have reloading manuals, firearms manuals and so forth. However I think that it can also be argued that there are other reasons for having a Sierra bullet reloading manual in the tent area; and it does go to refute the indication that it was merely a place where people met for

religious purposes.

THE COURT: The objection is overruled.

MR. LOWE: All right, sir.

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

MR. SIKMA: Once again I will show you Government Exhibit 33-D, 34-C, 37-D and 47-A; and I would also ask of defense counsel, if there is no objection, I would move for their admittance into evidence at this time.

MR. LOWE: I believe that's the same situation, your
{1756} Honor.

THE COURT: Very well. Subject to the record that has been made, 33-D, 34-C, 37-D and 47-A are received in evidence.

(Plaintiff's Exhibits Nos. 33-D, 34-C, 37-D and 47-A, respectively, having been previously duly marked for identification, so offered in evidence, were received.)

MR. LOWE: Could I have those numbers again?

MR. SIKMA: 33-D as in "Delta", 34-C as in "Charlie", 37-D as in "Delta", and 47-A.

MR. LOWE: Thank you.

A Government Exhibit 33-D consists of 15 .44 magnum cartridge cases.

Q (By Mr. Sikma) And what kind are these?

A They are six Remington Peters and nine Winchester Western.

Q And what caliber are they?

A .44 magnum.

Q And where were they found?

A All of these exhibits were found in the 1967 Ford Galaxy.

Q All right. I would then direct your attention to Government Exhibit 34-C.

A 34-C consists of 2.23 Remington cartridge cases, one Lake City, 12 Winchester Western, and 22 Remington Peters.

Q And what caliber are these?

A They are all 2.23 Remington caliber.
{1757}

Q And they also were found in the 1967 Ford Galaxy, is that correct?

A That is correct.

Q O.k. I direct your attention to Government Exhibit 37-D.

A This exhibit consists of 3.45 auto cartridge cases of Winchester Western manufacture.

Q And I direct your attention to 47-A.

A Yes.

Q What is that?

A That is a reloading manual put out by Sierra.

Q What is that -- are you familiar with that manual?

A Yes, sir.

Q And what is it?

A It is a manual. Anybody who reloads ammunition will have a reloading manual of some manufacturer, one of the reloading component manufacturers.

Q Is this a complete manual?

A I haven't looked it over, but I imagine it is a complete reloading manual.

Q Would you?

A (Examining).

Q And it would have information in it concerning the reloading of cartridge casings, is that true?

A Yes, various -- each cartridge designation. In other words we are dealing with, for instance, .30 caliber, .30 aught 6,
{1758} .30 Remington, Winchester, all .30 caliber cartridges. Each one is loaded a little bit differently.

Q Thank you. Would you take out Government Exhibit 34-C, and show the jury, if you can from that, what a cartridge casing is, and how that would be reloaded, if you can tell?

A Starting with a once fired cartridge case --

Q (Interrupting) Now, wait. That is a -- what caliber is that?

A That's .44 magnum.

Q O.k.

A Starting with a once fired cartridge case, you would have a die which would resist the case as well as push out the old primer. You would then reprime the case and excise it, load it with powder and put in a new bullet and crimp the bullet in the case; and when you are finished with that operation, you have a completely new cartridge ready to be fired.

Q Now, would you show the jury what a 2.23 looks like?

A That is a 2.23 cartridge case (indicating).

Q Do you know what the velocity of a 2.23 round is, such as that, if it were loaded properly?

A You mean commercially loaded?

Q Yes.

A Approximately thirty-two hundred feet per second.

Q Is that a high velocity or low velocity, or well, medium, or how

would you characterize it?
{1759}

A It is a high velocity cartridge.

Q What about the .44, what is the velocity of that?

A It all depends whether it has been fired in a revolver or in a shoulder weapon.

Q If it is fired in a shoulder weapon, what is the velocity of it?

A It would probably be up around eighteen hundred feet per second.

Q Is that high or low?

A For a rifle, that's low velocity.

Q And what about -- look at 37-D, and tell the jury what kind of a cartridge casing that is.

A That's a .45 auto.

Q What kind of a -- what is the velocity of that particular projectile if it was fired out of a commercially loaded cartridge case?

A Well again, it all depends on whether it is being fired in a handgun or in a shoulder weapon.

Q O.k. Let's say in -- are you familiar with the Commando Mark III?

A I am.

Q O.k. If it were fired from that kind of weapon, what would your estimate be?

A I do not know for sure. However, it would be probably over a thousand feet per second.
{1760}

Q O.k., and that again would be a low velocity?

A Yes.

Q When you examine bullet holes, what is it that makes the size of the entrance hole, does the velocity of the round have anything to do with that?

A Yes. It can affect the hole, yes, sir.

Q And would you explain that for the jury, please?

A Well, as a bullet passes through, pressure builds up in front of the bullet, close to the metal, It goes through the metal forming a crater-like form of the metal; and the higher the velocity, usually really the hole is larger than the projectile. The lower the velocity, you seem to come closer to the exact size of the projectile.

Q Then in a very, very high velocity, like the 2.23, the hole made by the entrance of the bullet would be much larger than the normal .22 caliber?
{1761}

A It would be larger; yes.

Q Do you know on a regular rim fire, .22 rim fire what the muzzle velocity is?

A Approximately; yes, sir.

Q What about approximately is that?

A In the long rifles approximately 1350 per second.

Q Those are relatively slow compared to the .223?

A Very much so; yes.

Q About, well, a little more than one-third, is that correct

A Yes, sir.

Q Now in a .223, do you have any idea what the size of the entrance wound, or entrance hole would be as compared with an M1, 30-06?

MR. LOWE: Objection to the form of the question. Your Honor. I think it gives insufficient facts upon which a witness can base an answer. It has to be stated whether it's going through metal or wood or cloth or what it's going through.

THE COURT: Sustained.

Q (By Mr. Sikma) We're speaking here of metal in vehicles which you examined. Can you make a comparison between the size of the hole that would be made by a 30-06 fired from an M1 and the .223?

A It would be smaller.

Q It would be smaller. How about a .44 magnum?

{1762}

A It would be larger than both of them.

MR. LOWE: Your Honor, I think there's confusion as to what he's answering, "It would be smaller." I wonder if he could clarify which would be smaller than which.

A The hole produced by the .223 Remington and a 30-06 would be smaller than those produced by a .44 magnum.

Q (By Mr. Sikma) I want to direct your attention to the same date, June 30, 1975. On that date you indicated in addition to making an examination of the 1967 Ford Galaxie you also examined a red and white van, is that correct?

A I did.

Q I will show you what has been marked for identification as Government Exhibit 33E, 34D, 37E and 69C.

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

(Recess taken.)

THE COURT: Is Counsel ready for the jury?

MR. LOWE: We are, Your Honor.

THE COURT: Government ready for the jury?

MR. SIKMA: Yes, Your Honor.

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

MR. LOWE: Your Honor, I believe at the conclusion when we broke the question of Exhibits 33E, 34D, 37E and 69C was raised. As to Exhibits 33E, 37E and 69C, we would stipulate to their admission. As to Exhibit 34D, we feel that probably
{1763} we just ought to go through with the normal procedure on that. I don't know there's any particular problem on it but we would prefer at this point not to stipulate that into admission

THE COURT: 33E, 37E and 69C are received.

Q (By Mr. Sikma) I would first of all show you Government Exhibit 33E, 37E and 69C and ask you if you would tell the jury where it was you found these particular items.

A These particular items were removed from a red and white van in Pine Ridge Compound, BIA compound in Pine Ridge, South Dakota.

Q And that is a red and white van that you observed in the tent city area, is that correct?

A Yes.

Q And when you examined that particular van, had someone else additionally made examinations of this van as to items other than firearms identification examination and search for cartridge casings and so forth?

A Yes, sir.

Q And had you seen the van with those types of items, with those other items in the van?

A The van. I saw the van prior to, before anybody went inside of it; yes, sir.

Q What kind of items did it have in it in addition to the things that you've mentioned here?

A Well, so very numerous. It did have some radio equipment,
{1764}
two tires and numerous other items, clothing, one thing and another.

Q I'll show you pages 35, 36 and 37 of Government Exhibit 55 and ask you whether or not these items appear to be similar to the items found in the van?

A Yes. I remember seeing the radio equipment.

Q I'd ask you also to turn the page and look on the following page

which is page 36 and 37. Does that look familiar to you?

A Yes, sir.

Q Now I will show you what is marked as Government Exhibit 34D and ask you to examine Government Exhibit 34D, first of all, and tell me what that is and if you can tell where you found it.

A Yes, sir. I found it in the red and white van, the .223 Remington caliber Winchester Western cartridge case.

Q Now what did you do specifically with that item after you found it?

A I packaged all of the items and turned them into the evidence room at Pine Ridge.

Q And then what did you do with them after that?

A I turned them over, I escorted all evidence back that we had collected and personally turned them over to Special Agent Evan Hodge in the FBI laboratory.

Q The reason I'm asking you specifically about this item is because the defense has not stipulated to the chain and has {1765}
asked that we indicate what the chain of custody was on this item. So the chain of custody you're saying is that it was in your custody from the time you found it essentially until you brought it specifically to Mr. Hodge in Washington, D.C.?

A Yes, sir.

Q And you assigned him to make the firearms examination in your laboratory on this item, is that correct?

A Yes, sir.

MR. LOWE: Excuse me. Just to be sure we're clear, sometimes pronunciation is a little difficult to hear in the courtroom. You're talking now about Exhibit 34D, are you not?

MR. SIKMA: Yes.

MR. LOWE: Okay. Thank you.

MR. SIKMA: I would offer it again at this time, Your Honor. Your Honor, at this time I would re-offer Government Exhibit 34D with that additional information.

MR. LOWE: I would like to just reserve until my cross-examination to go into this any further. I don't at the present time see any objection to it but I'd like to be able to reserve until I have an opportunity for cross-examination rather than interject voir dire at this point. I would object to it simply to reserve the point until my cross-examination.
{1766}

MR. SIKMA: Your Honor, I think that at this point there's nothing objectionable about it. We've shown that the witness found it at the scene, was found in the red and white van and then it was taken by him personally to the laboratory in Washington, D.C.

THE COURT: If you have a voir dire, you may exercise it now.

MR. LOWE: I would rather, Your Honor, it would go into it extensively and I might get mixed up with cross-examination. I'd rather have the Court note my objection. I'm sure the Court is going to admit it into evidence. Just so I preserve my point.

THE COURT: You just want to reserve your right to inquire?

MR. LOWE: Yes.

THE COURT: Very well. Then 34D is received.

MR. SIKMA: That's all I have at this time, Your Honor.

MR. LOWE: May I inquire, Your Honor?

THE COURT: You may inquire.

CROSS-EXAMINATION

BY MR. LOWE:

Q Special Agent Cunningham, let me be sure I have the sequence of events pinned down. I'm not sure if we got this down in very much detail. What day and approximately what hour did you first come into the general crime scene area?

A It was the morning of the 27th.

{1767}

Q And up until that point you had not seen any vehicles or potential evidence or anything, had you?

A No, sir.

Q When you entered the crime scene area, what area did you go to or were you led to initially?

A To the crime scene itself. There was some explosives that had to be destroyed.

Q All right.

Now I invite your attention to Exhibit 71, Government Exhibit 71, and when we talk of the crime scene, and we're using the Government's term at this point, whether the word "crime" is appropriate or not is still up in the air, are you speaking of the entire area of the Jumping Bull area and the tent city when you say that or are you speaking of the area immediately around what is described there as bodies of SA Williams and SA Coler? Can you tell the jury what you're speaking of when you say "crime scene"?

A I was referring to the whole area.

Q Including tent city, for example?

A Yes.

Q On June 27, the first day that you arrived, did you make any examination of any vehicles?

A As far as a thorough examination, sir?

Q Let's start out by saying, did you make any examination at all? {1768}

A I looked at the vehicles that were in tent city; yes, sir.

Q And would you state that those vehicles were that you did just look at, at least cursorily.

A There was a Ford Galaxie.

Q That's the 1967 Ford?

A Yes, sir.

Q What other vehicles?

A If I recall, sir, I believe I looked at the red -- no. I didn't either. I think it was just the Ford Galaxie that was down in the tent city area.

Q So that on the 27th, the only vehicle you looked at even in a cursory fashion was the 1967 Ford Galaxie?

A Yes, sir.

Q Did you make any crime scene search for cartridge casings on the 27th?

A I would have to look at the record, sir, but I believe I lid find some. I don't know if cartridge casings, I believe I lid in the tent city area recover some evidence, firearms evidence.

Q In order to be as precise as we can in examining the evidence that you're giving here, I want to suggest to you a differentiation in terms. I would like to refer to the tent city area as tent city and the area surrounding the residences and the junked cars and the locations where the bodies were found and that general area as what has been referred to as the crime {1769} scene just so you know what I'm talking about and I know what you're talking about. Is that all right?

A Yes, sir.

Q On the 27th where, if anywhere, did you make any search for cartridges as such, cartridge casings, and any other ballistics material?

A It would be in and around the tents at tent city.

Q On the 28th I believe you testified that you went to the BIA compound and am I correct in assuming that's the one at Pine Ridge you're speaking of?

A Yes, sir.

Q I believe you indicated that you spent whatever work you did on that day examining Special Agent Williams' car, am I correct?

A Yes, sir.

Q Did you look at Special Agent Coler's car at all that day?

A No, sir.

Q And I believe your testimony was that then on June 29 you came back to the same BIA compound and looked at Special Agent Coler's car?

A No, sir.

Q That is not correct?

A No, sir.

Q When did you look at Special Agent Coler's car?

A The 29th, sir. But it was not in the BIA compound, it was {1770} at Hot Springs.

Q Fine.

In any event, you spent the 29th in Hot Springs looking at Special Agent Coler's car among other things?

A Yes.

{1771}

Q And I understand from your testimony that on June 30th you examined a 1967 Ford Galaxie and the red and white Chevrolet van, am I correct about that?

A Yes, sir.

Q And was that at the BIA compound?

A Yes, sir.

Q All right. And I understand that was the first time that you looked at the red and white van and it was the first time other than your cursory look at the 1967 Ford on the 27th, and am I correct on that?

A As I recall, yes, sir.

Q Yes. Did you as in the practice make memorandums, or 302's with regard to the results of your various examinations?

A Yes, sir.

Q Prior to coming here to testify did you review your 302's?

A I did.

Q Wouldn't it be fair for me to say that with all of the cases that you handle you would be hard pressed to remember the specific details just out of your memory without looking at 302's?

A Yes, sir.

Q In fact would it be correct in saying that you do not remember the

information in your 302's from memory, but rely on those records which you keep in the ordinary course of your examinations in Washington in 302 forms? {1772}

A It is part half and half, sir. Some things I did not recall until I read my 302's, and other things I remembered.

Q Fine. Did you make your 302's fairly close in time after you made the examinations of the various vehicles based on your then fresh recollection and whatever notes you may have made?

A Yes, sir.

Q And was the information that you put down in your 302's a present sense at that time of the condition of those vehicles which you observed during your examination as best as you could write it down in the 302?

A I don't think I made a 302, sir, regarding the condition of the vehicle.

Q Well, you did --

A Other than to state that I found so many bullet holes in particular car.

Q All right. That's what I'm speaking of.

A Yes, sir.

Q And did it also, did your 302's consist at least in part of a description of the various cartridge casings and other things you found, and the condition you found them in in which you observed as you were finding these items?

A It's what generally speaking, yes, sir, that's what it is.

Q All right.

A Where I found it.

Q You described in the Williams' car seventy-five entrance {1773} and I believe you said one ricochet. I'm not clear in my mind, by ricochet do you mean the initial striking of the vehicle by a bullet that doesn't actually make a hole but simply glances?

A Yes, sir.

Q So that that would mean that a total of at least seventy-six shots, that is seventy-five holes plus one ricochet, a minimum of seventy-six shots were taken by that vehicle, one of which did not penetrate, the other seventy-five of which did; isn't that correct?

A Yes, sir.

Q And similarly with the Coler car I believe you said forty-one entrance holes and eight ricochets which means that at least forty-nine shots were impacted on that automobile and of course you mentioned the fact that there

might have been more; is that correct?

A That is correct, sir.

Q So if you add those up, the forty-nine and the seventy-six, you come up with a hundred and twenty-five. Your testimony indicates that there were at least one hundred and twenty-five shots fired at the two automobiles and perhaps more; isn't that correct?

A Yes, sir.

Q Now, you talked about the size of holes in the car, and I presume you are generally aware of the various calibers of weapons or cartridge casings or bullets that have been examined {1774} because they were found either in the tent city area or related in some way to the crime scene. You're aware generally of the range of caliber, are you not?

A Generally speaking, sir.

Q Would it be fair to say that of those one hundred and twenty-five shots that were received by the two vehicles that the holes or ricochet marks could have been caused by any one or more of those vehicles in different combinations? That is, that there were some holes that could have been caused by a .22, some holes that could have been caused by a .44, some holes by a 30-06 and so forth, that there was a full range o£ combinations possible?

A I made no record of size of holes, sir. I can't answer that question intelligently.

All I examined the car for was the number of entrance holes and not as to caliber.

Q Would you examination and your recollection of what you observed and your notes on what you observed enable you to preclude the possibility that at least one bullet from each of the different calibers might have struck those vehicles, or are you simply unable to say?

A On the basis of the examination of the evidence found which did not do, then you could make an intelligent, give you an intelligent answer on the basis of my recollection, sir. I don't really recall whether or not there were many {1775} different size holes because I wasn't looking for them at that time to determine caliber.

Q You certainly could not testify today, could you, that there were no .22 holes in the cars for example?

A No, sir, I could not.

Q You could not testify, could you, that there were no .44 holes in the car?

A No, sir.

Q And if I were to list each of the different calibers of various

ammunition which were connected in some way with the Jumping Bull area, I presume that you could not testify as to my one of those calibers, that it is impossible that they were used against the cars?

A No, sir, I could not.

Q Okay. Now, you made some mention about the fact that a .223 round for example, being very high velocity, might create hole that actually was larger than a .223. Am I correct in stating what you said?

A Yes, sir.

Q First of all just to, I'm not a gun person and what I've learned here is largely because of what I've read, or things that you wrote or things that I've read in other sources, and perhaps some of the jurors are in the same situation. So can you clarify what do we mean by .223? Can you tell the jury what that means?

{1776}

A .223 Remington is strictly a cartridge designation. It really does not refer to, to anything except that it's a .22 cartridge. Because the actual bullet diameter is .224.

It is, it really, it just tells you the cartridge configuration of one particular .22 caliber cartridge.

Q All right. I guess what I was specifically getting at is that .223 refers to .223 inches in diameter, isn't that the general the origin of the term?

A No, sir.

It's .22 caliber bullet by generally speaking. A center fire .22. The actual bullet diameter is .224 to be exact.

Q But the .224 means .224 inches as opposed to millimeters or something else?

A Yes, sir.

Q And when we talk about 30-06 we're talking about basically a 30 caliber, aren't we?

A Yes.

Q Which means basically .30 inches? It may vary.

A .308 is the diameter.

Q Okay. And if we talked about 5.56 millimeter we're again talking, whether it's the precise measurement or not, the approximate diameter of the bullet, aren't we?

A No, sir. It's again the cartridge designation.

Q Anyway, the difference is that some bullets are measured {1777} or described in inches and some in millimeters; and you just have to look

at each one to decide; isn't that true?

A Yes, sir.

To clarify one thing, the .223 Remington is known as a 5.56 by the military. Same cartridge.

Q That was generally what I wanted to bring out so if we discuss it at some point it will be clear.

Now, getting back to the high velocity nature. The size of the hole that is actually created, let's say by a .223 round, which is a high velocity, might vary on a lot of conditions. For example, the type of metal, the humidity, the distance away from the object when the bullet is fired; isn't that true?

A Yes. Velocity at the time it hit the vehicle.

Q In fact when we say that the velocity of a .223, just to talk about the one that you gave an example, was thirty-two hundred feet per second. You are speaking right as it comes out of the muzzle, or a short distance afterwards?

A Yes, sir.

Q And if you are talking about something that is a hundred yards away the velocity is going to be thirty-two hundred feet per second at that point, is it?

A No, sir.

Q Be somewhat slower because of friction and everything else?

A Yes, sir.

Q All right. So that the distance away from the car that a {1778} weapon is fired would have a lot of effect on what the size of the hole created was, wouldn't it, or might anyway?

A To be perfectly honest we're not dealing with a great deal In other words, depending on the metal and velocity you'd have to actually test it to find out how large a hole that you get.

Q All right. That's exactly, that's what I want to bring out.

Now, you mentioned that .223 is as commercially loaded a high velocity. And I'll ask you whether the same is not true for a 30-06?

A Yes, sir. It would be considered a high velocity cartridge.

Q And 30-30?

A No, sir.

Q You don't think 90?

A You're down approximately 2280 feet per second. It's in your lower velocity.

Q How about a .308?

A Definitely it's a high velocity cartridge.

Q How about a .303?

A No, sir. There again you're down the lower range.

Q Okay. So we have 30-06 and .308 that are commercially loaded high velocity. Now, let me ask you this: we've talked a little bit about reloading. First of all can you tell the jury among various people that use guns, such as hunters or sportsmen or skeet shooters or other people, is it common or {1779} uncommon for people to reload their own shells?

A Today it's very common.

Q All right. Reloading materials including the devices used, I think you mentioned a dye including the components of the ammunition, like primers and power and everything. They're readily available in gun stores, aren't they?

A Yes, sir.

Q You don't need a license to buy it, it's sold across the counter, isn't it?

A Yes, sir.

Q When you reload a cartridge isn't it true that you do not necessarily reload it with the same components, the same type of power for example as the commercial manufacturer originally put into the cartridge?

A That is always -- used different powders that the manufacturers put in.

Q And you can vary the muzzle velocity when you reload by different, using a different powder, a higher powder and you can give some variation in muzzle velocity, can you not?

A Yes, sir, you can.

Q Would it be fair to say that a person who reloads his own cartridges could take a 30-30 cartridge for example and load it with a type of powder that would make a high velocity round?

A Usually, sir, you wouldn't load up a 30-30 on account of most of the times it's being used in a lever action gun and the {1780} lever action gun wouldn't stand the high pressure.

Q What my question is: If someone did this it would be possible to load a 30-30 round for example, though, it would hit at a higher velocity?

A Yes, sir, at a higher --

Q And in fact it would be possible to load one at a, which would fire at a high velocity, not just higher, but in the category of a high velocity if you had a rifle to shoot it; isn't that true?

A Yes, sir.

Q And the same would be true of a .303, would it not?

A Yes, sir.

Q Now, the Sierra Manual, this loading manual, I believe you indicated this, but of all the common place reloading that you mentioned it would be normal for a person who does reloading to have some kind of reloading manual where he could look up the type of shot or type of powder or the weight of powder to be put in among other details, would it not?

A Yes, sir.

Q So that it would not be unusual, let's say, if sportsmen or hunters or anyone else who did their own reloading to have a Sierra Manual?

A No, sir.

Q Now, with regard to the two vehicles and the holes that you did identify. I take it from what you said that many of the {1781}
holes, because of the nature of the holes, you were not able to identify the direction from which the bullet came that made the hole, would that be fair?

A Yes, sir.

Q Except in a general sense that it was on the right side or the left side?

A Yes, sir.

Q Taking Special Agent Williams' car first, I gather from your testimony that the most holes were on the left side generally of that vehicle?

A Yes, sir.

Q However, there were holes on other portions than the left side, weren't there?

A I found exit holes, yes, sir, and one entrance hole on the right side.

Q One entrance hole on the right side?

A Yes, sir.

Q Were there any entrance holes on the front or the rear portions of the automobile as distinguished from the left side?

A Yes, sir. The hood and the windshield generally on the left side again had twelve entrance holes. The front had four entrance holes and again generally they were coming, two of them I could tell were coming generally from the left side.

Q I gather then the two others you couldn't tell where they came from? {1782}

A I couldn't tell, no, sir. They were in the radiator.

Q When you observed Special Agent Williams' car were the side windows,

that is, the windows that were in the doors on the left driver's side and the right passenger side, present or missing?

A The left rear is missing and the left front are both missing.

Q How about the right side of the vehicle?

A Right front is missing. The right front is missing.

Q All right. Would it be fair for me to say then that if someone standing on either the left side of the vehicle or the right side of the vehicle were to have fired bullets which impacted the windows that were the normal windows in the doors, which subsequently are now missing, it would be impossible for you to say whether that took place, whether it didn't take place and anything about the bullets if they did impact the windows?

A That is correct. They're missing.

Q In Special Agent Coler's car were there holes on all sides of the car, although most of them were on the front side that was facing generally east?

A There were holes on the left side, yes, sir. As well as the right.

Q In fact were there holes on the rear of the car other than the trunk? {1783}

A By the "rear" you mean what, sir?

Q I mean the rear portion where the taillights are, where the rear license plate is, were there any holes in that area, entrance holes I should say?

A I know none in my notes, sir.

Q Were either of the taillight lenses of the Coler car missing when you observed the car?

A I do not recall, sir.

Q You mentioned specifically that I recall four entrance holes in the right rear fender of Coler's car. Could you turn to whatever notes you might have in that regard and for a moment and just look at that.

A Yes, sir.

Q Were you able to determine any direction of entry on those four holes?

A My notes do not reflect any, no, sir.

Q So that as far as you can testify, as far as your investigation revealed, those could have been fired directly head-on into the right side of the car, or an angle from the front or an angle from the rear and you just can't say?

A Yes, sir. I can't say.

Q Did anyone explain to you why Special Agent Williams' car was taken

to the BIA compound and Special Agent Coler's car was taken to another place, Hot Springs?

A I knew nothing firsthand of either car, or how they got {1884} there.

Q I understand that you knew nothing firsthand, that was not my question.

I question is: Did anyone tell you any reason why one car was taken to one location and another car was taken to another location?

A Yes, sir.

{1785}

Q If I understood your testimony, you said something to this effect: "I saw the man before anyone went inside it." Did I hear you correctly?

A Yes, sir. It was sitting in the BIA compound. I saw it, if I recall, I saw it the day that we went over Williams' car. It was in the compound at that time.

Q So you saw the red and white van on the 28th of June, although you did not examine it on that day, is that correct?

A If I recall, sir, I cannot be sure on that. I recall seeing the van prior to anybody looking -- going into the van.

Q Do you have any notes or any independent recollection of having examined the red and white van on June 28th prior to your examining it on June 30?

A I did not examine it on June 28th.

Q That was my question. Is the first time that you examined the red and white van -- withdraw it. Was the first time that you examined the red and white van June 30th?

A Yes, sir.

Q Then I gather that the only thing you can testify from your own personal knowledge is that on June 30th, of the group of people that accompanied you, if anybody did, to the BIA compound on that day, you examined the van before anyone went inside, that is correct, isn't it?

A Well, I saw it, yes, sir.

{1786}

Q The point I am making is that you were not present at all times with that red and white van, either on June 26, June 27 or June 29, and on June 30 there was only a period of time when ; you were examining Special Agent Williams' car when you had just seen the car, so you can't testify whether anybody went in that van on those days or not, can you?

A No, sir.

MR. SIKMA: Your Honor, may we approach the bench?

THE COURT: You may.

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

MR. SIKMA: Your Honor, I would object to this line of questioning as being misleading and inconsistent with our prior stipulation. If I thought he was going to examine this witness in that manner, I would have called the other witnesses who have a chain of custody on that van because I can establish exactly what took place with that van from the time it left Tent City to the time this witness identified it; but it was my understanding that this was not a question, but it appears almost that at this point there is some sort of question as to whether or not this van had been tampered with, changed or whatever; and I think I am going to have to read a stipulation into the record at this point and clear that matter up.

MR. LOWE: Let me say several things.

{1787}

First of all, I am correct that -- I am not trying to play word games with you -- the van was not an item of evidence. You don't mean -- you mean the items in the van?

MR. SIKMA: Yes, the items in the van, also the condition of the van because that along with Special Agent Williams' and Coler's car which were moved, and also the Ford Galaxy, those four things were moved by certain people; and they would testify that they were in substantially the same condition at various times, and it was my understanding that it was not necessary for us to establish that chain evidence.

MR. LOWE: We have no dispute on the fact that the vehicles were in the same condition. There is no -- let me finish what I am going to say.

MR. SIKMA: O.k.

MR. LOWE: me only reason I even asked that of this witness is because he came out and made the statement under direct examination -- I would not have raised it -- and said that nobody had been in the van before he viewed it.

Now, that is not a stipulation and that is no -- he raised that in testimony, and I just wanted to point out as to his personal knowledge, he doesn't have that now.

As to a lot of these exhibits we have stipulated chain of custody, and we are not going to change the stipulation on that. I don't want anybody to get the {1788} impression somehow that -- he obviously could not state that nobody was in the van before he got in there. That's not in no way backing off of the stipulation we made. I don't want to suggest that, and I am in no way suggesting that all the bullet holes weren't exactly where they said

they were. I am not getting into that.

The only reason I went into that is because of the response he made on direct examination. I don't think that contradicts any of the stipulations we entered into at this point, and it certainly was not intended to.

MR. SIKMA: Well, you know, my advice to him as far as testimony would be much more technical and much more specific in this regard if I thought there would in any way be some question about this. You know, we wouldn't --

MR. LOWE: (Interrupting) I think you are seeing a question being raised that hasn't been raised. The only reason I went into that is because of the way he said it. He obviously wasn't in a position to say that he went and examined the van before anybody else went in it.

MR. SIKMA: Are you going to try to raise an inference that these items were not there at the time they were in Tent City, at the time the van was in Tent City; are you trying to raise an inference that these items were not in Tent City and then taken to the area where the vehicles were examined because that would be the only purpose of {1789} raising this question?

MR. LOWE: Can I talk to Mr. Taikeff a minute? You are raising a question here that I hadn't contemplated by asking that question. Do you want to break for lunch now and let us take this up?

MR. SIKMA: I would prefer to keep on this with this witness. He has got a plane to catch.

MR. LOWE: May I have a moment?

(Counsel confer.)

MR. LOWE: In order to be as fair as we can be and as complete on the record, it is my understanding that we have stipulated on a number of items, the vast majority of items, chain of custody, by which we mean and I understand you to mean that when somebody finds the item, you know, whoever the finder is, that there will be no challenging of the chain between the finder and whoever tests it and then comes in and testifies to it, or for that matter on up to the fact that it is the item that's in the courtroom; and on that much there is no question about it, as to any of these items.

Now, that is not to say that we are going to stipulate that the item was where it was claimed to have been found. mat's not part of our stipulation.

MR. SIKMA: Well --

MR. LOWE: (Interrupting) If we stipulated to {1790} foundation, that was a different story. That's different, but chain of custody means that the finder, once he testifies that he found it, that there will be no chain of custody challenged up to the testing of it and the producing of it in the courtroom and whatever else went on.

MR. SIKMA: The one thing I understood in our discussions with regard to the vehicles that were examined was that a stipulation would be made that they were in substantially the same condition that they were, that they were found in the general crime scene area.

MR. LOWE: That's right. We are not challenging any of the holes or whether they were washed or whether there was blood or anything else.

MR. SIKMA: No. The other thing deals with whether or not items were moved around in the vehicles and so forth because otherwise we would have to call someone to testify to that aspect because there was great care that was taken when the vehicles -- for example, the red and white van was taken from the Tent City areas, putting other items in it or taking other items out of it was carefully -- great care was taken, so that it wouldn't be different when somebody came later to examine it; and it was my under- standing that that was the nature of our agreement. Now --

MR. LOWE: (Interrupting) I will say that I did not have in my mind -- I gather what you are saying is that {1791} when we made the stipulation that the conditions of the vehicles was the same, that you thought that incorporated also that anything found in the vehicle was found where it was later identified by, well, say, this agent or someone else?

MR. SIKMA: Sure.

MR. LOWE: And there had been no disturbing of it or either putting into the vehicle and taking out of it items in the vehicle.

May I talk with Mr. Taikeff? That's not what I was thinking and -- Judge, this is going to be a matter we will have to discuss. I will still have 20 minutes, half an hour cross examination. I would respectfully suggest we break for lunch and try to come to some understanding after lunch. We can leave seven minutes early and come back seven minutes early.

THE COURT: We will not come back seven minutes earlier. We will come back at 1:30.

MR. LOWE: We will try and work it out with counsel.

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

THE COURT: The Court will recess at this time until 1:30.

(Whereupon, at 12:23 o'clock, p.m., the trial of the within cause was adjourned until 1:30 o'clock, p.m.).

{1792}

AFTERNOON SESSION

March 28, 1977

Whereupon, the following proceedings were had and entered of record

on Monday afternoon, March 2, 1977 at 1:30 o'clock, P.M. without the hearing and presence of the jury:

MR. LOWE: Your Honor, Mr. Taikeff just got back from that weapon thing.

MR. TAIKEFF: May I oblige the Court briefly of what happened during the past hour?

THE COURT: You may.

MR. TAIKEFF: In order to put the Court in notice of something that I think is inspected and somewhat unusual. We three times, to make sure we were accurate, measured off a half mile in the vicinity of the Fargo airport and we took the rifle with scope and had two people, first we looked east and then we turned around and looked west. When we looked east it was a person I knew, it was Mr. Nadler, and then when we went down the other end and looked west I had my wife stand in the roadway half a mile away and I trust that Your Honor realizes I would recognize her if I saw her. In neither instance was I able to determine anything other than the fact that I was looking at a human form. I could not recognize either of these two people whom I know well. On the basis of that observation and given the testimony which we've heard concerning that very same telescopic sight and the conceded distance of a half mile, I believe that it {1793} is important in this particular case to have the jury go through the very same experience with a person they would recognize, and we propose Mr. Hanson for that purpose, so that without any comment that each have an opportunity to look through that telescopic lens for as long as they like at a person whom they would recognize, and that would be the first thing we would offer to prove in our case, Your Honor.

THE COURT: It would seem to me you would have another problem here and that is the light conditions. I would think that would make a --

MR. HULTMAN: And the viewer.

MR. TAIKEFF: Your Honor may be correct, although I think it is so clear, and perhaps Your Honor would like to participate in the test by way of us making a prima-facie showing to Your Honor. I think Your Honor would be satisfied no matter what the light conditions were as long as it were in daylight. It wouldn't make any difference. You cannot see the features of the human face through that telescope at a half mile distance. It's just impossible. It doesn't work. It isn't possible for anyone to do that and it is so obvious that if Your Honor would take a look Your Honor would be persuaded.

However, if the government thinks that we must duplicate the light conditions, then we will just have to wait for a day when the light conditions be comparable. We know {1794} what the weather conditions were on that day

on June 26th, 1975 at 3:45 in the afternoon. We'll just have to wait for that particular time if they think it makes a difference. I would most respectfully suggest to the government in the course of the next several days when lighting conditions will vary from the early morning light to the late afternoon light that they try it several times. I think they will have the same experience we did. You just cannot see a person from that distance in that scope.

We intend to prove that to the jury in the course of our case.

MR. HULTMAN: Your Honor, I think we all know what the proper method of proof is here and if Counsel wants to put an expert on, and that is the conclusion that's drawn, that's going to be it. But the government is going to totally resist taking a jury with a telescope when all the factors we are talking about are indefinite factors and are subject only, first of all, to who the viewer is, and that's the thing an expert will talk about, the eyesight of a viewer.

I've looked through a few of them under some acute conditions sometime in the past and the viewers' eyes themselves indicate the ability. It is first distance and a very great distance.

I'm not in any way to minimize what Counsel is ultimately to prove. That's what experts are for. That's {1795} when viewers were given the scope are for. There's a proper way to produce whatever evidence Counsel wants to at any time.

I'll make it clear on the record the government is not waiting until a blue day in May or June, whatever it was, nobody knows specifically. You can't recreate exactly the same conditions and the government is going to proceed with its proof and I expect the defense will proceed with their proof, whatever it is, when the time comes. That's the posture and position that the government is going to take. I want that made clear at this particular time.

MR. TAIKEFF: I just want --

MR. HULTMAN: We're going to resist anything about a juror going out and at a measurement of a half mile to make a determination. I don't think there is any foundation of any kind that would, one, either allow that or, two, make it in any way admissible evidence.

MR. TAIKEFF: I don't quite understand Mr. Hultman's position. Apparently he's saying that the jury using as the fact finder the same instrument under comparable conditions as the witness would not be in a position to make up its mind as to whether or not that testimony is credible. It is so far from being credible, it isn't a close call.

MR. HULTMAN: Your Honor, all an expert would get up {1796} there and do and say is he looked through that telescope under certain circumstances and all he could see is a silhouette and now we have a swearing contest between a hired expert and the government's witness. But an expert is only necessary, Your Honor, where he can assist the jury in technical or learned matters that the jury is not in a position to know of its own experience. But the jury is perfectly competent to look in that telescope and decide whether any human being could make the kind of identification which the agent testified to.

By the way, I might indicate that on both occasions each of the people were giving me the full face view and were standing still. They were not in profile and were not moving. I could not tell who I was looking at.

MR. HULTMAN: Again, Your Honor, I come back, I don't want to prolong it, I want to, one, make the further observation, there is no place in this testimony, there is no proof that would indicate it was exactly a half mile. In fact, the record very clearly shows there is disagreement as to what the specific distances were.

MR. TAIKEFF: Yes. 20 feet was the variation on measurement.

MR. HULTMAN: We're also talking about something which has never been measured in any way which is something that is relative in nature and all of that testimony I think, {1797} Your Honor, is something properly for the jury to consider. So I just want to make my position very clear. I have no doubt of what Counsel has indicated. He's not a witness in this trial, the jurors are not witnesses in this trial. There is a proper method to attack, which I'm sure Counsel is very capable, as he indicated, to attack and appropriately attack and the government's not going to have any objection when those times come except the route of proper objections and what the record shows in terms of foundation. But the government's going to oppose any such position now being requested by Counsel.

THE COURT: I understand the positions of both sides. Are we ready for the jury?

MR. LOWE: May we have a moment? Mr. Taikeff has been gone over the lunch hour. A matter came up between Counsel, it may be somewhat significant. I think we ought to huddle our heads for a moment.

May we do that, Your Honor?

THE COURT: You may.

MR. LOWE: I believe that resolves the question.

While the jury is coming in I have something to show Mr. Sikma. I don't know any reason not to have the jury come in now.

THE COURT: Are Counsel ready for the jury then?

MR. SIKMA: Yes, Your Honor.

{1798}

MR. LOWE: Yes.

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

THE COURT: I notice that some o the jurors have taken jackets in with them this afternoon in contrast to Friday afternoon. I just want to tell you that there is no way really that we are able to control the temperature exactly. After the excessive warmth on Friday afternoon, I asked GSA, General Services Administration, who are responsible for the building to do whatever was necessary to cool the courtroom down and apparently they have cooled it down so I guess the best solution is to carry your jacket with you and if it's warm take it off and if it's cold put it on.

You may proceed.

CORTLANDT CUNNINHAM, having been previously sworn, testified further as follows:

CROSS-EXAMINATION CONTINUED

BY MR. LOWE:

Q Agent Cunningham, I have another recall question for you about ammunition size that I forgot to ask earlier and I'll get it out of the way at this point.

There have been a number of different caliber cartridge casings found in various places and I would like to clarify with regard to some types of weapons which ones are interchangeable. In that regard let me ask you, taking an AR15, {1799} I presume you're familiar, of course, with that weapon?

A Yes, sir.

Q The general character of the ammunition it uses is called .223 ammunition, isn't it, that is used in an AR15?

A Yes.

Q I asked you about ammunition which is described in other places, for example, .222 ammunition. Is that a type of ammunition that would also work in an AR15?

A No, sir.

Q How about 22-250 ammunition?

A No, sir.

Q Of all of the ammunition components which were discovered during the course of the investigation in this case, are there any components other than what have been identified as either .223 or as 5.56 millimeter which

will work in an AR15?

A No, sir.

Q So those are the only two types, .223 and 5.56 that will actually be able to be fired in an AR15?

A They are both the same thing.

Q I understand that. Other than those two designations, any others are not able to be fired in an AR15?

A No, sir.

Q And that is correct?

A Yes, sir.

MR. LOWE: May I approach the witness, Your Honor?

{1800}

THE COURT: You may.

Q (By Mr. Lowe) I show you what has been identified as Defendant's Exhibit 93, 94 and 95, pictures of a red vehicle, and I ask you if you ever had occasion to examine that vehicle?

A No, sir.

Q To your knowledge did anyone under your supervision with regard to recovery of ballistics information ever examine those vehicles, any experts?

A Not that I know of, sir.

Q Thank you.

I now show you what has been marked for identification as Defendant's Exhibits 120, 121, 122 and 123 and after you have had a chance to examine them I will ask you a question about them.

Are those four 302s which you prepared based on the examinations that you and perhaps other people made of the four vehicles in question?

A Yes, sir.

{1801}

Q As to Defendant's Exhibit 120 which is the Coler car I believe you indicated that you made your examination on June 29th, and the portion of the 302 indicating the date of interview is also June 29th, is it not?

A Yes, sir.

Q And that relates to your examination that you made, doesn't it?

A Yes, sir.

Q And as to Defendant's Exhibit 121 isn't that a 302 recording the results of your examination on June 28th of the Williams' car?

A Yes, sir.

Q And as to Defendant's Exhibit 122 is that not a recordation of the

results of your examination of the red and white Chevrolet van on June 30, 1975?

A Yes, sir.

Q And Exhibit 123 is the result or a recordation of the results of your examination of the 1967 Ford on June 30, 1975?

A Yes, sir.

Q When you made these reports did you make them as carefully as you could based on you then fresh recollection and whatever notes you had?

A Yes, sir.

Q And are, on the date you made them were they accurate to the best of your ability?

{1802}

A Yes, sir.

Q And were these records which you kept and have since maintained as a regular part of the activity of your firearms section of the FBI?

A I have never had them.

Q You've never had them

A No, sir. They were maintained in Rapid City, sir.

Q All right. But they were these records which you prepared in the regular course of your duties as an FBI agent which were maintained in an office of the FBI?

A Yes, sir.

Q And were these the documents or some of them which you indicated you reviewed prior to your testifying here today?

A Yes, sir.

Q And are these more complete in the details of what you examined and what you found on the four instances in question, that is, these four vehicles, than would be your own personal recollection of the similar items?

A Yes, sir.

MR. LOWE: Your Honor, we offer these four exhibits into evidence. And if Your Honor wants me to state the grounds I will. I think they're fairly obvious.

MR. SIKMA: Your Honor, we would object for the same reasons stated earlier. Counsel is using them for impeachment purposes, why he should point out what he's directing to. Other-{1803}wise, Your Honor, we'd suggest that the witness's testimony is the best evidence. The witness is present in the courtroom. If there's something that he wants to ask him about it, he can ask him about it. Otherwise we'd object to it.

MR. LOWE: Your Honor, may I state my reason?

MR. SIKMA: Your Honor, we'd approach the bench.

THE COURT: You may approach the bench to state your reasons.

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

MR. LOWE: I'm loaded for bear this time, Judge. There's no way in the world these can be kept out, starting out with Rule 612. If a witness uses a writing to refresh his memory --

MR. SIKMA: Mr. Lowe, would you keep your voice down.

MR. LOWE: If a witness uses a writing to refresh his memory for the purpose of testifying and then, second -- the first is while he is testifying which is not the case here.

Two.

THE COURT: Excuse me, what rule are you on?

MR. LOWE: 612. The second provision there is when he uses it to refresh his memory before testifying. Now, Rule 4 of 612 then provides that we are entitled to receive a document or see a copy of the document. Now, {1804} that's not applicable because under Rule 3500 rules we get it anyway. This is not apt to happen, but once having a copy we're entitled to it as the rule to cross-examine the witness thereon and to introduce in evidence those portions which relate to the testimony of the witness.

Now, the only thing in these reports is exactly what he has testified to. That is the sum of the testimony of him as to what he found. He said he found different items and he logged them, he tested them, he examined them. And for that reason, this being used before he testified, that is the first round that we would submit. This I might point out has nothing to do with impeaching a witness at all. And as to information which I want to ask him to bring out such things as the care with which he examined them, the thoroughness, the exhaustiveness with which he checked the weapons, the items and so forth as he logged them in, the thoroughness with which he made recordings of what he was finding.

I cannot ask him those without these documents because he has testified he does not remember the testimony in these 302's. He remembers some parts of it, but that he relies on these 302's as his business records and recordings that he made at the time it was filed.

So on that ground it would be admissible.

Secondly, very important, I'll wait for Your Honor if you want to look at them for a moment. They're all essentially {1805} the same, although the content is different. It's basically a listing of the items he found.

Rule 803 relates to hearsay exceptions where the availability of the declarant is immaterial. So here we have the declarant on the witness stand

under 803 paragraph 1(A) its present sense impression. A statement describing or explaining an event or commission made while --

THE COURT: Excuse me. Where are you?

MR. LOWE: 803 (1).

THE COURT: 803?

MR. LOWE: Yes, sir. Sorry, I thought you were already turned to that page.

THE COURT: I thought I was, too.

MR. LOWE: A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition immediately thereafter. These 302's he has testified were prepared very shortly after or contemporaneously with the finding of various items in the automobiles, the observing of conditions of the automobiles and that it was a recollection -- I mean a recording of those conditions. That he was immediately, while he was perceiving them or immediately thereafter. I think most of this is immediately thereafter that he actually did it because the dictation dates are within a day or two. So a present sense impression of what he was observing about these items {1806} in the cars would be a second independent basis, and this is not necessary to impeach him. It's not necessary to impeach him. And at this point I don't know whether it would impeach him or not because I haven't got it in evidence for the basis of glancing through it.

Now, 803 paragraph 5, it is a recorded recollection, and under that it says a memorandum or record concerning a matter about which a witness once had knowledge, but not has insufficient recollection to enable him to testify fully and accurately shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly.

He has testified that when this was fresh in his mind he made the 302 and that he no longer recalls the information in there except parts of it. That part of it he does not.

If admitted the memorandum or record made be recorded into evidence, but it may not be received unless offered by the adversary party. We are the adversary party.

Under 803 (6) records of a regularly conducted activity of a memorandum report, record or date of compilation in any form -- I'm skipping some parts -- made at or near the time by or from information transmitted by a person with knowledge if kept in the course of regularly conducted business activity; and if it was the regular practice of that business activity to

make the memorandum or report, record or {1807} date of compilation all is taken by the testimony which a qualified witness, it is subject to be entered. That is another independent basis.

It's a business record kept in the ordinary course of business and here I submit it is the best evidence because this witness admits that he does not presently have recollection.

MR. SIKA: Your Honor, I might ask Mr. Lowe to keep his voice down. You can hear it all the way through the courtroom.

You want to make an argument in front of the jury?

MR. LOWE: Rule 803(7) is also pertinent. The absence of entry in records kept in accordance, this is sort of the opposite side of the business records, and that is to show that regular business records are normally, and entries are normally made to show the absence of entry to establish the nonexistence or nonconcurrence of the matter. We offer it on that basis and I will vouch that there would be significant and material testimony to show from this witness, to how that there is an absence of at least one entry in these 302's, which is legally and factually very significant in this case.

Now, any one of those grounds is a relevant basis and none of them is couched in term that it was used to impeach a witness. That's not the point at all. I'm entitled to examine him to perhaps provide the basis of impeaching him. {1808} But also to clarify information he gave on direct. To bring out all of the details about things that he said on direct, it may not. It may simply be that it makes it more complete for the jury to understand the record of what exactly it was he did, or what exactly he found.

It doesn't mean it contradicts. So that the Government is mislaying its reliance on the fact that we must impeach over a prior inconsistency. Now, it's inconceivable to me in all of the trials that have been had that these 302's have been introduced in evidence routinely; that this document does not fall under at least one of those, and I submit under all of them there is no, the Government is not doubting the accuracy. They're certainly not trying to impeach their own agents and say these are not accurate. In the premises that we have recited are so far away from the rules of evidence as to calling into question what the reason is that they're trying to keep this material out.

MR. SIKMA: Your Honor, if I may respond to this. Number one, this clearly involves items under, first of all, Rule 612(2). It says -- Mr. Lowe left out the important part. That concerning those portions which relate to testimony of the witness. Now, there are, I don't know, about, about eighty per cent of the items in these 302' were not covered during the testimony

of this witness. That's one. Secondly, that we would object to it under this rule {1809} to those items not covered by the witness in direct examination.

Thirdly these 302's are written, a number of them, by persons other than -- well, here's one I don't know.

MR. LOWE: You're wrong. You're wrong. They're all by Cunningham.

MR. SIKMA: They're all Cunningham signed in part. So Cunningham has dealt with some of that. Cunningham is one of four people for example involved in finding that stuff. He can only testify to those items which he's familiar with. Now, he's not familiar with every item in that 302. He's only, some of them it indicates they're Special Agent Kelso. It's underlined by the defense counsel and he wants those underlined items of documents to go in. It's very clear that these are, these are mixed 302's. This witness can testify to certain items, but they certainly wouldn't be admissible under either Rule 803 or 612.

In addition to this it's reversible error to read aloud the prior statement of a witness in order to refresh his recollection. And in going, this is the United States, which is 37(F)2d 573 distinguishes between past recollection recorded and refreshing a witness's recollection. It says if a party can offer a previously given statement to substitute for the witness's testimony under the guise of refreshing recollection, which I would say is being done here, the whole adversary system ust be revised.

{1810}

I think what counsel is trying to do is trying to get the testimony of other agents, such as Kelson such as other persons who are involved in writing those 302's into evidence with this witness, and I think that's totally improper.

It's clear that these are not his 302's alone. They're made in conjunction with all of the other people that worked on this project. He's testified only to those items with which he's familiar and that goes completely outside the scope of what other people have testified to.

MR. LOWE: May I just point out a factual thing because I think you may want to distinguish. I don't know whether you will or not. These exhibits, 120 and 121 clearly state on their face, that is a list collected by Mr. Cunningham only. So to the extent that I speak to that last comment these two would clearly be admissible as being strictly what Mr. Cunningham found the lists.

Now, why Mr. Kelso joined in signing it, I don't know. But the catch 22 that the Government is proposing is that any time they would want to present a 302 from ever being introduced is put two names down there because you'd

never be able to have two witnesses on the stand at the same time. They're certainly able to bring it if one of these other ones, as to which part he knew and which part he didn't know.

Now, as to these two there is clearly no ground for not putting it in.

{1811}

THE COURT: Well, just a minute, though. It says a list of specimens collected by SA Cortlandt Cunningham. Then we have the signature of Kelso on there. Now, this may be his report.

MR. LOWE: Well, his signature also, Cunningham. But I asked him and he, Cunningham said he prepared these reports. So his testimony is in to lay the foundation for that.

MR. SIKMA: It says the list was made, but it doesn't say that he found all of those items either.

MR. LOWE: Oh, come on, what does it mean he takes a list Or the specimen collected by Mr. Cunningham. That's all I'm going to put in there.

MR. SIKMA: All right.

THE COURT: It says collected by Cunningham.

MR. LOWE: I don't know what it means if it doesn't mean that.

MR. SIKMA: I would still say that the Court, we would object to those not brought out on previous examination which will require an examination to exercise any portions not related to the testimony of this witness.

MR. LOWE: Judge, he stated he made a thorough examination of these cars. Were entitled to show that the thorough examination consisted of, what items he found. This is not trying to contradict him.

{1812}

This is to go to matters which were raised on direct examination to show the report he made as to what he found. Particularly in the ace of the fact that he does not now remember what he found.

THE COURT: But the 302 can be used to contradict him.

MR. LOWE: I don't necessarily want to contradict him. I want to show what it was he found.

MR. SIKMA: For what purpose?

MR. LOWE: For any proper purpose. I'm not limited on cross-examination to impeaching or contradicting a witness. Cross-examination also is to fully develop what he said on direct examination. He said he made a thorough examination and he collected certain items and he processed them and I want to show, and I'm entitled to show what it was he found. He doesn't remember in his own mind what he found.

THE COURT: Give them to him to refresh his recollection then. Ask him.

MR. LOWE: He says it won't refresh his recollection. He says he doesn't remember.

MR. SIKMA: I don't think he said that. In addition to this I would say that it's a waste of time, needless presentation of cumulative evidence under 403. It's a bunch of stuff that we're not offering into evidence. A bunch of stuff that's not before the jury, and it's totally irrelevant. {1813}

MR. LOWE: I've given five different basis under any of which we are entitled to show this. I just don't understand the Government's position. They've been to trial after trial. There have been hundreds of 302's introduced routinely under 803(1). The present sense impression meaning his, that what he's seen, it's admissible. It doesn't say I have to be contradicting the witness. This is relevant evidence.

MR. SIKMA: It does say he has to testify to it under direct examination.

MR. LOWE: Not under Rule 803. Absolutely does not.

THE COURT: Well, I will reserve my ruling and give you a ruling on it tomorrow morning.

MR. LOWE: This witness will be gone by then, Judge.

THE COURT: Maybe he'll have to be held.

MR. LOWE: All right. Now, because I don't want to have a lot of objections while I'm asking these questions, nor do I want to offend the Court's idea as to how I can properly use these as to what you've said, I want to ask him to list for the jury all of the items that he found in each of these vehicles since I can't do it by introducing the exhibits themselves. Am I to give it to him so he can read it, or am I to ask him if it refreshes his recollection, am I to read it to him? How does Your Honor want to proceed? We've got a horrendous list. That's the only way I can do it.

MR. SIKMA: If you have something that you want him to {1814} point out I suggest you ask him about it.

MR. LOWE: The entire list is what I want to point out. Now, if you want to --

MR. SIKMA: Ill object to it as outside the scope of the direct examination.

MR. LOWE: He examined the car and he found things in there and I'm entitled to find out what it was. Now, they asked him that on direct.

THE COURT: No. He's entitled to find out on cross-examination if there were articles found beyond that which he testified to. I don't think there's

any question.

MR. LOWE: Be a lot simpler to put these in. If the Government would put these in he could adopt it.

THE COURT: Without some further research on this you have to proceed accordingly.

MR. LOWE: How do you want me to proceed in that vein, Judge? Do I let him read it out loud, do I read it to him? I don't want to do it improperly and be up here again.

THE COURT: I think that you can ask him if it isn't true that he round this item or that item or this item.

MR. LOWE: I'd be happy to do that and I'll let him refer to a copy of it.

THE COURT: Any objection?

MR. SIKMA: No.

MR. LOWE: I'll let him refer to a copy of it.

{1815}

THE COURT: How can you refer to a copy of it?

MR. LOWE: May I suggest this, Your Honor. I think since you want to make this ruling I would like to have the ruling first because I don't want to bore the jury to tears when reading these things when we may want to refer to specific items later. And if Your Honor allows them to be admitted that solves the problem then. I'm not going to read the entire list. So I would ask that we be allowed to simply hold the witness until you make a ruling so that we can deal with it in an expeditious way and not tie up a lot of court time. I think it would help Your Honor's schedule.

THE COURT: What is your response to that? Your witness is going to get to the airport.

MR. SIKMA: No. Quite obviously, but I'm not going to give in on this issue because I think it clutters the record.

THE CURT: I'm not asking anybody to give up. I'm just asking for your response.

MR. SIKMA: I think that he can go into these items. If he wants some items to point out, let him go into it.

THE COURT: If he wants to reserve his cross-examination until after I have ruled on those exhibits, and I'm not going to rule without some further research on the question.

MR. SIKMA: Very well. I guess we'll have to hold the {1816} witness.

MR. LOWE: We'll just interrupt cross-examination at this point then and thy can put on whatever their next witness is. Thank you.

{1817}

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

THE COURT: Are you reserving further cross examination at this time?

MR. LOWE: Your Honor, pursuant to our discussion at the bench, I would like to reserve further cross examination until this witness comes back on the stand.

THE COURT: Very well. You may step down.

(Witness excused temporarily.)

MR. CROOKS: Your Honor, could we approach the bench for a moment?

THE COURT: You may.

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

MR. CROOKS: Your Honor, the reason I wanted to go to the bench, the next witness I had hoped to be able to accommodate so he could leave town today. He is a witness who would really be the first of the Oregon people.

Now, counsel has indicated that they would wish to make argument out of the hearing of the jury on this Oregon incident; and I was intending to call him, call him now in the hopes we could get him out. I think his plane is at 3:00 o'clock, but if they are going to make extended argument --

THE COURT: (Interrupting) I do not see how you can {1818} get somebody out at 3:00 o'clock.

MR. CROOKS: It appears now that's probably correct.

MR. LOWE: It would help if you would just give a brief statement as to the nature of it -- we haven't had a chance to analyze this -- in order to formulate what questions we have.

MR. CROOKS: He identifies Mr. Peltier as being in the recreational vehicle and the Plymouth which the Court has already seen in Exhibit 40-C, I believe it is; and he sees him on the date of the incident in Oregon, prior to the incident, puts him with the vehicle. He sees him at The Dalles, Oregon. The shooting and a confrontation with the officer takes place on the other side of Oregon at Ontario; but he does put Mr. Peltier at the vehicle.

MR. TAIKEFF: Mr. Crooks, I think that the portion of the Oregon case we are concerned with is not encompassed by that testimony. I think if you will call him right now we probably will not cross examine him and he can make his 3:00 o'clock plane; and then we can approach the bench. I think this man can make his plane if we go forward.

MR. CROOKS: That's what he would testify to. He doesn't get into the shooting part of it in Oregon.

MR. LOWE: Or the finding of anything in the vehicle?

MR. CROOKS: No.

(Whereupon, the following proceedings were had in {1819} the courtroom in the presence and hearing of the jury:)

MR. CROOKS: Your Honor, if it please the Court, the United States would call Mr. Eugene Strain.

EUGENE STRAIN, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. CROOKS:

Q Mr. Strain, would you state your full name again for the record, please?

A Eugene Strain.

Q Where do you leave, sir?

A The Dalles, Oregon.

Q And what is your employment?

A Service manager for Sunset Motor Company.

Q And calling your attention back to the fall of 1975, were you service manager or employed by the same oil company at that time?

A Yes.

Q All right. Calling your attention specifically to the 14th day of November, 1975, were you on duty with the Sunset Oil Company at The Dalles on that occasion?

A Yes.

Q During the course of the day did you in the normal duties as an attendant have occasion to service a Dodge motorhome which was accompanied by a Plymouth stationwagon?

{1820}

A Yes, it was in the repair shop.

Q I would show you what has been marked as Government's Exhibit No. 61, the first page of it, and ask if that is a vehicle which you associate in some way?

A (Examining) Yes, it is.

Q And is there anything particular that you see about that that you can identify and recall?

A The left windshield wiper is missing on the vehicle. That Is the reason it came into the repair shop, to see if we could assist them in repairing it.

Q There is also a picture of a white Plymouth with brown panel. Do you recall that vehicle specifically?

A There was a light-colored vehicle traveling with this unit. On that

car I can't say definitely whether it was.

Q You can't make a positive identification on the Plymouth wagon, but you can make a fairly positive identification on the picture?

A Yes.

Q And what was the occasion that you had to service the Dodge motorhome?

A They brought the unit in. They were having problems trying to repair this windshield wiper, so they could use it.

Q And how many people -- just not necessarily specifically -- how many people were with the motorhome?

A The only ones that I actually saw were three.

{1821}

Q All right, and approximately how long were you with the individuals that you identified as having been with the motorhome?

A About 15 to 20 minutes, I would say.

Q 15 to 20 minutes. Did you visit briefly off and on with the various individuals that we are concerned with there?

A Yes, I was talking to the two of them.

Q Now, would you point out just very briefly for the jury -- we have a map over here which is Exhibit 70. Would you point out where The Dalles is with reference to the State of Oregon, calling your attention to Exhibit No. 7? You can take the pointer if you would.

A I think it is approximately right in here, right here (indicating). We are actually 87 miles east of Portland, is where we are at. The Dalles is right there (indicating).

Q And the Dalles is at the western-most end of what is commonly referred to as the Columbia Gorge, is that correct?

A Yes.

Q I would ask you, Mr. Strain, if you can identify the individual or one of the individuals who was in the company of the Dodge motorhome as being in the courtroom today?

A This gentleman (indicating), sitting over there with the orange.

Q This would be the gentleman in the orange shirt at the counsel table?

{1822}

A It has been a long time.

Q All right. Give me your best recollection if you can identify him or anyone else.

A Not real positive.

Q You are not real positive?

A No, sir. It has been a long time.

Q Well, would you describe the man that you saw and state what differences, if any, you see with the individual you tentatively identified?

MR. LOWE: Your Honor, I object. There has been nobody tentatively identified. He is looking around the courtroom, and he his not positive he spots anybody. I object to the form of the question.

THE COURT: He may describe the individuals that were present.

Q (By Mr. Crooks) Describe the individual that you have in mind.

A Probably around five feet ten; five, nine; five, ten, somewhere in there; 170, 190 pounds; dark, curly, long hair; and a mustache at the time, of either Indian or Spanish descent.

MR. CROOKS: All right. We have no further questions.

MR. LOWE: May we have just a moment?

THE COURT: You may.

(Counsel confer.)

MR. LOWE: We have no questions, your Honor.

{1823}

THE COURT: You may step down.

MR. CROOKS: We would ask Mr. Strain be permanently excused so he can catch a plane.

THE COURT: Any objection?

MR. LOWE: No objection, your Honor.

THE COURT: You are excused.

THE WITNESS: Thank you.

(Witness excused.)

MR. HULTMAN: The Government calls Agent Waring, your Honor.

(Counsel confer.)

GERARD P. WARING, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. HULTMAN:

Q State to the jury and to the Court your name.

A It is Gerard P. Waring.

Q Where is your home, Mr. Waring?

A It is in West Des Moines, Iowa.

Q What is the nature of your occupation?

A Special Agent with the FBI.

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

A Since October, 1970.

Q What -- how long have you been an agent assigned to the Des Moines

area?
{1824}

A Since March, 1974.

Q And what is the general nature of your duties and responsibilities as a Special Agent of the FBI?

A Well, in Des Moines I am primarily concerned with the investigation of interstate transportation of stolen property cases, most generally fraudulent check type cases.

Q Is that what is normally referred to in the area of white collar crime?

A Yes, sir.

Q Was that your responsibilities primarily before the months o May and June, 1975, as well as since that time?

A Yes, it is.

Q Did you have an occasion sometime in 1975 to leave Des Moines, Iowa, and that general area of assignment and go somewhere else?

A Yes, I did.

Q And would you relate to the jury how that came, approximately when it was and how it came about?

A Well, a few days prior to May 26th, 1975, I was notified by my Assistant Special Agent in Charge of the Omaha Division that I was going to be assigned temporarily at the Pine Ridge Indian Reservation in South Dakota, and that I would have to report for duty on May 27th, 1975, in Rapid City, South Dakota.

Q And were you informed as to what was to be the purpose of your assignment there?
{1825}

A Yes, sir. I was being sent up there just to assist other FBI Agents working routine criminal matters on the Reservation.

Q Do you know whether or not there was any other individuals who received similar instructions from your own knowledge?

A Yes, sir. There were five other FBI Agents.

Q And do you know who those were?

A Yes. There was one other FBI Agent from my division which is Omaha.

Q Did you have occasion to discuss the assignment with him?

A Yes, I did, sir.

Q All right. Now, you referred, I believe to the word "assignment" or "special assignment", those words have been used.

What did that mean to you then as well as now?

A Well, it is only special in the sense that I was not going to be working in Des Moines, Iowa; that I was being temporarily assigned outside of my normal duty place.

{1826}

Q Is it fair for me to conclude that a temporary assignment and a special assignment are one in the same in normal parlance?

A Yes, sir. I look at them to be the same way.

Q What if anything did you then do once you went to the new area of temporary assignment that you had?

A As I said, on May 27, 1975 I reported into our resident agency in Rapid City, South Dakota, then from there I was assigned to work primarily the Pine Ridge Indian Reservation. So I was going to be temporarily staying down in Gordon, Nebraska at the Hopkins Motel.

Q When a change of assignment or a temporary assignment of that kind comes along, are there some routine documents that indicate that very thing?

A Yes, there are.

Q Did routine documents of that kind come to your attention at that particular time?

A Yes, they did.

Q I'm going to show you what's been marked as Government's Exhibit 51 which Counsel has indicated there is no objection so I will move without foundation, Your Honor, and ask you whether or not you recognize a transfer and movement document of that kind?

A Yes, sir.

Q And did you receive one of this general kind and nature at that time?

{1827}

A Yes, I did.

Q This particular one is not yours, is that correct?

A That's correct.

Q I'm going to show you also what's been marked as Government's Exhibit 52 here and this is a field office register which indicates somebody going from one spot of assignment to another area, and did you receive one similar to that at that time?

A Yes, I did.

Q And are you generally familiar again with documents of this kind?

A Yes, sir.

Q I'll show you what's been marked as Government's Exhibit 53 and ask you whether or not again that is a routine type of document which indicates

somebody is being transferred from one spot to another?

A Yes, it is.

MR. HULTMAN: Now, Your Honor, I will offer into evidence Government's Exhibits 51, 52 and 53 at this time.

MR. TAIKEFF: There is no objection.

THE COURT: Very well. Exhibits 51, 52 and 53 are received.

MR. HULTMAN: Yes, Your Honor.

Q (By Mr. Hultman) Now about when was it that you arrived on he reservation then, if you recall, approximately?

{1828}

A Well, I had gone down through the reservation on the way to Gordon, Nebraska, to the motel on May 27, 1975.

Q And did you proceed then from that day to carry out normal responsibilities of an agent?

A Yes, sir.

Q Would you just tell the jury in general what it was then that you did for the next few weeks.

A Well, basically myself and the other agents that were assigned with me on this temporary assignment, since it was a lengthy drive back to Rapid City, we more or less just established working facility at the motel in our rooms and we just conducted our investigations right from the motel and would drive daily to the reservation to conduct any investigations that we had been assigned.

Q Now did you have a, somebody that you worked with most of the time?

A Yes, I did, sir.

Q Who was that?

A That was Special Agent Vincent Breci.

Q Where was he from? Where had he been reassigned from temporarily?

A He had come from the Omaha headquarters office.

Q Now would you tell the jury just in a sentence or two what the nature of the work was that you did up until the 26th of June from the time you got there?

{1829}

A Basically was just very routine criminal matters. It was nothing outstanding. There was some break-ins and just theft that occurred on the reservation that I worked.

Q Did you make some arrests during that period of time?

A Yes, sir I did.

Q Is this a norEl and routine part of your responsibility to serve

warrants and execute warrants or to make arrests on warrants that are outstanding?

A Yes, sir, it is.

Q Now did you have occasion on the 25th of June to be concerned with any warrants primarily, as well as maybe a number generally?

A Yes, I did.

Q And would you tell the jury what the reason was and what those warrants were?

A Well, we had on June the 25th one of the agents from Rapid City, South Dakota notified me that four arrest warrants had been issued and that I was going to assist them in attempting to locate these individuals and place them under arrest.

Q Procedurally, would you explain to the jury how it is that it works in terms, do you have normally the actual warrant itself in your possession?

A No, sir.

Q Is the reason there may be many agents in many places looking pursuant to a given warrant, is that a fair conclusion on my {1830} part?

A Yes, sir.

Q But once you are notified and have knowledge, then you are in a capacity to perform certain functions, is that right?

A Yes, sir.

Q And you had so been notified as far as these four particular warrants that day, is that right?

A That's correct.

Q Now would you explain to the Court who those warrants concerned and what was the nature of the charge?

A Well, the actual warrants were issued for individuals named Teddy Paul Pourier, one was named Hobart Horse, one was Herbert Thunder Hawk and an individual by the name of Jimmy Eagle and they'd been issued for armed robbery, assault with a deadly weapon.

Q So there were warrants outstanding against some of those individuals for one charge and another warrant for certain individuals for another charge, is that right?

A That's correct, sir.

Q Now what had you then in fact done and with whom on the 25th of June?

A On the 25th of June I accompanied Special Agents from Rapid City and we had conducted an investigation up in the area known as Sharps Corners, in that general vicinity on the {1831} reservation, and had located and

assisted in the arrest of Teddy Paul Pourier.

Q What if anything then did you do beginning on the morning of the 26th? Would you start with when you first got up in the morning on the 26th of June, 1975.

A When I got up I just signed on duty at the motel which was 7:30, approximately 7:30 A.M. I signed on duty. Then I just proceeded to look over some work that I had previously done, prepared some dictation and just generally get organized from previous investigation that had taken place.

Q Let me ask you about your administrative work. Were you doing some administrative work during this period of time?

A Yes, sir.

Q With reference to administrative work such as the typing of your reports and so forth, are there many occasions when you do that yourself?

A Yes, there is, sir.

Q And was this particular period such a period in time?

A Yes, sir.

Q Now did you see anybody -- who was the first person you saw that morning that you recognized or knew?

A Special Agent Ronald Williams.

Q And where was it that you saw Agent Williams, do you recall?

A Yes. Agent Williams came up to my room and just asked me if I wanted to accompany him down to the motel coffee shop and {1832} have a cup of coffee and talk over some of the investigation that we had been doing together.

Q Had you been actually working with him the day before?

A Yes, sir. He was there along with a number of other special agents.

Q Now how many agents were on the entire reservation at this particular time to your knowledge?

A On the 26th of June, sir?

Q Yes.

A There was five agents that I knew of.

Q Now you said you had coffee with them and you discussed some things. What was it you discussed in particular?

A Well, basically Ron Williams was primarily interested in attempting to locate Jimmy Eagle since he had worked the previous day in the afternoon to locate Jimmy Eagle and he believed that Jimmy Eagle was on the reservation and most likely would be in the Oglala, South Dakota area.

Q And did you discuss or make any plan for the day?

A Yes, sir, we did. Ron discussed with me the fact he was going to go up to the Oglala area and just ask some questions in an effort to locate

where Jimmy Eagle was. I told Ron that I would go with him to assist him locating Jimmy Eagle.

Q Was there a particular reason why you offered to assist him on that morning?

A Just generally because normally we look for an individual {1833} and we go into a restaurant, we have two agents.

Q And was his partner that day available that had been with him?

A well, he didn't, he wasn't actually working with a partner but we would pick up one of the agents that was assigned there on a temporary assignment to work with him when he needed help.

Q Now what if anything happened next that morning?

A Well, after briefly discussing what had taken place the day before and the fact that we'd get together, go up to the reservation and look for Jimmy Eagle. Shortly afterwards Jack Coler entered the restaurant, sat down and had a cup of coffee and in the ensuing conversation he told Ron Williams that he would go with him. Then I indicated that since they would go together that I would meet them later on with Special Agent Breci and all four of us would go out on the reservation and look for Jimmy Eagle.

Q Is it fair for me to conclude that it was only by happenstance you did not proceed with Ron Williams that day and Jack Coler?

A That's correct, sir.

Q What if anything happened next?

A Well, as soon as we finished the coffee we just went back up to our rooms and Ron and Jack were then going to prepare to leave the motel area, but I had asked Ron if he'd stop by my {1834} room prior to leaving the motel area so I could give him some mail to drop off up at Rapid City later on in the day.

Q Did you in fact then see them leave that morning?

A Yes, sir. Shortly afterwards. Agent Williams came by my room. I gave him some mail. I again told him that I'd meet him up approximately noon time with Special Agent Breci and myself and we'd go with him and Jack Coler to look for Jimmy Eagle.

Q Did you later then that morning observe them leave in any automobile?

A Yes, sir.

Q all right.

I'm just going to show you what has generally been marked here as Government's Exhibit No. 57 and just ask you, first of all, if you remember what kind of a car Agent Coler was driving that morning?

A Yes. Agent Coler was in a white over gold Chevrolet.

Q And I would show you just in general some photographs in Exhibit No. 57 and ask whether or not you identify the vehicle that's represented there.

A Yes, sir. That's Agent Coler's car.

Q Is that the one he left in that morning?

A Yes, sir.

Q I'm going to show you and ask you -- first of all, before showing you, do you remember the type of automobile that Agent {1835} Williams was driving that morning?

A He was driving a dark green Rambler.

Q And I would show you what's been marked as Government's Exhibit 58 and ask you whether or not you'd identify any object that's represented there at the beginning.

A Yes, sir. That's Agent Williams' car.

Q Now had you on previous occasions, like even the day before, seen these two agents and their particular automobile?

A Yes, sir. I had ridden in both cars prior to that day.

Q So that you were generally familiar with them, is that correct?

A Yes, sir.

Q Now did you in fact leave later that morning?

A Yes, I did.

Q And did you leave with anyone?

A Yes. Agent Breci and myself left the motel between 11:00, 11:15 A.M. that morning.

Q And would you describe to the jury how you were traveling.

A Well, we were in my car.

Q And who was driving?

A Agent Breci.

Q Now would you describe to the jury where it was you left from, where you were going and then anything that came to your attention along the way.

A Well, we left the motel and the general area between 11:00, {1836} 11:15 A.M. since we wanted to meet up with Special Agents Williams and Coler in the village of Pine Ridge around noon time. So we decided to leave there and drove to the city of Gordon, Nebraska and we headed north toward the Pine Ridge Indian Reservation.

Q And how, approximately what is the distance between those two spots?

A At this time I don't recall the distance. Takes about 30 to 40 minutes to drive that distance.

Q At what rate of speed?

A At 55 miles per hour.

Q And where was it then in proximity, to the point from which you're leaving to the point which you're going to did something come to your attention? Did you state about halfway, about halfway --

A About halfway into the village of Pine Ridge I heard agent Williams come on the car radio.

Q Now would you explain to the jury and tell the jury what it was that you heard at that time.

A Well, the first transmission that I noticed from Agent Williams, he stated that there was a red and white vehicle traveling near him and there appeared to be a number of Indians in the vehicle.

Q And did he say anything about the Indians at all?

A That was shortly thereafter his next transmission was {1837} that the individuals appeared to have rifles and then almost all continuing with the radio transmission he stated that he was being fired on by these individuals.

Q And what if anything did you hear or do next?

A Well, at that point in time naturally Agent Breci accelerated since we'd, figured we'd get up in the area of the Pine Ridge Reservation as soon as we could. And Agent Gary Adams then came on the radio immediately after hearing Agent Williams had come under fire.

Q What if anything did you hear now?

A Agent Adams asked Williams his location and in response to that Williams told him that he was in the Oglala, South Dakota area near the Little residence and then again asked for help to get there as quick as he could.

Q And what if anything did you hear next?

A Well, then Williams continued saying that the firing was coming to him from the ridge above him and that he needed help quick to get the Indians off the ridge since the firing was above him.

Q What if anything did you hear next?

A Well, at that point again Williams was still transmitting and he stated on the radio that he needed help quick, that the Indians were on the rise and that if we didn't arrive quickly to help him that they were dead men.

Q And what if anything did you do?

{1838}

A Well, at that point, since I was not totally familiar with the areas of the reservation, I attempted to contact Williams on my radio to get an exact location as to where we could find him.

Q And he had said to you words that he was at the Little residence, is that as you read it, as you testified?

A Well, earlier when Special Agent Adams had contacted him, that was his response and he was near the Little residence.

Q That didn't mean anything in particular to you, that's why you were trying to get back to him, is that right?

A Not at that time; no, sir.

Q Now what if anything happened next?

A Well, I attempted to get through to Agent Williams but I didn't get the response since I had asked his location but he did come back on the radio and at that point he was noticeably out of breath. There was more excitement to his voice and the next words I heard him say that, "I have been hit," and that was the last transmission that I heard from Williams.

Q Now would you explain to the jury in your own words what was the time frame or sequence, as you recall it, from the first broadcast that you heard, that you described to him, to the last one you just now described?

A The entire sequence of transmissions would have been just a very few minutes. I can't place an exact time frame on it, but it was just a very few minutes.

{1839}

Q And was there any other transmissions that you heard during the few minutes, as you described it, other that the ones that you have indicated to the jury?

A No, sir. Not at that time.

Q Now what if anything did you do next?

A Well, as soon as I heard Williams announce on the radio that he had been hit, I at that point contacted the Rapid City resident agency on my radio and I asked them if they would contact the BIA or Bureau of Indian Affairs police department in Pine Ridge, contact the South Dakota Highway Patrol and any other law enforcement agencies that would lend people to assist us. I told them my interpretation of the radio transmissions were that Agent Williams had come under fire and that he had been hit and that he was most likely accompanied by Jack Coler.

Q What about your partner, had he done anything in terms of what he was doing during this period of time?

A He was driving the vehicle at a high rate of speed.

Q And approximately how high a rate of speed, if you know?

A We were in excess of 100 miles an hour.

Q Now what if anything was the next thing that transpired?

A Well, at that point, after notifying the Rapid City resident agency, myself and Agent Breci were just attempting to assess our own actions when we eventually located the area {1840} where the shooting had taken place. We knew we had one, two handguns and one shotgun and one rifle and we felt we might need additional weapons so we had planned on, as soon as we arrived in Pine Ridge village we were going to stop at the BIA office and see if we couldn't pick up some additional weapons.

Q Now were the weapons that you had, that you have referred to those that you normally carry during routine matters?

A Yes, sir. Those are the weapons that we normally have available to us.

Q But in an emergency matter of the kind that has now come to your attention, you then decided you needed additional equipment, is that right?

A Yes, sir.

Q So what if anything then did you do?

A Well, when we hit into the village of Pine Ridge, Vince Breci stopped the car and I told him to get the shotgun and the rifle that we had out of the trunk and I immediately proceeded to the BIA office to not only obtain weapons but to also notify them of the events of what was happening if they hadn't heard.

Q What if anything did you find when you got to the BIA office?

A I found the door was locked and I couldn't get in and there {1841} was nobody at the building.

Q So were you able to get any of the things that you thought you might need or might be of necessity to you?

A No, sir.

{1842}

Q So what if anything did you do next?

A We at that point, due to the urgency of the situation, I just immediately turned around. We got back into our car and we proceeded north our of the village of Pine Ridge and then I contacted Special Agent Adams on my radio again.

Q And what if anything happened next?

A Well, I contacted Special Agent Adams because at this point I still wasn't sure of the location, of where the shooting was. And Agent Adams notified me just to continue north on Highway 18, and that as we come north three or four miles of the Oglala area that we should see him on the west side of Highway 18.

Q What if anything happened next?

A Well, we just continued north and shortly thereafter we did notice Special Agent Adams car on the west side pulled off of Highway 18, and that Special Agent Adams was down beside the car kneeling down.

Q And do you know from your observation at that time what he was doing?

A Yes, sir. He was definitely being shot at.

Q And was there, could you see what he himself was doing at that particular time?

A At that particular time he was just talking on the radio.

Q All right. Now, I'm going to ask you to point out to the jury on Government's Exhibit No. 71, which is the exhibit immediately behind you, to show the Jury where you first can {1843} show them on the map you would appear on this particular exhibit.

A Well, as I would come down the highway we were up Highway 18. I would be coming from this point towards this direction (indicating).

Q All right. So you had already been to Pine Ridge which would be to the right of Government Exhibit 71; is that right?

A Yes, sir.

Q And you were traveling then in the direction of Oglala?

A Yes, sir.

Q On Highway 18.

All right. Now, would you point out to the jury where it was now, where you proceeded to and where it was in the general vicinity that you saw Agent Adams, his car and Agent Adams apparently talking over his microphone?

A Agent Adams would be in this general area right in here off of the highway (indicating).

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

MR. TAIKEFF: Your Honor, could the record reflect that in response to the earlier question he pointed to the area that we might describe as the place to which Adams backed up.

MR. HULTMAN: All right. That's fine, that's fine.

THE COURT: The record may so show.

MR. HULTMAN: Very good.

{1844}

Q (By Mr. Hultman) All right. Now, you might point to the jury at this time what the general direction of Mr. Adams, of Agent Adams' car was, what direction was it generally pointed if you can in just in a general direction on Government's Exhibit 71.

A As I recall he had his, the car would have been just slightly on an angle off of this road because he had the driver's door open to the Highway

18 side that he was kneeling down in that --

Q Would the general direction of the car be somewhere in the general direction of the housing area of Jumping Bull's as different from Highway 18?

A Yes, sir. When I saw the car it was just stopped right there and I would say that the front of it would be pointed off in this direction (indicating).

Q All right. Very good. Now, what if anything did you observe or do next?

A Well, at that point we knew that Adams was under fire right here (indicating) so we came past his location and we turned into, this is just a dirt path right over here (indicating). We turned in off of there and there's high ground in here (indicating). So we just pulled up in this general vicinity, stopped and got out of our car.

Q All right. How do you know he was under fire?

A Because I could hear the rifle shots.

{1845}

Q All right. And had he already transmitted anything between the two of you? Had you had any radio transmissions?

A Yes, sir. He told us he was under fire and for us to come up this way (indicating) because he knew that this would afford some protection. Not to get out into the open or where there was no protection.

Q So there were two reasons that you drew the conclusion that you did; is that right?

A Yes, sir.

Q Now, what if anything happened when you -- did you get out of your vehicle?

A I immediately got out of my vehicle and I proceeded to the top of this small rise right up along here on this side (indicating).

Q And what if anything happened within that period?

A Well, immediately upon reaching that rise there were rounds hitting not only around me but going for me.

Q All right. Now, could you tell generally the direction from whence the fire was coming?

A Yes, sir.

Q Would you point out to the jury the general direction it was coming from?

A Well, generally from this area right in here (indicating).

Q All right. Now, would you describe the nature of the fire that you

observed and heard at that time.
{1846}

A Well, the condition to the rifle fire, there was some automatic rifle fire also.

Q All right. Now, when you say "automatic" are you differentiating, tell the jury when it is that you are indicating by automatic fire?

A Well, automatic fire would be similar to machine gun fire. It would be a rapid succession of shots as opposed to a single shot rifle or a semiautomatic rifle.

Q You served in the military prior to this time?

A Yes, sir, I have.

Q And have you been exposed to a number of types of fire?

A Yes, sir.

Q And you are generally familiar with the type of fire that you are referring to?

A Yes, sir.

Q Now, you wouldn't have any way of knowing specifically at that time, would you, Agent Waring, whether or not it was coming from an automatic, in a technical sense, rifle as different from a semiautomatic weapon in a technical sense?

A No, sir.

Q So what you are referring to then, it was rapid fire in layman's terms, is that what you are saying?

A Yes, sir.

Q All right. And that some of the fire was different, very different from the rest of the fire, is that a fair conclusion {1847} for me to make?

A Yes, it was.

Q All right. Now, what if anything, you might resume the stand, did any other persons appear or did you observe any other persons in the area at that time?

A Not at that time, sir. It was just myself, Agent Breci and Agent Adams. And there was an individual with Agent Adams, but I don't know who that was.

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

A Well, from that point, since it was obvious that we wouldn't see or I personally couldn't see anyone that was shooting at me, I did not return any fire at that point.

I felt that the best course of action was to get back to my vehicle and get on the radio and assist other units that were enroute into the area.

Q Did you in fact do that then?

A Yes, I did, sir.

Q All right. Now, while you were in that position did you hear any other sounds that were distinct other than what you've indicated to the jury thus far?

A Yes, sir. After arriving into the area and hearing the rifle fire and the automatic rifle fire, I did hear a number of explosions in the distance to the west of my location.

Q All right. And would you indicate the general direction that you've indicated that you heard those explosions from where {1848} your position was.

A Well, they were to the west of my location.

Q Did you have any way of determining specifically where they had come from other than a general direction?

A No, sir.

Q All right. Do you have an opinion as to what they sounded like?

A Sounded like dynamite to me, sir.

Q Have you had experience in dealing with dynamite in the past?

A Yes, I have, sir.

Q And where, just in a general sense, on what occasions, what was the reason for that?

A Well, both in the military and also at the FBI Academy.

Q Did you have occasions in the, in your military experience to work with demolition?

A Yes, sir. I attended the U.S. Army demolition school in West Germany.

Q So this is something of which you have some unique knowledge, not just a general knowledge?

A No, sir.

Q All right. Now, what if anything happened next of any significance to you?

A Well, at that point we just stood by for a short while and then it was approximately between 12:30 to 1:00 P.M. that other {1849} agents started to arrive. And at that point also some BIA police officers had come into the area and were also arriving at that point.

Q All right. What if anything did you do with any of these other agents during this time?

A Well, myself, Dean Hughes and a number of BIA police officers decided that our best course of action would be to attempt to work ourselves to the rear of where we believed the firing was coming from.

Our main purpose was to locate the exact position of SA Coler and Williams and to determine their status.

Q Now, did you know anything at this time other than what you've already told the jury concerning where they might be?

A No, sir.

Q Or what their status may be?

A I had no idea what their status was.

Q Other than the communications that you had heard over the transmitter by Agent Williams?

A That is correct.

Q All right. What if anything did your group then do?

A Well, after gathering there and just briefly setting forth the fact that we were going to work our way to the west to come up to the rear of the area where we believed the firing was coming from, we sat out from the position where I pointed to where I parked my vehicle and we proceeded several hundred yards {1850} in a westerly direction.

Q All right. Would you take the pointer now and again go to Government's Exhibit No. 71 and beginning with your position at your car would you indicate where it was then that you went, the route, the general route that you took showing on Government's Exhibit 71 where you can. And if there are places where you can't, showing approximately with relationship to the exhibit where it was you went.

A Okay, sir. After we got our group together we traveled back now over in this area, this little indication here for a dirt road (indicating). The ground is rather high right up along this road here (indicating). It is cut through which would afford some protection from anything that might come from this area. So we worked our way both across just the open ground here and down this road several hundred yards until we get down into the creek bed area.

Q All right. And let me ask you just a word or two. Once you got out of your car and went up to the area generally where Adams and his car was, would you describe to the jury what the general topography was, what you generally could see in looking to the south and to the east. Would you just, in general terms, tell them what the topography there was that you could observe from that point, and in return who could see you from those points at that point?

A Well, from in this general vicinity you can see basically {1851} everything coming across over to this, where this plateau would drop off right in here (indicating).

See these residences, plowed field out here, Jumping Bull Hall, and some, some of this area coming down through here (indicating).

Q Now, could you see at all the area from where it indicates the edge of the plateau from there on down to the creek area?

A No, sir. From that out this direction the only thing you really can see are the tree tops that would border this low area down in here (indicating).

Q All right. That's other than, that's after you drop off the plateau itself?

A Yes, sir.

Q All right. Now, would you indicate then once you got to the stream, would you describe what the nature of the area was in terms of shrubs and so forth once you got to the stream area.

A Once we arrived down in here (indicating) it becomes very thick. The bushes are real thick and you're in ankle to knee deep water and a lot of mud and moss through here (indicating).

Q What's your general visibility in that area?

A It's not very far at that time. The bushes are thick in there.

Q This is the 26th of June; is that correct?

A Yes, sir.

Q What if anything did you do?

{1852}

A From that point, once we all arrived down in this area, we could still hear the sporadic firing coming back at that point we had been back up to the location from where we had just come from.

We traveled down along maintaining a position in these trees and bushes and the creek bed and so forth, just to maintain some cover as we came down along this way.

And while we traveled along this route we did continue to hear sporadic firing.

Q Now, as you traveled along that route could you see any of the open area that is represented by, on Government's Exhibit No. 71?

A Once you get down into here there is kind of a, I'd guess you call it just a creek bed or a high ground area that actually prevented me from seeing anything back up into this area (indicating).

Q So that along the creek itself it's a very steep dropoff, again generally speaking; is that correct?

A Yes, sir.

Q All right. Now, would you continue to trace for the jury where it

was, the group, that you were in proceeded to.

A Well, after we --

Q And anything that happened as you proceeded.

A Okay. As we moved down along here we just continued around following the general outline of the trees in here. And {1853} we continued on to a point that brought us out right up in here (indicating).

Q All right. And where were you with relationship to the group you were with when you arrived at that point?

A Right at this point, sir. (indicating)?

Q Yes.

A Well, myself and Dean Hughes, we were more or less out in front of the group of BIA officers.

Q All right. I would like you to mark on Government's Exhibit 71 at this time, maybe with an Z-1, Z-1, where it was that you came out to the edge of the trees, the point which you're now talking about.

A This would be approximately?

Q Approximate location. I understand.

A (Indicating)

Q Now, what if anything happened at that time?

A Well, that was the first time in our group that actually come out of some tree cover and immediately upon moving into the open we had one shot that came into the group, or right past the group.

Q And could you tell approximately or what direction it had come from?

A Generally it was in from this direction (indicating), in this area toward us, we were on the low ground.

Q At about how far away were you in yards from the general {1854} area from whence the round came?

A I would say approximately a hundred yards.

Q All right. What if anything did you do at that time?

A I immediately, along with the rest of the group, just went down to the ground and went back into the tree cover and just tried to get as much cover as we could at that point.

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

A Well, it was at that point that Agent Hughes and myself then discussed the fact that we wanted to work ourselves into a position since we were, we knew that the firing was generally coming from this area, we believed the green house here, out toward our original location.

So we wanted to get into a position close enough so we could yell to the individuals in the green house, identify ourselves and then ask them

to come out at that point.

Q All right. Now, from the time you had left over at your position in the general area of Highway 18 where you had left your car and traveled down to the creek area and then had generally followed the creek around to the point where you came out of the woods and the first shot was fired at you, had you seen at any time during that period of time any of the buildings or the area that you're now referring to? When was the first time that you saw any of the buildings that you're now referring to there on the top of the crest?

A It would have been right at the point where we came out of the tree cover. Right down here (indicating).

{1855}

Q So that if you generally followed the route you are following, you were in a position where you really literally couldn't see anything beyond, is that a fair conclusion on my part?

A That's correct, sir.

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

A Well, at that point we began to kind of spread out along here (indicating), kind of a bank area where you can get down and it affords a little cover, towards the tree. Agent Hughes decided he would go forward to the green house in a position so when he yelled they would be able to hear.

Q Now, did anybody in your group return fire on this occasion when you first came out of the woods?

A When we received that warning coming around?

Q Yes.

A No, sir.

Q It was then that you made the plans that you referred to, is that right?

A That's correct, sir.

Q All right. Do you have any idea approximately what time of the day this was in period of time?

A We arrived at this location marked Z-1 at approximately 2:00 to 2:15 p.m., sir.

Q All right. Now, would you explain to the jury then what the plan was that was decided upon at that time with reference {1856} to any people that might be in the area of the houses?

A Well, Agent Hughes again was just going to go forward and identify the group, and what he did was he walked up, oh, within a hundred yards of

the house and proceeded to yell at -- words to the effect, I can't get the exact wording, but the words to the effect, " me green house, you are surrounded by the FBI and BIA. Throw down your weapons. Surrender, no one will shoot."

Q All right, and did you at this time yet have any idea as to who the individuals might be or where Agent Williams or Agent Coler might or might not be?

A Not at that time, sir. In fact, Agent Dean Hughes had cautioned all of us in the group that since we didn't know where Agent Williams and Coler were, "Even if fired upon, don't just return fire unless you specifically see someone you are shooting at."

Q What, if anything, next then did in fact happen?

A Well, as soon as Agent Hughes completed yelling toward the green house, two individuals appeared right on this side of the green house (indicating), this green house right here, sir (indicating), and started firing rifles in our direction.

Q And what, if anything, happened next?

A Well, it was at that point when we had two individuals firing at us that our group returned fire.

Q All right, and did you hear anything yelled or anything {1857} said by anybody in the group at that time?

A Yes, sir. After just a short exchange of gunfire, the individual to my right yelled, "I think I have hit one."

Q Did you know who that was at all?

A No, sir.

Q All right. m is was during the return of fire and the fire itself, is that right?

A It was during the exchange between that group and our group, yes, sir.

Q What, if anything, happened next?

A Well, at that point, shortly after the firing ceased, both the individuals were gone, one went around the house and one appeared to go down on the ground, so it was shortly thereafter that BIA Officer Del Eastman had worked his way into a tree; and then he called to me and asked me to join him in the tree because he wanted me to look at something.

Q All right, and what, if anything, did you then do?

A Well, at that point I got into a rather large tree, right in this general vicinity (indicating), and with the scope on my rifle -- he had pointed out to me a vehicle down here (indicating) should be approximately

200 to 250 yards from the green house -- and I looked through the scope and identified the vehicle as the white over gold Chevrolet that I knew to be Jack Coler's.

Q All right. Did you in fact then have a scope on your {1858} rifle, is that a fair conclusion for me to draw?

A Yes, sir, I did.

Q Was there anybody else to your knowledge that had a scope?

A Not with our group at that time, no, sir.

Q And do you know what the power of your scope was?

A No, sir.

Q All right. Now, would you mark on the map for me again approximately where you were when you climbed into the tree and made the sightings that you are now discussing with the jury would you just make a "Z-2" for me just in the general area?

A This has to be approximately, it would be right in this location (indicating).

Q Was it still in the trees themselves?

A Oh, yes, sir.

Q It was still in a position of concealment, is that right?

A Yes, sir.

Q All right, Now, what was it then that you observed that you have just now started to testify about?

THE COURT: I think before we get into that the Court will recess at this time until 3:40.

(Recess taken.)

(Defendant present.)

THE COURT: The jury may be brought in.

(Whereupon, at 3:42 o'clock, p.m., the jury returned to the courtroom and the following further proceedings were {1859} had in the presence and hearing of the jury:)

MR. HULTMAN: May it please the Court?

THE COURT: You may proceed.

Q (By Mr. Hultman) Agent Waring, I believe when we recessed I had you up in a tree, as I recall, is that right, and you were about to make an observation --

A (Interrupting) Yes.

Q (Continuing) -- to the jury, and would you now tell us what it is that you saw at that time?

MR. TAIKEFF: Could we have the time of day just to give us the reference?

MR. HULTMAN: Approximately.

A Well, like I say, we arrived at Z-1 between 2:00 and 2:15. The exchange would have been now somewhere between 2:30 and 2:45.

Q (By Mr. Hultman) Is this just an approximation on your part though, you didn't look at your watch or anything during that time?

A No, sir. Both those times were just approximate times.

Q All right. O.k.

Now, would you explain what, if anything, you saw at this time?

A Well, as I say, I was in an area right here at Z-2 (indicating), a rather large tree. I could hold the rifle steady at that point against the tree, look down range about 200 to {1860} 250 yards -- and there again it is approximate -- and I could see the white over gold Chevrolet; and I could identify it as Jack Coler's FBI vehicle, and I could see numerous bullet holes in the vehicle. I could see that the flashing emergency lights were on in the front, both of them flashing, and that the driver's -- the door was slightly open; and after surveying as much as I could see inside the vehicle from that location, plus the area around the vehicle, I didn't see anyone or anybody near it.

Q All right. Now, would you indicate to the jury with reference to where you are at this particular time, and I believe you had pointed out here somewhere in the general vicinity of Z-2 (indicating), would you tell the jury the approximate location and maybe move this little car that is called SA Coler's car, it is an object, a rectangle, would you point it in approximately, the approximate direction; and then tell the jury where the front of it was located with reference to where you were and where the houses up on the hill are?

A Well, generally the headlights on the vehicle would be pointed generally at this group of buildings right in here (indicating), identified as the white house and the green house and a little shed right up to it. Generally the car was pointed in that direction with the driver's door open.

Q Now, if you were seated in the car here (indicating), and observing up the hill and looking at you, in your relative {1861} position where you are, what would be the general direction from the car -- person at the car looking out through the windshield and looking at your position, your general position where you were -- in other words, just reverse them -- what would be the general direction that you would be from someone down at the car looking up at the car?

A At the location?

Q Looking at the location.

A Where I was at that time, sir?

Q Yes.

A Generally focusing right in this area right here (indicating).

Q Where would that be, front left, front right, front, what would be the relative position that you were from the car itself, if somebody was seated at the car and looking up the hill, where would your position be generally?

A It would be just to the right, to the driver's right in this car, I would be off to the right.

Q All right, very good.

Now, you said you could see bullet holes, is that right?

A Yes, sir.

Q Is there any doubt in your mind at all then about that?

A No, sir. I told Agent Hughes and the other BIA officers that there were a number of bullet holes in the car.

Q So with your scope where you were looking at that car, you {1862} could see very clearly bullet holes, is that right?

A Yes, sir.

Q All right. Now, was there anything else about the car that you recall? I believe you said you identified it as being Agent Coler's car, is that right?

A Yes, sir. Like I said before, I had ridden in Agent Coler's car a number of times in the previous weeks to that date, and I knew it right away.

Q Did you see anything further at that time?

A Not at that time, no, sir, not down in this location (indicating).

Q Now, was the car in -- generally in the general location as it is shown at the present time on Government's Exhibit 71 with reference to the trails and the roads and so forth?

A Yes, sir.

Q All right. Now, had you up until the time that you got into the tree, had you seen a car there at all?

A No, sir.

Q And had anyone else brought this to your attention in your group from the time you left Highway 18 until somebody asked you to get in the tree?

A It wasn't until that point that we had actually seen any of the vehicles.

Q So for the first time that afternoon, other than radio broadcasts,

you now knew that Agent Coler's car was in the area {1863} and where it was, is that correct?

A That 's the first time.

Q But did you still know anything about Agent Williams?

A No, not at that time.

Q Did you know anything about Agent Coler?

A Not at that time.

Q Other than what you had heard on the radio transmission?

A That's correct.

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

MR. TAIKEFF: May the witness resume the stand, your Honor?

MR. HULTMAN: Yes, all right, you may. I think he is going to be back there very quickly though, counsel.

A It was at that point that while I was still looking down range at Agent Coler's car, that I heard an individual yell, "The man in the white shirt, throw down your gun, surrender," and at that point gunfire erupted again.

Q And where did the gunfire erupt from?

A Well, as I turned back toward the green house, I just caught a brief glimpse of an individual wearing a white shirt and that the gunfire was coming from him towards some of our people in our group.

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

A Well, at that point, since my cover was not real good up {1864} there in the tree, I didn't return any fire at that point, and; I just jumped from the tree to the ground, and it was just a brief exchange of gunfire and then firing stopped.

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

A Well, it was at that point Agent Hughes asked me to remain behind with some of the BIA officers at that particular location just to keep under observation the green house; and he stated that he and a couple of other people from the group were going to work their way down back from the direction we had come in the tree cover, back down so they could get closer to Agent Coler's car to see if they might be able to locate either Agent Coler or Agent Williams.

Q All right. Now, did you remain then in that general location back ln a position of cover?

A Yes, sir. We just stayed -- I just deployed officers along the bank, just so we could keep visual contact with the house, and we remained there for approximately 45 minutes.

Q And what, if anything -- was there any firing then that went on during that period of time, either at you or by anybody in your group?

A No, sir. At that time it was completely quiet throughout the area. I didn't hear any other gunshots at that point.

Q And what, if anything, then next came to your attention?

A Well, like I said, after staying there for about 45 minutes, Agent Hughes had come -- sent one of the group down to {1865} get us, and my entire group including myself, we worked our way back down the bank toward Agent Coler's car, and therefore, we left no one in the vicinity of the green house at that point.

Q All right. Would you with the pointer now again trace the general route that you took and where it was that you next stopped from the point you are now discussing?

A Well, we went from this general vicinity in here (indicating) back down along the bank, and we arrived at a location right here (indicating) in the corral area, right here approximately (indicating).

Q All right. Would you mark that with a Z-3 so that we will know where this approximate spot is?

A (Indicating).

Q All right. Now, would you resume the stand again, please?

Now, when you traced along the creek here earlier and when you traced again -- and I believe your pointer went in this general area (indicating), would you tell us specifically on the ground what it was that you were following, if you did follow anything in particular; were you following the tree line itself or were you following some other object of some kind?

A Well, once we started working our way back down toward Agent Coler's car, we knew the general location of the car at that point so we could follow along, more or less see the tree line, and just follow it along, knowing that we could line ourselves up in the corral area and be relatively close to {1866} Agent Coler's car.

Q All right, but were you in a position as you went to that point you just marked as Z-3, where you could actually see, did you see the car as you went down that route?

A No, sir.

Q All right. You were in a position again deep enough where you had cover and concealment, is that right?

A Yes, sir.

Q All right, because you still didn't know what the situation was, is that right?

A That's correct, sir.

Q All right. Now, what happened when you got at the point which you have just marked -- and I believe it is in the general vicinity of the southerly of the two corrals that are marked at the bottom of Government's Exhibit 71 -- what did you do, or what did you observe at the point you have just marked Z-3?

A Well, when I arrived there, Agent Hughes informed me that he had sent one of our group back to our original location on Highway 18 to get an additional radio since the radio we had initially brought with us, the batteries went dead on it and we had no communications with other agents; and then we just set up there and maintained a lookout point toward the green house and kept Agent Coler's car under observation.

Q Now, on the two occasions that you received fire, other than when you came out of the woods, I believe you indicated {1867} that there was three times you received fire: One when you came out of the woods, the second time after Agent Hughes had made an announcement, and the third occasion was when somebody else made a specific reference -- would you describe the fire on those two last occasions, the nature of the fire itself that you received?

A Well, generally it was just rifle fire coming our direction.

Q All right, now, other than those occasions, did you receive any fire of any kind that you have testified to?

A No, sir.

Q All right. Now, tell us what, if anything, now you proceeded to do at the point, Z-3, what happened next?

{1868}

A At that point the group was more or less in a waiting posture since we needed to establish contact and find out what had transpired from the time we originally left until the time we were in the corral area since we had pretty much been out of touch without a radio.

Then it got to be approximately 4:20 P.M. in the afternoon and we noticed an individual wearing a white shirt, t-shirt, come up in the area.

Can I go back to the map?

Q Yes. Would you go back and maybe mark that now with a "Z4," whatever it was you saw and where it was.

What was it that you observed at that time?

A Right here at that point an individual came up from behind these vehicles wearing a white t-shirt (indicating). Immediately upon seeing him, he put his hands into the air over his head.

Q Where you were pointing, can I mark a "Z4" at that particular spot?

A Yes, sir. Would have been right on this side (indicating).

Q And you observed that individual from where you were, is that correct?

A Yes, sir. This is low down here and this rises up towards the ridge right here (indicating). He was a little higher than ourselves.

Q Now you can resume the stand again.

Tell us what if anything, did you notice anything {1869} about the individual? Could you describe the individual in any general way?

A Well, as he proceeded down the hill, Agent Hughes had again yelled to that individual to proceed to our location which at that point I'm sure was advisable to that individual since he walked directly towards us. As he came closer Agent Hughs identified the individual to me as Edgar Bear Runner.

Q And what if anything happened next?

A Mr. Bear Runner just proceeded down to our location and stood just a few feet from Mr. Hughs and conversed with Agent Hughs.

Q And what if anything happened while they were there?

A Well, Mr. Bear Runner informed Agent Hughs that as he came past Agent Coler's car he saw two individuals lying on the driver's side of the vehicle, lying in the grass.

Q And was there anything else that was communicated or discussed there in your presence?

A Well, Agent Hughs inquired of Mr. Bear Runner how he had been allowed to come into the area. Mr. Bear Runner said, "They let me into the area to negotiate with the people firing from the green house."

Q And what if anything else took place?

A Well, Agent Hughs instructed Mr. Bear Runner to proceed back to the FBI vehicle and it was pointed out to them which car we meant and to get the status of the individuals lying in {1870} the grass, which we couldn't see since it was on the away side from our location.

Q Was this the first time anybody in your group to your knowledge learned of the whereabouts or possible whereabouts now of Agent Williams or Agent Coler?

A Right at that point. That's one of the reasons we wanted Mr. Bear Runner to check the individuals because we weren't sure at that point that it was Agent Williams and Agent Coler lying next to the FBI vehicles.

Q All you knew was what he told you, that there were two individuals there?

A Yes, sir.

Q Did he tell you whether they were dead or alive?

A All he indicated was they hadn't moved or said anything and he passed on foot relatively close to the vehicle and came to our location.

Q So what if anything happened next?

A Mr. Hughs agreed that Mr. Bear Runner should go up and attempt to negotiate with the people from those houses that were firing. First he wanted him to check on the two individuals at the FBI vehicle. So we asked him to do that and Mr. Bear Runner proceeded to the vehicles, still with his hands raised, and walked to the driver's side of the vehicle, just stood there for a brief moment and then turned and proceeded directly across the field up to the residences located on the {1871} plateau.

Q And did he make any signs or yell back or anything concerning what he had seen and observed there at that point?

A No, sir.

Q Now what if anything happened next?

A Well, at that point I just continued to observe Mr. Bear Runner and he walked up on the plateau and stood in the general vicinity of the green house still with his hands raised and he just stood there for a few minutes. He then proceeded to walk back out in the direction that would bring you out, on the map out toward Jumping Hall or out toward our original Location.

Q And did he disappear at some point from your view then?

A Yes, sir.

Q Now during this time did you see any other individuals other than the person whom Mr. Hughs had said and identified as Mr. Bear Runner?

A No, sir.

Q Now what if anything was the next thing that you recall?

A Well, again since Mr. Bear Runner hadn't mentioned the status of those two individuals, we still weren't sure of who they were and it was just a short time later and Mr. Bear Runner again appeared from that same location that is marked "Z4" and this time he was accompanied by a second individual.

Q And what if anything happened next?

{1872}

A Well, the second individual just came right out and never stopped. They walked right out into the open and continued and walked directly to Agent Coler's car.

Q What if anything did anybody in your group do?

A Well, I knew the one individual was again Mr. Bear Runner and the second

individual was identified as the commissioner.

Q Who was it that identified him to you?

A Was Agent Hughs.

Q He evidently then, as far as what you heard at that time, obviously knew both the individuals. Was that a conclusion you drew, he knew who they were?

A Yes, sir.

Q What if anything happened next?

A It was at that point that Agent Hughs and BIA officer Eastman decided that they would walk to the bureau vehicle and meet with Mr. Bear Runner and this individual known as commissioner. Agent Hughs felt we needed to find out who was lying next to the bureau car.

Q Now did Agent Hughs do anything with relationship to himself and the other gentlemen when they went to the car? A Yes. Briefly just before they walked out into the open it was suggested that their weapons be lowered at arm's length to the ground so anybody observing them from elsewhere wouldn't think they were going out there for any other reason but to just look at the vehicle and meet with Mr. Bear Runner.

{1873}

Q And what if anything happened next?

A Well, Agent Hughs and the BIA officer walked to the car. They went to the driver's side, they stood there for just a few moments and then proceeded back to our location. Then Agent Hughs arrived back at the location he told me that the individuals lying there were Agent Williams and Agent Coler and both Agents had been shot a number of times and that both were dead.

Q And what if anything happened next?

A Well, it was at this point that both Mr. Bear Runner and commissioner walked out of the area again in the general vicinity of the residences and just continued over the top of the plateau to where I couldn't see them anymore.

Q Now what if anything did your group do next?

A Well, again we were still maintaining just a waiting posture until shortly after learning the status of the two agents.

Additional individuals started arriving at our location. Again had taken us the same route that I had taken initially into the area and there we met some additional gents from the Minneapolis division. There was some South Dakota Highway Patrol officers and I believe there was some sheriff's deputies also in the group.

We then had a radio and we communicated with the other {1874} FBI agents in the area.

Q Now you mentioned who these individuals, the make-up of these individuals. Were any of the agents -- by the way, are you S.W.A.T. trained?

A No, sir.

Q Were any of the individuals, the agents who happened to join your group at that time, do you know from your own knowledge whether they are S.W.A.T. trained?

A There was a couple agents there; yes, sir. Was there any S.W.A.T. unit as such that joined you at that particular time?

A I couldn't say if they were units since they were from Minneapolis division and I don't know all the agents in the Minneapolis division.

Q But these are people who have arrived on the scene sometime after you had left up at Highway 18, is that right? Had you seen any of these individuals?

A Yes, sir. The time now was past the point 4:20 P.M. when Mr. Bear Runner first appeared and we had left that position sometime approximately between 12:30 and 1:00 P.M.

Q Now what if anything did you do next?

A Well, shortly thereafter that Agent Hughs conferred on the radio with other agents and it was decided since we now knew the fate of Agent Williams and Coler that our next thing to do would be to get people in the green house to stop {1875} firing on us. We'd have to get up there and secure the area.

Q Now were these agents that you saw at this time, had they been working on the reservation at all the day before, to your knowledge?

A Not the ones that had arrived from Minneapolis; no, sir.

Q Now what if anything happened next?

A Well, it was decided when we had a short conference there that at approximately 5:50 P.M. we would coordinate and advance and go on up toward the green residence and see if there was anyone still in there that would shoot at us. The idea was to secure that area and stop the firing.

Q And would you describe what happened next?

A Well, one group was sent back up toward our location.

Can I go to the map?

Q Yes.

A Some of the groups just went back down this area and it was decided they would go into the general vicinity I previously marked "Z2." They would go up toward the green house and the rest of our group would just come across

the open field (indicating).

Q And were some of the individuals that you just referred to in the group that went up to the general location where you had been earlier that you pointed out just now on the map?

A Right here, sir, (indicating).

Q Now what if anything then happened?

{1876}

If you stay there I think you could probably better describe it from Government Exhibit 71. What then happened at a given time or approximate time later that afternoon? A Well, it was decided that at 5:50 P.M. that we would, both groups would start to move toward the green house simultaneously. We felt that that would be the best way to secure the area with the minimum amount of problem.

Q And would you describe what took place.

A Well, I was instructed by Agent Hughs at this point, since I had the only rifle with a scope on it, to just stay back here at the corral area (indicating) and just look from the general vicinity of the plateau and just cover these people that we're going to move up toward the green house out across the open field. He said only to fire if some individual appears here to fire on our people.

Q And what if anything then happened next?

A As these individuals started up towards the green house and these people went across the field, I really wasn't in a position any longer to fire since they would have started to get into my area of fire. So I then started out across the open field to join them up here on the plateau (indicating).

Q What if anything happened next?

A I got about approximately in the middle of the field and there was also a sheriff's deputy with me at that time when {1877} rounds started coming in over our head. So at that point I just got down on the ground and there is some high ground over in here that affords a little bit of cover (indicating) and that's where I went to.

Q And what if anything happened next?

A Well, shortly after that the rest of the individuals in the group arrived on top of the plateau. They searched the building that was determined that the area was secure and the rest of us walked up toward the plateau and arrived in the vicinity of these buildings right in here (indicating).

Q All right.

As the group that was at the point of the trees, the other group

different from the one you were in that you were coming from the corral area, was there any firing that took place as that group approached the green house? {1878}

A Yes, sir, there was some firing.

Q All right. And from whom was the firing from the group itself?

A As best as I could see there were some individuals in our group firing, yes, sir.

Q All right. Now, had there been anything done in terms of preparing to move to the top of the hill in terms of any other activity by anyone?

A Just our two groups at that point, sir.

Q All right. Was there any action taken with reference to doing anything in terms of making the opportunity to neutralize the hill in any way, if you recall anything?

A Talking about the plateau, sir?

Q Yes. The people who may or may not have been there at that time.

A The idea was to get up there as quick as possible with as little shooting as possible to just secure those people.

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

A Well, as I arrived, and I kind of, I was trailing most of the people at; that point since I had been the last one to leave my position, when I arrived up on the plateau I notice that there was a dead Indian male right at this point right here (indicating) who was later identified to me as Joseph Stuntz.

Q All right. Now, would you indicate with your pointer so the the members of the jury will know and maybe we can then mark {1879} that, you pointed to the house, I believe the green house; is that right?

A Yes, sir.

Q And would you tell the jury where specifically with relationship to the green house did you see a body which later was identified to you as Joe Stuntz? Where did you first see the body?

A Well, it would be right where there is a point right here (indicating), I would call it northeast corner of the house.

Q All right. And it is, is there some kind of a marking there at the present time, a small circle or something --

A Yes, sir.

Q So that would be the spot at the northeast corner is where you first observed the body, right.

Now, would you describe to the jury what if anything that you noted about the person that you saw at that time.

A Well, I noted that he was an Indian male, and that he had on blue jeans and a dark fatigue jacket with the letters FBI stamped over the pocket.

Q Let me ask you, in looking at the person and what he had on and directing your attention specifically to the objects that you have just described, have you seen objects of that kind before?

A The FBI jacket, sir?

Q Yes.

{1880}

A Yes, I have, sir.

Q And so you are familiar with them; is that right?

A Yes, sir.

Q Would you indicate to the jury what that jacket represents, where you've seen it before?

A Those jackets are normally issued to members of the FBI S.W.A.T. teams.

Q All right. And I'm going to show you now what has been marked and introduced, been marked but has not been introduced into evidence yet, as Government's Exhibit No. 23.

And ask you to look at that exhibit and then tell me whether or not you recognize the scene that is portrayed there.

A That would be the Indian male that I saw lying there who was again later identified to me as Joseph Stunts.

Q All right. And is that generally what you observed at the time you're now referring to as far as the body itself?

A Yes, sir. When I saw the body it was faced up.

Q All right.

MR. HULTMAN: The Government at this time, Your Honor, would move to introduce Government's Exhibit No. 23 into evidence.

MR. TAIKEFF: No objection, Your Honor.

THE COURT: Exhibit 23 is received.

Q (By Mr. Hultman) Now, I will direct your attention to that exhibit and maybe you can indicate to the jury where it is {1881} the marking that you referred to as the FBI that was identifiable to you at that time if you can on this Government exhibit.

A Be over the left breast pocket.

Q Now, what if anything happened next?

A Well, shortly after believing that the area was secured there was one more round of rifle fire, into the area and it hit something in the area, a building or something. But we did take cover and then we just waited a

few moments. No fire was returned since we had no idea of the direction the bullet had come from, and then after that Agent Hughes said that the area was secure and asked me to proceed back down toward Agent Coler to assist in the crime scene search.

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

A Well, at that point I just started back down across the open field toward Agent Coler's car to assist other agents in gathering evidence at the crime scene.

Q All right. I'm going to show you now what has been marked here as Government's Exhibit No. 6-A and ask you first, before I show you the exhibit, when was it that you first observed the agents, if you observed the agents in or about the car of Mr. Coler, of Agent Coler?

A Well, I stopped briefly at the car when I had moved out to go up toward the green house, just to stop there for a moment for cover. I noted that the two agents were lying there in the grass and then I continued on. And then it was when I {1882} came back down from the plateau that I then took a look at the bodies.

Q All right. So that when you moved from the corral to go, the group you were in, to go to the houses on the high ground, you stated in earlier testimony that you went to the general car area as a position. You moved out to that point; is that right?

A I went from Z-3 to the car and then up toward the green house.

Q Now, did you at that time see the bodies and observe the bodies?

A Just briefly as I went past them.

Q All right. So you did in fact see them at that time?

A Yes, sir.

Q All right. I'm going to show you what is now marked as Government's Exhibit 6-A and ask you whether or not you've seen the scene that is portrayed in that exhibit before?

A Yes, sir, I have.

Q And would you tell the jury when it was that you first saw the scene that's portrayed there.

A Would have been on the afternoon of June 26, 1975.

Q And what time in your testimony that you have given would that have been?

A It would have been shortly after 5:50 P.M.

Q All right. Now, at the time you went up the hill and made {1883} this stop at the, at Coler's car as a position stop to you, did you observe the bodies in a general configuration as is generally shown on Exhibit 6-A?

A Yes, sir.

Q With relationship to the automobile portrayed there?

A Yes, sir.

Q And were they, were the bodies face down and in a general posture that they are here?

A Yes, sir.

Q All right. Now, when you then returned back down the hill at the point in time where you have now taken us, did you observe the bodies with relationship to the car in the same general posture and position as represented by Government's Exhibit 6-A

A Yes, I did, sir.

Q All right. Now, would you describe then now, and I'm going to show you what has been previously marked and introduced here as Government's Exhibit Series 54, and I'm going to have you first look at the scene that is portrayed by Government's Exhibit 54, page 1, and ask you if that is the general, again description, of the location of the automobile, the general condition of the automobile and the positions of the body as you first observed them when you first came out of the woods marking at the point Z-3 and moved to the general area of Agent Coler's car?

A Yes, it is.

{1884}

Q All right. Was the hood up, the rear hood, the trunk hood?

A The trunk lid was up, yes, sir.

Q And was the left driver's door open?

A Yes, it was, sir.

Q As observed here; is that right?

A Yes, sir.

Q Now, I would also ask you to look at page 4 and ask you if the scene you saw at that time is generally portrayed as it is on Government's Exhibit 4?

A Yes, it is, sir.

Q From a different angle?

A Yes, sir.

Q All right. And I'm going to ask you the same thing with reference to page 8 of that particular exhibit.

A Yes, sir.

Q All right. That's looking at it from another side; is that correct?

A Looking at it from the passenger's side, or the front passenger's side.

Q All right. And I'm going to ask you to look at No. 9 and ask you if that view likewise portrays what you generally saw at that time?

A Yes, sir.

Q Now, I'm going to ask you at this time to look at Government's {1885} Exhibit 9 and to tell the jury what it is you can see in the background, and if in fact you remember that you could see standing in the background, or at the rear of the trunk of Agent Coler's car the objects that can be seen in the background of this photo?

A Well, you can see the green house on the plateau.

Q And is it shown on this particular photo?

A Yes, sir. It's right here (indicating).

Q And is it marked on there in some way?

A I don't know if it's 27 or Z-7.

Q Well, let's call it Z-7 for the moment since we've been in a series. Is that the green house that you've been talking about and the green house that's represented on Government's Exhibit 71?

A Yes, sir.

Q All right. And I'm going to take you to the left of the green house as you are looking up the hill and indicate whether or not you can see anything else in a general --

A Yes, sir. There's a, well, you can see in to the side of the hill. There's kind of a, I don't know what you call it, it's a potato cellar or something. It's just a storage place built into the side of the hill.

Q And beyond that in the crest of the hill you can see other objects?

A Yes, sir. There's another residence up there.

{1886}

Q And are there any other objects in and about the residence in terms of any vegetation of any kind?

A There's some trees.

Q All right. Now, let me take you to the right-hand corner of the picture and ask you if you from your own knowledge and |where you had been at the time on the days that you've been referring to here in testimony, do you recognize anything there?

A Yes, sir. Right over here there is, you can just make out a couple of abandoned vehicles, junked vehicles, and there's a large tree. And there's kind of a dirt road that runs right in through here (indicating).

Q Is the picture itself cut right in the vehicles? Is that the --

A Yes, sir. Basically on the other side of the abandoned vehicles is pretty much the back area where you drop down into vegetation.

Q As you are looking at that photo then would you indicate where the right-hand side of the picture is with reference to Government’s Exhibit 71 and where you might have been at any time during the day.

A Well, this just shows, this would be where the abandoned vehicles are right in here (indicating). That's at both Z-1 and Z-2.

Q And does that photograph show some of the trees that are {1887} in that very corner that you've referred to in testimony?

A Yes, sir. They'd be right into, right where the road comes together right here (indicating).

Q All right. I'm going to go back and show you Exhibit page number 1 of Government's Exhibit 54 which we've been discussing, and I want to ask you there, can you from that, looking from the rear trunk of the vehicle likewise see the area that you've just now been discussing?

A Yes, sir. You can see the, where the road comes together, the large tree and the abandoned vehicles also.

Q All right. And so is it fair for me to conclude then in Government's Exhibit No., picture 1 in this exhibit, that you can see even more of the tree area that you've just described on Government's Exhibit 71?

A Yes, sir.

Q All right. Now, when you got back to the vehicle itself were, tell us what you did once you arrived back at the vehicle.

A When I arrived back down at the vehicle I assisted other agents in the crime scene search in the area immediately surrounding Agent Coler's vehicle.

Q All right. And would you explain to the jury what if anything did you find on that occasion and maybe we could take them one at a time.

A Well, I found a number of items, some of which where we found some automobile lens --

{1888}

Q Let's take them one at a time, all right?

You found some, what was it again?

A It was automobile glass, or it would be from either your turning lens or from your directional signal.

Q And would you describe to the jury what those items were and where they were found.

A They were found just to the front of Agent Coler's vehicle lying in the dirt. Just some pieces of lens.

Q All right. And would you point out to the jury on Government's Exhibit 71 with relationship to where Agent Coler's car was approximately with

relationship to the trail there where it was that you found the objects you've now described.

{1889}

A Well, it would have been just about 10 feet in front of the car, generally up to that little -- there is indicated a road, it is more of a path out there, distinguishable as such.

Q I am going to show you now what has been marked as Government's Exhibit 14-A and ask you to take a look at it and see whether or not you recognize anything therein?

A Yes, sir. (Examining) This would be pieces of lens that were found on the 26th of June, '75.

MR. HULTMAN: All right. These have already been introduced into evidence so I will not reoffer them at this time, your Honor.

Then was there anything else -- these have not been offered, I am sorry. I would at this time offer into evidence Government's Exhibit 14-A.

(Counsel examine exhibit.)

MR. TAIKEFF: No objection.

THE COURT: 14-A is received.

(Plaintiff's Exhibit No. 14-A, having been previously duly marked for identification, so offered in evidence, was received.)

Q (By Mr. Hultman) Now, Agent Waring, was there any other items that you found at this time and place to which you are now testifying?

A Yes, sir. There was a .38 shell casing.

Q And would you indicate where those three .08 shell casings {1890} that you found --

MR. TAIKEFF: (Interrupting) Your Honor, I believe the answer was ".38", and the question said, "3.08".

MR. HULTMAN: I am sorry if it was .38, I am sorry. Whatever it was you indicated.

A I believe it was a .38. At this time I would have to see the various items that were picked up in order to identify them.

Q (By Mr. Hultman) All right. I am going to show you what has been marked as Government's Exhibit 31-E, and ask you whether or not -- to examine it and look at it, and see whether or not you have seen that object before?

A (Examining) Yes, sir.

Q All right. Would you describe to the jury what it is and how it is you recognized it?

A Well, it says right on the back, it says: .38 Special Plus P Ammunition, and my initials are on this card showing that when we found it,

I initialed the card as being one of the agents that found the shell.

Q Would you indicate to the jury where it was that you found this particular casing?

A At this time I have to refresh my memory. I believe it was in the area of the bodies.

Q All right. Did -- was it then marked and then put through the process that you normally follow in terms of identification and the keeping of evidence?

{1891}

A Yes, sir.

Q And is the marking on it that you do recognize as being the casing that you found on that occasion, is that right?

A Yes, sir.

MR. HULTMAN: The Government would offer Government's Exhibit 31-E.

MR. TAIKEFF: May I see it? I am stepping forward to see the exhibit if I may, your Honor?

THE COURT: You may.

(Counsel examine document.)

MR. TAIKEFF: No objection.

THE COURT: 31-E is received.

(Plaintiff's Exhibit No. 31-E, having been previously duly marked for identification, so offered in evidence, was received.)

Q (By Mr. Hultman) All right. I will show you now what has been marked as Government's Exhibit 36-B, and -- (confers with counsel) -- show you 36-B, and ask you to look at it and to tell us whether or not you have seen that object that's contained therein before?

A Yes, sir. It is a 12 gauge shotgun cartridge, and it was located in the vicinity of the right rear tire of Agent Coler's car.

Q And was that round expended or was it a non-expended round?

A It is an expended round, it had been fired and ejected. {1892}

Q All right, and did you follow the same procedures on that occasion as you have indicated previously?

A Yes, sir.

MR. HULTMAN: All right. The Government would offer into evidence Government's Exhibit 36-B.

MR. TAIKEFF: No objection.

THE COURT: 36-B is received.

(Plaintiff's Exhibit No. 36-B, having been previously duly marked for identification, so offered in evidence, was received.)

Q (By Mr. Hultman) I am going to show you what has been marked as Government's Exhibit 30-B. Again I will have you take it and analyze it, and then I will ask you some questions about it.

A (Examining) It is a 3.08 expended cartridge.

Q And do you recognize it?

A Yes, sir.

Q And where was it that you first saw this cartridge, casing, cartridge casing?

A I believe it was in the rear of the vehicle, sir. At that time that would be to the best of my recollection at this point

Q All right. Was it in the general vicinity?

A It was lying just immediately adjacent to the vehicle, to the rear.

Q Did you proceed to do the same things with reference to {1893} Exhibit 30-B as you did with reference to other exhibits that you have testified to?

A Yes, sir.

MR. HULTMAN: The Government will offer into evidence Government Exhibit 30-B.

MR. TAIKEFF: No objection.

THE COURT: 30-B is received.

(Plaintiff's Exhibit No. 30-B, having been previously duly marked for identification, so offered in evidence, was received.)

Q (By Mr. Hultman) Did you have an occasion, while you were there, to look at the automobile itself?

A Yes, I did, sir.

Q And would you give a general description to the jury concerning the observations that you just made generally about the automobile?

A Well, there were a number of bullet holes in the vehicle, and some that I noticed in particular were a couple of bullet holes in the trunk lid which -- it was raised, and there was some bullet holes in there, and there were also some bullet holes on the right rear area of the vehicle.

Q I want to show you what has now been marked as Government's Exhibit 57, and in particular Page 15, which shows a general area which is of the automobile, and also Pages 15, Pages 16, and ask you whether or not you recognize the general areas that {1894} are portrayed there, Page 15 and Page 16?

A (Examining) Yes, sir. That would be the right rear area, and also the raised trunk lid.

Q All right, and also Page 17 and 18, is that right?

A Yes, sir.

Q And those are described generally as the pictures of the area we are talking about, is that right?

A Yes, sir.

Q Now, do you remember anything in general about those areas of that particular car?

A Well, I noticed, like I said earlier, the two rounds that came through the trunk lid made rather a large openings, and some of the holes in the right rear area were -- seemed to be smaller than the ones in the trunk.

Q Now, when you are referring to the right rear area, to what general area are you referring to as far as the vehicle that was there, Agent Coler's vehicle?

A From the panel, from the rear door on the back toward the bumper, rear bumper.

Q All right, and do you recall anything about the relative size of any of the holes that you observed at that time and place?

A Yes, sir. The ones in the rear panel, the right rear panel, seemed to be smaller, as I stated earlier. The ones in the trunk had left rather large openings in the metal as they {1895} came through.

Q You didn't analyze them in any particular way at that time, is that right?

A No, sir. We were more concerned in just counting them and kind of looking at them.

Q All right. Now, did you have an occasion to later return to the general area represented by the Jumping Bull ranch as it has been referred to in earlier testimony which is Government's Exhibit 71, did you come back at a later time?

A Yes, sir. On June the 28th I came back through what is commonly referred to as the shooting crime scene area.

Q And what, if anything, did you do on that occasion?

A Well, there was a number of individuals with me, and I was taking them through the area since I had been there on the 26th of June, and as we went along, we were looking for evidence and anything that might come to our attention at that point.

Q Now, I am going to ask you to direct your attention on Government's Exhibit 71, the area that you have talked about before and specific objects that you have discussed before, some abandoned automobiles or a general area where there are abandoned automobiles, and ask you whether or not you did any search in that area on that day?

A Yes, I did, sir.

Q All right. Would you describe to the jury what it was you did? {1896}

A Well, I will go to the map.

Q All right.

A As I walked along down through this area in here (indicating), I noticed ten 30.06 shell casings. They were all expended rounds, and it was obvious they hadn't been there very long since they were relatively shiny or brassy looking, hadn't been on the ground very long.

Q And did you make then a general search in and about and around the automobiles that were there at that time?

A Yes, sir.

Q And was -- where was it that you found the items to which you have just been referring with reference to any abandoned cars that were in that area, or junk car?

A Well, as you stand behind the last car in line --

Q (Interrupting) In what direction you are saying, "the last"?

A Faced to the trunk, it would have been on the left rear of the vehicle.

Q All right. Would you on the map, maybe even on the photograph, might be even a little easier, we have discussed a little earlier Government's Exhibit 54; and in viewing from the rear, a photo taken from the rear of Agent Coler's car, and you can see the scene which you have previously testified to -- would you indicate to the jury on that photograph where it was approximately that you made the finding that you have just {1897} testified to?

A It would have been in the car, in line with the other abandoned vehicles. It would have been the one at the farthest point from Agent Coler's car.

Q All right, so if you are looking then here at Government's Exhibit 73, it would be the car farthest that you just testified -- would be this car in this general area, is that right?

A Yes, sir.

Q And where with relationship to that car then did you make the finding that you have just been testifying to?

A They were just to the left rear of the vehicle as you faced into it, to the trunk, and they were lying about a foot away from the back of the car.

Q All right. Would you tell us what relationship to this trial that runs along here (indicating), which way the car was facing, which way was

the front and which way was the bank or the rear of the vehicle, so that the jury may know?

A Well, the rear was facing -- well, put the back toward the green house, and the front of it was down toward the bank area, the trees.

Q So then would you point out where it was that you found the casings you are referring to?

A Right there (indicating).

Q And do you remember anything about what kind of a car this was in any way?

{1898}

A At this time it is just a junked vehicle.

Q If you don't, all right.

{1899}

Q Now I'm going to show you what's been marked as Government Exhibit 29E as in echo and ask you whether or not you examined those items that are in 29 echo and tell the jury whether or not you recognize them.

A Yes, sir. These would be the cartridges that were found by myself in the area I just described.

Q And did you go through the same procedures that you have described before here?

A Yes.

Q With reference to that particular exhibit?

A Yes, sir.

Q And I believe you indicated that they were bright and shiny and so forth.

A At the time I picked them up; yes, sir.

MR. HULTMAN: The government at this time would offer into evidence Government's Exhibit 29E.

MR. TAIKEFF: No objection, Your Honor.

THE COURT: 29E is received.

Q (By Mr. Hultman) With reference to 29E, I notice that you indicated on testimony to the jury that you had found ten rounds there, is that right?

A That's correct.

Q And I want you to examine the rounds themselves and tell the jury how many rounds are physically there.

A When I counted them there was nine.

{1900}

Q All right.

And do you know of any reason why now there are nine rather than ten

which you found? Your own knowledge.

A No, sir. When I turned them in there was ten and they went to the laboratory personnel.

Q Is it general procedure that they don't necessarily return after examination all of a group of rounds?

MR. TAIKEFF: Objection to the leading.

THE COURT: Sustained. There's no foundation there.

Q (By Mr. Hultman) Do you know of any reason from your own knowledge in handling evidence of this kind and nature as to why there could be nine rounds rather than ten in the return?

MR. HULTMAN: Your Honor, I intend to connect it up later.

A The best of my knowledge, sir, there was ten 306 rounds turned in.

Q All right.

MR. HULTMAN: I have no further questions.

MR. TAIKEFF: May I inquire?

THE COURT: You may.

CROSS-EXAMINATION

BY MR. TAIKEFF:

Q Mr. Waring, did you read any materials before you began giving your testimony?

A Yes, sir.

Q What did you read?

{1901}

A Well. I reviewed some 302s that I had written.

Q How many?

A It would be three or four, sir. I'd have to see them to know if I read all of the ones that had my names on it. I've read three or four.

Q Do you recall the dates of the 302s you read?

A Yes, sir. I recall the date of one.

Q Yes, sir?

A I dated one interview on June 26th, 1975 and it showed a date dictated as of 6/30/1975.

Q Are you referring to the piece of paper which I'm now showing to you marked Defendant's Exhibit 83 for identification?

A Yes, sir.

Q Okay. What else did you read?

A Well, I'd have to see the other 302s. I don't recall the dates on them, sir.

Q I show you Defendant's Exhibit 84 for identification, did you read

that before you testified?

A Yes, sir.

Q Anymore?

A There was one other, sir.

Q How many pages long?

A One page, sir. Not quite a full page.

Q I show you: Defendant's Exhibit 125 for identification and {1902} ask if that's the one page report you read?

A Yes, sir.

Q Did you read those reports for the purpose of refreshing your recollection about the events that you were going to testify about?

A Yes, sir.

Q And did the reading of these documents assist you in any way in refreshing your recollection?

A Yes, sir, they did.

Q Mr. Hultman asked you on direct examination about your normal responsibilities. Do you recall him using that phrase?

A Yes, sir.

Q Is writing a 302 part of your normal responsibility as an agent of the Federal Bureau of Investigation?

A Yes, sir. Normally they are dictated, sir.

Q When I say write I mean authorize, whether you type them, dictate them or how they mechanically get prepared. I'm not making reference to that.

A Yes, sir.

Q Now in connection with these three 302s that you've identified, Nos. 83, 84 and 125, do you recall any special or unusual or noteworthy event in connection with the preparation of these reports up to the point where they became the typewritten reports which you've identified?

A Sir, could you give me the question again, please.

{1903}

MR. TAIKEFF: Yes. May the question be read to the witness, Your Honor.

THE COURT: Question may be read.

(Whereupon, the last question was read back."

A Yes, sir. When I wrote those reports they were reports of the sequence of events as I recalled them.

Q But you've written a lot of 302s in your career.

A Oh, yes, sir.

Q You have been an agent almost seven years, is that right?

A That's correct, sir.

Q And you've written many dozen 302s in that time, have you not?

A Yes, sir.

Q Was there anything concerning the writing, the preparation of these reports which was different in any significant way other than the fact that they referred to unique events from the other 302s which you've written in the course of your career?

A No, sir. I wrote those essentially the same way I would write any other 302s.

Q Did you use notes?

A No, sir.

Q You worked from memory?

A Yes, sir.

Q Did you consult with anyone else before you wrote your {1904} reports?

A No, sir.

{1905}

Q Did you dictate the reports to a stenographer?

A Yes, sir.

Q To a person directly or to a machine, such as a dictating machine?

A Well, in the case of the first 302 that you showed me, sir, that was dictated to two different individuals. And then the others were dictated to just one individual.

Q Do you recall that you dictated to two different individuals?

A Yes, sir.

Q Is that the commonplace thing?

A It has happened in the past, sir.

Q But it is rather unusual, isn't it?

A Yes, sir.

Q So when I asked you before whether there was anything unusual about the preparation of these reports why did you say, "no, there was nothing"?

A Because I didn't think that that was unusual, sir.

Q But you just told us that it wasn't commonplace.

A But it has happened in the past, sir.

Q What brought about the fact that you dictated to two different individuals?

A Well, basically we, due to the fact that we had very few stenographers in Pine Ridge and the fact that it was a rather lengthy report. So therefore we dictated to two different {1906} people.

Q Who's "we"?

A I dictated to two different people.

Q Did you make a mistake when you said "we"?

A I wasn't aware I said we.

MR. TAIKEFF: May the record be read back, Your Honor?

THE COURT: The record may be read back.

(Whereupon question and answer read back: Question: What brought about the fact that you dictated your report to two different individuals? Answer: Well, basically we, due to the fact that we had very few stenographers in Pine Ridge and the fact that it was a rather lengthy report. So therefore we dictated to two different people.)

Q (By Mr. Taikeff) Now, sir, are you satisfied that you said "we"?

A Yes, sir.

Q What did you mean when you said "we"?

A Well, I was referring to the other FBI agents.

Q They helped you dictate your report?

A No, sir, but I was aware that other FBI agents in the same time had used two stenographers.

Q Let me see if I understand what you are saying. You were then aware that others besides yourself were dictating to two stenographers in order to get a single report done; is that correct?

{1907}

A No, sir.

Q Well, what is it that you're aware of concerning the use of two stenographers?

A Well, sir, the only thing I'm aware of is that I personally dictated my report to two different stenographers, and I'm aware of the fact there were other FBI agents that were also dictating their reports to two stenographers, and it was to get the work completed.

Q Tell us the name of the agent or agents who dictated to two stenographers?

A At this time I don't recall which agents.

Q Not at all?

A No, sir.

Q Can you give us there physical description as to height and weight, color of hair and eyes?

MR. HULTMAN: Well, I object to this as being totally irrelevant, Your Honor.

MR. TAIKEFF: I think it's quite significant, and I will assure Your Honor that I will tie it together before this cross-examination is over.

THE COURT: He may answer.

A Sir, the only -- there were a number of FBI agents in our office space at Pine Ridge on June the 30th when I dictated that that. And I couldn't begin to describe or tell any names because I don't recall.

{1908}

Q (By Mr. Taikeff) Now, during what period of time did this special condition exist that necessitated dictating to two stenographers at the same time?

A Well, normally we like to get the reports dictated and completed as soon after the events occur so that they are accurate.

Q And your memory is fresh, right?

A Yes, sir.

Q And so that you can record in your 302's as much detail as you can recall which you considered to be significant or important; isn't that right?

A Well, I record, when I write my 302's I record the information that I consider significant at that time, yes, sir.

Q And in as much detail as you think is important to get down on paper; isn't that correct?

A Yes, sir.

Q And as a rule 302's are rather detailed, are they not?

A Yes, sir.

Q Now, please tell us over how long a period of time, beginning June 26, 1975, you were aware of whatever condition it was that necessitated using two stenographers one day, two days, five days, how long?

A Well, the only time I'm aware of, sir, is on June the 30th when I dictated that particular report. Due to the volume of work it necessitated me using two different stenographers.

{1909}

Q Well, others, one or more others were doing the same thing; isn't that correct?

A Yes, sir.

Q Well, let me ask you this question: If there was at least one other agent who needed the help of two stenographers why didn't you dictate all of your report to one stenographer and the other agent dictate all of his report to the other stenographer instead of using two stenographers?

A The reason being that the stenographer that was in charge at Pine Ridge just designates which girl will take the report.

It so happened she designated one girl and she took some of my report which was rather lengthy, and then another girl, then she began to type and then another girl came and finished the report.

Q Didn't you tell us there was a shortage of stenographers when you began your explanation on this subject?

A A shortage of stenographers compared to the number of agents that were in there dictating work that day, sir.

Q So you used two stenographers when there was a shortage of stenographers instead of one, is that what you are saying?

A Yes, sir.

Q Is that what you are telling us?

A Yes, sir.

MR. HULTMAN: Your Honor, again, again I now renew it that this is irrelevant to any issue. It's repetitive and it's {1910} argumentative.

THE COURT: What is the relevancy?

MR. TAIKEFF: The next question will reveal that fact, Your Honor.

THE COURT: Did the witness answer the question?

MR. TAIKEFF: The question has been answered. He said yes, that's what he's telling us.

THE COURT: All right.

Q (By Mr. Taikeff) Isn't it a fact that in discussing the case with your fellow agents on or about June 30, 1975 it was agreed amongst you all that what happened during the forty minutes between 11:50 A.M. and 12:30 P.M. were the most critical minutes during that day as far as this case is concerned? Correct or incorrect?

A That's incorrect, sir.

Q Isn't it a fact, sir, that you rewrote the first portion of your report so as to conform your earlier report to meet the agreed upon scenario that you and your fellow agents had discussed?

A No, sir, that's not so.

MR. HULTMAN: And now, Your Honor, I'm going to indicate that I object to any other questions of the kind because the record here will clearly show that that is not the case, and there's no basis or foundation upon counsel to make such a --

MR. TAIKEFF: The jury will decide that fact I trust, {1911} Your Honor.

Q (By Mr. Taikeff) I place before you Defendant's Exhibit 83 for identification.

MR. HULTMAN: May we approach the bench, Your Honor?

MR. TAIKEFF: Your Honor, I would like to continue my cross-examination uninterrupted. I have not asked a question, I do not know --

MR. HULTMAN: Because the reason we're right back again, Your Honor, with a 302, and it's the same issue all over again, and that's why I'd like

to approach the bench.

THE COURT: Members of the jury you are going to be excused two minutes early. I will hear legal arguments of counsel after the jury has left the courtroom and the jury is now excused until 9:00 o'clock tomorrow morning.

(Whereupon, the following proceedings were had in the courtroom without the presence of the jury:

MR. HULTMAN: Your Honor, the basis for my objection is this, and I want to make it clear now because we constantly get into this. This in my judgment, and I think I have a proper objection for it, that until such time as there is an in faith good showing that a condition of the kind in which there's not a scintilla of evidence in this record to show this point is indicated by counsel, that this is an attempt, and it's a blatant attempt to prejudice the jury to try and put information before this jury that such a condition did {1912} exist.

The record clearly shows that now he's done it, and the witness has said that it didn't exist. He's going to continue to persist even in that very allegation when there is nothing in this record of any kind to support that kind of questioning.

And that's the basis for my objection and I would like it to be an objection not only now but likewise that it hold for any future proceedings of this kind until there is a showing of some kind in good faith at the bench that there is going to be such a showing because all the damage is now done.

The jury now in their minds by counsel's remarks at least it's been projected to this jury that there has been improper conduct to-wit: a group of people sitting down and working out a plan of some kind as far as some 302's are concerned. And it's to that issue that I'm addressing now, and at any time in the future until some type of showing of some kind has been made.

MR. TAIKEFF: Your Honor, Mr. Hultman is wrong. The damage has not been done. We are beginning to do the damage that is going to be done, and we will ask appropriate questions and we will prove to this jury the corruption of the FBI in connection with this case.

MR. HULTMAN: And that refers to my motion in limine, {1913} Your Honor, that we go back to the very beginning.

MR. TAIKEFF: No, Your Honor, there is not one word in the motion of limine concerning what we will reveal through the testimony of this witness on cross-examination.

MR. HULTMAN: I'm referring to the corruption, to-wit the last remarks of the FBI.

MR. TAIKEFF: We will show in the first fifteen minutes of the remainder of this witness's cross-examination exactly what we're referring to, and the jury can decide for itself what the proper explanation is.

THE COURT: You may proceed with your cross-examination.

MR. TAIKEFF: There's no jury here, Your Honor.

THE COURT: That's right. It will be on an offer of proof.

MR. TAIKEFF: I would like to know, Your Honor, why I must make an offer of proof in order to cross-examine the witness. Am I required to tell the Government what my intentions are with respect to every question I'm going to ask on cross-examination?

THE COURT: Because there is no basis, all right. You don't have to proceed, but unless you want to make -- my ruling of the Court is sustaining the objection. At this point I see no relevancy.

MR. TAIKEFF: All right, Your Honor.

THE COURT: The witness has been asked the question. {1914} He has denied. Now --

MR. TAIKEFF: I'm not bound by his denial.

THE COURT: Why not?

MR. TAIKEFF: Because I don't believe a word he says, that's why not.

THE COURT: You are getting into a collateral issue then. You are attempting to litigate the collateral issue.

MR. TAIKEFF: Your Honor, the reason there is nothing in the record so far is because the Government keeps objecting when we offer their own reports, and Your Honor keeps sustaining the objections. That's the only reason there's nothing in evidence.

I will demonstrate to Your Honor, I will satisfy Your Honor right now. And I hope that Your Honor will realize in the future that it is not appropriate to require the defense to play its cards out in the absence of the jury so that Government counsel can think overnight what they're going to do about it.

THE COURT: You do not have to play your cards out. I'm simply giving you an opportunity to make an offer of proof. I have sustained the objection.

MR. TAIKEFF: All right. I'm now proceeding with Your Honor's permission.

Q (By Mr. Taikeff) 83 for identification is in front of you. That report covers events in a chronological sequence. Yes {1915} or no?

MR. HULTMAN: Could I look and see that also?

MR. TAIKEFF: Doesn't the Government have a copy?

MR. HULTMAN: I'd like to know what 83 is, Counsel, just one time.

You put about four exhibits up there and don't show one of them to me. I've got a right to take a look at the exhibit to know --

MR. TAIKEFF: Would Your Honor tell Mr. Hultman that I'm not deaf.

THE COURT: Counsel --

MR. LOWE: I suggest that he read the rules of evidence.

A That question again, sir?

Q (By Mr. Taikeff) Yes. I ask you whether that report develops the facts of the day as you recall them in chronological sequence from the beginning of your activities until the end of your activities?

A It is the report using what I considered to be at that time the important facts as related in this 302 that I wrote on the 30th of June, 1975.

Q Do you know what the word chronological means?

A Means in sequence or in order, sir.

Q In time sequence, right?

A Yes, sir.

Q Now, my question to you is: Is that report written in {1916} time sequence from the beginning to the end of your activities that day?

A It's not an exact time sequence, but it's approximately times as they happened, yes, sir.

Q Is it typed on two different typewriters?

A I wouldn't know that, sir.

Q Well, take a look and see whether your eye reveals to you whether or not it's typed on two different typewriters.

A I wouldn't -- I can't tell that.

Q You can't tell that?

MR. TAIKEFF: All right. Your Honor, on a hearing I trust that Your Honor is a finder of fact. I ask Your Honor to compare pages 1, 2, 3 and 4 treating them as a single unit and page 5 to the end in terms of judging the credibility of this witness who says he cannot discern whether this report was typed on two different typewriters. That's the first step in my proof to Your Honor.

MR. HULTMAN: Well, I object, Your Honor, again. The witness has indicated to the very best of his ability and he has so stated in response to questions. That again is a conclusion for any one who is looking to draw. He didn't say it was or it wasn't. He asked him if he knew.

MR. TAIKEFF: I asked him to look at it and tell me whether by looking at it he perceived whether or not it was typed on two different typewriters. {1917}

THE COURT: I would have to have evidence by someone qualified to testify on that point. I would not make a determination.

MR. TAIKEFF: Then I would ask Your Honor to look at the digit 7 as it appears in many places in virtually every page and indicate whether or not it is clear cut from the digit 7 that it was done on two different typewriters.

MR. HULTMAN: Well, again if they want to call an expert and to establish, that's within the capability. The question has been asked and answered and fairly answered.

MR. TAIKEFF: I'm asking Your Honor to make a finding of fact in connection with this voir dire hearing. I ask Your Honor to look at the digit 5 and the digit 7 and state on the record whether or not it is as obvious as the fact that I'm standing before Your Honor that they are different machines.

MR. LOWE: Your Honor, the first paragraph on page 1 and the last paragraph on page 6 have those digits on them.

MR. HULTMAN: Your Honor, I want to come back. The record clearly shows by cross-examination that the dictation was given to two different people. Now, if counsel will go on and ask the question whether or not the typing was done by two different people, and this defendant -- this witness knows that it was, then I would have no objection. But I think the question has been asked and this fellow, does he {1918} know looking at it point blank whether it is or it isn't. And he's responded, and I would submit my response would be exactly the same upon looking at it. {1919}

MR. TAIKEFF: I trust that Mr. Hultman would wait to send his signals to the witness until Your Honor finishes looking at the document. Does Your Honor wish to state anything concerning the digit "7" and "5"?

THE COURT: I am unable to determine from looking at the exhibit as to whether or not --

MR. TAIKEFF: May I proceed with my inquiry as to whether or not this has been typed with two different typewriters?

Q (By Mr. Taikeff) I show you, sir, again 83 for identification l)n the first four pages do you see the digits "7," "5," written numerous times, particularly with reference to the date, 1975?

A Yes, sir.

Q Do you find the digit "7" and "5" in the last four pages of the report?

A Yes, sir.

Q Based on your own personal observations just made, are you able

to tell us whether or not in your opinion the first four pages, at least to the extent where the "7s" and the "5s" appear were typed on the same typewriter as the last four pages, at least where the "7s" and the "5s" appear, can you express an opinion?

A Well, I'll just stay with the answer I had before, sir. I cannot make a determination.

{1920}

Q I appreciate the fact that you did that.

Now, sir, do you know at what point your dictation began with the second stenographer, at what point during the day's events?

A Not without looking at the 302 again, sir.

Q How could you tell from looking at the 302?

A Well, I recall that when I initialed the 302 after reading it that there was a break, there is about a half a page or so and I believe, recalling right now I think it's on page four. That should be where the one stenographer stopped.

Q I show you page five of 83 for identification. That paragraph begins with a description of events which occurred at what time?

A It says at approximately 12:30 to 1:00 P.M., sir.

Q Now isn't it a fact, sir, that you rewrite the first half of that report in order to make it confirm to the plan which had been worked out between yourself and the other agents?

A No, sir.

Q Isn't it a fact that initially you wrote your report concerning June 26th on June 26th and that the rewrite was done on June 30?

A No, sir.

Q You identified a document marked Defendant's Exhibit 84 for identification before, did you not?

A I'd have to see it again, sir. If that's an FD302, sir. {1921}

Q The record will reflect whether or not you did.

MR. HULTMAN: Could I see this one now, Counsel?

MR. TAIKEFF: No. We're not offering it in evidence yet.

MR. HULTMAN: Well, I'd like to be able to in the posture, I think it is just common courtesy, let alone procedure.

MR. TAIKEFF: I will in a moment.

MR. HULTMAN: For Counsel to be able to interpose an objection to know what the great secrecy is with reference to what document it is, at least that Counsel is querying about at this point. I'll forget it. I don't even want to see what it is. I could care less.

Q (By Mr. Taikeff) Did you write a report concerning an examination of the crime scene?

A I did not write that 302, sir.

Q You did not?

A No, sir.

Q You initialed it, didn't you?

A Yes, sir.

Q When was that done?

A I initialed it after the, another agent had dictated that report. I read it for accuracy and then I initialed it, sir.

Q On what date did you do that?

{1922}

A I'd have to see it, sir.

Q Can you tell us whether you did that before or after Exhibit 83 was written?

A At this time, sir, I'd have no way of knowing because when they returned it to us, they're given to me to read. Like I said, I read it for accuracy and then if it's accurate, the best of my recollection, I initial it as such and when they come to me after they're typed I couldn't at this time recall the date numbers.

Q The crime scene activities were at the end of the afternoon, isn't that correct?

A Yes, sir.

Q And the other activities which are in Defendant's Exhibit 83 for identification are from the beginning of the day up to the point where the crime search began, isn't that true?

A That's correct, sir.

Q Which did you write the report on first?

A I wrote the report that has my name on it by itself. I wrote that report, sir.

Q Before or after you initialed the crime scene examination report?

A At this time I can't recall whether I received that second 302 for purposes of initialing prior to or after I dictated the one that's indicated on 6/30/75.

Q You have no independent recollection, is that correct?

{1923}

A No, sir.

MR. TAIKEFF: Now, Your Honor, I will show Defendant's Exhibit 84 to Mr. Hultman and then I will show it to the witness and I will ask him if

he can tell us when that report was seen by him for the first time in typewritten form.

A Again, sir, the dates 6/28 but whether I saw it then or sometime after, within a few days, I have no way of knowing. My initials appear that I have read this and checked it for accuracy.

Q When you say "6/28," where were you looking for that date?

A It shows a date of transcript, date of dictation, "6/28."

Q Yes.

A Date of transcription, "6/28."

Q Are you relying upon that? Do you consider that a reliable piece of information?

A Well, it doesn't appear to be a mistake. It shows it was dictated two days after the crime scene and typed the same date.

Q You mean the events occurred on 6/26, it was dictated on 6/28 and it was typed on 6/28, is that what you're saying?

A That's the way this reads, yes, sir.

Q As a general rule are you prepared to rely upon those entries as being accurate?

A Well, the sequence of dates here would appear to be {1924} accurate.

Q So you're prepared to rely on the accuracy on the competence of the stenographers of the Federal Bureau of Investigation, aren't you?

A Yes, sir. But I'm mainly concerned with the accuracy of the report itself.

Q I understand that.

A This particular date has very little meaning.

Q But you testified here on this voir dire that 6/28 was the date of typing. You relied upon the fact that that was on the report in saying that, didn't you, rather than your own independent recollection?

A I'd say that's -- excuse me. I said that's the date I would have to say at this time.

Q Well, is it because you give some credence to what you see on 302s like that?

A I anticipate that those dates would be accurate but they can be wrong.

Q They can be wrong?

A The interview date is the important date, sir.

Q 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"?

A Well, I know that the date on the other 302 that you're referring to, when the stenographer transposed the date from {1925} 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.

Q How often does that happen?

A I have no way of knowing how often. It's happened.

Q But it's unusual, isn't it?

A Well, normally.

Q Isn't it unusual?

A Yes.

Q Why didn't you tell us before when the jury was here and I asked you that anything unusual happened in connection with any of your reports, why didn't you say that the typist made a mistake in the date? Just explain that to the judge.

A I believe you asked me the question, you asked me if there was anything important in the sequence of events leading up to the dictating of the report.

Q Is that what you think I said?

A As I recall it. Unless I had the question read back.

Q Isn't it a fact that what really happened here was that on June 30 you rewrote the first four pages of your report and the typist didn't make a mistake but you made a mistake in failing to recognize that the typist recorded the correct date of dictation; namely, June 30, but copied off the other front page the date of typing of June 26th, isn't that what really happened? {1926}

A No, sir. It couldn't have happened that way.

Q Well, we all know that June 30 didn't come before June 26th. What do you mean it couldn't have happened that way? Is it physically impossible for somebody to rewrite a report on June 30 that was originally done on the 26th and have the typist put June 26th on the top of it when she's copying off the old heading, is that physically impossible?

A I would have to have the question again.

Q I want to know whether it is physically impossible for a typist to copy from an old report on to a new report and type in the old typing date, is that impossible?

A I said it was impossible for me to dictate on the 26th of June.

Q I'm not asking you that question.

A Well, it wouldn't be impossible to --

Q It's within the realm of possibility, is it not?

A To transcribe something on the 26th; yes.

Q It's within the realm of possibility?

A Yes, sir.

MR. TAIKEFF: Your Honor, on that basis I trust your Honor recognizes it's a fact question for the jury to determine what really happened on that day.

THE COURT: Is that all?

MR. TAIKEFF: That's all on that point, Your Honor.

THE COURT: The court has ruled and there has been {1927} nothing presented on the voir dire that changes that ruling.

MR. TAIKEFF: What is Your Honor's ruling?

THE COURT: I sustain the objection of Counsel to the questions that were asked.

MR. TAIKEFF: For me to go into the question that report was dictated on June 30, even though it was typed on June 26th. Is Your Honor's ruling that I cannot ask this witness why that existed in the presence of the jury?

THE COURT: You may ask that. You may ask that question, certainly.

MR. TAIKEFF: That's what I was going to get to.

MR. HULTMAN: That's a far cry from what he did ask and that was that four people got together, or whatever it was, and put together a conspiracy.

THE COURT: That was the basis for the Court's ruling. You were suggesting something there I can see no basis in.

MR. TAIKEFF: Your Honor, cannot even see when something is typed on two different typewriters, that is so obvious that it is impossible to believe that Your Honor doesn't see the difference between the 7 and the 5 on those separate pages, I can't expect Your Honor to appreciate some of the things we're trying to prove in this case.

THE COURT: You've made your record.

MR. TAIKEFF: Yes, Your Honor.

{1928}

THE COURT: There's another matter that may come up with reference to the testimony of Angie Dickinson. I see Mr. Tilsen in the --

MR. TILSEN: Long Visitor, Your Honor.

THE COURT: Long Visitor. Angie Dickinson. The day is getting long. I'm wondering whether there is something that should be taken up on that at this time. Now I recognize that Mrs. Long Visitor is not available. Apparently she is gone.

MR. TILSEN: She may be here.

MR. HULTMAN: I would suggest, Your Honor, that we take that matter up at 9:00 o'clock A.M. in the morning or whatever time the Court would wish

to set and it ought to be taken up in chambers. That's the other thing. It has to do with a question that has to do with immunity and things flowing from it. I suggest it be taken up tomorrow morning. It's obvious we're not going to get to the witness this afternoon. She's scheduled as a witness tomorrow and I would recommend we take it up first thing in the morning.

MR. TILSEN: I have no preference. I'm prepared in open court and I'm prepared at 9:00 o'clock in open court and I'll be prepared right now in chambers.

THE COURT: Why do you feel it necessary to take up --

MR. HULTMAN: I'll be very frank about it, Your Honor, {1929} and I'll say it in open court. We're dealing with the immunity of a witness and that witness has to be available if we're going to discuss immunity concerning that witness and that's the reason I say we do it --

THE COURT: Simmer down.

MR. HULTMAN: We'd do it, sir, in chambers, and we do it in chambers, sir, at an appropriate time and place where it is usually done and under the circumstances under which --

THE COURT: It's usually done in chambers because we do not have a sequestered jury.

MR. TILSEN: I don't know how many immunity hearings Mr. Hultman has had. In the course of the proceedings, and proceedings related thereto, I participated in quite a number of them and they have all been in open court. I see no reason particularly, in view of the kind of matters I observed in the last half hour, where my client or I would not prefer to be in open court. I think being in chambers, in view of the kinds of differences of opinion as to propriety and impropriety are only accelerated and increased by being in chambers. I prefer the open court.

MR. HULTMAN: The government would exceed to any request Mr. Tilsen would have of that kind. We have no objection. Not for the same reasons. {1930}

Your Honor, I'll be happy to proceed right now. In fact, I would prefer to under the circumstances.

MR. TILSEN: She is here.

MR. HULTMAN: Counsel indicated she isn't here. That's my only reason. If she's here we'll do it right now. That's fine.

{1931}

(The witness, Angie Long Visitor, appeared with her attorney, Mr. Kenneth E. Tilsen; and the following further proceedings were had:)

THE COURT: You may proceed when you are ready, Mr. Tilsen.

MR. TILSEN: Well, your Honor, I think the motion that I have served is self-explanatory. The United States Government has in prior proceedings inferred that the witness, Angie Long Visitor's failure to appear, although on subpoena at a prior proceeding, was somehow her responsibility; and they have inferred that in affidavits and briefs and matters ancillary to this proceeding.

I, therefore, give notice that this witness will refused to answer any questions put to her concerning, affecting, involving or connected with or which might lead to the discovery of matters relating to her alleged unavailability as a witness in prior proceedings arising out of the events of June 26, 1975, at Oglala, South Dakota.

I point out that that right of hers is based upon the United States Constitution.

I move this Court for a pre-testimonial order that her voluntary or non-voluntary testimony regarding the events of June 26, '75, which apparently she might be questioned about tomorrow -- we assumed she would be questioned about today -- shall not be deemed to be a {1932} waiver of her rights not to testify concerning her alleged unavailability as a witness in prior proceedings.

I have attached a very short memorandum to it. I really have no desire to argue the matter. I would assume that the United States would join the motion, and ask the Court to issue such a ruling.

If the United States does not join in the motion or if the Court, either because of that fact or in its own discretion, does not issue such a ruling, then the witness will have to take further -- exercise further rights.

MR. HULTMAN: Your Honor, I was just served with this today; and I want to indicate on the record that, one, pursuant to what Mr. Tilsen's request is, one which I would insist on myself personally being honored. It is, one, intent of what the Government intends to do.

Two, I would join in the request for such an order and would in any way likewise do our very best to cooperate.

Now, at the same time I want it clearly understood that I have no way in which I can determine what counsel for the Defendant is going to -- and you could probably decide and determine that and find out that far better than I could -- on what questions they may or may not be going to ask; but it is clearly the intent, which I think is clearly the request of counsel for a witness, that, one, this witness is being called and will be asked questions {1933} by the Government specifically about events in the year, 1975, one-nine-seven-five -- that any events that happened from that point

on are not a subject of inquiry here regardless of what the typewriter may show as far as the "seven", it is 75, not 76; and there will be no inquiry as to anything except the events that are directly related to the year, 1975, and the event of June 26th, 1975, so I would join in the immunity likewise now -- the immunity likewise goes to that very event, to that specific time, and has no relationship in any way to what happens in 1976 or anything subsequent to that time.

Now, counsel is shaking his head. Evidently he has got something else.

MR. TILSEN: I don't understand a word that Mr. Hultman said. I absolutely don't understand.

All I want is an order from this Court that her testimony concerning this event will not be deemed as waiver of any testimonial privilege she has here concerning her alleged unavailability as a witness.

He did begin by saying he has no objection to that order. All I want is for the Court to enter an order.

MR. HULTMAN: I don't know how I can make myself more clear.

THE COURT: Very well. You may submit a proposed written to the Court in the form you desire, and the Court {1934} will consider it the first thing in the morning.

MR. TILSEN: Thank you.

THE COURT: The Court is in recess until 9:00 o'clock.

(Whereupon, at 5:30 o'clock, p.m., the trial of the within cause was adjourned until 9:00 o'clock, a.m., on Tuesday, March 29, 1977.)